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By: Thierry R. Montoya, Esq.

Article One

The Court Lacked Jurisdiction To Review An EPA Draft Permit Objection Letter That Did Not Promulgate Any Effluent Limitation

Southern California Alliance of Publicly Owned Treatment Works v. U.S. Environmental Protection Agency
(Case No. 14-74047, 9th Cir. April 12, 2017)

Petitioner sought review of an EPA objection letter regarding draft permits for water reclamation plants in El Monte and Pomona, California. Petitioner alleged that the Court had original jurisdiction to review the objection letter under 33 U.S.C. section 1369(b)(1)(E), a section applying to EPA action "approving or promulgating any effluent limitation," as well as under 33 U.S.C section 1369(b)(1)(F), which applies to EPA action "issuing or denying a permit." The Court dismissed the Petition agreeing with EPA that it lacked jurisdiction to review an EPA "opinion letter" merely representing an interim step in the State's permitting process.

Background

The Clean Water Act created a wastewater discharge permitting system called the NPDES program. 33 U.S.C. §1342. Under Clean Water Act sections 301 and 402, all facilities that discharge pollutants from any point source into waters of the United States are required to obtain an NPDES permit. 33 U.S.C. §1311; 33 U.S.C. §1342. The NPDES permit system "serves to transform generally applicable effluent limitations...into the obligations...of the individual discharger." EPA v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 205 (1976).

Effluent limitations serve as the primary mechanism in NPDES permits for controlling discharges of pollutants from point sources to receiving waters. 33 U.S.C. §1362(11); 40 C.F.R. §122.44. Compliance with effluent limitations is judged upon self-monitoring results that are regularly reported and certified under penalty of perjury. 40 C.F.R. §122.22(d); §122.44(h). Non-compliance with *6 effluent limitations can be severely penalized both civilly and criminally. 33 U.S.C. §1319.

Water quality standards are used as the basis for deriving the specific effluent limitations in NPDES permits. 40 C.F.R. §122.44(d). USEPA is required to review and to approve or disapprove state-adopted water quality standards under the Clean Water Act. 33 U.S.C. §1313. Under Clean Water Act section 303 (c), "a water quality standard . . . consist[s] of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. §1313(c)(2)(A) (emphasis added). Generally, "uses" are the types of activities for which the water can be used (e.g., recreation, agriculture), and "criteria" are the numeric or narrative water quality levels necessary to support the water's designated uses. 40 C.F.R. §131.10; 40 C.F.R. §131.11. Numeric criteria are often expressed as specific concentrations of individual pollutants (e.g., no more than 5 micrograms per liter of copper). 40 C.F.R. §131.11(b). Narrative criteria (e.g., no toxics in toxic amounts) are the catch-all of water quality regulation, expressed as narrative statements describing a desired water quality goal. 40 C.F.R. §131.11(b).

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Article One (cont.)

The Court Lacked Jurisdiction To Review An EPA Draft Permit Objection Letter That Did Not Promulgate Any Effluent Limitation

California has the authority to issue its own NPDES permits, and EPA maintains supervisory authority over the state's permitting programs. 33 U.S.C. section 1342(d). California must transmit to EPA a copy of each permit application received, as well as proposed permits, and EPA has ninety days to notify the state of any objections it has to the draft permit. *Id*. If the disagreement remains intractable, the state or any interested party may request that EPA a hold public hearing on objection. 40 C.F.R. section 123.44(e). Following this hearing, EPA may reaffirm, withdraw, or modify its original objection, to which the state has a choice: to either revise the permit to address EPA's objection, or allow permitting authority to pass back to EPA. If the state choses the former, an aggrieved party can seek further administrative review and then judicial review in accordance with state law. Contrastingly, if jurisdiction returns to EPA and EPA issues a federal NPDES permit, EPA's decision may be appealed within EPA Appeals Board.

A. The Whittier Narrows and Pomona Water Reclamation Plants.

Whittier Narrows is a tertiary level treatment water reclamation facility located in El Monte, California that receives industrial, commercial, and residential wastewater from neighboring cities. Whittier Narrows has a design capacity of 15.0 million gallons per day ("MGD") and serves an estimated population of 107,000 people. *Id*.

