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EPA Allowed to Use Vague Classification Scheme

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EPA ALLOWED TO USE VAGUE CLASSIFICATION SCHEME

FEDERAL REGULATION—JUDICIAL REVIEW: The Ninth Circuit holds that EPA classification of remote/nonremote areas in Alaska is vague but not impermissibly vague. *Association of Pacific Fisheries v. EPA*, 615 F.2d 794 (9th Cir. 1980).

BACKGROUND

In 1972 Congress amended the Federal Water Pollution Control Act[1] to establish national pollution goals to be achieved by specific dates.[2] Congress gave the Environmental Protection Agency (EPA or Agency) the responsibility of implementing regulations to achieve these goals.[3] In addition, Congress authorized the EPA to require industry to use the "best practicable control technology currently available" by 1977[4] and the "best available technology economically achievable" by 1983.[5]

The EPA promulgated regulations establishing effluent guidelines for the Canned and Preserved Seafood Processing Point Source Category in 1974 and 1975.[6] The regulations limited the amount of discharge of fish residuals[7] into the waters of the United States. By 1977, the regulations required processors not located in Alaska and processors located in "non-remote" areas of Alaska to use screens to trap the residuals. The regulations required processors located in "remote" areas of Alaska only to grind the residuals before discharge. Screen installation was considered more expensive than grinding. By 1983 the guidelines called for processors located in "remote" areas of Alaska to use screens. By the same 1983 date, however, the guidelines required processors outside Alaska and those located in "non-remote" areas of Alaska to filter residuals through a dissolved air flotation unit or aerated lagoon.[8]

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1. 33 U.S.C. §§ 1251–1265 (1976).
2. 33 U.S.C. § 1311(b)(1), (b)(2) (1978).
3. 33 U.S.C. § 1314 (1978 & Supp. V 1982).
4. 33 U.S.C. § 1311(b)(1)(A) (1978).
5. 33 U.S.C. § 1311(b)(2)(A) (1978).
6. 40 C.F.R. § 408 (1982).
7. Residuals are the heads, tails and other unused parts of the processed fish.
8. The guidelines require all plants processing seafood to use dissolved air flotation units except for plants processing conventional bottomfish which are required to use an aerated lagoon rather than a dissolved air flotation unit. 615 F.2d 794, 802 (9th Cir. 1980).

In *Association of Pacific Fisheries v. EPA*,[9] the Association of Pacific Fisheries, a trade association representing canners and fresh and frozen fish processors, and some individual processors challenged both the 1977 EPA requirements and the 1983 EPA guidelines. They based their challenge to the 1977 requirements primarily on the fact that the Agency required plants located in "non-remote" areas of Alaska to install more expensive pollution controls than plants located in "remote" areas of Alaska. The Association and the individual processors argued that the distinction between "remote" and "non-remote" parts of Alaska was based on impermissibly vague definitions of "population centers" and "processing centers." Plants located in either a "population center" or a "processing center" were placed in the "non-remote" classification. The Ninth Circuit found that the distinction between "remote" and "non-remote" was vague, but not impermissibly vague.

The Association and the processors also challenged the 1977 requirements on the grounds of excessive cost, flawed data, and inability to comply. The Court dismissed these challenges quickly. The Court found that the Agency had considered costs and need not balance costs against benefits. The court accepted the imperfect "flawed" data in the interest of saving time. Further, the court found that "inability to comply" was not a proper complaint for the court to address. Instead, the Association and the processors could petition the Agency for changes during normal Agency reviews of its guidelines.

The Association and the processors challenged the 1983 guidelines requiring the use of air flotation units or aerated lagoons for "non-remote" plants. They argued that these methods were neither "available" nor "economically achievable." The record showed that the Agency relied on only one study in formulating its technological requirements. However, the court found that requirements based on only one study were not in themselves arbitrary or capricious. The court agreed with the EPA that the single study convincingly showed that flotation unit technology could be employed in all "non-remote" plants. However, the court found that the EPA had failed to demonstrate that the aerated lagoon technology was transferable to all "non-remote" plants. The Court ruled that the EPA therefore erred in relying on such limited data.

The court found that requiring the use of air flotation units was "economically achievable" because the cost was not unreasonable. However, the court ruled that when calculating the cost of aerated lagoons the EPA failed to take into account the cost of the land on which the lagoons would be located. Therefore, the court approved the required installation of screens by 1977 and the required use of air flotation units by 1983 for

9. 615 F.2d 794 (9th Cir. 1980).

all plants located in "non-remote" areas of Alaska. The Court, however, remanded the 1983 requirement of using aerated lagoons. The Court asked the Agency to reconsider the issue of transferability of technology and to include the cost of land in its calculations of the achievability of the required technology.

