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Item Type	Article
Authors	Trott, Adam
Publisher	UC Berkeley School of Law
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Download date	2026-11-15 03:28:05
Link to Item	http://hdl.handle.net/20.500.12424/175796

Lack of Deference: The Ninth Circuit's Misstep in *NRDC v. EPA*

Adam Trott[*]

Prior to 2005, the Environmental Protection Agency had a long-standing policy that the statutory exemption from regulation of oil and gas facilities did not include the emission of sediment from related construction activities. The Energy Policy Act of 2005 changed the definition of "oil and gas facilities" to include these related activities. Essentially reasoning that such expansion of the Clean Water Act would be meaningless unless it applied to the most common emission from construction activities—sediment—EPA changed its policy to exempt some types of sediment from regulation.

The Natural Resources Defense Council challenged this new policy, arguing that this change was arbitrary and capricious due to the long-standing nature of the previous policy, such that the new policy was an "impermissible interpretation." In NRDC v. EPA, *the Ninth Circuit agreed in a split decision.*

This Note suggests that the Ninth Circuit did not properly apply Chevron *deference and overstepped its bounds by becoming a policy-making body. While EPA's rule may not be environmentally optimal, EPA is a political branch. Where, as here, the mandate from Congress is ambiguous, EPA should be held accountable by the voters, not by the courts. Since the interpretation was reasonable on its face, it should have been upheld.*

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INTRODUCTION

Over the thirty-six year history of the Federal Water Pollution Control Amendments of 1972 (the "Clean Water Act" or "CWA"), the Environmental Protection Agency (EPA) has wavered in its statutory mandate to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] On the margin, where EPA could rationalize either a decision to regulate or a decision not to regulate, the agency has often opted for the latter course. In particular, EPA has been willing to grant National Pollutant Discharge Elimination System (NPDES) exemptions to avoid dealing with hard-to-regulate polluters (politically) and pollutants (physically).[2] While EPA's decisions may have complied with the letter of the law—or at least not gone expressly against it—the agency has frequently failed to adopt the most environmentally friendly solution. The pattern of EPA's actions, or lack thereof, has had little to do with clean water, and more to do with administrative or political convenience.[3] Attempting to rectify this problem in *Natural Resources Defense Council v. EPA* (*NRDC v. EPA*),[4] the Ninth Circuit made a critical misstep in its application of the deferential standard espoused in

1. 33 U.S.C. § 1251(a) (2006).

2. *Id.* § 1342. NPDES requires dischargers of pollutants from point sources into the nation's waters to obtain permits. *Id.; see infra* Part I.

3. *See* Michael C. Blumm, *Roads Not Taken:* EPA vs. Clean Water, 33 ENVTL. L. 79, 110–111 (2003).

4. 526 F.3d 591 (9th Cir. 2008).

Chevron U.S.A., Inc. v. Natural Resources Defense Council.[5] While purporting to apply the *Chevron* standard, the Ninth Circuit substituted its own judgment in place of EPA's, displacing the agency's expertise and creating potential separation of powers issues.

Among the discharges that EPA has refused to regulate are those from sea-going vessels,[6] dams, water transfer facilities,[7] and small oil and gas construction facilities.[8] Each of these discharges has its own unique context and presents its own challenges for regulation. In each case, EPA has been unwilling to confront these challenges head-on, opting instead to settle for administrative convenience and allow these activities—each of which has a negative impact on the quality of our waters[9]—with few, if any, federal restrictions. Significantly, these exempted point sources have critical similarities to nonpoint sources.[10]

5. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–44 (1984). See Part III for more detail on *Chevron* deference, its application, and the policy considerations behind it.

6. 40 C.F.R. § 122(a) exempts "[a]ny discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel." This has been interpreted to include ballast water.

7. EPA did not issue a rule regulating the supersaturated water of dams or water transfer facilities.

8. 40 C.F.R. § 126(a)(2)(ii) exempts "[d]ischarges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities" from the NPDES permitting process.

9. Ballast Water: In its order granting plaintiffs' motion for permanent injunctive relief, the district court described the effects of discharging ballast water: "Once established, invasive species become almost impossible to remove, leading '[s]cientists, industry officials, and land managers [to] recogniz[e] that invasive species are one of the most serious, yet least appreciated, environmental threats of the 21st century.'" Northwest Envtl. Advocates v. U.S. EPA, 2006 U.S. Dist. LEXIS 69476 (N.D. Cal. 2006) (quoting Decl. of Deborah A. Sivas in Support of Pl. Mot. for Summary Judgment, Exh. H, at 7).

Dams: "Dams cause a variety of interrelated water quality problems, both in reservoirs and in river water downstream from a dam." National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 161 (D.C. Cir. 1982). For a detailed description of these problems, *see* National Wildlife Federation v. Gorsuch, 530 F. Supp. 1291, 1297-1303 (D.D.C. 1982).

Water Transfer Facilities: "When water from [the canal] is pumped across the levees [via the water transfer facility], the phosphorous it contains alters the balance of [the large undeveloped wetland] ecosystem (which is naturally low in phosphorous) and stimulates the growth of algae and plants foreign to the Everglades ecosystem." S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 101 (2004). The phosphorous threatens the viability of the Everglades ecosystem. Other pumps have similar ecosystem-altering effects.

Small Oil and Gas Construction Facilities: EPA has recognized that "[w]here construction activities are intensive, the localized impacts of water quality may be severe because of high unit loads of pollutants, primarily sediments." 55 Fed. Reg. at 48033–34.

10. The term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2006). This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. *Id.* A nonpoint source is defined as any source that is not a point source, and is "caused by rainfall or snowmelt moving over and through the ground." U.S. Envtl. Prot. Agency, What is Nonpoint Source (NPS) Pollution?, Questions and Answers,

The courts must intervene with EPA's decisions in certain situations in order to uphold both the letter and spirit of the CWA. However, this Note argues that where the circumstances present great ambiguity, as is the case in *NRDC v. EPA*, the question is political and therefore not for the courts. The considerations supporting *Chevron* belie this judicial intrusion into a problem that is best solved by agency experts working within a greater frame of coherent executive branch policy. While the Natural Resources Defense Council (NRDC), other environmental groups, and the Ninth Circuit may disagree with EPA's policies, political action rather than litigation is necessary, or else judicial policy-making and its inherent lack of democratic legitimacy take over.

It is within EPA's power under the CWA to regulate these activities, and the collective negative environmental consequences are potentially ominous. In *NRDC v. EPA*, the Ninth Circuit demonstrated it is no longer willing to defer to EPA when it makes a determination to exempt a pollutant source from NPDES permitting requirements, even where EPA's decision is a reasonable interpretation of statutory ambiguity. While the result in *NRDC v. EPA* may be positive in the short term—EPA must regulate discharges of pollutants from small oil and gas construction facilities—the long-term consequence of the decision is too great to justify that benefit. The Ninth Circuit failed to apply the deferential standard the Supreme Court thoughtfully created in *Chevron*, inappropriately taking upon itself the mantle of policy making in place of the politically accountable EPA. In this case, judges replaced the expert agency, requiring EPA to go in a certain direction when the statute was ambiguous. Judicial fiat replaced careful consideration of all relevant factors and even congressional intent.

The Ninth Circuit held that EPA's interpretation of the Energy Policy Act of 2005 as exempting these facilities from NPDES permitting requirements was arbitrary and capricious, and hence unlawful. As a result, EPA and agencies generally are now barred from reasonably changing their policies via notice-and-comment rulemaking in response to an ambiguous congressional enactment. The court has done more than stretched its reasoning to justify arriving at the "right" result; it has thrown the baby out with the bathwater because it interferes with EPA's optimal functionality: acting based on its expertise and respond to changing conditions on the ground.

