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ENVIRONMENTAL LAW

In 1972, Congress enacted the Federal Water Pollution Control Act (the Act)¹ to restore and maintain the “chemical, physical, and biological integrity of the Nation’s waters.”² To meet this objective, Congress required that by 1985 no pollution be discharged into navigable waters.³ Congress also authorized the Environmental Protection Agency (the Agency) to implement the Act⁴ by allowing the Agency to establish, among other things, limitations on various pollutants⁵ and commence projects without filing environmental impact statements.⁶ This past

1. 33 U.S.C. § 1251-1376, as amended by the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1976). For an exhaustive discussion of the Act, see H. LIEBER, *FEDERALISM AND CLEAN WATER* (1975). See also R. HARRIS, W. JEFFERY & B. STEWART, JR., *INTERSTATE ENVIRONMENTAL PROBLEMS-A GUIDE TO WATER POLLUTION AND WATER SCARCITY* (1974); R. MIDDLEKAUFF, *WATER QUALITY CONTROL LEGISLATION* (1975); I. SLOAN, *ENVIRONMENT AND THE LAW* (2d ed. 1979).

2. 33 U.S.C. § 1251(a).

3. *Id.* § 1251(a)(1).

4. *Id.* § 1251(d).

5. Section 301(b) of the Act provides that:

[T]here shall be achieved

(1)(A) not later than July 1, 1977, effluent limitations for point sources . . . which require the application of the best practicable control technology currently available as defined by the Administrator

.
(2)(A) [not later than July 1, 1983,] . . . effluent limitations for categories and classes of point sources . . . which shall require application of the best available technology economically achievable . . . with regulations issued by the Administrator

.
33 U.S.C. § 1311(b) (1976).

In this Note, the Environmental Protection Agency and its Administrator will be referred to as “the Agency.”

6. 33 U.S.C. § 1371(c) (1976). Section 511(c) of the Act requires the Agency to file an environmental impact statement where it grants either federal funds to help build a publicly owned treatment works or a permit for a new source of pollution. “Permit” refers to a National Pollutant Discharge Elimination System permit. 33 U.S.C. § 1342 (1976).

An environmental impact statement must be filed for any “major Federal action significantly affecting the quality of the human environment.” National Environmental Policy Act of 1969, § 102 (2)(C), 42 U.S.C. § 4332(2)(C) (1970). For a survey of recent Ninth Circuit cases on the environmental impact statement, see Note, 10 *GOLDEN GATE*

term, the Court of Appeals for the Ninth Circuit examined the Agency's power under both of these provisions.

In *Association of Pacific Fisheries v. Environmental Protection Agency*,⁷ the Ninth Circuit upheld all except one of the methods the Agency required for the seafood processing industry to reduce the amount of pollution discharged. In *Kilroy v. Quarles*,⁸ the Ninth Circuit limited instances in which the Agency had to prepare an environmental impact statement. This Note will first examine the facts and legal arguments of each case. Then congressional intent evidenced through legislative history will be explored. Finally, the Ninth Circuit decisions will be measured against the expressed intent of Congress.

I. METHODS TO REDUCE POLLUTANTS DISCHARGED

In *Association of Pacific Fisheries*, the Ninth Circuit upheld the Agency's requirement for two methods of pollution reduction, and found a third method inadequately supported by the evidence. In 1974, the Agency promulgated levels to which pollution must be reduced (pollution limitations) for the seafood processing industry.⁹ Pursuant to section 301 of the Act,¹⁰ the Agency set pollution limitations for 1977 and additional limitations for 1983. The Agency then determined methods by which processing plants could best comply with the required limitations.

In determining its methods, the Agency distinguished

U. L. Rev. 205 (1980).

7. 615 F.2d 794 (9th Cir. 1980) (per Kennedy, J.; the other panel members were Sneed and Trask, J.J.).

8. 614 F.2d 225 (9th Cir. 1980) (per Sneed, J.; the other panel members were Tang, J. and Campbell, D.J., sitting by designation).

