



July 31, 2008

Ms. Molly Dwyer
Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: EPA's Petition for Rehearing and Suggestion for Rehearing En Banc in NRDC v. EPA, 526 F.3d 591 (9th Cir., May 8, 2008)
(Docket No. 06-73217)

Dear Ms. Dwyer:

Enclosed for please find an original and 4 copies of the Interstate Natural Gas Association of America's ("INGAA's") Motion for Leave to File an *Amicus Curiae* Letter in support of the Environmental Protection Agency's pending "Petition for Rehearing, With Suggestion for Rehearing En Banc" (filed July 21), and an original and 3 copies of INGAA's *Amicus Curiae* Letter.

I have also enclosed an extra copy of each document. Please date stamp and return these extra copies to our office in the enclosed self-addressed stamped envelope. Thank you.

Sincerely,

Timm Abendroth
(202) 216-5912
Tabendroth@ingaa.org

Enclosures

NO. 06-73217

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

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

**MOTION OF THE INTERSTATE NATURAL GAS ASSOCIATION
OF AMERICA FOR LEAVE TO FILE AN *AMICUS CURIAE* LETTER IN
SUPPORT OF PETITION FOR REHEARING WITH SUGGESTION FOR
REHEARING *EN BANC***

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure and this Circuit's corresponding Rule 29-2, along with Circuit Advisory Committee Note to Circuit Rule 29-1, the Interstate Natural Gas Association of America ("INGAA") moves for leave to file an *amicus curiae* letter supporting the Environmental Protection Agency's "Petition for Rehearing, With a Suggestion for Rehearing *En Banc*," filed July 21, 2008. EPA consents to the motion. The Natural Resources Defense Council ("NRDC") opposes the motion.

A. INGAA's Interest (Fed. R. App. P. 29(b)(1)). INGAA and its members have an interest in this case. INGAA is a non-profit trade organization that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA represents virtually all of the interstate pipelines and interstate natural gas storage companies operating in the United States. Its members transport over 95 percent of the nation's natural gas through a network of over 200,000 miles of pipelines. INGAA pipelines are subject to regulation by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w.

In this case, a majority of the Panel in *NRDC v. EPA*, 526 F.3d 591 (2008), vacated a final EPA rule that established a storm water permitting exemption for discharges of sediment run-off from oil and natural gas construction sites. *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. 33,628 (Jun. 12, 2006). INGAA's members construct interstate natural gas transmission, storage and related facilities. While the construction of those natural gas pipeline facilities is subject to the comprehensive regulation by FERC under section 7(c) of the NGA, 15 U.S.C. § 717(c), INGAA members are subject to EPA's permitting exemption. The Panel Majority's

decision harms INGAA's members by requiring them to obtain section 402 permits for storm water discharges from constructions activities which are already regulated by the FERC. Thus, the Majority's decision imposes unnecessary delays and redundant costs on the construction of new interstate natural gas pipeline infrastructure.

B. Desirability and Relevance of INGAA's Participation as *Amicus Curiae* (Fed. R. App. P. 29(b)(2)). INGAA's proffered *amicus* filing in this case is contemplated by this Court's Rule 29-2, which specifically provides for briefs of *amicus curiae* at the rehearing stage. The Court's Advisory Committee Note to Rule 29-2 indicates that *amicus* briefs at this stage are appropriate when post-disposition deliberations involve novel or particularly complex issues. In this case, the issues of statutory construction and the appropriate application of principles of judicial deference to administrative decisions under *Chevron v. NRDC*, 367 U.S. 837 (1984), are indeed novel and complex.

INGAA agrees with and adopts the arguments set out in the EPA's Petition for Rehearing, and Suggestion for Rehearing *En Banc*. In these circumstances, consistent with Circuit Advisory Committee Note to Rule 29-1, INGAA deems it appropriate to file a letter rather than a brief setting out its position. While INGAA does not proffer additional legal argument, INGAA seeks to bring to the attention of the Court that the case presents a question of exceptional importance in terms of

the nationwide impact on an important sector of the economy, namely the natural gas industry.

Respectfully submitted,

Joan Dreskin
General Counsel
Timm Abendroth
Dan Regan
Attorneys
Interstate Natural Gas
Association of America
10 G Street, NE, Suite 700
Washington, D.C. 20002

July 31, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July 2008, I caused to be served a copy of the foregoing Motion of Interstate Natural Gas Association of America for Leave to File an *Amicus Curiae* Letter in Support of Petition for Rehearing on the following individuals by first class United States mail:¹

David A. Carson
Environment and Natural Resources
Division
Department of Justice
1961 Stout Street - 8th Floor
Denver, CO 80294

Aaron Colangelo
Natural Resources Defense Council
1200 New York, Ave., N.W. - Suite 400
Washington, DC 20005

Michael G. Lee
U.S. EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 2355A
Washington, DC 20460

Daniel M. Steinway
Thomas C. Jackson
Baker Botts L.L.P.
1299 Pennsylvania Ave. NW
Washington, DC 20004-2400

Harry Ng
Michael See
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005-4070

Timm Abendroth

¹ Courtesy copies have also been sent by electronic mail to counsel for NRDC and the EPA.



