EASTERN WATER NEWS

COURT CASE AND REGULATORY ACTION MAY IMPACT CLEAN WATER ACT EFFLUENT LIMITATION GUIDELINES IN 2006

The year ahead promises to be a busy one in the world of U.S. Environmental Protection Agency (EPA) effluent limitation guidelines (ELGs). ELGs are the mainstay provisions of the Clean Water Act (CWA) that establish technology-based discharge standards for industry sectors. Since 1972, EPA has promulgated effluent guidelines that address 56 industrial categories. EPA estimates that the ELG program prevents the discharge of almost 700 billion pounds of conventional and toxic pollutants each year from the tens of thousands of regulated discharges covered by specific standards. By all accounts, this technology-forcing regulatory program has been tremendously successful in improving the quality of America's waters in the 30 years of its implementation.

So why will such a well-established program garner attention in 2006? The answer lies in the far-reaching strategy that EPA has been developing in recent years. From 1992-2002, EPA's ELG program was subject to the requirements of a consent decree resulting from litigation with the Natural Resources Defense Council (NRDC) in the 1990s. Many of today's standards went into effect under the NRDC Decree. Freed of these obligations, EPA since 2002 has developed and is pursuing a new strategy for its ongoing CWA § 304 obligations to review, and, "if appropriate," update ELGs. That strategy, in a nutshell, focuses on where the highest risk remains and whether there is technology that is feasible and cost-effective to reduce it.

Critics contend that the ELG program is about technology, not risk, and that EPA's approach runs counter to its CWA mandates. Supporters say that EPA's strategy makes sense in light of today's most pressing water quality problems and the reality of limited resources. Both a court case and a regulatory process are pending, and either (or both) could lead to further court action in 2006.

Background

The ELG program is known as technology-forcing because it does not rely upon discharge-specific water quality differences to establish pollution control requirements but, rather, imposes a uniform, base treatment standard across like facilities in an industrial sector. Under the ELG program, EPA identifies the pollutants requiring control in a particular industry category or subcategory, and, applying statutory factors such as the types and age of equipment, engineering aspects of the manufacturing process, and economic considerations, defines a technology to accomplish the level of control required. The entire industry must then adopt the technology and meet the uniform discharge limits. Development of an ELG requires extensive data-gathering and analysis, and typically takes years to complete from the onset of the effort to the culmination of a rulemaking proceeding establishing a final ELG.

Lawsuit Challenges EPA's 2004 ELG Strategy

The fundamental question at issue in the pending litigation is whether and under what circumstances EPA must revisit and revise promulgated ELGs. A secondary issue is the scope of EPA's obligation to undertake to establish new ELGs for previously unregulated industry sectors. In *Our Children's Earth Foundation, et al. v. U.S. EPA* (*OCE*), the plaintiffs challenged EPA's review of the ELG program as set forth in the agency's 2004 ELG Plan. The District Court ruled, in May 2005, that EPA had fulfilled its non-discretionary duties to review ELGs and to develop a plan for conducting the required evaluations. The court rejected plaintiff's argument that the CWA required EPA to conduct its ELG reviews using only technology as a guide, instead finding that the CWA provides EPA with broad discretion how to conduct its reviews. The District Court also found that its jurisdiction did not extend to conducting a substantive review of the 2004 ELG Plan, because such review is only available in federal appellate courts.

Seeking a reversal of these rulings, the plaintiffs filed an appeal to the Ninth Circuit Court of Appeals. Most significantly, the appeal seeks to have the

appellate court answer the question of whether the 2004 ELG Plan complies with the requirements of the CWA. In briefs recently filed with the Ninth Circuit, EPA has argued not only that the District Court properly upheld EPA's actions with respect to the 2004 ELG Plan, but also that the appeal to hear the merits of EPA's 2004 Plan is untimely and not properly raised in the lower court. The National Association of Clean Water Agencies (NACWA) intervened in the case, supporting EPA's reading of the CWA and arguing that challenges to the substance of EPA's ELG Plan can be made only via direct and timely appeal under § 509(b) of the CWA, rather than the citizen suit provisions originally invoked by the plaintiffs in the lower court action.

