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Envtl. Def. Ctr., Inc. v. United States Env'tl. Prot. Agency, 319 F.3d 398 (9th Cir. 2003)

NINTH CIRCUIT

Envtl. Def. Ctr., Inc. v. United States Env'tl. Prot. Agency, 319 F.3d 398 (9th Cir. 2003) (holding that the Environmental Protection Agency's failure to require review of Notices of Intent, the equivalent of a permit, and failure to allow public availability and public comment of the Notices of Intent violates the express requirements of the Clean Water Act).

The United States Court of Appeals for the Ninth Circuit heard three consolidated cases challenging a final rule ("Phase II Rule") promulgated by the Environmental Protection Agency ("EPA"). The EPA issued a rule pursuant to the Clean Water Act ("CWA") to control pollutants entering the nation's waters by storm sewers. The rule mandated that discharges from construction sites between one and five acres and from small municipal separate storm sewer systems ("MS4s") be subject to the general permitting requirements of the National Pollutant Discharge Elimination System ("NPDES"). The Texas Cities Coalition on Stormwater and the Texas Counties Stormwater Coalition ("Municipal Parties") challenged the rule in the United States Court of Appeals for the Fifth Circuit on the following grounds: (1) the EPA promulgated the rule in a procedurally defective manner; (2) the rule violated the Tenth Amendment because it impermissibly requires municipalities to regulate their own citizens; and (3) the rule violated the First Amendment because it requires municipalities to communicate a federally mandated message. The Natural Resources Defense Council ("NRDC") intervened against the Municipal Parties. The Environmental Defense Center ("EDC"), joined by the NRDC, ("Environmental Parties") challenged the rule in the United States Court of Appeals for the Ninth Circuit claiming that the regulations: (1) constitute a program of impermissible self-regulation; (2) fail to provide adequate public participation; and (3) do not address stormwater runoff from other significant sources of pollution. The National Association of Home Builders and the American Forest and Paper Association ("Industry Parties") challenged the rule in the United States Court of Appeals for the D.C. Circuit asserting: (1) the EPA promulgated the rule defectively in violation of the Regulatory Flexibility Act; (2) the EPA acted *ultra vires* by regulating future sources of runoff pollution; and (3) the EPA acted arbitrarily and capriciously by choosing to regulate construction sites between one and five acres. The court upheld the rule as to all the challenges except the first two asserted by the Environmental Parties.

Stormwater runoff is a significant contributor to water pollution in the United States. The sources of stormwater runoff include discharges from construction sites, industrial facilities, urban development, and many more. In 1985, three-quarters of the states cited urban runoff as a major cause of water body impairment. Also,

stormwater runoff is associated with the impairment of surveyed ocean waters. Congress attempted to minimize the pollution from stormwater by requiring the EPA to enact a Phase I Rule and a Phase II Rule. The Municipal, Environmental and Industry Parties challenged the Phase II Rule in this case.

Municipal Parties

The Municipal Parties first claimed that the statutory authority under section 402(p)(6) of the CWA requiring the EPA to develop a comprehensive program to regulate stormwater runoff excluded the option of enacting a program based on NPDES permits. They argued that Congress failed to include permitting in the statutory list of actions. In refuting this claim, the appellate court reiterated that the list is not manifestly exclusive. For this reason, Congress intended to give the EPA more than the listed activities in the statute. The Municipal Parties also argued that the structure of section 402(p), which contains a separate statutory section requiring permits for medium and large MS4s, indicates that Congress would have inserted a separate statutory section for permitting of small MS4s. The court looked to a statutory section enacting a permitting moratorium that applied only to Phase II dischargers. The court determined that the existence of a moratorium necessarily implied that the EPA retained authority to require permits after the expiration of the moratorium. The Municipal Parties' argument therefore violated the principle that interpretation of a statute should not render other provisions superfluous. The court determined that the EPA acted within its statutorily granted authority.

