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# Intervention as It May Affect an Environmental Settlement Agreement

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# INTERVENTION AS IT MAY AFFECT AN ENVIRONMENTAL SETTLEMENT AGREEMENT

FEDERAL WATER POLLUTION CONTROL ACT—CIVIL PROCEDURE: Permitting intervention of industrial polluters may or may not change an NRDC-EPA settlement agreement depending upon the interpretation of the Federal Water Pollution Control Act Amendments of 1977, and depending upon the amount of participation by the intervenors which the court will allow. *Natural Resources Defense Council, Inc. v. Costle,* 561 F.2d 904 (D.C. Cir. 1977).

## INTRODUCTION AND BACKGROUND

A recent decision by the District of Columbia Court of Appeals[1] will result in permitting assorted rubber and chemical companies to intervene in district court proceedings involving the implementation and oversight of a settlement agreement. This agreement obligates the Administrator of the Environmental Protection Agency (EPA) to establish, by rule-making, various sets of regulations under the Federal Water Pollution Control Act Amendments of 1972[2] [hereinafter "the Act"]. The regulations relate to the discharge of various toxic pollutants into American waters. On first impression, this decision might seem to be a victory for certain industrial polluters since they clearly have an interest in how such toxic pollutants are regulated. However, because of the nature of this particular intervention, this decision may not significantly alter the settlement agreement and it may be useful to environmental groups who in the future wish to intervene in similar situations.

In 1973, various environmental groups including Natural Resources Defense Council (NRDC), a party in the present case, filed a lawsuit against the EPA Administrator seeking declaratory and injunctive relief under Section 307(a) of the Act.[3] In furtherance of a national policy "that the discharge of toxic pollutants into the nation's waters in toxic amounts be prohibited,"[4] this section states that the Administrator shall publish a list of such toxic pollutants or

1. Natural Resources Defense Council, Inc. v. Costle, 561 F.2d 904 (D.C. Cir. 1977).
2. 33 U.S.C. §1251 (Supp. V 1975).
3. 33 U.S.C. §1317(a) (Supp. V 1975).
4. 33 U.S.C. §1251(a)(3) (Supp. V 1975).

combination of pollutants, taking "into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organism."

The first count of original complaint alleged a number of things: that the selection criteria used by the Administrator in choosing pollutants for inclusion on his initial list imposed "preconditions and restrictions upon the inclusion of pollutants" on the list that were unlawful and inconsistent with the provisions and policies of the Act; that the promulgation of these unlawfully restrictive selection criteria was arbitrary, beyond the Administrator's statutory authority, and therefore in violation of the Act; that in omitting substances from the list the Administrator had been guided by criteria and other considerations neither authorized by nor consistent with the Act; and that the Administrator's actions had been an abuse of discretion. The second count listed 25 substances alleged to be toxic within the meaning of the Act and, therefore, not within the range of the Administrator's discretion to exclude from the list. It was alleged that the omission of these substances was arbitrary and capricious and in violation of the Act.

The D.C. Court of Appeals reversed the District Court's dismissal of the environmentalists' complaint and remanded *NRDC v. Train*[5] to the U.S. District Court for the District of Columbia. Two major issues addressed in this case should be briefly considered.

First, the Administrator argued that although the district court had found for him, it did not have jurisdiction to hear the matter initially. The Administrator insisted that Section 505 of the Act,[6] which states that in a civil action against the Administrator "where there is alleged a failure of the Administrator to perform any act or duty ... which is not discretionary with the Administrator ...," does not apply because the use of selection criteria and the selection of substances to be listed are within his discretion. Rather, the applicable section is 509(b)(1),[7] which states that "review of the Administrator's action ... (c) in promulgating any effluent standard or prohibition ... may be had in the Circuit Court of Appeals." The *Train* Court agreed with the Administrator, but then addressed the problem which arises if a substance is alleged to have been omitted from the list. Relying solely on the Act, there will be no place for

5. 519 F.2d 287 (D.C. Cir. 1975).
6. 33 U.S.C. §1365 (Supp. V 1975).
7. 33 U.S.C. §1369(b)(1) (Supp. V 1975).

such an omission to be reviewed since an omission will not be promulgated under Section 509 and will be discretionary under Section 505. To prevent this issue from remaining in a jurisdictional limbo, the court restated the rule from an earlier case,[8] which made it clear that Section 505 of the Act is not an exclusive basis for jurisdiction in the district court. The Administrative Procedure Act also gives the district court power to review administrative action not expressly made unreviewable to determine whether there has been an abuse of discretion.[9] Therefore, the D.C. Court of Appeals held that the district court had had jurisdiction.