This case note will analyze the court's finding that the distinction between "non-remote" and "remote" areas of Alaska was vague but not impermissibly vague because of the significance of that distinction to plant owners, environmentalists and government officials. The Ninth Circuit's treatment of the distinction should be analyzed against the background of how other courts have treated a vagueness challenge.

VAGUENESS STANDARDS

The Supreme Court set the standard for determining vagueness in *Connally v. General Construction Co.*[10] The Court said that a statute which requires the doing of an act in terms so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[11] The Court first applied that standard to agency-promulgated regulations in *U.S. v. Mersky.*[12] In *Mersky,* the Court found that a regulation must be set aside as unconstitutionally vague if it is so vague that one cannot know what is the law.[13] The Supreme Court also requires that an agency support its regulations in the record. In *Citizens to Preserve Overton Park, Inc. v. Volpe*[14] the Court stated that a full record is required as a basis of decisions and for judicial review. The Supreme Court has never applied the vagueness standard or the support standard to regulations promulgated by the EPA.[15]

The circuit courts have rarely applied the vagueness standard set out in *Connally* and *Mersky* to EPA regulations but have often applied the support standard of *Overton Park.* The Fourth Circuit did use the vagueness standard and the support standard in *Maryland v. EPA.*[16] In *Maryland,* the Fourth Circuit found an EPA regulation requiring em-

10. 269 U.S. 385 (1926).

11. *Id.* at 391.

12. 361 U.S. 431, 441 (1960).

13. *Id.* at 441.

14. 401 U.S. 402 (1971).

15. The only case involving the EPA and the vagueness question to reach the Supreme Court was Lake Carriers' Association v. MacMullan, 406 U.S. 498 (1972). That case involved the Michigan Watercraft Pollution Control Act of 1970. The EPA was brought in as a grounds for federal preemption and the Michigan statute was challenged for vagueness. However, the Supreme Court did not address the issues of preemption or vagueness.

16. 530 F.2d 215 (4th Cir. 1975), *cert. granted,* 426 U.S. 904 (1976), *vacated,* 431 U.S. 99 (1977).

ployers to "encourage" carpooling was unconstitutionally vague because the regulation did not advise the employers of the factors to be considered important in determining compliance. Without knowing those factors, the court could not determine whether the regulation was "arbitrary and capricious."[17] Since *Maryland,* the Fourth Circuit has been more deferential to the EPA. In *Consolidated Coal Co. v. Costle*[18] the Fourth Circuit court found that judicial review of EPA regulations should be limited because the court did not want to interfere with the Agency's attempts to clean up the water within the Congressionally mandated period.

The District of Columbia Circuit Court will uphold an EPA regulation if there is any "rational basis" for the regulation, but will require the EPA to set out in the record the factors it considers relevant to compliance. In *Sierra Club v. EPA*[19] the District of Columbia Circuit Court found that a regulation must be upheld if a "rational basis" exists for the regulation, even if the Agency does not appear "wise" in promulgating the regulation. In *Atlas Copco Inc. v. EPA*[20] the court stated that a blanket requirement compelling compliance is impermissibly vague unless the requirement indicates the factors to be considered in determining compliance. Although other circuits[21] have considered EPA regulations and the vagueness question, they have not used any standards different than those used by the Fourth Circuit and the District of Columbia Circuit.

Thus, the standards for determining vagueness used prior to *Association of Pacific Fisheries* have varied somewhat. *Mersky* and *Maryland* found a regulation impermissibly vague because the Agency failed to specify what was required of those subject to the regulation. *Overton Park* and *Atlas Copco* found an Agency regulation impermissibly vague because the Agency failed to support the regulation in the record. However, until *Association of Pacific Fisheries* no court has found an Agency regulation "Admittedly vague but not impermissibly vague."

ANALYSIS

In *Association of Pacific Fisheries,* the Association and the fish processors asked the Ninth Circuit to set aside an EPA decision to distinguish between "remote" and "non-remote" areas in Alaska. The EPA required the installation of pollution control technologies for "non-remote" areas

17. The "arbitrary and capricious" standard is found in the Administrative Procedures Act, 5 U.S.C. § 706(2)(A) (1976). This is the standard used most often by courts reviewing agency regulations.

18. 604 F.2d 239 (4th Cir. 1979), *rev'd on other grounds,* 449 U.S. 64 (1980).

19. 540 F.2d 1114, 1123 (D.C. Cir. 1976), *cert. denied,* 430 U.S. 959 (1977).

20. 642 F.2d 458, 465 (D.C. Cir. 1979).