EPA raised similar arguments rationalizing its decision not to regulate ships under the CWA in *Northwest Environmental Advocates v. EPA*.[11] There, the Ninth Circuit found that EPA's thirty-six-year-old NPDES exemption was

http://www.epa.gov/owow/nps/qa.html (last visited Mar. 22, 2009). In between are "wet weather point sources" like urban storm sewer systems and construction sites. U.S. Envtl. Prot. Agency, Introduction to the Clean Water Act, http://www.epa.gov/watertrain/cwa (last visited Mar. 22, 2009).

11. Nw. Envtl. Advocates v. EPA, 537 F.3d 1006, 1011 (9th Cir. 2008).

illegitimate because EPA did not have the requisite power to grant such an exemption, and the court therefore remanded the matter to EPA for further consideration. This result, like *NRDC v. EPA*, seems strained in light of judicial precedent favoring deference to agencies that justify their position by administrative convenience and priority.[12] The rationales EPA gave for its lack of regulation in *Northwest Environmental Advocates v. EPA* are strikingly similar to those that the court had previously found reasonable for an NPDES exemption—fewer administrative costs, relatively little pollution, and the presence of other, higher priorities.[13] Nevertheless, this decision is better justified than the Ninth Circuit's judgment in *NRDC v. EPA*, since there was less ambiguity in the statute in that case.[14] Since the decision in *NRDC v. EPA* to exempt ballast water discharge from NPDES requirements was unreasonable as a matter of law, there is no reason to think that Congress could have intended EPA's interpretation of the statute, no matter EPA's justifications. This is so since *Chevron* is premised on the idea that when Congress leaves ambiguities in any statute, it intends to delegate the interpretation of that ambiguity to the authorized agency.[15] If Congress' meaning is unambiguous, then EPA by law cannot interpret the statute differently.

Through these two cases, the Ninth Circuit seems to be pushing EPA toward more environmentally friendly regulation, at least in the context of the CWA, in an effort to achieve the greater purpose behind the CWA. However, the method that the court is using to achieve this noble goal is suspect, and may lead to unforeseen negative consequences as agencies lose flexibility and discretion to prioritize their responsibilities.

This Note argues that while EPA is not enforcing the CWA to its fullest possible capacity, the Ninth Circuit's heavy-handed response is not the solution. Rather, statutory interpretation questions like those in *NRDC v. EPA* should be answered first politically. Part I briefly discusses NPDES permits generally. Part II looks at EPA's refusal to regulate in areas of ambiguity within the CWA, and connects it to the agency's vision of the NPDES process as regulating end-of-pipe emissions exclusively. In Part III, the Note discusses *NRDC v. EPA* in the context of *Chevron* deference. Part IV puts *NRDC v. EPA* in the context of other, properly-decided *Chevron* deference cases. Part V discusses the costs of the Ninth Circuit's approach in this case. The Note concludes with the suggestion that EPA's policy toward regulation of true gray

12. *See, e.g.*, Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982); Or. Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1998); Am. Wildlands v. Browner (Am. Wildlands II), 260 F.3d 1192 (10th Cir. 2001).

13. *See* Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982).

14. In other words, the conveyance in *Northwest Environmental Advocates v. EPA* is clearly a point source, and hence should be regulated by EPA, whereas oil and gas construction facilities are not so clearly point sources. *See* discussion *infra* Parts II and IV.A.2.

15. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

areas should not be litigated in the courts, but, instead, determined at the ballot box.

I. BACKGROUND: NPDES PERMITS

In an attempt to help restore water quality, Congress enacted the CWA Amendments of 1972.[16] One of the central innovations of the 1972 Act was the establishment of the NPDES, which requires dischargers of pollutants from point sources into the nation's waters to obtain permits.[17] These permits limit the amount of pollutants a source may discharge.[18] The process requires that all permit applications and permits be publicly disclosed, and allows for public participation.[19] Enforceable violations of the CWA require only a showing of non-compliance with the specific limits in the permits.[20] The CWA also lays out the process in section 319 by which states may control pollution added to the nation's waters from nonpoint sources.[21] Courts have become increasingly aggressive in requiring EPA to regulate the "gray area"—those point sources with characteristics of nonpoint sources, called "wet weather point sources." These include construction sites and water transfer facilities.[22]

16. 33 U.S.C. § 1251(a).

17. *Id.* § 1342. The Act provides that "(1) the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [of this Act], upon condition that such discharge will meet either (A) all applicable requirements under [various sections of the Act], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. (2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate." *Id.* § 1342(a). Sources that are not point sources are not subject to NPDES permit requirements. 33 U.S.C. § 1251. The lack of a mechanism for *direct* federal regulation of non-point source pollution is due "simply to [Congress'] recognition that the control of non-point source pollution was so dependent on such site-specific factors as topography, soil structure, rainfall, vegetation, and land use that its uniform federal regulation was virtually impossible." Shanty Town Assoc. Ltd. P'ship v. Envtl. Prot. Agency, 843 F.2d 782, 791 (4th Cir. 1988).

States may take over the permitting program if EPA Administrator determines that "adequate authority" exists. 33 U.S.C. § 1342(b). Currently forty-five states have such programs. U.S. Envtl. Prot. Agency, National Pollutant Discharge Elimination System, State Program Status, http://cfpub.epa.gov/npdes/statestats.cfm (last visited Mar. 22, 2009).

The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source" or "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). The term "pollutant" means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6). There are two exceptions to "pollutant" that are not applicable here.

18. *See* 33 U.S.C. § 1342 (2006).

19. *Id.*

20. *Id.* § 1319.

21. *Id.* § 1329. A classic example of a nonpoint source is irrigation runoff.

22. *See* Jeffrey Gaba, *Generally Illegal: NPDES General Permits under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 412 (2007).

Mere months after Congress passed the CWA amendments, EPA issued a regulation exempting certain discharges from storm sewers, smaller animal confinement facilities, silvicultural activities, and irrigation return flow from smaller farms from NPDES requirements, citing the difficulty of developing appropriate effluent limitations and of issuing and managing so many permits.[23] In 1977, the D.C. Circuit rejected these justifications, reasoning that Congress had intended that all point sources have NPDES permits, and that administrative difficulty was not sufficient justification to ignore the statute's mandate.[24] EPA subsequently designed the general permit program to cover large numbers and a wide variety of sources.[25] Unlike regular NPDES permits, which are developed individually for each point source with input from the public, EPA issues general permits developed through a "notice and comment" process.[26] General permits "are issued for an entire class of hypothetical dischargers in a given geographical region" and "may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous."[27] Under this process, sources need only submit a "Notice of Intent" to the permitting authority, after which they are allowed to discharge under the conditions set forth in the general permit without additional government review or public participation: the two main safeguards found in the regular process.[28] Most point sources that require general permits involve storm water discharges or oil and gas facilities.[29] The idea of general permits has come under attack as illegal under the CWA, but nevertheless remains good law.[30]

II. EPA'S RELUCTANCE TO REGULATE IN GRAY AREAS

Since the CWA was enacted, EPA has often taken the politically expedient route and refused to regulate certain polluters, even though a liberal reading of the statute indicates that the agency could have regulated in those situations. In a 2003 article commemorating the thirtieth anniversary of the CWA, Professor Michael Blumm commented that "[o]ften, when the goal of a comprehensive