The Municipal Parties raised a facial Tenth Amendment challenge to the Phase II Rule. In particular, the Municipal Parties claimed the Phase II Rule excessively interfered with local government functions and compelled small MS4s to regulate upstream dischargers. The court started with the premise that for a facial challenge, the Municipal Parties must demonstrate there are no circumstances in which the challenged provision is constitutional. The court concluded that the individual and general permitting requirements of the Phase II Rule, even though they require operators of small MS4s to regulate third parties, do not unconstitutionally coerce because the small MS4 discharges have two alternative options to the permits: not discharging and the alternative permit option. The Municipal Parties argued that not discharging stormwater into federal waters provided an unfeasible option. The court stated that the fact that the alternative proved to be more difficult or more expensive did not alter the legal framework under which a municipality may choose to discard their stormwater. Further, the alternative permit option allowed the operator of a small MS4 to seek individualized permission to discharge based on the Phase II Rule permitting rubric for large and medium MS4s. This option allowed small MS4s to avoid regulation of third parties. The court ruled that the Municipal Parties failed to meet the standard of

demonstrating no circumstances where the alleged rule was constitutional.

Finally, the Municipal Parties argued that the Phase II Rule violated the First Amendment. The key challenge resulted from a part of the rule entitled the “Public Education and Outreach” Minimum Measures, which ordered small MS4s to distribute materials to the community about the impact of stormwater runoff on water sources. The Municipal Parties argued that neither Congress nor the EPA may dictate the speech of small MS4s. The court rejected the argument because the broad requirements did not dictate that the small MS4s convey either a specific message or an affirmation of a specific belief. Conveying information to the public about safe toxin disposal contained no ideological component. For these reasons, the court held that the public information component was constitutional.

Environmental Parties

The Environmental Parties challenged the Phase II Rule claiming it contravened the CWA by allowing small MS4s to create stormwater pollution controls without adequate regulatory oversight. The Environmental Parties specifically challenged the general permitting scheme. The court determined that general permitting schemes provide the EPA with lawful means of regulating discharges. Under a general permitting scheme, each general permit outlined the technology required and the effluent limitations to adequately protect a water source from a class of dischargers. The dischargers may then acquire permission to discharge by filing a Notice of Intent (“NOI”). The NOI simply represents an acceptance of the parameters of the general permitting scheme and the EPA need not review each particular NOI.

The general permitting scheme for the Phase II Rule differed from traditional general permitting schemes mentioned above. The CWA requires that the EPA ensure that operators of small MS4s comply with general effluent limitations, but at the same time, EPA must ensure that operators of small MS4s “reduce the discharge of pollutants to the maximum extent practicable.” Using the first part of the *Chevron* test, where Congress clearly expressed its intent, the court required that the EPA must review each individual NOI. The court decided that a general permitting scheme would ensure that every discharger meet the effluent limitations, but the scheme in no way could ensure that every small MS4 reduced “the discharge of pollutants to the maximum extent practicable.” The court required meaningful review by the appropriate regulatory agency before approval of an NOI.

The Environmental Parties also claimed that the general permitting scheme failed to provide adequate public participation because the EPA did not provide the public with notice or opportunity for NOI hearings. The court used the first part of the *Chevron* test and looked at provisions in the CWA requiring that permit applications be available for public review and a hearing. The court then stated that

the NOI equivocated to a permit application, so the EPA must involve public participation in the general permitting scheme.

Finally, the Environmental Parties argued that the EPA acted arbitrarily and capriciously when designating regulated sources under the Phase II Rule. The Environmental Parties asserted that many other serious sources of stormwater pollution designated in a list called Group A Facilities were subject to regulation under the Phase II Rule. The Group A Facilities consisted of stormwater dischargers similar to regulated dischargers under the Phase I Rule, but intentionally excluded from regulation. The EPA conducted studies of many sources of stormwater pollution, but the EPA only enacted the Phase II Rule to apply to small MS4s and construction sites. The court deferred to the EPA's interpretation of the statute because the statute did not require the EPA to consider Group A sources individually. The Environmental Parties also claimed that the EPA acted arbitrarily by not including forest roads under the Phase II Rule. The court deferred to the EPA's interpretation because the statutory language only mentioned that the Phase II Rule specifically applied to municipal and industrial sources and not agriculture.

