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Judicial Review of a Revision to Nevada's SIP Is Deferred until Final Action by EPA Administrator

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JUDICIAL REVIEW OF A REVISION TO NEVADA'S SIP IS DEFERRED UNTIL FINAL ACTION BY EPA ADMINISTRATOR

CLEAN AIR ACT: The Ninth Circuit has remanded for dismissal a district court's declaratory judgment concerning a revision of Nevada's SIP and their mandatory injunction requiring the EPA Administrator to approve the revision, citing lack of jurisdiction and the need for judicial restraint until the Administrator has acted.

Kennecott Copper Corporation, as part of its continuing battle with the Environmental Protection Agency (EPA) over pollution controls at its smelter in McGill, Nevada, filed suit against the EPA Administrator in U.S. District Court for the District of Nevada.[1] Kennecott asked for (1) a declaratory judgment that Nevada's revision of its State Implementation Plan (SIP), as it affected the smelter, met the requirements of the Clean Air Amendments of 1970;[2] (2) a mandatory injunction or mandamus requiring the administrator to approve the revision, which was a requested variance from the SIP; and (3) an injunction prohibiting the administrator from enforcing the original SIP or from "taking any other action to impede the operation of the McGill smelter."[3] The district court granted all of Kennecott's requests, but the Ninth Circuit granted EPA's motion for a stay of the district court's order pending appeal.[4]

Prior to this action between EPA and Kennecott, the agency had generally approved the SIP proposed by Nevada but had promulgated its own sulphur dioxide emission limitations for Nevada under § 110 of the Clean Air Amendments.[5] For the McGill smelter, this limitation required construction of an acid plant to reduce sulphur dioxide emissions by 60 per cent and implementation of a research program aimed at finding means of reducing sulphur dioxide emissions by 86 per cent. Kennecott challenged the research requirement before the Ninth Circuit under § 307(b)(1) of the Clean Air Amendments of 1970[6] but the court upheld the regulation in *Kennecott I.*[7] The

1. 572 F.2d 1349, 1352 (9th Cir. 1978).
2. 42 U.S.C. § 7401 to § 7642.
3. 572 F.2d at 1352.
4. *Id.*
5. 42 U.S.C.A. § 7410 (1977).
6. 42 U.S.C.A. § 7607(b)(1) (1977).
7. Kennecott Copper Corp. v. Train, 526 F.2d 1149 (9th Cir. 1975), *cert. denied,* 425 U.S. 935 (1976).

court noted, however, that the EPA "could not compel Kennecott to install additional reduction systems at McGill unless it were economically feasible for Kennecott to do so." This was based on the assumption that both the company and EPA considered the acid plant sulphur dioxide reduction of 60 per cent to be feasible.[8]

After *Kennecott I,* the company said that *any* acid plant requirement was not economically feasible because of higher construction costs and lower copper prices. Kennecott closed the smelter in July, 1976 rather than risk EPA sanctions for noncompliance with their regulations. It then persuaded Nevada to revise its SIP so as to require only a 40 per cent reduction of sulphur dioxide emissions, which would be achieved through production curtailments rather than construction of an acid plant. The company also received recognition from Nevada's State Environmental Commission that the use of a tall stack was an acceptable method of achieving national ambient air quality standards. In addition, the company received a one-year variance that exempted Kennecott from meeting all requirements except those that would enable Nevada to achieve the national standards "by one means or another."[9]

Nevada approved the variance and SIP revisions on October 1, 1976, and they were submitted to the EPA on October 7.[10] Before the agency could act, Kennecott filed its declaratory judgment and injunction requests with the district court.[11]

In remanding the case for dismissal, the Ninth Circuit rejected all of the grounds for jurisdiction relied on by the lower court, including § 304(a)(2) of the Clean Air Amendments of 1970.[12] That provision allows any person to sue the EPA administrator "where there is alleged a failure of the administrator to perform any act or duty under the Act which is not discretionary" with the administrator. He has the mandatory duty of determining whether or not state variances and revisions meet the requirements of § 110(a)(3),[13] but the content of that decision is discretionary. The district court, therefore, did not have jurisdiction under § 304(a)(2).

The Ninth Circuit also rejected Kennecott's argument that § 304 gives final authority for passing on the economic feasibility of constant emission control systems to the state. The court pointed out that in *Train v. Natural Resources Defense Council,*[14] the Supreme Court said the EPA is required to approve a state plan only when it

8. 526 F.2d at 1151.
9. 572 F.2d at 1352.
10. *Id.*
11. *Id.*
12. 42 U.S.C.A. § 7604(a)(2) (1977).
13. 42 U.S.C.A. § 7410(a)(3)(A) (1977).
14. 421 U.S. 60 (1975).

"provides for the timely attainment and subsequent maintenance of ambient air standards, and . . . satisfies that section's other general requirements,"[15] which include meeting "air quality standards to the extent feasible by constant emission controls."[16] The question of feasibility, either economic or technological, is within the discretion of the administrator, who again is not bound by the state's determination.[17]

The court also rejected the Administrative Procedure Act[18] as an independent basis for jurisdiction in Kennecott's suit under *Califano v. Sanders,*[19] and said the Mandamus Act[20] could not support jurisdiction because it applies only when the action involved is mandatory or ministerial.[21]

Federal question jurisdiction might have provided a basis for the district court's having heard the case under 28 U.S.C. § 1331 and *Califano v. Sanders.* But the Ninth Circuit ruled that even if § 1331 would provide jurisdiction, the district court's preliminary injunction had to fall because (1) the lower court had relied on an incorrect legal principle in granting the injunction; and (2) judicial intervention in the case should not occur until the EPA acts on the revised SIP, especially in light of the 1977 amendments to the Clean Air Act.[22] The "incorrect legal principle" was the district court's belief that EPA was required to accept Nevada's finding that the emission controls were not economically feasible.[23]

Further, the 1977 amendments to the Act provide exclusive circuit court review of "any final action of the Administrator under this Act which is locally or regionally applicable."[24] This calls for judicial restraint and supports the decision not to treat the proceeding as an original petition for review under § 307 of the Clean Air Amendments of 1970.

"This enables us to stand aside," the Ninth Circuit ruled, "as we believe it proper to do, reasonably confident that in due course either the concern with the revision and variance will become moot or that final action with respect thereto by the Administrator will be subject to judicial review."[25]

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15. 421 U.S. at 79, quoted at 572 F.2d at 1354.
16. 526 F.2d at 1154.
17. 572 F.2d at 1354. *See also* Bunker Hill v. EPA, 572 F.2d 1286 (9th Cir. 1977), *aff'd and modified on rehearing,* 572 F.2d 1305 (9th Cir. 1977).
18. 5 U.S.C. § 701 to § 706 (1976).
19. 430 U.S. 99 (1977).
20. 28 U.S.C. § 1361 (1976).
21. 572 F.2d at 1356.
22. Act of Aug. 7, 1977, Pub. L. No. 95-95, § 305(c)(2) 91 Stat. 685, 776.
23. 572 F.2d at 1357.
24. Act of Aug. 7, 1977, Pub. L. No. 95-95, § 305(c)(2) 91 Stat. 685, 776.
25. 572 F.2d at 1357.