The Pomona plant is a tertiary level treatment water reclamation facility in Pomona, California, receiving wastewater from neighboring cities. *Id*. The Pomona plant has a design capacity of 15.0 MGD and serves an estimated population of 149,000. Id. Like Whittier Narrows, the Pomona plant also produces approximately 9,000 AFY of recycled water essential for groundwater recharge and landscape irrigation purposes in drought-prone Southern California. *Id*.

Here, EPA issued its objection letter to the draft permits for these plants raising concerns regarding numeric effluent limits. The LA. Board revised the draft permits to meet EPA's objection letter. After its review of the draft permits, EPA advised the L.A. Board, the State Board, and the permits applicants that its objections had been satisfied, and that the NPDES permits remained within the L.A. Board's jurisdiction. The L.A. Board issued the permits in November 2014.

Petitioner filed an administrative appeal with the State Board. Petitioner was then granted an abeyance of the appeal in the hopes of resolving the issue with the L.A. Board. Petitioner then filed suit challenging EPA's objection letter on grounds that EPA exceeded its authority in requiring water quality-based effluent limitations. EPA responded alleging that the Court lacked jurisdiction to review its objection letter so long as the permitting authority rested with California state agencies.

Court's Rationale

Petitioner alleged that the Court possessed jurisdiction as EPA's objection letter: i) promulgated new effluent limitations; and, ii) was the "functional equivalent" of EPA's denial of the state-proposed draft permits. Neither are correct.

In *Crown Simpson Pulp Co. v. Costle ("Crown"),* 599 F.2d 897 (9th Cir. 1979), this Court held that 33 U.S.C. section 1369(b)(1)(E) does not provide jurisdiction over a claim like Petitioner's. In *Crown*, the permit applicant argued that EPA's permits veto was "the functional equivalent of a newly promulgated, generalized regulation" and that "if the Administrator had formally promulgated such a generalized variance regulation, it would have been directly reviewable by the court of appeals as an 'effluent or other limitation" under subsection (E).'" *Id*., at 900. The Court held that EPA's actions were not the establishment of new regulations, but merely one of two adjudications to determine the proper application of already promulgated effluent limitations applied to the entire industry. *Id*. By objecting, EPA did not approve or disapprove of any aspect of the draft permit—it merely applied preexisting regulations on an individual basis to determine that the draft permits were inadequate.

The same rationale applies in this case. Moreover, EPA's opinion in this case is irrelevant as California was free adopt more stringent standards, such that EPA's objection letter was not binding on the L.A. Board.

The Court also held that EPA's objections were merely part of the ongoing state NPDES process, not the end of the process. Thus, complaints about an EPA objection letter are premature because when EPA objects to a permit, the administrative process is not yet at an end: the state and EPA may resolve their dispute over the objection informally.

Conclusion

Here, EPA was merely commenting specifically on the draft permits submitted by the two plants in a manner consistent with 33 U.S.C. section 1342(d)(1). Unlike Petitioner's citation to the Eight Circuit's decision in *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), in which EPA has issued guidance letters that imposed new requirements for water treatment processes and that it was doing so without promulgating regulations, the Court did not need to decide whether it would agree with the Eight Circuit's decision as EPA's objection letter was a mere response to a general inquiry, and was not its "binding policy." *Iowa League of Cities*, at 865.

Article Two

Clean Water Act Authorizes Citizen Suits Against Anyone That Is Currently Violating Certification Under Section 401

Deschutes River Alliance v. Portland General Electric Company

(Case No. 3:16-cv-1644-SI, D. OR. Mar. 27, 2017)

Plaintiff filed suit under the citizen suit provision of the Clean Water Act ("CWA") alleging that Portland General Electric Company ("PGEC") was responsible for past and continuing CWA violations at is Pelton Round Butte Hydroelectric Project (the "Project")—specifically that PGEC violated several of the requirements in its Water Quality Certification, designed to ensure that discharges comply with all applicable state water quality standards. PGEC moved to dismiss the lawsuit for lack of jurisdiction, alleging that the CWA's citizen suit provision did not allow a civil action challenging compliance with conditions contained in a water quality certification issued under CWA's section 401. PGEC alleged that only the licensing entity, not citizens, states, and not the EPA—had authority to enforce certification conditions. Here, the licensing entity is the Federal Energy Regulatory Commission ("FERC"). The court rejected PGEC's interpretation of the CWA—holding that PGEC rewrote the statute. "The plain reading of the citizen suit provision is that it authorizes a citizen to initiate suit against anyone alleged to be in violation—that is, currently violating—certification under section 401.