9. 615 F.2d at 801-02. The Agency promulgated the guidelines in two phases. The first phase affected catfish, crab, shrimp, and tuna. 40 C.F.R. §§ 408.10-408.16 (1980). The second phase affected fish meal, salmon, bottomfish, clam, oyster, sardine, scallop, herring fillet and abalone. 40 C.F.R. §§ 408.160-408.196, 408.290-408.296, 408.310-408.326 (1980). Within each subcategory, the Agency set limitations measured by biological oxygen demand (BOD₅), total suspended solids (TSS), and oil and grease (O&G). BOD₅ is a measure of the oxygen-consuming potential of organic matter in the effluent. TSS is a measure of the quality of undissolved solid matter suspended in the effluent. O&G describes the volume of naturally occurring fish oil in the effluent. See 615 F.2d at 802 n.2. Water that comes into contact with fish residue (for example, heads, tails, and internal organs) is measured against each of these limitations. The regulations set average monthly and daily levels.

10. See note 5 *supra*.

processing plants near "population or processing centers"¹¹ from those further away, and decided that plants near those centers must screen the larger particles out and dispose of them by transporting them to sanitary landfills, to other facilities for further processing, or to approved disposal sites at sea.¹² The plants away from the centers must only grind the solids prior to discharge. The Agency based its determination on two factors: costs, and an independent evaluation of the data.

The Agency found operation, maintenance, and waste disposal costs considerably lower for plants near population centers due to the availability of power and workers, and lower for plants near processing centers due to shared disposal costs.¹³ Consequently, the Agency decided that these plants could afford more expensive methods of reducing pollution. The Agency also used a model plant and established that the plants could reduce pollution to the 1977 levels with the required methods.¹⁴

The Agency prescribed two methods for plants located near centers to meet the 1983 limitations. One method employed dissolved air flotation units which funnel pressurized air into tanks where solids are immersed in water. The air buoys the solid particles up, allowing them to be skimmed off and used as either animal feed or fertilizer.¹⁵ The other method employed aerated lagoons consisting of shallow ponds. The pollutant, dumped into the ponds, is left there for up to fifty days, during which time it is biologically broken down.¹⁶ Plants located away from population or processing centers need only screen solids out prior to discharge.¹⁷

Again the Agency used the cost of compliance and an independent determination of the data to establish that these were

11. 615 F.2d at 803. The Agency defined population or processing centers as "including but not limited to Anchorage, Cordova, Juneau, Ketchikan, Kodiak, and Petersburg . . ." See, e.g., 40 C.F.R. § 408.162 (1980). The Agency further characterized "processing centers" as areas where multiple plants are located. 615 F.2d at 804.

12. 615 F.2d at 803.

13. *Id.* at 804. The Agency also found construction costs of waste disposal sites more expensive to plants away from population centers because of rugged terrain. *Id.*

14. *Id.* at 809.

15. *Id.* at 816.

16. *Id.* at 819.

17. *Id.* at 802.

the best methods for the plants to meet the 1983 limitations. Cost considerations included capital costs and operation and maintenance costs.¹⁸ The independent determination was a single study which determined that these methods would best meet the desired goal.

The Association of Pacific Fisheries (the Association), a trade organization of fish canners and processors, challenged the 1977 regulations on both cost and independent study determination grounds. First, the Association argued that the Agency based costs on an unsubstantiated distinction determined by plant location.¹⁹ The Association further claimed that the Agency failed to adequately weigh the incremental benefits which would result from increased costs and that the Agency failed to consider all the relevant costs.²⁰ Second, the Association challenged the accuracy and adequacy of the data the Agency used to determine the pollution limitations.²¹ In addition, the Association questioned whether the 1983 limitations were, as the statute mandated, "available [and] economically achievable"²² through either the dissolved air flotation unit²³ or the aerated lagoon²⁴ method.

A. SCREENING

Cost Factors

The Association argued that the Agency's distinction between processing plants near population or processing centers and those further away from such centers was not supported by the evidence and that the Agency's designation of the cities as population centers was arbitrary.²⁵ The Ninth Circuit rejected both arguments, holding that the record sufficiently supported the much lower construction, operation, and maintenance costs of plants near population or processing centers compared to those further away.²⁶ The Ninth Circuit also decided that the

18. *Id.* at 818.