23. 40 C.F.R. § 125.4 (1975).
24. Natural Res. Def. Council v. Costle, 568 F.2d 1369, 1379 (D.C. Cir. 1977).
25. Gaba, *supra* note 22, at 422.
26. *Id*.
27. Natural Res. Def. Council v. EPA, 279 F.3d 1180, 1183 (9th Cir. 2002).
28. Gaba, *supra* note 22, at 422
29. *Id*. at 432.
30. For example, in *Environmental Defense Center v. EPA*, 344 F.3d 832, 854–56 (9th Cir. 2003), the court determined that EPA's procedures for obtaining a general permit did not allow for adequate public participation, and that EPA's failure to review Notices of Intent constituted a "failure to regulate" and contravened the express requirements of the CWA. Professor Gaba argues that "[a]lthough general permits can fill a useful role in implementing the NPDES permit program, EPA will need to modify its general permit policies to provide for greater public participation and government oversight to ensure compliance with water quality standards. The acknowledged efficiency advantages of general permits simply cannot trump the substantive requirements of the Clean Water Act." Gaba, *supra* note 22, at 412.

approach to clean water conflicted with administrative convenience or received political wisdom, EPA compromised that goal."[31] Indeed, the first thirty years of CWA enforcement were fraught with instances in which EPA avoided the CWA's primary objective—to repair and preserve water quality in U.S. waters.[32] Professor Blumm explained these decisions as a result of "a maturing bureaucracy more interested in self-preservation than in championing the environmental goals established in its authorizing legislation."[33] Blumm argued that EPA could and should have interpreted the statute differently in light of the CWA's objective, especially because of the deference courts provide to EPA's interpretations.[34] Because of the agency's failure, the CWA "has been unable to achieve the ambitious goals Congress established thirty years ago in some significant part because EPA has chosen not to try."[35]

EPA's reluctance is especially highlighted in its decisions not to regulate sources that are not clearly covered by the CWA. Even in situations where a court may have sustained EPA's decision to regulate because of the adverse water quality effects of a particular source, the agency has chosen to manipulate ambiguity in the statute to avoid regulating.[36] These gray areas generally involve either (1) discharges from sources that are on the border between point and nonpoint sources, or (2) sources where the agency can argue that the source is merely transporting water (and whatever is in it) within the same water body.

EPA has had trouble espousing a persuasive justification in several marginal cases where the discharging conveyance has elements of both point and nonpoint sources. As demonstrated by the discussion of cases below, whether the court was persuaded in these marginal cases has turned in large part on whether the court found the language of the CWA to be clear. Where the statute was unclear, the courts have, and should, defer to the agency determination so long as there is some degree of reasonableness in that interpretation.

In *National Wildlife Federation v. Gorsuch*,[37] EPA refused to require dams to apply for NPDES permits for their water quality changes even after hundreds of thousands of fish died due to uncontrolled supersaturated gas in the water spilling over the dam.[38] Dams are a good example of the sources that are in the gray area between point and nonpoint sources, as they have characteristics of point sources (the presence of an easily defined point of

31. Blumm, *supra* note 3, at 80–81.
32. *See id.* at 81.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 82.
37. Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 161 (D.C. Cir. 1982).
38. Blumm, *supra* note 3, at 83–84.

emission, stereotypically a pipe) and nonpoint sources (the pollution results from the natural flow of water from one area to another, arguably in the same water body).

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, the South Florida Water Management District operated a pumping facility that transferred water from a canal into a reservoir a short distance away.[39] Florida, to which EPA had delegated authority, did not require the facility to obtain an NPDES permit.[40] The canal drained many square miles of ground and rainwater contaminated by human activities.[41] When the canal's water level reached a certain point, the pump station pumped the water from the canal into a chemically different water conservation area sixty feet away.[42] In this manner, the district was able to maintain disparate water table levels, in which the water's return was slowed by a series of levees.[43] The issue for the court was whether the operation of the pump constituted the "discharge of [a] pollutant" within the meaning of the CWA.[44] EPA argued that when a discharger had merely "taken a ladle of soup from a pot, lifted it above the pot, and poured it back into the pot, [it] ha[d] not 'added' soup or anything else to the pot," and as such did not require an NPDES permit.[45] The agency likely would have succeeded if it had been in the position of justifying the requirement of a permit for the source. In that situation, it could have legitimately argued that since pollutants were moving from contaminated to clean water, an NPDES permit was required. This is the essence of the ambiguity: the language of the CWA is unclear about whether this particular source of pollution should be covered, since it does not conveniently fit within the regulatory framework. The result is that EPA may justify its decisions not to regulate based entirely on inconvenience, explicitly or not.

In *Northwest Environmental Advocates v. EPA*, the environmental group plaintiffs challenged an EPA regulation that exempted certain marine discharges, including a vessel's discharge of ballast water, from NPDES permitting requirements.[46] Ballast water is seawater used by cargo ships to compensate for changes in weight, whether as cargo is unloaded or fuel is consumed.[47] Such water is typically pumped in or out at ports of call; when a ship pumps in ballast water, native organisms usually enter the ship as well.[48]

39. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 98–99 (2004).
40. *Id.* at 99.
41. *Id.* at 100.
42. *Id*. at 100–101.
43. *Id.*
44. *Id.* at 103.
45. *Id.* at 110.
46. Nw. Envtl. Advocates v. EPA, 537 F.3d 1006, 1010 (9th Cir. 2008); 40 C.F.R. 122.3(a) (1999).
47. *Nw. Envtl. Advocates*, 537 F.3d at 1012.
48. *Id.*

When the ship gets to its next port and pumps out ballast water, these organisms are released into a new ecosystem.[49] If these organisms survive in their new environment—and they are increasingly able to do so—they can cause severe harm to the ecosystem.[50]

EPA supported its ballast water exemption by claiming that such discharge "generally causes little pollution" and that "exclusion of vessel wastes from the permit requirements will reduce administrative costs dramatically."[51] EPA contended it had the power to make the exemption, even though the text of the CWA itself did not explicitly delegate this authority.[52] Significantly, ballast water shares many of the elements of *Miccosukee*. The ship, like the levee, is just the transporter of the water, and is not the source of the harmful organisms that are in the water. It can also be argued that the ocean is one "pot" of water.

Finally, at issue in *NRDC v. EPA*, EPA exempted storm water discharges of sediment from oil and gas construction facilities since "discharges of sediment . . . do not necessarily indicate contamination."[53] EPA claimed that its exemption of storm water discharges of sediment from oil and gas construction facilities "reflects a reasonable (and EPA believes, the best) interpretation of Congressional intent in limiting the NPDES exemption to discharges not contaminated by contact with raw material, intermediate products, finished product, byproduct, or waste products."[54]

The point to take from these cases is that EPA's reluctance to regulate in the gray areas is not a new phenomenon. It spans Presidents' administrations, and shifts in congressional majorities. Furthermore, since the CWA's conception, the courts have often deferred to these judgments, even where such a decision would work *against* any efforts to clean up the nation's waters.[55] Recently, however, the courts have seemed more willing to respond to EPA's lackadaisical approach toward even the most basic mandates in the CWA. This culminates in an overreach in *NRDC v. EPA*, where the Ninth Circuit, motivated either by EPA's blatant disregard for the spirit[56] and letter[57] of the CWA, or else by a genuine interest in clean water, took away EPA's authority

49. *Id*. at 1013.