Background

The Project consists of three dams and a selective water withdrawal facility between river miles 100 and 120 of the Deschutes River. In 2002, the Project went through relicensing through FERC. As part of that process, the Project was issued a Water Quality Certification pursuant to CWA section 401. The requirements of the Project's Water Quality Certification are conditions of the FERC license.

Plaintiff alleges that PGEC violated several such requirements, most notably, its "management plans." In not operating the Project pursuant to its management plans, Plaintiff alleged that PGEC violated, and continued to violate, water quality standards, including those relating to hydrogen ion concentrations, temperature, and dissolved oxygen levels.

Court's Rationale

PGEC's assertion that Plaintiff was precluded from bringing its lawsuit hinges on PGEC's interpretation of "effluent standards or limitation" in the CWA's citizen suit provision. Section 505(f) provides, in relevant part:

> "For purposes of this section, the term 'effluent standard or limitation under this chapter' means (1) effective July 1, 1973, an unlawful act under subsection (a) of section [301] of this title (2) an effluent limitation or other limitation under section [301] or [302] of this title; (3) standard of performance under section [306] of this title; (4) prohibition, effluent standard or pretreatment standards under section [307] of this title; (5) *certification under section [401] of this title*; (6) a permit or condition thereof issued under section [402] of this title, which is in effect under this chapter (including a requirement applicable by reason of section [313] of this title); or (7) a regulation under section [405](d) of this title."

33 U.S.C. section 1365(f) (emphasis added).

PGEC "…construes section 505 as follows: 'any citizen may commence a civil action on his own behalf…against any person…who is alleged to be in *violation of…certification* under section [401] of this title[.]" *Id*. The term "certification," PGEC alleges is "…the document containing the state's certification for a permitted or licensed facility." *Id*. Under the CWA, PGEC alleges, the certification has no legal effect, other than as a statement that the proposed activity will not violate the CWA. As a result, PGEC concludes, "…Congress authorized citizen suits to enforce the *requirement* under section 401 of the CWA to obtain a certification but not to enforce any conditions that are included within any certification. PGEC maintains that any such enforcement authority resides only in the hands of the federal permitting or licensing entity." *Id*.

This interpretation, however, is not based on a plain reading of the citizen suit provision authorizing suit against any person which has, and continues to, violate the CWA. "The definition does not expressly limit its application to *obtaining* certification. To the contrary, it incorporates the entirety of section 401 into the definition of effluent standard or limitation." *Id*. Given the expansive incorporation—"…the most natural reading permits citizen suits both to require a facility to obtain a water quality certification *and* to enforce conditions contained in existing certifications." *Id*.

Looking at the text of section 401, PGEC alleged that because any certification conditions must be included in the permit or license, the certification is not a separately enforceable obligation, but simply a condition to obtaining a federal license or permit. 33 US.C. section 1341(a)(1) & (d). While this is true, the court cited to the legislative history suggesting that this was not the only reason for the incorporation requirement. "Congress appeared to have been concerned, at least in part, that a Federal licensing or permitting agency might attempt to ignore state water quality requirements." *Id*.

PGEC also alleged that Plaintiff must have no authority to enforce section 401 certification conditions because neither the EPA nor the states have any such authorization. Contrary to PGEC's reading of law, "…states do have authority to enforce any violation of an effluent standard or limitation pursuant to the citizen suit provision. The CWA defines a citizen to mean "a person or persons having an interest which is or may be adversely affected'" to specifically include a state. 33 U.S.C. section 1365(g), 1362(5).

It is true that EPA does not have the authority to enforce section 401. 33 U.S.C. section 1319. PGEC alleges, therefore, that Congress could not have intended citizens to have a greater role that the EPA.

Cont.

Article Two (cont.)

Clean Water Act Authorizes Citizen Suits Against Anyone That Is Currently Violating Certification Under Section 401

Askins v. Ohio Dep't of Agric, 809 F.3d 868, 873 (6th Cir. 2016)—suggesting that citizens are "backup" to the EPA and states, which are the primary enforcers. Congress, however, intended states to take the lead, in fact, granting states the power to create and enforce their own water quality standards. In that light, "…the absence of EPA enforcement authority is not a persuasive reason to accept [PGEC's] interpretation of the CWA—an interpretation that would put all enforcement authority exclusively in the hands of the federal permitting agency." *Id*.

