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Environmental Law - Federal Compliance with State Pollution Control Requirements - California v. Environmental Protection Agency

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ENVIRONMENTAL LAW—Federal Compliance with State Pollution Control Requirements—California v. Environmental Protection Agency, 511 F.2d 963 (9th Cir. 1975).*

One of the frustrating aspects of air (and other types) pollution is the presence of large Federal installations either operated directly by the Government or under its direction which contaminate the atmosphere on a large scale. How can we expect cooperation or credibility for the government effort when the installations controlled by Uncle Sam are some of the worst polluters?¹

Congress, through the Clean Air Act Amendments of 1970² and the 1972 Federal Water Pollution Control Act Amendments,³ has attempted to deal with the problem of pollution created by these installations.⁴

Acting under Section 402 of the Clean Water Act,⁵ California and Washington submitted their proposed permit systems for allowing persons to discharge in their respective states' waters to the Administrator of the Environmental Protection Agency. The Administrator approved the permit systems but exempted federal facilities from compliance with the procedural requirements of the states' permit systems.⁶ California and Washington appealed the Administrator's decision to exempt federal facilities. At issue was the proper interpretation of Section 313 of the Clean Water Act which provides:

Each department, agency, or instrumentality of the executive, legislative and judicial branches of the Federal Government . . . shall comply with . . . State . . . requirements respecting control and abate-

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1. 116 CONG. REC. 19207 (1970) (remarks of Representative Springer).
2. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified at 42 U.S.C. § 1857 (1970)).
3. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251 to 1376 (Supp. III, 1973)) (hereinafter referred to as "the 1972 Amendments" or "the Clean Water Act").
4. H.R. REP. NO. 91-1146, 91st Cong., 2nd Sess. (1970) (3 U.S. CODE CONG. & AD. NEWS 1970, 5356, 5359-60; S. REP. NO. 92-414, 92nd Cong., 2nd Sess. (1972) (2 U.S. CODE CONG. & AD. NEWS 1972, 3668, 3733-34)).
5. Pub. L. No. 92-500, § 402, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1342 (Supp. III, 1973)).
6. California v. Environmental Protection Agency, 511 F.2d 963 (9th Cir. 1975).

ment of pollution to the same extent that any person is subject to such requirements including the payment of reasonable service charges.⁷

California and Washington argued that Section 313 required federal facilities to comply with all aspects of the states' permit systems—substantive and procedural.⁸ The EPA argued that Section 313 could not require federal agencies to comply with the procedural aspects of the state permit programs.

The court accepted California's and Washington's argument and ordered the Administrator to reconsider the states' applications and to grant them the authority to issue permits for all discharges by federal facilities within their respective jurisdictions.⁹ The court held that under Section 313 of the Clean Water Act, federal facilities are required to comply with state procedural requirements with respect to control of water pollution.¹⁰

THE 1972 CLEAN WATER ACT

Since 1948 when the first Federal Water Pollution Control Act was passed, regulation of water pollution "has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution."¹¹ Congress first applied the above-mentioned policy of state responsibility to federal facilities in 1970.¹² In 1971, a federal district court in California ruled that Section 21(a) of the 1970 Amendments

7. Pub. L. No. 92-500, § 313, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1323 (Supp. III, 1973)). The balance of the section reads:

The President may exempt any effluent source of any department, agency or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so No such exemptions shall be granted due to lack of appropriation

8. California v. Environmental Protection Agency, *supra* note 6, at 964-75.

9. *Id.* at 965.

10. *Id.* at 964.

11. S. REP. NO. 92-414, 92nd Cong., 2nd Sess. (1972) (2 U.S. CODE CONG. & AD. NEWS 1972, 3668, 3669).

12. *Id.* at 3669-77. Section 21(a) of the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91, as amended 33 U.S.C. § 1323 (Supp. III, 1973), provides:

Each Federal agency . . . having jurisdiction over any real property or facility . . . shall . . . insure compliance with applicable water quality standards and the purposes of this Act in the administration of such facility, property or activity.

required federal agency compliance with the substantive provisions of state water pollution standards.¹³ The 1972 Amendments established the National Pollutant Discharge Elimination System (NPDES) and provided that all dischargers must have permits before being allowed to discharge wastes into navigable waters.¹⁴ Under this permit scheme, states could establish and enforce more restrictive effluent standards than the federal standards.¹⁵ The scheme also allowed states to impose conditions upon EPA's granting of permits and take over EPA's permit granting authority when the state had developed a permit system that could and would be enforced to federal or stricter standards as determined by the Administrator.¹⁶ Finally, in 1972 Congress replaced Section 21(a) of the 1970 Amendments with Section 313 which required federal facilities to comply with state effluent limitations "to the same extent that any person is subject to such requirements, including the payment of reasonable service charges."¹⁷

BASIS OF THE DECISION IN THE *California* CASE

The EPA argued the Plenary Powers Clause¹⁸ and Supremacy Clause¹⁹ of the United States Constitution prohibit

13. *California v. Davidson*, 3 E.R.C. 1157, 1158 (N.D. Cal. 1971).

14. 33 U.S.C. § 1342 (Supp. III, 1973).

15. 33 U.S.C. § 1356 (Supp. III, 1973).