19. *Id.* at 803-04.

20. *Id.* at 806-09.

21. *Id.* at 809-10, 812.

22. *See* note 5 *supra*.

23. 615 F.2d at 816.

24. *Id.* at 819.

25. *Id.* at 804-05.

26. *Id.* at 804. For example, the record indicated that measuring all construction

Agency had substantial discretion to determine what constituted a population center.²⁷

The Association also challenged the adequacy of the Agency's consideration of increased benefits from increased costs. Again, the Ninth Circuit found such considerations within the Agency's discretion.²⁸ Furthermore, the Ninth Circuit determined that the Association's focus on improved water quality was misdirected. Prior to the 1972 Act, the emphasis was on improved water quality. With the Act, however, the focus shifted to regulating pollution before it is discharged into water and affects its quality. Consequently, the court rejected the improved water quality standard.²⁹

Next, the Association argued that screening and dumping pollutants into specific sites in the ocean and grinding and dumping it near the shoreline had the same polluting effect.³⁰ The Ninth Circuit pointed out that dumping screened solids into the ocean was only one of several alternatives,³¹ that higher tidal activity further away from the shoreline aids dispersion of screened solids, and that improved water quality near the shoreline is itself a benefit.³²

Finally, the Ninth Circuit set aside the Association's claim that compliance was impractical because an excessive number of

costs against a standardized scale, population centers such as Anchorage and Juneau had cost factors of 1.5 and 1.6 respectively. Conversely, plants located away from such centers had a higher cost factor of 2.5. *Id.* The record also supported the distinction based on operation and maintenance costs. *See* note 13 *supra* and accompanying text.

27. 615 F.2d at 805.

28. *Id.* The Ninth Circuit supported its position with the Conference Report on the bill which preceded the Act. The report found the balance between costs and benefits to be where added benefits are "wholly out of proportion to the costs." CONGRESSIONAL RESEARCH SERVICE, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 170 (1973) [hereinafter cited as L.H.].

The United States Supreme Court, in *Environmental Protection Agency v. National Crushed Stone Assoc.*, 101 S. Ct. 295 (1980), supported this Agency discretion. It stated that 1977 limitations are a "conclusion by the [Agency] that the costs imposed on the industry are worth the benefits in pollution reduction that will be gained by meeting those limits." *Id.* at 303.

29. 615 F.2d at 805. *See* I. SLOAN, ENVIRONMENT AND THE LAW 23-28 (2d ed. 1979).

30. 615 F.2d at 806.

31. *Id.*

32. *Id.* at 807.

plants would close due to the limitations.³³ The court decided that the price increase, not the number of plants closing, determined the practicality of compliance.³⁴ The Ninth Circuit found the price increase insignificant,³⁵ and adopted the Agency's conclusion that the 1977 limitations were economically practical.³⁶

Data Considered

Having found that the Agency adequately considered costs of compliance through the screening methods, the Ninth Circuit then addressed the Association's second major argument: that the Agency failed to adequately consider the data used to set the 1977 limitations. The Agency based its 1977 limitations on a model plant which it constructed with processing data from 1973 and financial data from 1968 to 1972.³⁷ The Association claimed that using processing data from 1973, an unproductive season, caused the Agency to underestimate the amount of fish processed per hour.³⁸ The Agency responded that even if production was underestimated, any effect it had was minimal because processing costs increased at a much slower rate than the amount processed did.³⁹ For example, a plant that processed ten times more fish than another plant only had an increased cost of 1.4 times.⁴⁰ The Ninth Circuit refused to disturb the Agency's determination because the Agency adequately considered all the information before it.⁴¹

The Ninth Circuit rejected the Association's attempt to in-

33. *Id.* at 808. The Association based its argument on an Agency-conducted study which predicted that 7 of 16 plants would close because of the new limitations. *Id.*

34. *Id.* at 808-09.

35. *Id.* The Agency projected price increases to range from 0.3% to 0.5%.

36. *Id.* at 809.