Conclusion

There is a scarcity of authority on this issue. However, the Ninth Circuit in *Northwest Environmental Advocates v. City of Portland,* 56 F.3d 979, 988 (9th Cir. 1995) did hold that states could impoase and enforce certifications conditions. Moreover, in *Or. Nat. Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998), the Ninth Circuit also held that section 505(f)(5) allows citizens to enforce the need to *obtain* a certification before issuance of a federal permit. In so holding, the Ninth Circuit concluded that because the citizen suit provision cross-referenced the entirety of section 401 and because nothing in the provision limited such a suit to challenges of existing certifications, the CWA allowed the plaintiff's suit. *Id*.

About Thierry R. Montoya

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Thierry also represents clients in natural resources issues involving water, oil and gas interests, air and water permitting and violations including NPDES and Title V.

On the land use side, Thierry provides permitting, zoning, CEQA/NEPA, and eminent domain expertise. Thierry also represents public and private sector clients in construction biddings, contracting, and litigation.

Article Three

The Court Reject's EPA's Primary Justification For Its Final Rule--That It Would Be Impractical Or Unlikely For EPA To Pursue Animal Waste Air Emissions

Waterkeeper Alliance, et al. v. Environmental Protection Agency

(Case No. 09-1017, D.C. Cir. April 11, 2017)

In December 18, 2008, EPA finalized a proposed exemption—exempting all farms from reporting air releases from animal waste under CERCLA, but to continue to report air emissions under EPCRA. Two of the hazardous substances emitted by animal waste as it decomposes—ammonia and hydrogen sulfide—are listed as both CERCLA "hazardous substances" and EPCRA "extremely hazardous substances." None of the public comments changed EPA's opinion that those reports "are unnecessary because, in most cases, a federal response is impractical and unlikely (i.e., [the EPA] would not respond to them since there is no reasonable approach for that response)." *Id*. However, public comment did convince EPA to carve out large farms, CAFOs out of its EPCRA exemption. Petitioners challenged the final rule alleging that CERCLA and EPCRA do not permit EPA to grant reporting exemptions, but instead require reports of any and all releases over the reportable quantity (the reportable quantity for each is 100 pounds per day). The Court granted Petitioners' petition and vacated the final rule holding that "…the reports aren't nearly as useless as the EPA makes them out to be." *Id*.

Background

Congress sought to ensure that federal, state, and local agencies could adequately respond when hazardous chemicals threaten public safety or the environment. CERCLA provides federal authorities broad power to investigate and respond to actual or threatened release of hazardous substances. 42 U.S.C. section 9604. "And since the EPA can't respond to releases it doesn't know about, section 103 of CERCLA requires parties to immediately notify the National Response Center ("NRC") of any release of a hazardous substance over a threshold set by the EPA—know in regulatory speak as the "reportable quantity." Section 9603. After receiving a report from the NRC, EPA determines if a response is appropriate. 40 C.F.R section 300.130(c).

EPCRA has a similar reporting requirement, except that it requires the relevant parties to notify state and local (rather than federal) authorities whenever covered pollutants (which it refers to as "extremely hazardous substances") are released into the environment. 42 U.S.C. section 11004.

In December 2007, EPA proposed exempting farms from CERCLA and EPCRA reporting of air releases from animal waste. EPA stated that it had never taken a response action based on notifications of air releases from animal waste. *Id*. Nor could the agency "foresee a situation where [it] would take any future response action as a result of such notification[s]…because in all instances the source (animal waste) and nature (to the air over a broad area) are such that on-going releases makes an emergency response unnecessary, impractical and unlikely." *Id*. EPA specifically requested public comments on "whether there might be a situation where a response would be triggered by such a notification of the release of hazardous substances to the air from animal waste at farms, and if so, what an appropriate response would be." *Id*.

Court's Rationale

The Court addressed the jurisdictional issue at the outset. Absent a specific statutory provision assigning review to the court of appeals, a challenge to agency action must go first to district court. *Int'l Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994). Concerning CERCLA, Congress granted the court direct jurisdiction over CERCLA rules. 42 U.S.C. section 9613(a). Thus, the Court had no bar to hearing CERCLA-based challenges to the final rule.