A second, and more important reason for the *Train* court's holding was the insufficiency of the record which had been before the district court. The Administrative Procedure Act requires that in reviewing agency action claimed to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [the court] shall review the whole record or those parts of it cited by a party."[10] Following this statutory mandate, as well as the guidelines established in *Citizens to Preserve Overton Park, Inc. v. Volpe*,[11] the court remanded the case so that the Administrator could file the entire administrative record pertinent to the omissions identified in the complaint.

Following this remand, NRDC and EPA entered into private negotiations aimed at settling the case, and the resulting proposed settlement agreement was submitted to the U.S. District Court for the District of Columbia for approval on March 31, 1976. The settlement includes provisions which remedy many of the plaintiffs' original objections to the Administrator's actions: the EPA is required to establish, by rule-making, a series of regulations relating to various named pollutants[12]; the EPA will regulate the pollutants on an industry-by-industry basis[13]; and a priority and timetable for studies and rule-making was established by the agreement.[14]

8. Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975).

9. 5 U.S.C. §706(2)(A) (1970).

10. 5 U.S.C. §706 (1970).

11. 401 U.S. 402 (1971).

12. The EPA will be promulgating these regulations under Sections 301, 304, and 306 of the Act (33 U.S.C.A. §§1311, 1314, 1316 (1977 Supp.)). The pollutants listed in the agreement number 65 in total and include such substances as cyanides, mercury and compounds, and vinyl chloride.

13. The agreement names 21 industrial categories, e.g., timber products processing and organic chemicals manufacturing.

14. Regulation is generally to proceed in the order that industrial categories are listed; timetables are set for the letting of contracts and for the initiation and termination of rule-making. Regulations for the last five categories listed are to be promulgated not later than December 31; 1979.

On March 29, 1976 and April 23, 1976 two separate groups,[15] known collectively as "Union Carbide" and "Firestone" moved to intervene. Both groups argued that they should be allowed to intervene in order to ensure their full rights of participation in "crucial decisions" to be made before the distric court in the oversight and implementation of the agreement. On April 29, 1976 both motions to intervene were denied. Following this denial, the district court entered an order on June 9, 1976 which approved the settlement agreement and directed compliance with its terms.

## THE INSTANT CASE

In reversing the order denying intervention, the D.C. Court of Appeals considered the single issue of whether the appellants were entitled to intervene as of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure.[16] The court found that the appellants were so entitled and disagreed with each of the three bases upon which the district court had denied intervention.

First, the court found that whether a motion to intervene is timely "is to be determined from all the circumstances,"[17] and more particularly, a standard which they had previously set out in *Hodgson v. United Mine Workers of America*[18] should be followed. The amount of time which has elapsed since the litigation began, here approximately four years, is not in itself the determinative test. Rather, it is more important to look to the circumstances, including the purpose for which intervention is being sought. The appellants claimed that they wished to intervene because of their concern for participation in the implementation of the agreement, and not because they sought to reopen settled issues in the case. For this purpose, the court held, their motions were timely. Also, any delay caused by intervention would not prejudice the original parties: intervention was not sought to upset the settlement agreement, but to participate in its future administration. The court of appeals stated that the district court

15. The first group included Union Carbide Corporation, FMC Corporation, The Dow Chemical Company, Celanese Corporation, Olin Corporation, E. I. duPont de Nemours and Company, Exxon Corporation, and Monsanto Company. The second group was made up of Firestone Tire and Rubber Company, Goodyear Tire and Rubber Company and B.F. Goodrich Company.

16. "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest . . ."

17. NAACP v. New York, 413 U.S. 345 (1973).

18. 473 F.2d 118 (D.C. Cir. 1972).

might benefit from appellants' participation in solving questions concerning the proper working of the agreement.