50. *Id*. GAO concluded that the "total annual economic losses and associated control costs are about $137 billion a year—more than double the annual economic damage caused by all natural disasters" in the United States. *Id.*

51. *Id.* at 1011 (quoting 38 Fed. Reg. at 13,528 (May 22, 1973)).

52. *Id.* at 1012.

53. Natural Res. Def. Council v. EPA, 526 F.3d 591, 600 (9th Cir. 2008) (quoting 71 Fed. Reg. 33,628, 33,631 (June 12, 2006)).

54. *Id.* at 600 (quoting 71 Fed. Reg. 33,628, 33,634 (June 12, 2006)).

55. *See, e.g.*, Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (1982); Or. Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. Or. 1998); Am. Wildlands v. Browner (Am. Wildlands II), 260 F.3d 1192 (10th Cir. 2001).

56. *See, e.g., Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156; S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).

57. *See, e.g.* Nw. Envtl. Advocates v. EPA, 537 F.3d 1006 (9th Cir. 2008).

over that most basic of agency functions: interpreting ambiguities in the statutes it administers. While the motive may have been noble, the result in this case may have more negative than positive consequences for EPA. The courts lack the expertise and resources necessary to correctly execute the agency function it commandeered. Such considerations are the key justifications for the deference afforded to executive agencies by the Supreme Court in *Chevron.*

Regardless of the benefits the Ninth Circuit may have been seeking, the statute did not clearly indicate that it was EPA's duty to regulate the sources in these cases, and EPA should get to decide whether and to what extent to regulate in those situations. To resolve the most pressing problems facing the nation, agencies must have discretion on how to allocate resources so long as its choices are within the letter of the relevant statutes. In *NRDC v. EPA*, the Ninth Circuit stripped EPA of this essential discretion.

III. *NRDC V. EPA*: A THREAT TO *CHEVRON* DEFERENCE

A. Storm Water Runoff Exemptions and NRDC's Challenge

From 1972 until 1987, EPA did little to control storm water runoff. In recognition of the potentially great environmental threat posed by storm water runoff, Congress amended the CWA by enacting the Water Quality Act of 1987 (WQA). The WQA established a framework for the regulation of storm water runoff; section 402(p) established two phases for storm water regulation, allowing EPA and the states to focus on the more serious problems first.[58] Section 402(l) exempted storm water runoff from oil, gas, and mining operations, specifically runoff that is "not contaminated by contact with . . . any overburden, raw material, intermediate products, finished product, byproduct, or waste products . . . ."[59] The Ninth Circuit has held that EPA Administrator has discretion to determine if the runoff at one of these operations is so contaminated.[60]

Three years after the WQA was enacted, EPA issued its NPDES Phase I storm water rule, requiring permits for certain enumerated storm water discharges, including those from construction sites disturbing five or more acres.[61] The amended section 402(l)(2)(iii) exempted the operator of "an existing or new discharge composed entirely of storm water from an [oil or gas facility]" from being required to submit a permit application "unless the facility . . . contributes to a violation of a water quality standard."[62] EPA found a

58. 33 U.S.C. § 1342(p) (2006).

59. *Id.* § 1342(l)(2).

60. Natural Res. Def. Council v. EPA, 966 F.2d 1292, 1307 (9th Cir. 1992).

61. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, Part I, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (to be codified at 40 C.F.R. pts. 122–24).

62. 40 C.F.R. § 122.26(c)(1)(iii).

"potential for serious water quality impacts," of oil and gas facilities, which are "likely to discharge storm water runoff that is contaminated," potentially including "disturbed soils." According to EPA, Congress had concluded that those operators using "good management practices" and making "expenditures to prevent contamination" need not apply for a permit for uncontaminated runoff.[63] This was justified by a decrease in the resource strain on both EPA and potential permittees.[64]

However, because the statutory exemption applied only to "operations," EPA declared that the exemption did not apply to the construction activities required to build oil and gas facilities.[65] Those who would build such facilities must apply for NPDES permits to limit the "serious water quality impacts" of construction storm water discharges polluted with sediment.[66] EPA found that "intensive construction activities may result in severe localized impacts on water quality because of high unit loads of pollutants, *primarily sediments.*"[67] In its findings, EPA wrote that construction discharges should require NPDES permits, since the sites "continue to be a major source of water quality problems and water quality standard violations."[68]

In 1999, EPA promulgated its Phase II storm water rule, expanding the NPDES storm water program to include small construction sites between one and five acres in size.[69] EPA justified this expansion by noting that various studies showed that the negative water quality impact per acre for small construction sites was at least as great, if not greater, than the impact from larger sites.[70] EPA then postponed the deadline of this rule until 2005,[71] and again until 2006,[72] to evaluate the economic impact of these requirements on the oil and gas industry, the appropriate best management practices (BMPs), and the scope and effect of the section 402(l)(2) exemption.

63. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. at 48,029.

64. *Id.*

65. *Id.* at 48,033–48,034.

66. *Id.*

67. *Id.* (emphasis added). Sediment runoff rates for construction sites are typically ten to twenty times, and as much as one hundred times, that of agricultural lands. *Id.*

68. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, Part I, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (to be codified at 40 C.F.R. pts. 122–24).

69. National Pollutant Discharge Elimination System, Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, Part II, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (to be codified at 40 C.F.R. pts. 9, 122–124).

70. *Id.* at 68,730.

71. Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land, 68 Fed. Reg. 11,325 (Mar. 10, 2003) (to be codified at 40 C.F.R. 122).

72. Extension of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Activity That Disturbs One to Five Acres, 70 Fed. Reg. 11,560 (Mar. 9, 2005) (to be codified at 40 C.F.R. 122).

In 2005, before EPA's final deadline for permit applications, Congress enacted the Energy Policy Act of 2005 ("Energy Policy Act"), which in part addressed NPDES permit requirements for oil and gas construction sites that discharged storm water. The Energy Policy Act expanded the application of the CWA to activities related to the construction of oil and gas facilities, and made sure that those activities qualified for the section 402(l)(2) NPDES exemption.[73] The Energy Policy Act did not change the language of the section 402(l)(2) exemption.

In response to the new statute, EPA proposed and promulgated a new rule clarifying that "[d]ischarges of sediment from construction activities associated with oil and gas [operations or facilities] are not subject" to NPDES permitting requirements. EPA then justified its new stance: "[N]ow that Congress has explicitly extended the exemption to construction activities associated with oil and gas operations, EPA believes this presumption may no longer be valid in some instances,"[74] concluding instead that since sediment is the "pollutant most commonly associated with construction activity," it is the "very pollutant being exempted from permitting by the [Energy Policy Act]."[75] EPA consequently exempted storm water discharges of sediment from oil and gas construction facilities.[76]

NRDC challenged the new exemption, contending that it "contravenes Congressional intent and constitutes an impermissible interpretation of section 402(l)(2) of the CWA, as amended by the [Energy Policy Act]."[77] EPA, in turn, contended that the statute unambiguously excluded sediment-laden storm water runoff discharges from NPDES permitting requirements, or, in the alternative, that its interpretation was reasonable under *Chevron*.[78] EPA further claimed it had no discretion to require a permit from these construction facilities, but conceded that prior to the Energy Policy Act, if an oil and gas facility discharged storm water runoff contaminated with sediment that resulted in a water quality violation, the facility would not have qualified for an NPDES exemption.[79]

73. The statute as amended states: "The term 'oil and gas exploration, production, processing, or treatment operations or transmission facilities' means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, *whether or not such field activities or operations may be considered to be construction activities.*" 33 U.S.C. § 1362(24) (2006) (emphasis added).

