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Envtl. Defense Ctr., Inc. v. EPA, 344 F.3d 832 (9th Cir. 2003)
(upholding the Environmental Protection Agency's Phase II rule under the Clean Water Act, but remanding for revision portions of the rule which allowed polluters to design their own stormwater programs with minimal review, and which allowed the EPA not to disclose Notices of Intent to comply with the Phase II rule).

The Texas Cities Coalition on Stormwater, the Texas Counties Stormwater Coalition (together "Municipalities"), Environmental Defense Center ("Environmentalists"), the American Forest and Paper Association ("AFPA") and the National Association of Home Builders ("NAHB") challenged an administrative rule promulgated by the Environmental Protection Agency ("EPA") under the Clean Water Act ("CWA"). The Natural Resources Defense Council intervened on behalf of Environmental Defense Center. Three separate suits arose in the D.C. Circuit, the Fifth Circuit and the Ninth Circuit Courts of Appeals, and these suits were consolidated into a single suit heard by the Ninth Circuit Court of Appeals.

The Phase II rule, developed in response to the severe pollution caused from storm water runoff, subjected pollutant discharges from small municipal storm sewers and construction sites one to five acres in size to the requirements of the National Pollution Discharge Elimination System. Under the rule, municipalities could evidence their intent to comply with a general permit issued by an NPDES permitting authority by filing a Notice of Intent ("NOI"), or could apply for an individual permit. General permits establish emissions limits and technological requirements for multiple similar dischargers. In either case, the rule required municipalities to develop waste management plans containing six minimum measures: (1) education on stormwater impacts, (2) encouraging the public to participate in development of stormwater programs, (3) stopping illicit discharges, (4) reducing emissions from one-acre or larger construction sites, (5) reducing water quality impacts to a minimum, (6) reducing pollution runoff from municipal activities. Municipalities could alternatively seek permits through a process not requiring regulation of third parties including illicit dischargers and small construction sites. Construction sites could either comply with the general rule or obtain individual permits. The court determined that AFPA lacked standing because it failed to demonstrate actual imminent harm, and dismissed most of the twenty-two challenges against the rule. The court remanded portions of the rule allowing limited oversight of stormwater programs, and allowing approval of NOI's without public comment.

The Municipalities raised several constitutional challenges to the rule. First, they argued that the EPA lacked congressional authorization to develop a permitting program under the CWA. They based this argument on the language in section 402 of the CWA allowing programs to contain performance elements and guidelines,

but which was silent as to permits. The court read this portion of the CWA as establishing baseline requirements for programs rather than listing the only factors that the EPA could use in developing programs, and interpreted the omission of permits as an indication of the flexibility granted to the EPA. The Municipalities also argued that the EPA lacked authority because express language required permits for large and medium municipal storm sewers, but no requirement existed for small municipal storm sewers. The court held that a provision for a moratorium on small emitters necessarily implied that the EPA possessed authority to require permits after the moratorium expired.

The Municipalities also argued the rule violated the Tenth Amendment by forcing them to regulate third parties as a part of a federal regulatory program. The court dismissed this claim, holding the rule was not unduly coercive in violation of the Tenth Amendment because Municipalities could select alternative permitting not requiring regulation of third parties.

The Municipalities challenged the provision requiring public education arguing that it compelled municipal storm sewers to express the political message of the EPA in violation of the First Amendment. The court held that the required message about safe disposal of waste was not ideologically grounded and as a result did not require the municipal storm sewers to endorse a particular belief.

The Municipalities further asserted that the EPA failed to comply with the Administrative Procedure Act (“APA”) provisions for notice and comment on proposed rules because the EPA omitted the individual permit option from the proposed rule. The court held that the EPA gave sufficient notice and opportunity for comment because it had suggested an individual permit option in the proposed rule, and therefore the final rule contained no elements absent from the proposed rule.

The Environmentalists challenged the rule claiming that it provided insufficient oversight and allowed polluters to design and self-enforce their own programs. According to the Environmentalists, the rule contravened the CWA command to maximally reduce pollution. The court agreed, holding that stormwater programs required review by the EPA to ensure that polluters sufficiently reduced emissions.

In addition, the Environmentalists challenged the rule because they claimed it denied the public opportunity to participate as required by the CWA. The court determined that the EPA must make NOI’s submitted by municipal storm sewers public to provide a sufficient hearing. Under the Phase II rule, NOI’s contained all of the relevant information about how pollution reduction would take place and therefore necessitated public comment. As a result, the court vacated the procedural portion of the rule allowing the EPA to prevent public comment on NOI’s and remanded the rule to the EPA for action consistent with the CWA.