37. *Id.*

38. *Id.* at 809-10. For processing data, the Agency used a 42 day average processing season, although the Association claimed that 14 to 30 days was more accurate. The Agency also used an average working day of 18 hours, although the Association claimed that an 18-hour work day was rare. Finally, the Agency determined that large processors processed about 8.3 tons per hour, medium processors, 5.0 tons, and small processors, 1.1 tons, although the Association claimed 40, 20, and 10 tons, respectively, was more accurate.

39. *Id.* at 810.

40. *Id.*

41. *Id.* at 810-11. The Ninth Circuit decided that some variation may be allowed within a subcategory. *Id.* (citing *American Iron & Steel Inst. v. Environmental Protection Agency*, 568 F.2d 284 (3d Cir. 1977)).

roduce independent studies conducted after the Agency set the pollution limitations.⁴² The Ninth Circuit said it would only consider studies which showed “that the Agency proceeded upon assumptions that were entirely fictional or utterly without scientific support.”⁴³

The Ninth Circuit refused to question the Agency’s decision to stress water and waste management practices when it determined attainable limitations.⁴⁴ Instead, the court found sufficient evidence in the record to support the Agency’s emphasis on water management practices⁴⁵ and held that the Agency had the power to recommend dry cleanup methods⁴⁶ to improve those practices.⁴⁷

After rejecting all of the Association’s challenges to the 1977 limitations, the court addressed the Association’s attacks on the dissolved air flotation unit and aerated lagoon methods for the 1983 limitations.

42. 615 F.2d at 811-12.

43. *Id.* at 812. The Ninth Circuit enumerated several alternatives by which the Association could have challenged the limitations. First, the Association could have filed for reconsideration of its original action under appropriate circumstances. In *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), the circuit court suggested that when a revision of the limitations is sought, a petition should be submitted to the Agency. The petitioner also could have filed supporting material explaining why the limitations should be changed. If denied, the petitioner then could have sought judicial review. *Id.* at 666.

Next, the Association could have applied for a variance under § 301(c) of the Act, 33 U.S.C. § 1311(c) (1976). Third, the Association could have challenged the limitations during the annual revision required by § 304(b) of the Act, 33 U.S.C. § 1314(b) (1976). Finally, the Association could have challenged the limitations at the five year review required by § 301(d) of the Act, 33 U.S.C. § 1311(d) (1976).

44. 615 F.2d at 813. The Association maintained that the Agency should have considered the species and sexual maturity of the fish processed, the level of mechanization of each plant, and the condition of the fish when delivered to the plant. *Id.* The Agency responded that poor water management practices, including continuous use of water hoses to wash areas of waste buildup, excessive use of water when not processing fish, use of outdated machines which require more water to operate and use of water during rest breaks, were the major causes of pollution variability. *Id.* at 813-14.

45. *Id.* at 815. The Agency cited two studies which estimated that about 20 to 30% of the water use occurred during cleanup operations and was responsible for about 10 to 20% of the total pollution. *Id.*

46. *Id.* at 815-16. Dry cleanup methods include shoveling solid waste into bins before water cleanup and using conveyor belts instead of water to transport waste. *Id.* at 615.

47. The Ninth Circuit rejected the Association’s claim that dry cleanup methods required in-plant changes. The court found no such changes in the model plant on which the Agency based its recommendation. *Id.* at 815.

B. DISSOLVED AIR FLOTATION UNITS

Cost Factor

The Association first argued that the 1983 limitations must be based on the increased benefits resulting from increased costs.⁴⁸ The Ninth Circuit noted that in 1977 cost calculations, the benefits must be considered in relation to costs although the Agency had discretion to determine where added costs did not yield adequate benefits.⁴⁹ The court then found that for the 1983 cost considerations the Agency must only include costs in its calculations without determining its relation to benefits.⁵⁰ The Ninth Circuit decided that the Agency fulfilled the statutory mandate for the dissolved air flotation units because it considered the costs of construction, labor, power, chemicals, and fuel.⁵¹

Data Considerations

The Association argued that the Agency's 1983 limitations for dissolved air flotation units were arbitrary and capricious because they were based on a single study.⁵² The Ninth Circuit found that Congress did not intend to require more than one study for setting 1983 limitations.⁵³ Consequently, the court held

48. The Association repeated the arguments it made for computing costs for 1977 limitations. See text accompanying note 28 *supra*.