74. *Id*.

75. Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities, 71 Fed. Reg. 33,630, 33,630–33,631, 33,634 (June 12, 2006) (to be codified at 40 C.F.R. 122).

76. *Id*. at 33,634.

77. Natural Res. Def. Council v. EPA, 526 F.3d 591, 601 (9th Cir. 2008).

78. *Id*.

79. *Id*.

B. The Departure from True Deference: The Ninth Circuit's Review Under Chevron

As required when a court is reviewing an agency's statutory interpretation, the court applied the two-step approach announced in *Chevron*.[80] The first step under *Chevron* is to determine if Congress has "unambiguously expressed [its] intent."[81] If so, that ends the inquiry, and the meaning of the statute is determined as a matter of law.[82] If not, the court is to apply the second step of the analysis and determine whether the agency's answer is "based on a permissible construction of the statute."[83] The court should defer to an agency's statutory interpretation so long as it is reasonable.[84] Significantly for this case, though not directly under the *Chevron* two-step, "the consistency of an agency's position is a factor in assessing the weight [the agency's] position is due."[85] The court here rather non-controversially determined under *Chevron*'s first step that the statute and its legislative intent were ambiguous regarding whether facilities discharging only sediment were exempted.[86] None of the relevant provisions expressly mentioned "sediment," the term "waste product" may or may not include "sediment," and EPA was unable to produce conclusive evidence that Congress intended either to include or exclude "sediment" within the exemption.[87]

Because the court held that the statute was ambiguous under the first step, the court then applied *Chevron*'s second step, where it had to determine whether EPA's interpretation of the statute was reasonable.[88] The court must "look[] to the plain and sensible meaning of the statute, the statutory provision in the context of the whole statute and the case law, and to the legislative purpose and intent" to determine if the agency interpretation is reasonable.[89] An agency is allowed to change an earlier determination, but when it does, the court is not to review the new interpretation without regard to the previous one.[90] In fact, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less

80. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–44 (1984).
81. *Chevron*, 467 U.S. at 842–44 (1984).
82. *Id.*
83. *Id.*
84. *Id.* at 844.
85. Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993). This development in the doctrine was established after *Chevron* was decided. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987); Watt v. Alaska, 451 U.S. 259, 273 (1981).
86. Natural Res. Def. Council v. EPA, 526 F.3d 591, 603–04 (9th Cir. 2008).
87. *Id.* at 603–05.
88. *See Chevron*, 467 U.S. at 843 n.11.
89. Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1022 (9th Cir. 2005).
90. *Good Samaritan Hosp.*, 508 U.S. at 417.

deference' than a consistently held agency view."[91] EPA argued first that since "sediment is the pollutant most commonly associated with construction activities," the Energy Policy Act would be "effectively meaningless" unless Congress intended to exempt all construction-related sediment when it made oil and gas facility construction activities eligible for the exemption from NPDES permitting requirements.[92]

Nonetheless, the court concluded that the new interpretation was arbitrary and capricious because of the agency's changed position on what constitutes "contamination."[93] The court was not persuaded that the change was reasonable because EPA changed its position based on "a legislative amendment that does not mention (1) sediment or (2) EPA's long-standing position that discharges of storm water runoff from oil and gas activities, contaminated solely with sediment *and* which contribute to a violation of a water quality standard, require a NPDES permit."[94] The court rejected EPA's argument that it had never previously considered the issue for two reasons. First, EPA demonstrably had a long-standing belief that the construction sites in question were "prime candidates" for NPDES permits in light of the "serious water quality impacts" caused by construction storm water discharges polluted with sediment.[95] Furthermore, in 1990, EPA wrote that the agency "believed it reasonable to presume that causing or contributing to a violation of water quality standards was an indication of contamination as envisioned under the statute."[96] The court concluded that "EPA's inconsistent and conflicting position regarding the discharge of sediment-laden storm water from oil and gas construction sites causes its interpretation of amended section 402(l)(2), as reflected in the storm water discharge rule . . . to be an arbitrary and capricious one."[97]

The court's analysis in this case is thin at best. It amounts to little more than a prohibition on agencies from changing their policies in response to a legislative mandate, if an ambiguous one. The reasoning prevents agencies

91. INS v. Cardoza-Fonoseca, 480 U.S. 421, 447 n.30 (1987) (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981)). Though not explicit in the opinion, the level of deference here seems to be something between *Chevron* and *Skidmore*. In *Skidmore*, the Supreme Court established a principle of "respect" for certain types of agency decisions, without outright deference. Skidmore v. Swift & Co., 323 U.S. 134 (1944). Meanwhile, as outlined above, *Chevron* constitutes a more deferential standard when the agency's interpretation is reasonable. *Chevron*, 467 U.S. 837. The court here makes clear that there should be *less* deference here, but that is a far cry from saying there should be *no* deference.

92. Natural Res. Def. Council v. EPA, 526 F.3d 591, 606 (9th Cir. 2008).

93. *Id.*

94. *Id.* at 606–07.

95. *Id.* at 607 (quoting Nat'l Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, Part I, 55 Fed. Reg. 47,990, 48,033–48,034 (June 12, 2006)).

96. *Id.* at 600 (quoting Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities, 71 Fed. Reg. 894, 898 (Jan. 6, 2006)).

97. *Id.* at 607–08.

from deferring to Congress, as it should, because it deters them from formulating changes when new laws are enacted. The majority equates "less deference" with "no deference at all," based on EPA's changed position regarding sediment after the Energy Policy Act was enacted. The dissent is correct in pointing out that the agency's new interpretation is "at least as plausible as competing ones" and therefore should be permissible.[98] Further, where an agency's interpretation of an ambiguous statute is reasonable, *Chevron* step two requires judicial deference. If agencies are forbidden from responding to external changes, especially mandates from Congress, then two of the major advantages of the administrative system—flexibility and expertise—are lost. The informed decision making of EPA becomes substituted for that of the less informed courts, discounting EPA's "reasoned analysis" and "adequate[] [explanation of] its revised interpretation of section 402(l)(2)."[99]

While consistent agency rules are desirable as a matter of everyday planning, EPA—like Congress—must be willing and able to respond to changing circumstances in a reasonable time and fashion. Where that circumstance is a new congressional mandate, this requirement is especially important, since the agency derives its power entirely from congressional delegation. Here, EPA responded reasonably to a change in its scope of authority to regulate oil and gas construction facilities. Although non-environmental interests are served by the court's interpretation, the impetus is on Congress to be clear in such a circumstance, or else the interpretation may be inconsistent with its intent. If this happens, it should be changed by the political process only: a new statute or a change in administrative leadership. The judiciary, with its lack of political accountability, should not step in. Where there is ambiguity in a statute underlying an agency's regulation, courts must resist their normal prerogative to "say what the law is"[100] and allow the political process to work.

As the next Part argues, whether courts should defer to an agency that justifies its interpretation of a statute by administrative convenience depends on the circumstances. This is not necessarily because administrative convenience is a particularly noteworthy justification, especially for an agency charged with protecting our environment. But, in those situations, the costs of the court making the determination when there is ambiguity far outweigh the benefits of administrative governance and the modern bureaucratic state.