Second, the court found that intervention was necessary to prevent an impairment of appellant's interests. The agreement provides that the resulting regulations will be for the purpose of establishing effluent limitations and standards for each industrial category. Clearly, appeallants will be affected by these regulations. The agreement also states that if the EPA decides that it will not initiate rule-making for a particular pollutant within an industrial category, such exclusion must be explained to all parties who may, presumably, invoke the continuing jurisdiction of the district court to review whether the exclusion conforms with the settlement agreement. But the agreement does not provide for review or approval by the district court of the merits of the ultimate regulations. Such review is apparently vested by the Act exclusively in the courts of appeals.

Practically speaking, if the EPA decides to omit a pollutant from the list and NRDC contests this decision, the rubber and chemical companies cannot participate in the ensuing litigation before the district court. And, if the EPA's exclusion is not permitted, appellants' only recourse will be to file comments and then litigate the regulation after promulgation. The court stated that Rule 24(a)(2) must be read as looking to the "practical consequences" of denying intervention, as stated in the leading case of *Nuesse v. Camp.*[19] Even though the possibility of future challenge to any regulation remained available, the court found that impairment of appellants' interests still existed.

> Judicial review of regulations *after* promulgation may, "as a practical matter," afford much less protection than the opportunity to participate in post-settlement proceedings that seek to ensure sustainable regulations in the first place, with no need for judicial review. Aside from the time and expense of litigation as a recourse, it may be that review might be had only after final effectiveness, during a period when appellants may be subject to compliance and enforcement.[20]

The court found that appellants' interest were further impaired in that, similar to proceedings on exclusions, only parties will be entitled to participate before the district court in timetable modifications. Because of the likelihood that such modifications would

19. 385 F.2d 694 (D.C. Cir. 1967).

20. Natural Resources Defense Council, Inc. v. Costle, 561 F.2d 904, 909 (D.C. Cir. 1977).

occur,[21] and thus cause inconvenience to appellants, the court again followed *Nuesse*. The court in that case stated that "in the intervention area the 'interest' test is primarily a practical guide to dispose of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[22]

Finally, the Court found a third basis for allowing intervention: the appellants' interests might not be adequately represented by existing parties.[23] According to the standard established by *Trbovich v. United Mineworkers of America*,[24] appellants had a minimal burden of showing that existing representation "may be" inadequate to protect their interest. Because the EPA is broadly concerned with implementation and enforcement of the settlement agreement and the appellants are more narrowly concerned with proceedings that may affect their industries, the court found this minimal burden was met. "With the clear possibility of disparate interests, we think appellants have shown that EPA representation may not be adequate."[25] The court further stated that the interests of EPA and appellants can be expected to coincide, with the only difference being that appellants' interests are more focused on regulations that effect industries. In spite of this, the Court held, a Second Circuit case, *New York Pub. Interest Research Group v. Regents*,[26] should be followed:

> Given the acknowledged impact that regulation can be expected to have upon their operations, appellants' participation in defense of EPA decisions that accord with their interest may also be likely to serve as a vigorous and helpful supplement to EPA's defense. Many of these decisions turn . . . on questions of very technical detail and data; on the basis of their experience and expertise in their relevant fields, appellants can reasonably be expected to contribute to the informed resolutions of these questions . . .[27]

21. Appellants' brief referred to the court-ordered timetable prescribed in Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975). By Aug. 1976, there had been fourteen orders modifying thy initial timetable of Nov. 1973 for the promulgation of final guideline regulations.

22. Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967).

23. Rule 24(a)(2) provides that if requirements as to timeliness and impairment of interest are met, intervention shall be allowed unless the applicant's interest is adequately represented by existing parties.

24. 404 U.S. 528 (1972).

25. Natural Resources Defense Council, Inc. v. Costle, 561 F.2d 904, 912 (D.C. Cir. 1977).

26. 516 F.2d 350 (2d Cir. 1975).