EPCRA, however, has no jurisdictional review provision so challenges would ordinarily be brought in district court. *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 47 (D.C. Cir. 2000). However, where a single agency action relies on multiple statutory bases, it would be a "…wasteful exaltation of form over substance to require piecemeal challenges in various courts. We thus commonly examine the entire agency action in a 'comprehensive and coherent fashion; so long as at least one of the statutes provides for our direct review." *Id*., citation omitted.

Although the Court could hear the challenge, EPA alleged that Petitioners lacked standing to challenge the CERCLA portions of the final rule "…because while both statutes require reporting, CERCLA (unlike EPCRA) has no requirement of *disclosure*." *Id*. In EPA's opinion, therefore, the CERCLA portion of the rule would inflict no informational injury on Petitioners. The Court disagreed.

A plaintiff suffers injury in fact when agency action cuts it him off from "information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998). The upshot of *Akins* is that the plaintiff must assert "a view of the law under which the defendant (or entity it regulates) is obligated to disclose certain information that the plaintiff has a right to obtain." *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entertainment, Inc.,* 659 F.3d 13, 22-23 (D.C. Cir. 2011). Here, the issue of whether a reporting mandate under CERLCA triggers a public disclosure requirement.

EPA alleged that as CERCLA does not require disclosure—there cannot be an injury. "But due to the complex interplay between CERCLA and EPCRA, the EPA's allegedly unlawful CERCLA exemption reduces the information that must be publicly disclosed under EPCRA. As a result [Petitioners] (and others) who previously sought that information no longer have a statutory right to access it. For the purpose of standing, that's injury enough." *Id*.

The Court review the final rule under the *Chevron, USA, Inc. v. NRDC, Inc.* 467 U.S. 837 (1984) standard, meaning that "…(within its domain) that a 'reasonable agency interpretation prevails.'" However, if Congress has directly spoken to the issue, then any agency interpretation contradicting Congress would be, *per se,* unreasonable. *Id*., citation omitted.

Article Three (cont.)

The Court Reject's EPA's Primary Justification For Its Final Rule--That It Would Be Impractical Or Unlikely For EPA To Pursue Animal Waste Air Emissions

EPA did not cite to any particular text that's ambiguous, rather it suggested that some of the exemption language allowed EPA the authority to set reportable quantities and adopt necessary regulations. "While none of those provisions even hints at the type of reporting exemption the EPA adopted in the *Final Rule*, the EPA extracts from the a notion that Congress meant to 'avoid[] duplication of effort…and minimiz[e] the burden on both regulated entities and government response agencies." *Id*. But, this Court has long held that agencies are bound by the ultimate purposes Congress selected, and the means it had deemed appropriate.

Here, EPA alleged to find an absence of regulatory benefit in the animal-waste reports because, in most cases, a federal response would be impractical and unlikely. This would suggest that some circumstances would call for a response, which is exactly what the commenters foresaw. They put before EPA a great deal of information, which it did not refute, suggesting scenarios where the reports could be quite helpful in fulfilling the statutes' goals—*i.e.,* when manure pits are agitated for pumping, hydrogen and ammonia are released at levels that may reach toxicity or displace oxygen thereby posing a risk to humans and livestock. Commenters also pointed to the role of information in enabling responses by local officials. A 911 call concerning a foul odor may not contain enough information regarding the source location, but reporting by facilities under EPCRA could.

Whatever the EPA's past experience has been in responding to mandated information, it plainly has broad authority to respond. Therefore, the comments undermined EPA's primary justification for the final rule—that notifications of animal-waste-related releases serve no regulatory purpose because it would be "impractical or unlikely" to response to such a release. *Id*. The record, rather, suggested the potential of some real benefits. "Because the EPA's action here can't be justified either as a reasonable interpretation of any statutory ambiguity or implementation of a *de minimus* exception,…" the Court granted Petitioner's petition and vacated the final rule.

Conclusion

The Court held that it was unclear why EPA felt that it would be impractical for it to investigate or issue abatement orders in cases where pumping techniques or other actions lead to toxic levels of hazardous substances such as hydrogen sulfide. Both could be regulated under CERCLA or EPCRA, and the factual record did suggest some potential for real benefits in doing so. *Id*.

About AlvaradoSmith

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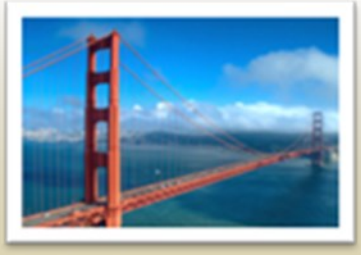

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