IV. WHERE *CHEVRON* DEFERENCE SHOULD APPLY, AND WHERE IT SHOULD NOT

Though Chevron deference strongly weighs the courts' analysis in favor of the agency's interpretation, sometimes the agency fails to satisfy the

98. *Id.* at 611 (quoting Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993)).
99. *Id.* at 609.
100. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

requisite reasonableness standard. First, this Part discusses cases where the courts have properly made this reasonableness determination, either by upholding the agency interpretation or by finding it unreasonable. Next, this Part suggests that the courts' increasing skepticism (and cynicism) of EPA's interpretations has improperly influenced the Court's decision not to defer in NRDC v. EPA.

A. Proper Applications of Chevron *in the Context of NPDES Permit Exemptions*

The courts have used *Chevron* analysis both to defer to and strike down agency decisions regarding NPDES permits. So long as the agency interpretation of an unclear statute is not unreasonable, the courts have deferred and should defer. Where the statutory language is clear however, the agency should have to follow the statutory instruction. The following cases show that paradigm in action.

Gorsuch represents the pinnacle of deference. There, the D.C. Circuit upheld EPA regulation, even though EPA could not give a reason for its regulation consistent with the purpose of the CWA. Even though that case was decided before *Chevron*, the decision is consistent with the deference afforded in that landmark case.

Elsewhere, courts have used *Chevron* to strike down EPA's regulations. In *Miccosukee*, the seminal Supreme Court case in this area, the Court held that the transfer of water from one side of a system of levees to another requires an NPDES permit if the two bodies were, in fact, hydrologically distinct.[101] In *Northwest Environmental Advocates v. EPA*, the Ninth Circuit held EPA's long-standing exemption for dischargers of ballast water was beyond the agency's authority. Finally, in *NRDC v. EPA*, the Ninth Circuit held that EPA's interpretation of an ambiguous portion of the Energy Policy Act was arbitrary and capricious. The significance of each of these cases is that the court substituted its own judgment for that of EPA. The difference among them is that in the former two, EPA regulation itself was unreasonable; in *NRDC v. EPA*, the regulation itself was reasonable, but the court found that EPA acted arbitrarily and capriciously in changing its earlier position.[102] This latter approach is short-sighted in the case of *NRDC v. EPA*.[103]

101. S. Fla Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).

102. The dissent asserts that the regulation, *tabula rasa*, was reasonable, and the majority never disputes this view. The new interpretation was unreasonable simply because it was an unjustified change from prior policy. Natural Res. Def. Council v. EPA, 526 F.3d 591 (9th Cir. 2008).

103. *See infra* Part IV.B.

1. Gorsuch*: Great Deference to EPA*

In *Gorsuch*, EPA argued that a pollutant must be added to the water to be considered an added pollutant.[104] The district court concluded that it would undermine the remedial purpose of the CWA to narrow the meaning of the statute.[105] In its opinion, the NPDES program was "intended to be comprehensive," and EPA's interpretation was "overly literal and technical" and not consonant with the goal of the statute.[106] The D.C. Circuit reversed, saying that the district court failed to give proper deference to EPA, even though the agency was unable to justify its decisions in terms of the purpose of the CWA.[107] The D.C. Circuit concluded that "as long as it did not conflict with the statute or frustrate congressional policy, EPA's interpretation must be upheld if sufficiently reasonable," even if it was not the decision the court would have reached on its own.[108] Even though the interpretation of the particular statute was debatable, the court deferred to EPA's interpretation.

Further, the D.C. Circuit did not consider whether EPA's decisions made sense in the context of the objective of the CWA.[109] This decision demonstrates deference at its peak, where the court was more generous in its determination of what was ambiguous in the statute, and required only that the agency's interpretation be a "reasonable" one. I posit that in a case such as this, where the statute is not clear and the agency is enforcing its mandate in a way that is considered "reasonable," the court correctly deferred to agency discretion. It does not matter what result the court itself would have preferred, because the court lacks expertise and resources to make such a determination. Deference places pressure on the political and executive branches to get it right, or else face electoral defeat. If the courts do not defer, they enter the realm of policy making, and make it more difficult for the politically accountable branches to create coherent government policy.

Professor Blumm argues that in *Gorluch*, EPA "ignored the remedial purpose of the statute and instead employed a narrow, technical interpretation to conclude that dam pollution was exempt from federal permit requirements."[110] While the interpretation may have been narrow and technical, this does not mean it is necessarily *wrong* or *unreasonable*. This is how the courts should be acting: if Congress is unhappy with the interpretation, or if new EPA leadership arrives at the behest of a new administration, then and only then should a rule should be changed, so long as it is *legally* correct.

104. Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982).
105. Nat'l Wildlife Fed'n v. Gorsuch, 530 F. Supp. 1291, 1303 (D.D.C. 1982).
106. *Id.* at 1304, 1307.
107. *Gorsuch*, 693 F.2d at 161.
108. Blumm, *supra* note 3, at 87 (internal quotations omitted); *See Gorsuch*, 693 F.2d at 171.
109. Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982).
110. *Id.* at 110.

2. Miccosukee *and* Northwest Environmental Advocates*: A Proper Lack of Deference*

In *Miccosukee*, the Supreme Court rejected EPA's argument that the point source must be the original source of the pollutant.[111] Instead, the court held that any point source that conveys a pollutant to "navigable waters" must be regulated by the NPDES program, unless the two areas in question are "hydrologically indistinguishable parts of a single water body."[112] If the district court determined on remand that the source and the destination of the water were the same body of water, pumping water from one into the other could not constitute an "addition" of pollutants under the statute, and so could not require an NPDES permit.[113] The language of the statute necessitates the court's understanding of the CWA: "point source" is defined in terms of the existence of a discrete discharger of the pollution, and not in terms of a discrete producer of pollution.[114] Also, the term "addition" in the statute requires that the pollutants not be in a body of water in the same density as those in the new water in the first place, else nothing is added to the water but itself. Thus, EPA's interpretation was unreasonable and it made sense for the court to intervene.

In *Northwest Environmental Advocates v. EPA*, the Ninth Circuit held that EPA exceeded its CWA-created authority by exempting discharges of ballast water from ships.[115] The court justified this by asserting that CWA sections 301(a) and 402 combine to prohibit "discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit."[116] Section 301(a) mandates that "the discharge of any pollutant by any person shall be unlawful."[117] This prohibition is the "cornerstone" and "fundamental premise" of the CWA.[118] Since the term "pollutant" includes "biological materials,"[119] and thus invasive species,[120] the ballast water contained pollutants. Section 402 says that the EPA Administrator "may, after opportunity for public hearing, issue a permit for the discharge of any

111. S. Fla Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 99 (2004). The Eleventh Circuit had rejected the argument that no addition of pollutants may occur unless pollutants are added from the outside world, which was the argument the Ninth Circuit accepted in *Gorsuch*. *See* Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist., 280 F.3d 1364, 1368 (11th Cir. 2002).

112. *Miccosukee*, 541 U.S. at 104–05, 109–12.

113. *Id.* at 109.

114. 33 U.S.C. § 1362(14) (2006) (The term "point source" means "any discernible, confined and discrete *conveyance*.") (emphasis added).

115. Nw. Envtl. Advocates v. EPA, 537 F.3d 1006, 1010 (9th Cir. 2008).

116. *Id.* (quoting N. Plains Res. Council v. Fid. Exploration & Dev. Co., 325 F.3d 1155, 1160 (9th Cir. 2003)) (internal quotation marks omitted).

117. 33 U.S.C § 1251(a) (2006).

118. *Nw. Envtl. Advocates*, 537 F.3d at 1020 (quoting Se. Ala. Conservation Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638, 644 (9th Cir. 2007)) (internal quotation marks omitted).

119. 33 U.S.C. § 1362(6).