27. Natural Resources Defense Council, Inc. v. Costle, 561 F.2d 904, 912-13 (D.C. Cir. 1977).

COMMENT

First, it does not appear that any of the standards, as established by the leading cases and used by this court in permitting intervention have been significantly altered. The *Hodgson*[28] timeliness standard seems unchanged. In both the instant case and in *Hodgson,* it was not when the application for intervention was filed that was determinative. Rather, in each case the applicant did not seek to reopen the settled issues in the case but instead sought to participate in an upcoming, remedial phase of the litigation. In considering a standard for what constitutes impairment of interest, the *Nuesse*[29] court read this to mean "practical consequences" and found impairment even where the possibility of future challenge remained available. The *Nuesse* standard also contains language to the effect, that, especially in Administrative law cases, questions of "convenience" are clearly relevant. Upon these bases, the present court could have found an impairment of the appellants' interest even if they had found that appellants had other means, besides litigation, of contesting a regulation. Finally, from *Trbovich,* the standard is clear: an appellant need meet only the minimal burden of showing that existing representation *may* be inadequate. The court applied this standard in the instant case.

Both the holding and the cases relied upon by this court to so hold indicate that a relatively loose standard for intervention remains in force: an applicant has to meet a minimal burden in demonstrating why he should be allowed to intervene. This relaxed standard serves not only to protect all interested parties who may have a stake in the litigation, but it also encourages judicial efficiency by avoiding the need for later litigation. That courts keep these two factors in mind is obvious from the history of this case. Originally, the settlement agreement included settlement of three related cases which were consolidated with the lead case.[30] In one of these cases, intervention by various companies and trade associations had already been granted.[31] Although the EPA argued, in the instant case, that the

28. Hodgson v. United Mine Workers of America, 473 F.2d 118 (D.C. Cir. 1972).

29. Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967).

30. Environmental Defense Fund, Inc. v. Train, Civil Action No. 75-172. Citizens for a Better Environment v. Train, Civil Action No. 75-1698. NRDC v. Agee, Civil Action No. 75-1267. Nos. 75-172 and 75-1698 sought to compel EPA to comply with the timetable of §307(a) for the regulation of toxic pollutants. No. 75-1267 sought to compel speedy promulgation of pretreatment standards under §307(b).

31. In Civil Action No. 75-172, intervention had been allowed to the American Iron and Steel Institute, American Cyanamid Company, the National Coal Association, and four members of the American Petroleum Institute including Shell Oil Company, Standard Oil Company (Indiana), Union Oil Company and Standard Oil Company (Ohio).

admission of appellants would lead to a cluttering of lawsuits with multitudinous useless intervenors, intervention was allowed. In so doing, the court sought to protect *any* possible separate interest that might exist, as well as to prevent repetitious litigation.

This standard for intervention, however, may be more useful than harmful to such groups as NRDC. Environmental groups regularly intervene at all stages of proceedings. In fact, had a recent case from Alaska, *U.S. v. Ketchikan Pulp Co.*,[32] been decided before the instant case, NRDC and EPA may have been hard-pressed to argue that appellants should not be allowed to intervene. Briefly, the Ketchikan case resulted from an alleged violation of a permit issued to Ketchikan Pulp Company under the Federal Water Pollution Control Act. The permit allowed KPC to discharge mill effluents into interstate waters, subject to certain conditions. The United States filed its complaint and simultaneously filed a proposed consent decree which had been negotiated with KPC and provided a compromise plan to bring KPC into compliance with the Act. Environmental groups were allowed to intervene in the enforcement action against the pulp company. Clearly then, the result of the instant case can serve as further useful precedent for environmental groups.

One caveat should be added: the NRDC court seems to defer to appellants' arguments that as separate industries they can aid the district court with their "experience and expertise" and that because they are such separate industries they have many particular, separate interests. This court may not, in the future, find such expertise or separate interests in an environmental group. Indeed, the court implies that parties such as the appellants may be more useful than environmental groups, through cooperation with the EPA, in the implementation of such agreements.