49. 615 F.2d at 817-18. The Ninth Circuit recognized the relative costs and benefit considerations mandated by the language of § 304(b)(1)(B) of the Act, 33 U.S.C. § 1314(b)(1)(B) (1976). The legislative history of the Act, however, expressed the intent that the Agency should "limit the application of technology only where the additional degree of effluent reduction is *wholly out of proportion* to the costs . . ." L.H. at 170 (emphasis added).

50. 615 F.2d at 817-18. Again, the court examined the statutory language and found no requirement to weigh costs against benefits. Section 304(b)(2)(B) of the Act, 33 U.S.C. § 1314(b)(2)(B) (1976). Instead, the court found evidence to the contrary in legislative history. There the committee said that the 1983 limitations must be determined "without regard to cost." L.H. at 170. The Ninth Circuit also cited *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978), in which the court only required the Agency to consider costs along with other factors.

51. 615 F.2d at 818. Land costs were not considered because the amount of land needed was minimal. *Id.*

52. *Id.* at 816. The study, conducted by the British Columbia Seafood Industry and the Canadian Fisheries Research Board, determined that the dissolved air flotation units reduced BOD₅ by 80%, TSS by 90%, and O&G by 95%. *Id.*

53. *Id.* at 816. The House Report declared that "one operating facility which demonstrates that the level can be achieved" is sufficient for setting guidelines. L.H. at 798. The Ninth Circuit added that all the Agency must show is that the best existing dissolved air flotation unit can meet the limitations. The study the Agency relied on showed

that the Agency adequately determined that plants using dissolved air flotation units could meet 1983 limitations.⁵⁴

C. AERATED LAGOONS

Costs Factors

The Association argued that the Agency failed to consider all the costs for aerated lagoons. The Court agreed that the Agency failed to consider land acquisition costs.⁵⁵ The Ninth Circuit decided that although the Agency did not have to consider land acquisition costs for dissolved air flotation units because of the minimal land needed, the court held that the Agency must consider this cost for aerated lagoons which require much larger areas of land.⁵⁶ Consequently, the court remanded this portion of the Agency's decision for reevaluation.⁵⁷

Data Considerations

Finally, the Association argued that the Agency's single study which supported aerated lagoons failed to adequately prove that plants using this method could obtain the 1983 limitations. The Ninth Circuit agreed and found the study inadequate.⁵⁸ The Ninth Circuit remanded the aerated lagoons method to the Agency for further data as well as cost determinations, but affirmed the Agency's decisions in all other respects.⁵⁹

that for salmon, the dissolved air flotation unit can reduce BOD₅ by 80%, TSS by 90% and O&G by 95%. 615 F.2d at 816. Additional studies involving other fish showed substantial reduction in all three subcategories. *Id.* at 816-17.

54. *Id.* at 818.

55. *Id.* at 819.

56. *Id.* at 820. The Ninth Circuit rejected the Agency's reliance on *American Iron & Steel Inst. v. Environmental Protection Agency*, 526 F.2d 1027 (3rd Cir. 1976), *modified on other grounds*, 560 F.2d 589 (1977), in which the court held that the costs of land should not be considered because of its variability depending on quality. The *Association of Pacific Fisheries* court reasoned that because the cost of screening and other required changes which also vary with the quality of land were considered in costs calculations, land acquisition costs should also be considered. 615 F.2d at 820.

57. 615 F.2d at 820.

58. *Id.* at 819. The study failed to show the analytical approach the Agency used or the possibility that aerated lagoons would be used for more than limited types of seafood. Furthermore, the study failed to illustrate the effectiveness of the lagoons. *Id.*

59. *Id.* at 820.