120. Nw. Envtl. Advocates v. EPA, 537 F.3d 1006, 1021 (9th Cir. 2008).

pollutant."[121] Further, the word "may" means that the Administrator "has discretion either to issue a permit or to leave the discharger subject to the total proscription of section 301."[122] Furthermore, the statute was clear that a vessel is a point source, whatever it discharges.[123] Under *Miccosukee*, so long as the originating and destination waters were hydrologically distinct, an NPDES permit would be required. The court recognized the magnitude of the task of cleaning the nation's waters, especially in arenas where end-pipe technology is not sufficient to fix the problem, but noted in *Northwest Environmental Advocates v. EPA* that "this ambitious statute is not hospitable to the concept that the appropriate response to a difficult pollution problem is not to try at all."[124] Like *Miccosukee*, the agency's interpretation was unreasonable, and so the court rightfully stepped in to ensure proper enforcement.

NRDC v. EPA was different than those two cases. In *NRDC v. EPA*, the agency's interpretation itself was reasonable, and though the change in agency policy may not have been ideal, the court should have deferred. This is not a case where the agency is arbitrary or capricious, since EPA has a valid justification in the statute for its determination. The agency was legitimately responding to a new ambiguity in the law, and for the reasons detailed below, its new exemption should be allowed to stand.

B. The Agency as a Force for Optimal Decision Making: Why Deference Is Best

In the fourth decade of CWA enforcement, recent appellate court decisions regarding NPDES exemptions suggest that the courts have become increasingly skeptical of EPA taking its mandate to maintain and protect the nation's waters seriously. In *Miccosukee* the court did not shy away from rejecting one of EPA's arguments in favor of an NPDES exemption, and remanding another argument to the District Court for a factual determination.[125] *Miccosukee* is not the only instance of twenty-first century cynicism regarding EPA's seeming eagerness to grant NPDES exemptions where it perceives the opportunity avails itself.[126]

The problem with the courts' skepticism is that, when it influences the outcome of the case, as it did in *NRDC v. EPA*, it interferes with EPA's expertise and greater political accountability, and essentially amounts to judicial policy making. The courts' motivation here may be that some

121. 33 U.S.C. § 1342(a)(1).

122. *Nw. Envtl. Advocates*, 537 F.3d at 1022 (quoting Natural Res. Def. Council v. Costle, 568 F.2d 1369, 1375 (D.C. Cir. 1977)) (internal quotation marks omitted).

123. 33 U.S.C. § 1362(14) (2006).

124. Nw. Envtl. Advocates v. EPA, 537 F.3d 1006, 1026 (9th Cir. 2008) (quoting Natural Res. Def. Council v. Costle, 568 F.2d 1369, 1380 (D.C. Cir. 1977)) (internal quotation marks omitted).

125. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).

126. *See* Natural Res. Def. Council v. EPA, 526 F.3d 591 (9th Cir. 2008).

dischargers given NPDES exemptions—cargo ships—are convincingly characterized as point sources under the CWA, and yet EPA has failed to adequately regulate them.[127] While ballast water has some characteristics in common with discharge from nonpoint sources (the vessel is not actually producing the pollution), this does not change the fact that the vessel is itself a point source, whatever it discharges. EPA's lack of regulation is likely influenced more by agency complacency and convenience rather than an actual belief that Congress intended those sources be exempted, or that Congress delegated to EPA discretion to determine whether such sources should be exempted. If what EPA believed were true, Congress would have distinguished EPA's authority based on the type of discharge instead of the type of source.

The problem is that courts have used this perception of EPA's motives to strike down its reasonable interpretation of the Energy Policy Act. This is a case where the circumstances should dictate that EPA has discretion to change its policy, so long as that change is reasonable. Otherwise the courts are prohibiting the agency from responding to the ever-changing exigencies of federal governance, felling one of the most compelling justifications for the creation of agencies. If the courts force Congress to explicate every detail with regard to their intention by refusing to allow agencies any free reign outside of their express powers, nothing would be accomplished. The agencies would be unable to respond quickly to changing problems, and Congress would be deadlocked because of (1) the sheer amount of time that would have to be spent hammering out each detail, and (2) the difficulty of achieving consensus for specific points as compared to consensus for a mandate to protect and maintain the integrity of the nation's waters. Since Congress' intent regarding the definitional change in the Energy Policy Act is ambiguous, intentionally so or not, *Chevron* dictates that the courts defer to EPA's determination so long as it is reasonable. It seems that EPA's past actions have influenced the courts' decision in *NRDC v. EPA*, as the Ninth Circuit's determination that EPA's interpretation was arbitrary and capricious is inexplicable on the merits of the case.

The premise underlying *Chevron* deference is that, where Congress leaves an ambiguity in a statute, Congress gives the agency the authority to interpret that ambiguity in a reasonable fashion.[128] There is a myriad of reasons for this deference. If agencies were not authorized to interpret ambiguities, they will likely face political gridlock. Also, the judiciary is not an efficient or qualified decision maker in this context; it lacks the expertise, scientific and otherwise, that the agency has by design. The judiciary further lack the time and resources to commission studies and make well-reasoned agency policies within the scope of agency power. Furthermore, once appointed, federal judges are

127. *See infra* Part IV.B.2.

128. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–44 (1982).

virtually unaccountable to any constituency besides their own consciences, except for gross malfeasance. Hence they are not as legitimate decision-making bodies as an agency would be on broad policy issues. Finally, affording courts the power to make these types of decisions strips the political branches of their ability to make coherent decisions, leading to inconsistent and potentially confusing results. As seen in the cases illustrated below, there is a time and place for judicial intervention, and that time and place was not present in *NRDC v. EPA*.

V. DEFERENCE IN JEOPARDY: THE PROBLEM WITH DEPARTING FROM TRUE *CHEVRON* DEFERENCE

The current situation, where NPDES exemptions are common and justified by EPA's unsatisfying, though legal, explanations, is a result of the actions of all three branches of government. While the result of *NRDC v. EPA* will likely have environmental benefits, the costs of ignoring agency expertise and denying agency flexibility are too great for the court to intervene as it did. The political branches, and not the judiciary, should make determinations such as these, and the agency should be able to interpret ambiguities as it sees appropriate.

A. Arriving at the Current Environmental Predicament

No branch of the federal government is entirely blameless for EPA's willingness (or, perhaps, eagerness) to grant NPDES exemptions and for the agency's lack of enforcement for these polluters. Ambiguous statutory language from Congress has resulted in many—most likely unintended—instances where EPA could abide by the express CWA while undermining the underlying purpose of the statute. This was exacerbated by the courts' willingness (rightfully or not) to defer to EPA so long as its justification was not completely inconsistent with the mandates of the CWA—meaning that EPA effectively had absolute authority to grant exemptions unless those exemptions went expressly against the word of the CWA.

Political pressure from the executive branch can be only a partial explanation. Questionable interpretations have occurred in both Republican and Democratic administrations, and, indeed, no presidential administration of either party has challenged the ballast water rule since its formulation three decades ago.[129] These decisions may have been driven by pressures from special interest groups. Another possible explanation is that the agency staff

129. There was no regulation for dams during the Nixon, Ford, or Carter Administrations, and the trial in *Gorsuch* began during Carter's Administration in 1980. *See* Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 161 n.2 (D.C. Cir. 1982). The ballast water rule has been in effect since the formation of the CWA. The rule regarding oil and gas construction facilities was formed during George W. Bush's second term.

running the NPDES permit program has a myopic vision of a purely end-of-pipe program, and has trouble applying it to novel situations requiring ingenuity[130]—the gray area, where no single technology placed at the end of some pipe will magically clean the water.