Industry Parties

The Industry Parties contended that the EPA violated the Regulatory Flexibility Act ("RFA") by not conducting the requisite analysis. The RFA requires federal agencies to prepare and analyze the economic impacts proposed rules may have on small business entities. Under the RFA, an agency need not conduct the analysis if the proposed rule will not have significant economic impacts on a substantial number of small entities. The court concluded that the EPA correctly determined that the Phase II Rule did not trigger an RFA analysis. The court determined that even if the EPA erroneously concluded that there was no impact, the Small Business Advocacy Panel conducted by the EPA sufficed for the economic analysis under the RFA.

The Industry Parties also argued that the EPA improperly acted by authorizing the designation of future sources of stormwater pollution. The Phase II Rule allowed the EPA and authorized state agencies to require currently unregulated stormwater dischargers to apply for a permit under the rule when future circumstances warrant regulation. The Industry Parties argued that allowing future designation falls outside of the EPA's permitted authority. The court rejected the Industry Parties' argument on the basis that section 402(p)(6) authorizes a comprehensive approach, which allows regional determination of polluting dischargers even if that type of source does not compromise water quality on a national scale. The court looked to the plain language of the statute, which provided no specific date for designation of stormwater sources and rejected the Industry Parties' argument.

Finally, the Industry Parties contended that the EPA acted arbitrarily and capriciously when designating small MS4s and small

construction sites within the purview of the Phase II Rule. They argued that the EPA's use of Census-Bureau data to designate small MS4s lacked a sound basis. The Industry Parties asserted that the EPA failed to establish a correlation between population size and stormwater pollution. The court treated the EPA's designation with great deference. The court denied the Industry Parties' assertion that the EPA must establish the correlation with pinpoint precision. For areas of technical expertise, courts do not require perfect data or studies. The Industry Parties also argued that the EPA's designation of small construction sites between one and five acres as falling under the Phase II Rule lacked sufficient support in the record. Again, the court gave great deference to the EPA on this claim. Under an arbitrary and capricious standard, the court would have reversed only if the EPA relied on factors Congress did not intend for them to consider. The court looked to the record, which contained more than twenty studies of stormwater pollution impacts from small construction sites, and found EPA's designation of small construction sites under the Phase II Rule plausible. Thus, the EPA acted according to the record when designating small construction sites under the Phase II Rule.

Adriano Martinez

California Trout, Inc. v. Fed. Energy Regulatory Comm'n, 313 F.3d 1131 (9th Cir. 2002) (holding state water quality certification required by the Clean Water Act does not limit federal authority to permit ongoing projects pending relicensing).

California Trout, Inc. ("Trout") petitioned for review of a Federal Energy Regulatory Commission ("FERC") order that denied its request for rehearing and revocation of the annual license for Project 1933, operated by Southern California Edison ("Edison"). At issue was whether FERC acted within its authority when it issued annual licenses to Edison pursuant to the Federal Power Act ("FPA"), though Edison had not received state water quality certification as required by the Clean Water Act ("CWA"). FERC denied this request for rehearing and Trout appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 16 U.S.C. § 8251(b). The court affirmed FERC's denial.

This dispute arose from the 1996 expiration of Edison's fifty-year FPA license for Project 1933 permitting the diversion of water from the lower portion of the Santa Ana River for both water supply and power generation. Edison filed an application for a new license for the project in 1994 and simultaneously requested water quality certification pursuant to the CWA. The state denied water quality certification, but Edison received a temporary suspension through March 2002. After that date Edison filed a new application for water quality certification.