II. EXEMPTION FROM FILING AN ENVIRONMENTAL IMPACT STATEMENT

In *Kilroy v. Quarles*,⁶⁰ the Ninth Circuit narrowly construed section 511(c) of the Act, which exempts the agency from preparing an environmental impact statement (Statement) in certain situations.⁶¹ Los Angeles owns and operates the Hyperion Wastewater Treatment Plant.⁶² Until 1975, the plant applied primary treatment⁶³ to about two-thirds of its sewage and secondary treatment to the rest.⁶⁴ After treatment, the solid waste is separated from the liquid waste. The plant then discharges the liquid waste into the ocean five miles from shore, and the solid waste (or sludge), seven miles out.⁶⁵

In 1975, however, the Agency ordered Hyperion to apply secondary treatment to all pollution before discharge and to stop the discharge of sludge.⁶⁶ The Agency did not have a final plan for disposal of the sludge, and so it designed an interim plan as a condition to the renewal of Hyperion's permit to discharge pollution.⁶⁷ The interim plan required the plant to separate the sludge from the water and to transport the sludge to a sanitary landfill.⁶⁸ To help effectuate the interim plan, the Agency intended to award Hyperion a federal grant.⁶⁹

60. 614 F.2d 225 (9th Cir. 1980).

61. See note 6 *supra*.

62. *Pacific Legal Foundation v. Quarles*, 440 F. Supp. 316, 318 (D.C. Cal. 1977). Because the *Kilroy* court's recapitulation of the facts is inadequate, facts are taken from the district court's decision.

63. 40 C.F.R. § 125.58(m) (1980) defines primary treatment as "the first stage in wastewater treatment where substantially all floating or settleable solids, are removed by flotation and/or sedimentation."

64. 440 F. Supp. at 318. 40 C.F.R. § 133.102 (1980) defines secondary treatment as that treatment through which "the minimum level of effluent quality . . . in terms of the parameters — biological oxygen demand, suspended solids and pH" can be attained.

65. 440 F. Supp. at 318.

66. *Pacific Legal Foundation v. Costle*, 586 F.2d 650, 653 (9th Cir. 1978). *Pacific Legal Foundation v. Costle* was factually the same as *Pacific Legal Foundation v. Quarles*. *Costle*, however, raised different issues which the Supreme Court subsequently reversed in *Costle v. Pacific Legal Foundation*, 100 S. Ct. 1095 (1980). The Supreme Court held that the Ninth Circuit erred in requiring the Agency to hold a public hearing on every § 402 (permit) decision without first finding a material fact in dispute. See note 6 *supra*. Instead, the Court found that § 402 of the Act only requires an "opportunity for [a] public hearing." 100 S. Ct. at 1105 (emphasis added) (quoting 33 U.S.C. § 1342(a)(1) (1976)).

67. 440 F. Supp. at 319.

68. *Id.*

69. *Id.*

Plaintiffs, three sometime members of the Los Angeles City Council, one Los Angeles property owner, and the city of Torrance, argued that the Agency's plan would force Los Angeles to finance a project which would adversely affect the land without any prior determination that the land was a better receptacle for the sludge than the ocean. They sued on two bases.⁷⁰ They sought an injunction against commencement of the interim plan until the Agency filed a Statement, as the National Environmental Policy Act of 1969 (the Policy Act) requires of all "major Federal actions significantly affecting the human environment."⁷¹ Plaintiffs also sued the Agency for a second Statement, arguing that the Agency's declared national policy against ocean disposal of sludge itself constituted a "major Federal action."⁷² The district court decided that the Agency's action in either case was exempt from the Statement requirement.⁷³ On appeal, the Ninth Circuit affirmed and adopted the rationale of the district court.⁷⁴ Consequently, arguments and holdings will be referred to the district court's opinion.

Injunction Denied

Plaintiffs sought a temporary injunction against commencement of the interim plan until the Agency filed a Statement. They argued that under section 511(c) of the Act,⁷⁵ any grant of federal funds to help construct a publicly owned sewage treatment works required a Statement.⁷⁶ The Agency agreed, and promised not to grant the funds until a Statement was com-

70. *Id.* at 320. The district court dismissed plaintiff's third cause of action—that ocean disposal be considered as an alternative—as improperly raised. Under this claim, plaintiffs argued that the Agency exceeded the scope of the Act by regulating the dumping of sludge from vessels beyond the territorial seas. Consequently, plaintiffs contended the exemption statute no longer insulated the no-sludge policy.