21. *See Lloyd A. Fry Roofing Co. v. EPA,* 554 F.2d 885 (8th Cir. 1977); *American Petroleum Inst. v. EPA,* 661 F.2d 340 (5th Cir. 1981).

but not for "remote" areas. The Agency defined "remote" facilities as those not located in "population or processing centers" and "non-remote" facilities as those located in "population or processing centers." The Agency placed facilities located in Anchorage, Cordova, Juneau, Ketchikan, Kodiak, and Petersburg in the "non-remote" category.[22] The Association and the processors claimed that the EPA had failed to support a distinction between "remote" and "non-remote" facilities because the definitions of "population center" and "processing center" were impermissibly vague. The Ninth Circuit refused to set aside the EPA decision on the ground of vagueness.

The Ninth Cirucit found some evidence in the record that construction costs in general are less in "population centers" than in other areas; that plants located in "population centers" have more dependable access to transportation and landfills; and that "non-remote" locations enjoy lower rates for transportation, have better access to populations and have more electrical power. The court found that the Agency could infer from that data that the cost of pollution abatement would be lower in "population centers" than in other areas. The court also found that the record contained some evidence that facilities in "processing centers" could share some of the costs of pollution abatement while facilities not in "processing centers" would have to carry the entire burden alone.[23]

In addition to the record, the Court considered that Congress had set the year 1985 as the goal for achieving clean water in the United States. The Court did not want to interfere with that goal unless absolutely necessary. The Court also found that the Agency could be expected to make the definitions more precise in the future.[24] Relying upon both the record and the need for expediency, the Ninth Circuit concluded that, while the definitions were "not commendable" and are "admittedly vague," the court would not set aside the distinction between "remote" and "non-remote" facilities as impermissibly vague.

In *Association of Pacific Fisheries* the Ninth Circuit did not address the main problem before it. The court did not discuss the vagueness of the definitions of "population centers" or "processing centers" but instead looked directly at the distinction between "remote" and 'non-remote." The court found that the EPA could infer that "non-remote" facilities were sufficiently different from "remote" facilities to set different standards for the different facilities. The record did support the distinction based on the cost of installing pollution control devices, but the court never addressed the vagueness of the definitions of "population centers"

22. 40 C.F.R. § 408.162 (1982).
23. 615 F.2d at 804.
24. *Id.* at 805.

or "processing centers." The only definition of these terms contained in *Ass'n of Pacific Fisheries* stated that "Any . . . facility located in population or processing centers including but not limited to Anchorage, Cordova, Juneau, Kelchiken, Kodiak, and Petersburg shall . . ."[25] be in the "non-remote" category and subject to stricter pollution control requirements. This definition may give warning to facilities located in those particular population centers but gives no guidance to facilities in other parts of Alaska.[26] Because "men of common intelligence must necessarily guess at its meaning and differ as to its application," the Ninth Circuit could have found this definition unconstitutionally vague under *Connally.* The Ninth Circuit admitted that the definition "leaves open the possibility that other places may nevertheless possess certain undefined characteristics justifying designation as population or processing centers"[27] but refused to find the definitions impermissibly vague. The court "expects" the Agency to make the definitions more precise in the future. Such "expectation," without more guidance by the court is deference carried to an extreme.

Additionally, the Ninth Circuit set forth no standard to distinguish between "admittedly vague" and "impermissibly vague." The court only stated that, "We must afford the EPA substantial discretion to implement the mandate of the Act."[28] The court's opinion contained no discussion of *Mersky, Connally, Overton Park* or any of the circuit court standards. If the Ninth Circuit will only "expect" the EPA to clarify its own definitions in the future, the court has failed to review the regulation at all.

CONCLUSION

The Ninth Circuit in *Association of Pacific Fisheries* grants total defense to the EPA by failing to apply any recognized standard of review to an EPA definition. The Ninth Circuit has refused to find an EPA definition impermissibly vague even though the definition gives no guidance to facilities, has no support in the record, and is therefore arbitrary and capricious.

If other circuits follow the Ninth Circuit's deference standard, no challenge to an EPA definition as impermissibly vague could succeed. Potential challengers would do better to voice their objections on the record before the EPA rather than attempt a challenge in the courts.

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25. *Id.* at 803 quoted from, 40 C.F.R. § 408.162.

26. Census data available to the EPA at the time these definitions were set do not support the distinction. Bureau of the Census, Dep't of Commerce, CENSUS OF THE POPULATION 3–10 (1970); Alaska Population Estimates and Projections 5–6 (1977).

27. 615 F.2d at 803.

28. *Id.* at 805.