

Case No. 06-73217

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

NATURAL RESOURCES DEFENSE COUNCIL, et al.,  
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
Respondent

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**NRDC ET AL.'S RESPONSE TO PETITION FOR REHEARING**

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## INTRODUCTION

Neither the U.S. Environmental Protection Agency (“EPA”) nor the *amici curiae* offer any compelling justification to revisit the well-reasoned opinion of the majority in this case. The opinion is based on well-established precedent and careful consideration of the administrative record, thorough briefs and oral argument. As required by *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court looked to see if EPA’s explanation for its statutory interpretation was reasonable. The majority found that it was not.

In an attempt to overturn the opinion, EPA misrepresents what the opinion says. EPA states in its petition for rehearing that the majority “erred by overturning EPA’s final rule *solely because* the Panel found it inconsistent with EPA’s prior interpretation of a provision of the Clean Water Act.” EPA Pet. at 1 (emphasis in original). This is incorrect. The majority considered EPA’s change in position as *one* factor in evaluating the reasonableness of the agency’s interpretation. *Natural Resources Defense Council v. U.S. EPA*, 526 F.3d 591, 605 (9<sup>th</sup> Cir. 2008). The majority’s analysis did not end with a factual determination that EPA had changed its position. Instead, the majority looked at EPA’s explanation for its change and found it unreasonable. *Id.* at 605-07. This is precisely the analysis that the *Chevron* caselaw requires.

Moreover, *amici curiae* misrepresent the consequences of the Court's decision. The record does not support the claims that *amici curiae* make. First, the decision will not result in meaningless paperwork, as *amici curiae* claim. Second, the problem of stormwater pollution from oil and gas activities is not adequately addressed in the absence of the Court's decision. The invalidated EPA rule would have permitted discharges of sediment that contribute to violations of water quality standards. The majority correctly found that allowing violations of water quality standards was inconsistent with the Clean Water Act and unauthorized by Congress.

## BACKGROUND

This case involved a challenge to a rule issued by EPA in June 2006 exempting stormwater discharges from oil and gas activities from permit requirements. *NRDC*, 526 F.3d at 600. The rule interpreted Section 402(D)(2) of the Clean Water Act as amended by the Energy Policy Act of 2005 (hereafter "Energy Act"). Enacted in 1987 and codified at 33 U.S.C. § 1342(D)(2), Section 402(D)(2) provided a permit exemption for stormwater discharges from oil and gas operations "*which are not contaminated* by contact with, or do not come into contact with, any *overburden, raw material, intermediate products, finished product, byproduct, or waste products* located on the site of such operations." *Id.* at 594 (emphasis in original).

The Energy Act provided that oil and gas construction, in addition to operations, could qualify for the permit exemption. *Id.* at 599. The Energy Act clarified the *types of activities* that could qualify for the exemption in Section 402(l)(2). It did nothing to change the *conditions* necessary to qualify for this exemption. *Id.* (statutory text of Section 402(l)(2) is “unchanged”). To qualify for a permit exemption, discharges must still be uncontaminated, no matter whether they come from operations or construction.

EPA has long recognized that sediment-laden discharge is “contaminated” if it contributes to a violation of a water quality standard. EPA first defined the meaning of “contamination” under Section 402(l)(2) in 1990 stormwater regulations. *Id.* at 596. Among other things, EPA determined that any discharge that contributed to the violation of a water quality standard constituted contamination and required a permit. 40 C.F.R. § 122.26(c)(1)(iii). This regulation placed a responsibility on oil and gas companies to put the controls in place that would prevent their activities from violating water quality standards.

In the challenged rule, EPA removed this obligation and explicitly excused violations of water quality standards caused by sediment. *NRDC*, 526 F.3d at 600. Such rule conflicts with the core of the Clean Water Act which rests on the establishment and compliance of water quality standards. 33 U.S.C. § 1313(c). States and tribes opposed EPA’s change because it would allow discharges that

contributed to violations of water quality standards. NRDC Excerpts of the Record (hereafter “ER”) 128, 140, 141.

After oral argument, the Court issued an opinion vacating EPA’s rule. 526 F.3d at 608. The majority opinion carefully examined EPA’s rationale for allowing discharges of sediment that contributed to violations of water quality standards and found the agency’s explanation unreasonable. *Id.* at 606-07. The majority first found that nothing in the Energy Act dictated the change, contrary to EPA’s argument. *Id.* Furthermore, EPA’s change ran counter to the evidence before the agency. EPA’s own statements in the record established that sediment is a leading cause of water pollution. *Id.* at 607.

