` No. 05-16214

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OUR CHILDREN'S EARTH FOUNDATION and ECOLOGICAL RIGHTS FOUNDATION Appellants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL LEAVITT, as Administrator of the United States Environmental Protection Agency, et al. Appellees.	) Appeal))) Citation of Supplemental) Authority)))))))))

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I. NEW SECOND CIRCUIT COURT OF APPEALS DECISION RELEVANT TO THIS CASE

Appellants-Petitioners hereby alert the Court to recently decided supplemental authority, *Riverkeeper, Inc., et al. v. EPA*, 2007 WL 184658 (2nd Cir. 2007) (Jan. 25, 2007) (Ex. 1). *See* Ninth Circuit Rule 28(j). The *Riverkeeper* decision held invalid the U.S. Environmental Protection Agency ("EPA")'s recent promulgation of new source performance rules under Clean Water Act (CWA) section 316, 33 U.S.C. § 1326, which are analogous to the effluent limitation guidelines at issue in this case. *Riverkeeper* held, *inter alia*, that EPA's determination of BAT for new sources based on a balancing of relative environmental benefits versus the costs of new regulation was impermissible given Congress' core intent and design to have the CWA impose technology-based controls that do not depend on showings of environmental benefit. *See Riverkeeper* at *9-*10 (the CWA "expressly requires a technology-driven result . . . not one driven by cost considerations or an assessment of the desirability of reducing adverse environmental impacts in light of the cost of doing so.").

Accordingly, the Second Circuit decision supports Appellants' argument that EPA has acted impermissibly in limiting its review of existing effluent guidelines and promulgation of new effluent guidelines to those industries that EPA has found pose the greatest relative risk of environmental harm, i.e., to those categories where

EPA finds that the environmental benefits of added technology-based controls will justify the costs to EPA and to industry of promulgating and complying with such controls. *See Riverkeeper* at *10 ("The [CWA] statute . . . precludes [EPA] cost-benefit analysis because "Congress itself defined the basic relationship between costs and benefits."). *Riverkeeper* supports Appellants' argument that in reviewing existing effluent guidelines and planning new effluent guidelines, EPA must limit its considerations to the CWA Section 304 statutory factors--and thus focus its analysis on the availability of improved technologies for reducing pollutant discharges. (*See* Appellants' Reply Brief §§ II. A. & B.).

II. APPEAL TO THE 9TH CIRCUIT OF DISTRICT COURT DECISION PREVIOUSLY CITED AS SUPPLEMENTAL AUTHORITY

On December 8, 2006, Appellants filed a Citation of Supplemental Authority alerting this Court about the U.S. District Court for the Central District of California's December 5, 2006 ruling in *NRDC, et al., v. EPA, et al.*, CV 04-8307 (December 5, 2006). Appellants alert the Court that on January 29, 2007, the U.S. EPA filed a Notice of Appeal to the Ninth Circuit appealing, among other things, the District Court's December 5, 2006 final judgment (*See* Ex. 2) .

Respectfully submitted,

Dated: February 7, 2007

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