The court found that because plaintiffs did not seek injunctive relief to prohibit sludge dumping from vessels, the claim raised was limited to the Agency's consideration of vessel dumping of sludge as an alternative to land disposal. After so limiting the cause of action, the court held that the Agency need not consider the vessel dumping alternative. 440 F. Supp. at 327. This holding was not appealed to the Ninth Circuit.

71. *Id.* See note 6 *supra*. Los Angeles argued that under § 511(c)(1) of the Act the funding of a publicly owned treatment plant constituted a major federal action significantly affecting the quality of the human environment. See note 6 *supra*.

72. 440 F. Supp. at 321.

73. *Id.* at 320, 326.

74. 614 F.2d at 227.

75. See note 6 *supra*.

76. 440 F. Supp. at 320.

pleted. Plaintiffs argued that that was not enough because the Agency required Los Angeles to commence the interim plan with its share of the funds.⁷⁷ The district court found that the language of the exemption statute set forth two situations in which the Agency had to prepare a Statement.⁷⁸ Neither situation, however, applied to the interim plan and the court decided that the Agency acted within its discretion when it required Los Angeles to commence construction of the sanitary landfill before the federal funds were available.⁷⁹

No Statement Required for the Declared National Policy

The Agency endorsed a national policy to eliminate all ocean disposal of sludge.⁸⁰ This endorsement, plaintiffs argued, constituted a "major Federal action" within the meaning of the Policy Act for which the Agency must prepare a Statement. Plaintiffs reasoned that only section 403 of the Act⁸¹ regulated ocean disposal of pollution and that it did not authorize the Agency to declare the national policy. Because section 511(c) of the Act only exempts Agency actions which are within the Act, plaintiffs concluded that the Agency acted beyond its power under the Act by declaring the policy and could not use section 511(c) to bypass the Statement requirement.⁸² In response, the Agency argued that the language of section 301 of the Act implied that the Agency had the power to declare the policy.⁸³

This issue was one of first impression, therefore the district court based most of its discussion on the legislative history of sections 301 and 403. The court determined that Congress intended section 301 to regulate ocean disposal of pollution,⁸⁴ that section 403 merely supplement section 301 where section 301 did

77. *Id.* The Act allows the federal government to fund up to 75% of the cost of constructing a treatment works; the individual entity must pay the rest. 33 U.S.C. § 1282(a)(1) (1976).

78. *See* note 6 *supra*.

79. 440 F. Supp. at 320. The district court decided that a construction schedule for the interim plan was a condition of renewing Hyperion's permit and could be classified as neither an Agency grant of federal funds nor a permit for a new pollution source. *Id.*

80. 440 F. Supp. at 321.

81. 33 U.S.C. § 1343 (1976).

82. 440 F. Supp. at 321.

83. The Agency pointed to § 301 of the Act where all publicly owned sewage treatment works must apply secondary treatment to sludge. 40 C.F.R. § 133 (1980) defines secondary treatment as the elimination of sludge discharge. 440 F. Supp. at 332.

84. 440 F. Supp. at 326.

not go far enough,⁸⁵ and that, even if section 301 did not regulate ocean disposal of pollution, the Agency still had the power under section 403 to declare the policy.⁸⁶ The district court concluded that the Agency was exempt from preparing a Statement under section 511(c) for its declared national policy against ocean disposal of sludge.⁸⁷

Congressional Intent

To determine how Congress intended section 301 of the Act to be construed, Congress expected the focus to be on section 304,⁸⁸ which lists factors the Agency must consider to set permissible pollution levels for 1977 and 1983. For 1977 limitations, section 304(b)(1)(B) required the Agency to compare the total cost of implementing a technology to the resulting benefits.⁸⁹ The Agency, however, has discretion to determine within this cost-benefit analysis the point at which added benefits do not justify the added costs.⁹⁰ By so limiting the cost-benefit analysis, the Agency can maintain uniform pollution limitations within a class or category of pollution sources.⁹¹

In addition to these cost factors, section 304(b)(1)(B) requires the Agency to consider such other factors as the age of equipment and facilities, the development of present and future technology, and "engineering aspects" required to apply the new technology. The Agency's consideration of such data, however, need not be limited to studies or other information provided by the polluter.⁹² Instead, the Agency can use its own resources to compile and interpret data for the pollution limitations.