The record also showed that oil and gas activities increase erosion and sedimentation in nearby waters. *See e.g.*, ER 006 (Government Accountability Office, *Storm Water Pollution: Information Needed on the Implications of Permitting Oil and Gas Construction Activities* (February 2005)); ER 153-172 (SAIC, *Review of Sediment Impacts from Construction Sites* (Nov. 26, 2005)); ER 174-208 (Abt Associates, *Environmental Effects of Stormwater Runoff from Construction Activities at Oil and Gas Exploration and Production Sites* (Dec. 2, 2005)); ER 253 (Comments of City of Grand Junction, Colorado); ER 278 (Comments of U.S. Bureau of Reclamation). Again, EPA never argued otherwise.

In light of this record, the Court determined that the agency failed to justify its change in position. 526 F.3d at 607-08.

## ARGUMENT

### I. The Majority Applied the Correct Legal Standard in Deciding this Case.

Contrary to the claims made by EPA and *amici curiae*, there is nothing novel about the legal analysis of the Court's decision in this case. The majority's opinion carefully steps through the analysis required by the *Chevron* caselaw when evaluating whether EPA's interpretation of the Clean Water Act as amended by the Energy Act of 2005 was lawful. *NRDC*, 526 F.3d at 602. The Court first determined that Congressional intent was unclear. *Id.* at 603-04. Turning to step two under *Chevron*, the Court evaluated whether EPA's interpretation was permissible. *Id.* at 605.

EPA incorrectly argues that the majority refused to afford "*any* deference" to EPA's interpretation. EPA Pet. at 1 (emphasis in the original). EPA ignores the plain language of the Court's decision. The majority wrote, "We need not find that EPA's interpretation is the *only* permissible construction of the amended section 402(l)(2) or even the reading this Court would have reached, but only that EPA's interpretation is not arbitrary and capricious." *NRDC*, 526 F.3d at 605 (emphasis in original); *see also id.* at 602 ("[W]e must defer to an agency's statutory interpretation so long as it is reasonable.").

EPA is also incorrect when it argues that the majority overturned EPA's regulation "*solely because* it determined the regulation was inconsistent with EPA's previous treatment of discharges of sediment from oil and gas operations under CWA section 402(*l*)(2)." EPA Pet. at 13 (emphasis in original). The Court's decision nowhere concludes that EPA's reversal is in any way dispositive. Reading the majority's opinion reveals that the Court considered EPA's change in position as one factor – not the sole factor – in evaluating the legality of the agency's rule. The majority explicitly states, "An administrative agency is 'not estopped from changing a view [it] believes to have been grounded upon a mistaken legal interpretation.'" *NRDC*, 526 F.3d at 605 (citations omitted). In reaching its conclusion, the majority considered and relied on the complete absence of any statutory justification for the challenged rule, *id.* at 606-07, evidence in the record about the serious harm to water quality caused by sediment pollution, *id.* at 607, and EPA's unpersuasive characterization of its previous position as a "rule of administrative convenience" only, *id.*

Nothing in the Court's decision conflicts with the case law cited by the dissent, EPA or *amici curiae*. Quoting *National Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005), *amicus curiae* Interstate Natural Gas Association of America ("INGAA") asserts, "if the agency adequately explains the reasons for a reversal of policy, change is not invalidating." INGAA Ltr. at 3.

NRDC did not argue – and the Court did not decide – anything differently. After careful consideration of the record, the briefs, and oral argument, the majority determined that EPA did not provide a reasoned analysis of its change. There is no reason to second-guess this judgment.

Likewise, nothing in the majority’s decision is inconsistent with this Court’s decision in *Resident Councils of Washington v. Leavitt*, 500 F.3d 1025 (9<sup>th</sup> Cir. 2007). As quoted by EPA, *Resident Councils*, 500 F.3d at 1036, provides that “an agency’s ‘new’ position is entitled to deference ‘so long as the agency acknowledges and explains the departure from its prior views.’” EPA Pet. at 15. In *Resident Councils*, the Court found that the Department of Health and Human Services had adequately explained why new regulations allowed those who were not nurse aides to assist in feeding residents while earlier informal letters had not. 500 F.3d at 1036-37. The Court found that the change was “both necessary and consistent with the governing statute.” *Id.* at 1037. Here, EPA’s change was completely inconsistent with the governing statute. *NRDC*, 526 F.3d at 606-07, 608. EPA authorized violations of water quality standards when the Clean Water Act is explicitly designed to prevent such violations.