July 31, 2008

Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

***AMICUS CURIAE* LETTER OF THE INTERSTATE
NATURAL GAS ASSOCIATION OF AMERICA**

Re: Rehearing of *Natural Resources Defense Council v. EPA*, 526 F.3d 591
(2008)

Pursuant to Ninth Circuit Rule 29.2 and Circuit Advisory Committee Note to Circuit Rule 29-1 of the Circuit Rules, the Interstate Natural Gas Association of America (“INGAA”) submits this letter (along with the accompanying motion) as *amicus curiae*. INGAA supports the Environmental Protection Agency’s (“EPA’s”) “Petition for Rehearing, With a Suggestion for Rehearing *En Banc*,” filed July 21, 2008. In addition to the legal errors set out there, the panel majority’s decision vacating EPA’s rule will have a nationwide impact on construction of oil and gas infrastructure, and accordingly presents a question of exceptional importance. See Fed. R. App. P. 35(a).

Interest of the *Amicus Curiae* INGAA

INGAA is a national, non-profit trade association that represents the interstate natural gas pipeline industry operating in the United States, as well as interstate and inter-provincial natural gas pipelines operating in Canada and Mexico. INGAA’s United States members, which transport virtually all of the natural gas sold in interstate commerce, are regulated by the Federal Energy Regulatory Commission (“FERC”) under the Natural Gas Act, 15 U.S.C. §§ 717-717w. INGAA advocates regulatory and legislative positions that are of importance to the interstate natural gas pipeline industry.

In this case, the panel majority vacated a final EPA rule that established a storm water permitting exemption for discharges of sediment runoff from oil and natural gas construction sites. 526 F.3d at 608. INGAA’s members

construct interstate natural gas pipeline transmission, storage and related facilities. Construction of natural gas pipeline facilities is subject to regulation by FERC under section 7(c) of the NGA, 15 U.S.C. § 717(c). FERC's regulations require INGAA's members to comply with mandatory procedures to control sedimentation during natural gas pipeline construction and maintenance activities. By vacating the exemption, the majority's decision would now impose the additional section 402 requirements of controlling sediment from pipeline construction which are largely redundant with the FERC procedures. Therefore, the panel majority's vacatur of the permitting exemption results in additional paperwork, unnecessary delays in pipeline construction, and redundant costs for INGAA's members, with little if any additional environmental benefit.

The Vacated Rule

In section 402(l)(2) of the Water Quality Act of 1987, Congress established an exemption from the otherwise applicable Clean Water Act permitting requirements "for discharges or stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities." 33 U.S.C. § 1342(l)(2) ("The Administrator shall not require a permit . . ."). The statutory exemption does not apply if the runoff is contaminated by specific, statutorily enumerated substances (e.g., "raw material, intermediate product"). *Id.*

In implementing the 1987 legislation, EPA initially required that an oil and gas facility that discharged storm water runoff containing only sediment must nevertheless apply for a permit, and concluded that the section 402(l)(2) exemption *did not apply* to oil and gas "construction" activities (as opposed to "operations"). See generally *Maj. Op.*, 526 F.3d at 595-98. After Congress amended the Clean Water Act's definition of "oil and gas exploration ... or transmission facilities" in the Energy Policy Act of 2005 to specifically include construction activities -- thus effectively reversing EPA's determination that such activities were not eligible for the section 402(l)(2) exemption -- EPA revised its regulations to reflect the changes made by the Energy Policy Act. EPA concluded that since sediment is the pollutant most commonly associated with construction, that it would be inconsistent with the Energy Policy Act amendment to interpret section 402(l)(2) as not exempting sediment discharges, as long as those discharges are not contaminated by the enumerated pollutants. See generally 526 F.3d at 599-601 (*Maj. Op.*), and 610 (*Dissent*)(citing to pertinent EPA rulemaking orders).

The panel majority vacated the EPA rule, and remanded. Although nominally following “step 2” under the familiar analysis of *Chevron v. NRDC*, 467 U.S. 837 (1984), the majority afforded no deference to EPA’s interpretation of the impact of Congress’s Energy Policy Act on permitting under section 402(l)(2). 526 F.3d at 603-08. Based on its view of the “EPA’s inconsistent and conflicting position” on the question of sediment-laden storm water discharges from oil and gas construction sites, *id.* at 608, the majority concluded that EPA’s rule was arbitrary and capricious.

The Panel Majority Erred in Declining to Defer to a Reasoned Agency Interpretation

INGAA agrees with dissenting Judge Callahan and EPA that the panel majority’s decision is in direct conflict with controlling Supreme Court and Ninth Circuit precedent holding that an agency’s interpretation is entitled to deference as long as it is a permissible interpretation of the statute, and as long as the agency provides a reasoned explanation for any change in its interpretation. See 526 F.3d at 608-09 and EPA Rehearing at 13-19 (and authorities cited there). As the Supreme Court has held, “if the agency adequately explains the reasons for a reversal of policy, ‘change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.’” *National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)). Here, EPA provided a reasoned explanation for its interpretation of section 402(l)(2) based on the Energy Policy Act of 2005 amendment to the Clean Water Act. As this Court most recently noted, it may not substitute its judgment for the reasoned judgment of the agency. *Lands Council v. McNair*, 2008 U.S. App. LEXIS 13998, *10-11 (9th Cir. July 2, 2008) (“[W]e will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, ‘entirely failed to consider an important aspect of the problem,’ or offered an explanation ‘that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’”).