It is important for courts and EPA to remember that the CWA, and in particular the NPDES permitting process, was intended to be "broadly remedial" and "comprehensive," and not have a "restricted meaning."[131] Nevertheless, courts should give EPA discretion to reasonably interpret and enforce the statute within the authority delegated by Congress. Perhaps Congress was not careful enough when it passed the CWA with certain ambiguities, but we cannot expect the drafting to be perfect, just as we cannot expect the law to address every contingency. That is why we have agencies: to fill in the details in the spirit of the statute conferring authority. Yet EPA has, in many instances, failed to effectuate the overarching meta-objectives of the CWA through unnecessarily narrow interpretations of its mandate. While EPA's interpretations of the CWA are not necessarily incorrect, and may in fact have been *reasonable* in some sense, its decisions have often been far from the most environmentally protective interpretations.[132] This is unfortunate, but not an issue properly addressed by the courts. For accountability reasons, changes such as these should be made democratically.

B. State of Judicial Attitudes toward EPA Today: Are the Courts on the Right Track?

Michael Blumm hoped that "one day Congress, or an EPA seriously concerned about clean water, will reconsider these issues and reverse the results of these cases."[133] Perhaps that day has come, except it is the courts, not Congress, nor EPA, enforcing this change toward environmental responsibility.[134] Perhaps the ends justify the means. After all, cases such as *NRDC v. EPA* force EPA to take more seriously the purpose underlying the CWA, and our waters will be cleaner as a result.

However, the means the courts used may come at a great cost. In the past six years, the courts have been less inclined to trust EPA's actions and more inclined to require EPA to act. This leads to the question of whom we as a nation trust to make such decisions—the staff of an agency facially dedicated to protecting the environment, yet susceptible to capture and inertia, or a judiciary

130. *See, e.g.*, STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK MANAGEMENT 10–29 (1993) (criticizing administrative agencies for their tunnel vision and inconsistency); Cass Sunstein, *Legislative Forward: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN L. REV. 247, 260–61 (1996) (criticizing agencies for being too rigid).

131. Blumm, *supra* note 3, at 84–85.

132. *See, e.g.*, Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982).

133. Blumm, *supra* note 3, at 82.

134. *Id.*

immune from such concerns but lacking the necessary background and resources to always substitute their judgment for that of the agency. It is certainly appropriate for the latter to require the former to act according to the statute, but in *NRDC v. EPA* the court did not follow a logical path, and failed to justify why it did not defer to EPA's new position.

The next question the court will have to answer is how much of a change in the statutory text is required to justify deference to EPA's subsequent interpretation of a statute within its domain. The standard set in *NRDC v. EPA* seems to be that where the change does not expressly mention the explicit target of the new regulation, EPA may not change its interpretation through a rulemaking. As the dissent points out, this is in spite of the fact that EPA's interpretation would have been reasonable if it were reviewed de novo.[135] It is unclear how explicit Congress must be in the future to change the status quo. The dissent takes the more valid position that where EPA can adequately explain the motives behind its change in position, and where such motives are reasonable in light of both the statute and any relevant changed circumstances, the courts should defer to EPA unless there is an egregious reason not to.[136]

Because ambiguous statutory language has sparked this tension between EPA and the courts for decades, Congress would be the best body to make determinations like these. When EPA refuses to enforce its statutes, the court should step in; but at the same time, the court should not be the institution that determines how EPA uses the discretion delegated to it by Congress.

The Ninth Circuit's opinion in *NRDC v. EPA* creates new areas of ambiguity that did not previously exist, while taking away essential agency flexibility. By declaring EPA's interpretation to be arbitrary and capricious when it was prompted by statutory change and where the interpretation itself was reasonable, the court imprudently treaded on an area that is best left outside their realm.

CONCLUSION

In cases such as *Miccosukee*, *Northwest Environmental Advocates*, and *NRDC v. EPA*, the judiciary has attempted to enforce the NPDES program to protect and maintain the quality of our nation's waters in a way neither the executive nor the legislative branch has: by requiring EPA to take its charge seriously and to not interpret statutory ambiguities against regulation. Even in cases when the text of the statute was clear, EPA has neglected its mandate.[137] Of course, in those cases, the courts must step in, or else EPA may run

135. Natural Res. Def. Council v. EPA, 526 F.3d 591, 608–611 (9th Cir. 2008) (Callahan, J., dissenting).

136. *Id.*

137. *See* Nw. Envtl. Advocates v. EPA, 537 F.3d 1006 (9th Cir. 2008); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).

roughshod over Congress' express mandates. It seems, however, that as a result of its most egregious transgressions, EPA has lost the benefit of the doubt, to the point where courts are more actively limiting its discretion, telling EPA where it must and must not regulate in the statutory gray areas.

This dynamic seems to be little more than cutting off the head of the Hydra: it resolves each problem one at a time on a limited basis on a specific fact pattern, and so when the courts' opinion is more broadly applied, it may have serious unintended consequences. The courts cannot single-handedly change the culture at EPA, and attempting to do so by restricting EPA's discretion where the underlying statute is ambiguous, as in *NRDC v. EPA*, is not the correct method of achieving this. This strategy contravenes the notion in *Chevron* that agencies, and not courts, are to determine the meaning of statutory ambiguity, whether for reasons of expertise or political accountability. In *NRDC v. EPA*, the Ninth Circuit, in attempting to put EPA in its place, instead *supplanted* the agency. This is not the proper role for the courts. Rogue agencies must be reined in, but the courts must be diligent and not lose track of their proper bounds. Serious policy change must come from within one of the two politically accountable branches to effect more lasting results.

Congress has the option of getting involved, though it seems to be reluctant (or unable) to do so, for various reasons. It is unclear whether Congress would even want to get involved, since doing so would mean that they, instead of EPA, would be held accountable, and thus blamed for the costs of environmental regulation to the public. However, that is exactly the type of issue we should hold Congress accountable for—they should be problem solvers in the first instance, instead of merely problem delegators. It is time for Congress to step in and amend the law to clarify whether and to what extent EPA must regulate the sources that currently fall in the gray areas of the CWA.

Oversight hearings by congressional committees could produce publicity and pressure for changes, though there is a possibility that those changes may not be in the environmentally-protective direction. An appropriations rider may prohibit the agency from engaging in certain courses of conduct, though it is difficult to define this course of conduct in a context where some NPDES exemptions *are* legitimate. Congress may decrease or increase the agency's budget to express its views, but increased funds could mean cuts elsewhere or else a tax increase, and fewer funds as a reprimand means that EPA would have an even more difficult time enforcing its mandates. Congress may enact "sunset" legislation, or it may repeal or limit the agency's authority, though this result would be no different than the result of the court's actions in *NRDC v. EPA*. Perhaps the best solution is informal pressure from Congress.

Regardless of the method, the most effective change will need to come from inside the agency. The courts, and even Congress, cannot effect a culture change at EPA. The problem is that neither the executive nor the legislative branch wants to be held accountable, and so the court steps in, further

perpetuating the unaccountability of the political branches. So long as the judiciary tries to take EPA's discretion away piecemeal, the system will remain broken, and the courts will gain power that belongs with a different branch. Only by making it plain that the political branches are responsible for regulation decisions can effective change from the inside occur, since then voters can exercise their power to grant positions of authority to those with concordant views. And only change from the inside will mean that EPA is more willing to regulate the gray areas—if the political will exists.

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.