Watch for the Ninth Circuit's Decision

If the Ninth Circuit declines the appeal of the claim challenging the merits of EPA's 2004 ELG Plan, then the appeal will be limited to whether the district court properly applied the requirements of the CWA's ELG review provisions in finding that EPA had adequately executed its statutory duties. On the other hand, if the Ninth Circuit decides to address the substance of EPA's 2004 ELG Plan, then the agency's strategy in the post-NRDC Consent Decree era will come under judicial scrutiny, and much more is at stake in the *OCE* case than the largely procedural matters originally raised. At the farthest possible extreme, EPA could find its ELG program again subject to court-ordered action, the content of which would remain to be seen. If the Ninth Circuit takes jurisdiction over the claims on the merits, expect extensive briefing on issues such as whether EPA must consider technology improvements in each industry category as part of each required review, whether EPA can group and evaluate industries on the basis of a risk screening tool derived from regulatory databases that are likely incomplete, whether EPA has a mandatory duty to continually ratchet down industry and municipal discharges by always imposing the latest proven and cost-effective technology, and the like.

EPA's Draft 2006 ELG Plan

At the same time as the *OCE* case is on appeal, EPA is moving forward with its annual review and planning process, which will culminate in finalization of its 2006 ELG Plan later this year. While the substance of the draft 2006 Plan is not directly before the court in *OCE*, it lurks in the shadows, because the 2006 Plan builds upon the ELG strategy being challenged in the 2004 Plan.

Were it up to the plaintiffs in *OCE*, EPA would be obligated as part of each statutory review period to apply the CWA's technology-based criteria—used to develop ELGs in the first instance—to EPA's annual and five-year reviews of existing ELGs. Given that this approach would require revisiting, on the merits, each of the 56 categories currently subject to ELGs, EPA has understandably argued this level of review is not mandated or warranted by the CWA. Instead, EPA has adopted a more focused approach, as summarized below. This summary highlights some of the philosophical differences in how the parties in *OCE* view the scope of EPA's ELG program obligations.

Risk Is the Focus of EPA's ELG Strategy

In 2002, following termination of the NRDC Consent Decree, EPA embarked on establishing its going-forward ELG program. In particular, the agency identified four factors it would use to guide its evaluation of whether to revise existing ELGs: (1) the amount and toxicity of the pollutants in an industry sector's discharge and the associated potential environmental and human health harm; (2) whether effective reduction of these pollutants and the attendant potential harm is feasible and if so, the costs and performance of applicable and demonstrated technologies, process changes or pollution prevention alternatives necessary to effect these reductions; (3) the affordability or economic achievability of the technologies identified; and (4) implementation and efficiency considerations.

Applying these factors, and building on the 2004 ELG Plan, EPA focused its annual review during 2005 on applying screening-level tools to identify industrial categories with the greatest potential to pose harm due to the toxicity of the discharge. This effort led to the agency focusing on certain point source categories with what EPA determined were the highest estimated values for "toxic-weighted" pollutant discharges based on available data. Other categories were assigned a lower priority for various reasons, including low perceived risk (*e.g.*, relatively innocuous discharges or a small number of dischargers), successful voluntary reductions, or reductions that were more viable and efficient to achieve through individual

permit actions. According to EPA, this approach analyzes the effectiveness of technologies currently in use by a category based on the amount and toxicity of the discharges. According to critics, this approach erroneously elevates risk over technology, and in any event is inaccurate in its risk prioritizing because the information relied upon is of variable quality.

From this review, EPA's draft 2006 ELG Plan identifies six industry categories for further attention under the existing standards review process of the ELG program: the six categories include pulp and paper, steam electric power generation, tobacco, iron and steel manufacturing, vinyl chloride and chlor-alkali manufacturing, and concentrated animal feeding operations. In addition, EPA has identified two potential new categories for possible development of ELGs, namely, airport deicing and drinking water supply and treatment. If EPA's ELG Strategy goes forward without judicial modification, then these industry categories will represent, for now, the areas of focus that EPA believes represent the best potential for additional pollutant reductions from technology advances. Critics would argue that every industry category for which a new technology has been identified must be evaluated for possible revision in light of the new information.

Conclusion and Implications

As noted, the ELG program has been in operation for many years and its mechanics and implications are well understood by states, municipalities and industry. The *OCE* case, in its initial foray, was seen by many observers as a procedural dispute about EPA's internal workings that the District Court not surprisingly and rather swiftly decided in EPA's favor. If *OCE* becomes a vehicle to challenge the ELG Strategy EPA has recently pursued, the importance of the case is greatly magnified. Even if *OCE* does not turn into a substantive review of EPA's ELG strategy, a direct appeal of EPA's 2006 ELG plan, once it is finalized, may be waiting in the wings. Stay tuned. We will continue to follow and report on these important developments. (KMH/RSD)