The Case Involves a Question of Exceptional Importance

It seems fair to say that the principal reason that the EPA deferred implementation of its “Phase II” storm water rule was its concern for the impact on the oil and gas industries. See *id.* (“EPA determined that close to 30,000 oil

and gas sites, annually, could be affected by the Phase II rule.”). That concern was well-founded. According to a report prepared for the Department of Energy in 2004 (available at http://www.fossil.energy.gov/programs/oilgas/publications/storm_water_analysis/Storm_Water_Analysis.html), the economic impacts of implementing the Phase II permitting program would include the following during the 2005-2010 time period:

- \$110 million per year in increased compliance expenses
- \$270 million in costs associated with delayed production, project delays and underutilized domestic drilling capacity
- 350 billion cubic feet per year in lost domestic natural gas production

As noted above, construction of natural gas transmission facilities by INGAA members is already regulated by the FERC. FERC construction approval requires that INGAA members file a detailed project plan that includes, among other things, mandatory procedures that the company will utilize during construction and maintenance activities to control sedimentation and protect environmental resources. During construction, FERC ensures compliance with such procedures through inspection and enforcement. Because FERC already requires INGAA’s members to protect environmental resources from impacts associated with pipeline construction, particularly sedimentation, INGAA members will face redundant and potentially conflicting and confusing requirements from two different federal agencies if EPA’s rule is vacated and the section 402 permitting requirement is imposed. This will result in unnecessary costs and delays in the construction of new interstate natural gas pipeline infrastructure.

The timing could not be worse for the natural gas industry. Since the 2004 DOE report assessing the economic impact of the EPA Phase II, natural gas has come to play an increasingly prominent role in our nation’s energy mix, and interstate natural gas pipelines are an integral part of the energy infrastructure. Natural gas demand has grown to the point that it currently constitutes approximately 25 percent of energy consumption in the United States. If this growth in consumption is to be sustained, however, large amounts of infrastructure, including interstate pipeline and storage facilities, and liquefied natural gas terminals, must be built in the United States and Canada. According to the Energy Information Administration (“EIA,” an agency within the Department of Energy), the pace of additions to the U.S. natural gas pipeline

grid has picked up significantly as a result of increased demand for natural gas (particularly in the electric power sector), and a need to shift from maturing domestic sources (e.g., the Gulf) to new production areas (e.g., Wyoming, Colorado). See generally EIA, *Additions to Capacity on the U.S. Natural Gas Pipeline Network: 2007*, available at http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2008/ngpipelinenet/ngpipelinenet.pdf (July 2008). In 2007, there were capacity additions to the grid totaling nearly 14.9 billion cubic feet of daily deliverability, with 1700 miles of pipeline installed, at a cost of \$4.3 billion. *Id.* at 1. EIA estimates that these levels will increase substantially between 2008 and 2010, increasing overall network capacity by 38 percent, with approximately 200 projects proposed, representing potentially an additional 10,100 miles of pipeline, and approximately 103 Bcf per day of capacity, at an estimated cost of \$28 billion *Id.* at 2.

In short, the case involves a question of exceptional importance to the oil and gas industries.

Conclusion

INGAA agrees with the dissent and supports EPA's argument that the panel majority's decision is in direct conflict with controlling Supreme Court and Ninth Circuit precedent. The EPA's reliance on Congress's decision to amend the definition of oil and gas facilities to specifically include construction activities provides all the reasoning necessary to sustain its interpretation as a "permissible" one under *Chevron*.

For the foregoing reasons, the INGAA urges the Court to grant EPA's Petition for Rehearing, With Suggestion for Rehearing *En Banc*.

Respectfully submitted,

Joan Dreskin
General Counsel
Timm Abendroth
Dan Regan
Attorneys
Interstate Natural Gas
Association of America
10 G Street, NE, Suite 700
Washington, D.C. 20002
Counsel for INGAA

July 31, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July 2008, I caused to be served a copy of the foregoing Motion of Interstate Natural Gas Association of America for Leave to File an *Amicus Curiae* Letter in Support of Petition for Rehearing on the following individuals by first class United States mail:

David A. Carson
Environment and Natural Resources
Division
Department of Justice
1961 Stout Street - 8th Floor
Denver, CO 80294

Aaron Colangelo
Natural Resources Defense Council
1200 New York, Ave., N.W. - Suite
400
Washington, DC 20005

Michael G. Lee
U.S. EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 2355A
Washington, DC 20460

Daniel M. Steinway
Thomas C. Jackson
Baker Botts L.L.P.
1299 Pennsylvania Ave. NW
Washington, DC 20004-2400

Harry Ng
Michael See
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005-4070

Timm Abendroth

Dated at Washington, DC, this 31st day of July, 2008.