Similarly, nothing in the majority’s decision is inconsistent with this Court’s recent decision in *Lands Council v. McNair*, \_\_\_ F.3d \_\_\_, No. 07-35000, 2008 WL 2640001 (9<sup>th</sup> Cir. July 2, 2008) (*en banc*). The standard of review applied in *Lands*

*Council* is exactly the same one the majority applied here. As quoted by INGAA, *Lands Council* provides that the Court will reverse an agency interpretation if the agency “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency.” INGAA Ltr. at 3. The majority used this standard and found that EPA’s explanation for its rule change conflicted with the agency’s own evidence that sediment can cause serious water pollution. *NRDC*, 526 F.3d at 607.

In a strained attempt to fit within Circuit Rule 35-1’s standard for rehearing en banc, *amicus curiae* Chesapeake Energy Corporation argues that the majority’s opinion is also inconsistent with decisions in the D.C., Third and Eighth Circuits. Chesapeake Br. at 4-5. Yet, the decisions cited by Chesapeake do not say anything different than the Ninth Circuit cases dealing with agency change in position. Consistent with all of these decisions, the Court’s decision in this case recognized that an agency’s contradiction of its own previous policy is not fatal. 526 F.3d at 605. Under *Chevron* and its progeny, an agency must justify its change as reasonable. EPA failed to do so here.

## **II. EPA Failed to Provide the Required “Reasoned Analysis” to Justify Its Rule.**

In its decision, the majority examined EPA’s explanation for its change in regulations and found it lacking. The challenged EPA rule allowed discharges of

sediment that contributed to violations of water quality standards. *NRDC*, 526 F.3d at 605 (a “water quality standard violation for sediment alone does not trigger a permitting requirement”) (*quoting* 71 Fed. Reg. 894, 898 (Jan. 6, 2006)). EPA argued that this change was necessary since Congress had added construction activities to the existing oil and gas exemption from stormwater permits. *NRDC*, 526 F.3d at 605-06.

As the Court correctly found, EPA had overreached. The agency went beyond what Congress authorized. EPA ignored the fact that the original exemption in Section 402(l)(2) was limited to *uncontaminated* discharges. 33 U.S.C. § 1342(l)(2). EPA itself had determined that “causing or contributing to a violation of water quality standards was an indication of contamination as envisioned under the statute.” *NRDC*, 526 F.3d at 607 (*quoting* 71 Fed. Reg. at 898). Nothing that Congress did in the Energy Act of 2005 authorized violations of water quality standards even if sediment alone caused the violation. Sediment – even without toxic constituents – smothers aquatic life and habitats, causes loss of storage in reservoirs and increases agricultural ditch maintenance. *See generally*, ER 152-203. Decisions by this Court and others have documented the water quality problems caused by sediment alone. *See, e.g., Rybachek v. EPA*, 904 F.2d 1276, 1285-86 (holding that sediment is a “pollutant” under the CWA). As *NRDC* indicated in its original briefing, most states have water quality standards for

sediment. *See, e.g.*, MT Admin. Rules 17.30.621-17.30.629; NM Admin. Code 20.6.4.13; 30 TX Admin. Code § 307.4; UT Admin. R. 317-2-7; WY Rules and Regulations ENV WQ Ch. 1 ss. 7, 15, 16.

As the majority correctly found, evidence in the record and EPA's own statements demonstrated the "serious water quality impacts" of sediment. *Id.* at 607. *See, e.g.*, 64 Fed. Reg. 68722, 68724 (Dec. 8, 1999) ("siltation is the largest cause of impaired water quality in rivers"). EPA's interpretation ran counter to the evidence and also ran counter to the purpose and structure of the Clean Water Act. Consequently, applying the well-established precedent under *Chevron*, the majority found EPA's interpretation unreasonable and impermissible.