The Environmentalists also claimed that the EPA's failure to designate certain industries and forest roads under the regulation, and failure to regulate forest roads violated the APA as arbitrary and capricious decisions. With regard to the EPA's failure to designate industries and forest roads, the court found the EPA acted reasonably and established a rational connection because it possessed insufficient data to justify nationwide designation. As a result, the court deferred to the EPA's determination. With regard to the EPA's failure to regulate forest roads, the court held the Environmentalists had standing to challenge the decision. Because the EPA failed to address the merits of the challenge, the court remanded the issue to the EPA for consideration.

NAHB claimed that the EPA promulgated the Phase II rule without necessary consultation with state governments. The court found the EPA met its duty to consult states by circulating draft copies of the final rule to state and local governments, and revising the rule based upon the comments received. That some states and localities disagreed with the rule did not disprove the EPA's consultation with states.

NAHB also asserted the EPA acted in contravention of the CWA by failing to base its Phase II rule on section 402 studies. NAHB claimed the CWA required the EPA to solely base its program on studies, and that the EPA failed to do so, instead basing its designation partially on input from the public and additional research. The court determined that NAHB had standing based on its assertion that the EPA failed to comply with procedural requirements. On the merits, the court affirmed the EPA's rule holding that the statute required the EPA to base its program on studies and on consultation, and to make use of all sources of information.

The Municipalities challenged designation of small municipal storm sewers based on population density determinations taken from the census as arbitrary and capricious because no connection existed between urban density and pollution due to stormwater runoff. The court deferred to the EPA and affirmed the rule, holding that the EPA established a reasoned basis for its designation based upon evidence demonstrating a clear connection between stormwater runoff and decreased water quality.

NAHB argued the Phase II rule arbitrarily regulated one- to five-acre construction sites because the evidence in the record only considered the cumulative effect of small sites, not their individual environmental impact. NAHB also claimed the EPA arbitrarily and capriciously regulated small construction sites by applying different standards to the small sites than to other sources of runoff. The court held the EPA made its decision consistently with the record, and that the EPA could legitimately extrapolate the effects of large and medium sites to smaller sites. The court determined the EPA did not err in regulating small construction sites since no evidence indicated that the other sources of runoff were similar enough to merit regulation.

NAHB also argued that waivers for small construction sites shifted

the burden of proof to businesses to demonstrate they did not decrease water quality in contravention of the statute's requirement that the EPA establish a program controlling sources. The court held the waiver system was reasonable to allow exceptions for small sites that would likely not damage water quality.

NAHB also claimed that the EPA improperly retained power to designate sources of stormwater runoff in the future. NAHB argued that Congress did not authorize the EPA to retain such power. NAHB also claimed that such authority violated the non-delegation doctrine because the EPA developed no "intelligible principle" to guide its future discretion, and because the ability to designate in the future was not disclosed for notice and comment. The court held the EPA's authority to designate sources covered under the rule did not expire, and that the issue of whether the EPA could designate a source without determining its eligibility was not yet ripe for review. On the non-delegation challenge the court held the overall purpose of the CWA—protecting water quality—gave the EPA sufficient guidance. Finally, the court held the power to designate future sources was a logical outgrowth of continuing designation present in the draft rule, and therefore provided sufficient opportunity for notice and comment.

NAHB raised a challenge under the Regulatory Flexibility Act ("RFA"), arguing the EPA failed to conduct sufficient analysis and ignored the substantial cost imposed on small entities by the Phase II rule. The court found the EPA reasonably determined the rule would insignificantly impact small entities, and even if the EPA improperly complied with the RFA, its assessment of the economic impact made the error harmless.

Justice Tallman concurred in part and dissented in part. He believed the court should defer to the EPA, allow certain determinations without review, and approve NOI's without comment.

Jared Ellis

Friends of Yosemite Valley v. Norton, 348 F.3d 789 (9th Cir. 2003)
(holding National Park Service's (1) Merced Comprehensive Management Plan violated Wild and Scenic Rivers Act because it did not adopt specific limits on visitor use and improperly delineated certain segment boundaries, (2) decision to prepare Merced Comprehensive Management Plan as a programmatic document did not violate Wild and Scenic Rivers Act nor National Environmental Policy Act, and (3) failure to prevent sewage spills was actionable under Wild and Scenic Rivers Act but did not violate that Act's agency cooperation mandate).

This appeal arose from Friends of Yosemite Valley's ("Friends") challenge to the National Park Service's ("NPS") Merced Wild and