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EPA MAY NOT CONSIDER QUALITY OF RECEIVING WATER IN GRANTING A VARIANCE FROM EFFLUENT LIMITATIONS

ENVIRONMENTAL LAW—FEDERAL WATER POLLUTION CONTROL ACT: The Ninth Circuit Court of Appeals holds that the EPA may not grant a variance from water effluent limitations on the basis of the quality of receiving water. *Crown Simpson Pulp Co. v. Costle*, 16 E.R.C. 1556 (9th Cir. 1981).

The Federal Water Pollution Control Act¹ authorizes the Administrator of the Environmental Protection Agency (EPA) to promulgate effluent limitations for industrial sources,² from which there is or may be a discharge of pollutants.³ In 1976 EPA issued effluent limitations for different bleached kraft pulp, paper and paperboard mills discharging effluent into navigable waters.⁴

The regulations that apply to the mills impose discharge limits for the period from July 1, 1977 to July 1, 1982 based on the application of the best practicable control technology currently available (BPT) as defined by the EPA Administrator.⁵ Every industrial discharger is required to obtain a National Pollutant Discharge Elimination Permit.⁶ In order to receive a permit, a discharger must either comply with the effluent limitations or receive a variance. The EPA may grant a variance to an industrial plant upon a showing that factors relating to the equipment or facilities involved, the process applied or other related factors are fundamentally different from the factors considered in the establishment of the guidelines for the industry as a whole.⁷

Crown Simpson Pulp Company and Louisiana-Pacific Corporation operate two bleached kraft paper mills near Eureka, California. Each mill discharges pollutants into the Pacific Ocean. After EPA's issuance of effluent limitation guidelines, both companies applied for discharge permits.

Following hearings on the applications, the California Water Resources

1. 33 U.S.C. §1251-1376 (1977).

2. 33 U.S.C. §1316(b)(1)(A) (1977) includes pulp and paper mills, and paperboard, builders paper, and board mills as categories of sources.

3. 33 U.S.C. §1316(a)(3) (1977).

4. 40 C.F.R. §§430.60-92 (1976).

5. 40 C.F.R. §§401.12, 430.12. Factors taken into account in determining BPT standards include consideration of costs in relation to effluent reduction benefits, the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact, and other factors that the EPA Administrator deems appropriate. 33 U.S.C. §1314(b)(1)(B) (1977).

6. 33 U.S.C. §1342 (1977).

7. 40 C.F.R. §430.62.

Control Board⁸ concluded that adherence to EPA guidelines for biochemical oxygen demand of effluent (BOD) and pH would require construction and operation of a treatment facility, and "there is no expected or predictable water quality improvement to be achieved as the result of imposition of the EPA Guidelines."⁹ Thus, based on local water quality considerations, the Board granted the requested variances, subject to approval by the EPA Administrator.¹⁰

On September 15, 1977, the EPA Administrator vetoed the permits. The Administrator ruled that the California Board had not found an acceptable fundamental difference in the non-water quality environmental effects from those considered by EPA in establishing effluent limitations. Rather, EPA determined that the only fundamental difference between Crown Simpson's and Louisiana-Pacific's Samoa Peninsula's mills and other paper mills was the type of receiving water. Citing legislative history, the Administrator concluded that the Federal Water Pollution Control Act does not allow variances from technology-based effluent limitations merely because compliance with the limitations will not improve the quality of receiving water.¹¹

The two companies appealed this decision of the EPA Administrator. Three years elapsed before the Ninth Circuit Court of Appeals resolved the issue in *Crown Simpson Pulp Co. v. Costle*.¹² In the intervening period both the Ninth Circuit and the U.S. Supreme Court dealt with jurisdictional issues in the case.¹³

After these jurisdictional questions were settled, the Ninth Circuit issued its opinion on April 20, 1981. The court agreed with EPA that a fundamental purpose of the Federal Water Pollution Control Act was to shift the focus of pollution control from receiving water quality to the technological control of effluent. The court emphasized that variances are

8. In California, EPA shares its permit-granting authority with the state board, as permitted by 33 U.S.C. §1342(b) (1977).

9. In re Louisiana-Pacific Corp., 10 E.R.C. 1841, 1850 (1977).

10. The California Regional Water Quality Control Board, North Coast Region, first reviewed the companies' applications and granted variances. EPA Region IX objected to the granting of the variances. Subsequently the California State Water Resources Control Board reviewed the action of the Regional Board, set aside the earlier variances granted to the companies, and granted variances only for BOD and pH.

11. In re Louisiana-Pacific Corp., 10 E.R.C. 1841 (1977).

12. 16 E.R.C. 1556 (9th Cir. 1981).

13. The jurisdictional issues concerned whether the action of EPA in denying a variance and disapproving effluent restrictions contained in a National Pollutant Discharge Elimination System Permit issued by an authorized state agency is reviewable in the Federal Court of Appeals. The Ninth Circuit held that a Court of Appeals had no jurisdiction under 33 U.S.C. §1369(b)(1)(F). *Crown Simpson Pulp Co. v. Costle*, 599 F.2d 897 (9th Cir. 1979). Upon appeal, the U.S. Supreme Court reversed and remanded. The Court held that under 33 U.S.C. §1369(b)(1)(F), the Court of Appeals had jurisdiction since EPA's authority to deny a state-issued permit is functionally similar to its authority to deny a permit in states that do not administer an approved permit-issuing program. Therefore, the same appeal procedures apply under the statute.

available only when a discharger can show a fundamental difference in a particular plant from the technological factors considered by EPA in setting effluent limitations for the industry as a whole. Neither plant demonstrated a fundamental difference.

The court, therefore, rejected the companies' arguments that EPA must issue a variance where the costs of adherence to the guidelines are high and the benefits to the receiving water are negligible. The companies did not challenge the fundamental difference requirement which requires EPA to consider certain factors in determining whether a plant is fundamentally different and thus entitled to a variance.¹⁴ Instead the companies argued that receiving water quality itself was a fundamental difference.

The Ninth Circuit noted that its opinion in *Crown Simpson Pulp Co. v. Costle*¹⁵ was consistent with its holding in *Association of Pacific Fisheries v. EPA*.¹⁶ In that case, the court upheld EPA's issuance of permits to certain Alaskan fish processors. The issue was whether EPA could allow fish processors to barge and dump larger fish particles at certain offshore sites even though effluent limitations prohibited them from grinding and dispersing the fish particles as part of the effluent at the processing site. In that opinion, the court held that EPA could give limited consideration to improvement in nearshore water quality as one factor in support of the effluent limitations imposed on fish processors. The court distinguished the *Pacific Fisheries* decision from that of *Crown Simpson Pulp Co. v. Costle* by its unusual factual setting and legislative history that supported a limited consideration of water quality in framing effluent standards for the Alaskan fish processing industry.

CONCLUSION

The Ninth Circuit Court of Appeals looked to EPA's statutory interpretation and legislative history in determining that the quality of receiving water cannot be a major factor in the granting of a variance. When Congress set BPT standards, it intended effluent limitations to be based on technology available for reducing discharge of pollutants into navigable streams and not on the quality of the receiving water. The Ninth Circuit stated that if EPA could base guidelines on local water quality considerations, "we would be returning water pollution control to its ineffective pre-1972 status in defiance of Congress's desire 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"¹⁷

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14. These factors include non-water quality environmental impact, energy requirements, and cost in relation to effluent reduction benefit.

15. 16 E.R.C. 1556 (9th Cir. 1981).

16. 615 F.2d 794 (9th Cir. 1980).

17. 33 U.S.C. §1251 (1977).