For 1983 limitations, section 304(b)(2)(B) also allows the Agency to independently consider all the above data. Congress

85. *Id.* at 323, 326.

86. *Id.* at 326.

87. *Id.*

88. 33 U.S.C. § 1314 (1976).

89. *Id.* § 1314(b)(1)(B) (1976).

90. In one case, *American Petroleum Inst. v. Environmental Protection Agency*, 540 F.2d 1023 (10th Cir. 1976), the court only required that the Agency conduct a serious and comprehensive study of compliance costs. After so doing, the Agency then has discretion to select the point of diminishing returns. *Id.* at 1038.

91. L.H. at 170. The required technology for the 1977 limitations set the minimum level of control in order to achieve uniformity.

92. S. REP. NO. 414, 92d Cong., 2d Sess. 34 (1972).

intended, however, that the Agency discard the cost-benefit analysis.⁹³ Instead, the Agency must only take costs into consideration in setting 1983 limitations, using a reasonableness standard.⁹⁴

Section 403⁹⁵ authorizes the Agency to regulate pollution discharged into the ocean. This section includes all pollution discharged from any sewer outfall regardless of the distance from the shoreline.⁹⁶ To avoid undermining the scope of this section, Congress stated that this section controls, notwithstanding any legislation to the contrary.⁹⁷

Finally, section 511(c) was designed to settle any conflict which might arise between the Federal Water Pollution Control Act and the National Environmental Policy Act.⁹⁸ Section 511(c) accomplishes this purpose by limiting the situations in which the Agency must comply with the National Policy Act requirement of a Statement.⁹⁹ In essence, section 511(c) freed the Agency's hands in its effort to fulfill the Federal Water Pollution Control Act's goals.¹⁰⁰

III. CONCLUSION

In both *Association of Pacific Fisheries* and *Kilroy*, the Ninth Circuit examined the legislative history of the Act in its effort to fulfill the congressional intent for the challenged provisions. The *Pacific Fisheries* panel properly construed the costs and data provisions of section 301 for both the 1977 and the 1983 limitations. The *Kilroy* court also correctly afforded section 511(c) a narrow construction. The *Kilroy* court, however, misconstrued section 403.

93. L.H. at 170. Congress intended that for 1983, no balancing test be required. See also *Environmental Protection Agency v. National Crushed Stone Ass'n*, 101 S. Ct. 295, 300 (1980).

94. *Id.* In determining what is reasonable, the Agency must evaluate what needs to be done to help eliminate pollution discharge and what the available technology can achieve, without regard to cost. *Id.*

95. 33 U.S.C. § 1343 (1976).

96. L.H. at 177.

97. *Id.*

98. 42 U.S.C. § 4321 (1970). See also note 6 *supra*.

99. See note 6 *supra*.

100. L.H. at 182.

Congress intended that the Agency's power to regulate ocean disposal of pollutants to be derived only from section 403.¹⁰¹ The *Kilroy* court interpreted section 301 as the source of this power and construed section 403 as a supplement to section 301. This interpretation frustrates the clear intent of Congress. Fortunately, this misconstruction proved harmless because the *Kilroy* court decided that the result would be the same under either section. It should be noted, however, that section 301 is not all encompassing. Congress intended that section 403 absolutely control ocean disposal, "any other legislation to the contrary notwithstanding."¹⁰² Further misinterpretations of congressional intent may be avoided by close examination of the legislative history of individual provisions of the Act.

*Robinson R. Ng**

101. See notes 94-96 *supra* and accompanying text.

102. L.H. at 177. The district court found this absolute language may still give rise to a "possibility that section 403 requirements . . . apply in addition to section 301's." 440 F. Supp. at 323. The language itself, however, appears not to allow this "possibility."

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