Aside from the judicial standard for intervention established or reiterated by the NRDC court, the practical effect of intervention in this case should be considered. As mentioned above, the district court entered an order on June 9, 1976, before the instant case was decided, which approved the settlement agreement.[33] Because this settlement agreement was intended as a resolution of the issues, and because appellants asked for intervention solely for the purpose of participating in future implementation, it seems that appellants should be bound by all terms of the settlement agreement as entered by the June 1976 consent decree. This is not completely clear however. The court of appeals stated on remand that the district court

32. 430 F. Supp. 83 (D. Alas. 1977).
33. Natural Resources Defense Council, Inc. v. Train, 8 ERC 2120 (D.C. D.C. 1976).

has the discretion to control the course of the proceedings before it and thus "*may* . . . bar appellants from seeking to reopen a question settled by the agreement . . ."[34] (Emphasis added). Apparently, appellants may be able to persuade the district court in the future to allow them to reopen settled questions of the agreement. This directly contradicts the guidelines established in *Hodgson.* However, it is doubtful that appellants could ever succeed in changing the basic structure of the agreement.

Even this question may have been superceded by another. In December of 1977, Congress passed the Clean Water Act of 1977,[35] which amended several sections of the Federal Water Pollution Control Act. The 1977 Act was widely supported in both houses of Congress,[36] and several of its provisions are felt to have been in direct response to the terms of the June 1976 settlement agreement. These provisions may conflict with the settlement agreement. For example, the agreement provides that the Administrator "shall develop and promulgate regulations . . . of effluent limitations and guidelines for classes and categories of point sources which shall require application of the best available technology economically achievable for such category or class."[37] Such regulations are to be promulgated no later than June 30, 1983. The 1977 amendments, however, change the date set forth in section 301(b)(2)(E) of the Act to July 1, 1984.[38] Possibly, the Administrator will not have to follow the date set forth in the agreement.

The agreement also provides in paragraph 7(b) a time schedule for proposing and finalizing regulations for each point source category in the agreement. June 30, 1979 is the latest date by which proposed regulations must be published in the Federal Register for any category; December 31, 1979 is the latest date by which final regulations should be promulgated.[39] These dates have also, arguably, been supplanted by amended section 307(a)(2) of the Act. This section states that "[T]he Administrator, in his discretion may publish . . . a proposed effluent standard . . . for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class if such standard imposes more

34. 561 F.2d 904, 911 n.36 (D.C. Cir. 1977).

35. Clean Water Act of 1977, 33 U.S.C.A. §§1251-1376 (1977 Supp.).

36. The amendments passed the House 346 to 2, and were approved on a voice vote in the Senate.

37. Natural Resources Defense Council, Inc. v. Train, 8 ERC 2120, 2123 (D.C. D.C. 1976).

38. Clean Water Act of 1977, 33 U.S.C.A. §1311(b)(2)(E) (1977 Supp.).

39. Natural Resources Defense Council, Inc. v. Train, 8 ERC 2120, 2125-26 (D.C.D.C. 1976).

stringent requirements."[40] The Administrator has until July 1, 1980 to promulgate any such standard.

A third possible area in which the settlement agreement may have been altered by the 1977 amendments is paragraph 8(a) of the agreement. This section lists the conditions under which the Administrator may exclude from regulation under the effluent limitations and guidelines a specific pollutant.[41] These conditions are quite strict and seem to limit the Administrator's discretion.[42] However, section 307(a)(i) of the Act as amended allows the Administrator from time to time to add or remove pollutants from the list. In doing so, the Administrator "shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms."[43] This amendment seems to give the Administrator more discretion than does the agreement and could possibly weaken the effect of the agreement's original list of pollutants.

The effect of any of these amendments on the settlement agreement is speculative. It seems likely, though that conflicts will arise. Currently, the agreement is being implemented and no party has tried to change its structure. However, in April of 1978, NRDC was informed that dozens, if not hundreds, of electric companies have asked to also intervene. They will presumably use the same arguments as appellants used in the instant case. Some companies will probably be allowed to intervene, since they are part of a separate industry with separate interests. Given this assumption, plus the discrepancies between the 1977 amendments and the settlement agreement, it is likely that further implementation will result in conflicts and more litigation.

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40. Clean Water Act of 1977, 33 U.S.C.A. §1317(a)(2) (1977 Supp.).

41. Natural Resources Defense Council, Inc. v. Train, 8 ERC 2120, 2126 (D.C.D.C. 1976).

42. For example, one reason for excluding a specific pollutant may be if equally or more stringent protection is already provided by other standards promulgated pursuant to other provisions of the Act.

43. Clean Water Act of 1977, 33 U.S.C.A. §1317(a)(1) (1977 Supp.).