### **III. No Exceptional Circumstances Exist to Justify Rehearing.**

In addition to arguing that the majority misapplied *Chevron* in this case, *amici curiae* suggest that the Court's opinion will have devastating consequences. *Amici curiae* argue that the decision will result in costly paperwork with little environmental benefit. American Petroleum Institute ("API") Br. at 9-17; Chesapeake Br. at 8; INGAA Ltr. at 3-5. According to API, the decision will cause paperwork and delay that will cost companies millions of dollars per year. API Br. at 10. API also argues that sediment pollution is "not the problem that the majority makes it out to be." *Id.* at 12. API and others made these same claims to

the original panel that heard this case. Such claims are exaggerated and conflict with evidence in the record.

**A. The Court's Decision Will Not Result in Meaningless Paperwork.**

The *amici curiae* misrepresent the consequences of the Court's decision. API, for example, claims that "stormwater permitting requirements could result in compliance and delay costs of \$370 million to as much as \$2.9 billion per year." API Br. at 10. These numbers assume that all sites will require a permit, but that is not what the Court's decision requires.

The Court rejected EPA's interpretation that authorized discharges of sediment that contribute to violations of water quality standards. Nothing in the majority's decision mandates that all oil and gas construction sites obtain a stormwater permit. Consistent with the Clean Water Act, the Court's decision places the responsibility for preventing violations of water quality standards on oil and gas companies. If a company takes the steps necessary to prevent violations of water quality standards, as API says that companies are doing (API Br. at 14-15), no permit is necessary.

**B. Sediment Is a Serious Water Quality Problem.**

The *amici curiae* also misrepresent the consequences of pollution from sediment discharges. API criticizes the Court's decision because it relies on material in the record that discusses impacts of sediment pollution from

construction in general and not specifically oil and gas construction. API Br. at 12-13. API, however, never explains why oil and gas construction is significantly different from other types of construction. As EPA itself found and the record repeatedly indicates, erosion and sedimentation of streams can result from oil and gas construction just like any other type of construction. *NRDC*, 526 F.3d at 607. Sediment alone – without toxic constituents – causes serious water quality problems. *See supra*, 9-10. API pulls one item from the record that it says concludes that environmental impacts from storm water discharges from oil and gas activities are “minimal.” API Br. at 14. Yet, API ignores the numerous other items in the record and EPA’s own statements that document the problems that sediment causes. *See, e.g.*, ER 006, 153-172, 174-208, 253, 278.

EPA never argues that sediment is not a problem. *See* EPA Pet. Instead, EPA argued that the Energy Act of 2005 required the agency to allow sediment discharges even if they were contributing to water quality violations. *NRDC*, 526 F.3d at 605 (“EPA interpreted section 402(l)(2) of the CWA, as amended by the Energy Policy Act, to provide that a ‘water quality standard violation for sediment alone does not trigger a permitting requirement.’”) (*quoting* 71 Fed. Reg. at 898). The Court correctly held that Congress said no such thing. *Id.* at 607. Nothing in the Energy Act of 2005 authorized violations of water quality standards.

The Energy Act provided that discharges from construction activities could qualify for the same exemption as operations. *Id.* at 599 (*quoting* text of Section 323 of the Energy Policy Act). If a discharge did not contribute to violations of a water quality standard, the discharge did not need a permit whether it resulted from oil and gas operations or construction. If the discharge would contribute to a violation of a water quality standard, however, it did require a permit. Nothing in the Energy Act changed the underlying limitation on the permit exemption in the Clean Water Act, *i.e.* that the discharge must be uncontaminated. *Id.* (“The Energy Policy Act amendment of the definition did not . . . change the statutory language of section 402(l)(2).”). The Court correctly rejected EPA’s interpretation that allowed violations of water quality standards.

## CONCLUSION

The Court’s decision does nothing to change well-established precedent under *Chevron*. EPA and the *amici curiae* simply disagree with how the Court applied this precedent. While EPA continues to think that its action was reasonable, the Court did not. Such disagreement is not grounds for rehearing. If it were, anyone who loses before the Court would have a chance to get a different result by seeking *en banc* review, resulting in a significant waste of resources for the Court and other parties. For the reasons stated herein, NRDC et al. respectfully request that the Court deny EPA’s Petition for Rehearing.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2008 I served a true and correct copy of NRDC et al.'s Response to Petition for Rehearing upon the following counsel by utilizing the court's electronic filing and via First Class United States mail:

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