16. 33 U.S.C. §§ 1341, 1342 (Supp. III, 1973). Thus even when the EPA is the permit or licensing authority under Section 402, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1342 (Supp. III, 1973)), applicants for permits must meet the state water quality standards. However, the Administrator has review authority under the system to assure that polluters meet state requirements for pollution control. See S. REP. NO. 92-414, 92nd Cong., 2nd Sess. (1972) (2 U.S. CODE CONG. & AD. NEWS 1972, 3668, 3736-37).

17. Pub. L. No. 92-500, § 313, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1323 (Supp. III, 1973)). The legislative history of this section indicates that Congress was concerned with the many "flagrant violations" of air and water pollution requirements by federal facilities and activities and notes that private industry could not be expected to abate pollution if the federal government did not. Thus the section requires federal facilities to meet all control requirements as if they were private citizens. S. REP. NO. 92-414, 92nd Cong., 2nd Sess. (1972) (2 U.S. CODE CONG. & AD. NEWS 1972, 3668, 3733-34).

18. U.S. CONST. art. I, § 8, cl. 17, reads:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding Ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress . . . become the seat of the Government of the United States, and to exercise, like authority over all places purchased by the consent of the legislature of the state in which the same shall be . . .

19. U.S. CONST. art. VI, cl. 2, reads:

application of Section 313 of the Clean Water Act to force federal agencies to comply with state procedural requirements with respect to the control of water pollution.²⁰ The court disagreed and held that subjecting federal agencies to state regulation is constitutional and required by the Clean Water Act. At the outset, the court noted that Congress has the power to waive its exclusive legislative jurisdiction over the activities of federal agencies and facilities so long as it does not undermine its own ultimate legislative control. Thus the significant issue was whether Congress waived exclusive jurisdiction over water pollution in a manner that was not unduly broad and whether the waiver was made in a clear and unequivocal manner.

Addressing the broadness issue, the EPA argued that under the Plenary Powers Clause, Congress is given a non-delegable power over federal facilities.²¹ The court disagreed, finding that the breadth of the Plenary Powers Clause gives Congress the right to subject federal agencies to substantive standards. For this reason, the court found that Congress could utilize state regulatory bodies to enforce such standards. On the issue of irrevocability, the court concluded that the 1972 Amendments neither limited congressional ability to amend the law and reassert federal control nor precluded the Administrator from withholding or withdrawing approval from state programs that did not meet the guidelines set out in the law.²² The court buttressed this position by recognizing that the President has the power to exempt federal agencies from compliance with state laws when he finds it essential to the national interest.

Second, the court determined whether Congress had clearly and unequivocally intended federal agencies to comply with state procedural requirements dealing with pollution control. Although certain parts of the legislative history of Section 313 refer only to substantive water quality standards,

This Constitution and the law of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

20. *California v. Environmental Protection Agency*, *supra* note 6, at 968-69.

21. *Id.* at 968.

22. *Id.* at 968-69.

the court decided that these references merely summarized the major provisions of Section 313 and did not speak to the congressional intent.²³ Looking at the overall scheme, the court held that the language in Section 313 "including reasonable service charges" meant charges incident to state permit programs.²⁴ In the court's opinion, state administrative practices supported this conclusion.

Further, the court found that federal agencies will not comply with state pollution requirements unless they are forced to seek state discharge permits. The scheme contemplated by Congress allows the states to impose conditions on the issuance of discharge permits.²⁵ The court concluded that such conditions can only be developed by an administrative proceeding in which the permit requirements can be tailored to the individual discharger.²⁶ Therefore, to insure federal agency participation in the administrative process the court held that federal agencies must seek state permits. This argument is inapplicable if Section 313 is interpreted to mean that federal agencies must comply with the hearing process but are to be licensed by the EPA. The court determined this interpretation of Section 313 was unlikely because:

1. This interpretation would establish a dual permit system which would be less efficient than a single permit system administered by the states.

2. Section 510 of the Act provides that states cannot be denied the right "to . . . enforce A) any . . . limitation respecting discharges of pollutants or B) any requirement re-

23. *Id.* at 969. See Comment, *Local Control of Pollution From Federal Facilities*, 11 SAN DIEGO L. REV. 972, 991 (1972).

24. *California v. Environmental Protection Agency*, *supra* note 6, at 969-70. EPA argued that the language referred to charges for local and state sewage treatment hookups. The court rejected this argument because normally federal agencies must pay for services obtained from state and local governments. Thus EPA's interpretation renders the language "including reasonable service charges" meaningless. Second, some federal agencies were at the time of this case paying filing fees for "requirements" under the California permit system. Thus the court felt that Congress might have been attempting to ensure that federal agencies "uniformly contribute their full share to the cost of processing their applications under state permit programs."

25. 33 U.S.C. § 1341(a) (Supp. III, 1973).

26. *California v. Environmental Protection Agency*, *supra* note 6, at 970-71.

specting control or abatement of pollution"²⁷ Thus, this section distinguishes between effluent limitations and requirements which, under the EPA theory, were interchangeable terms. Also, Section 510 implies states can set more rigid standards than the federal government which the court noted may not be met by federal agencies unless they are subject to state permit requirements.

ANALYSIS OF THE *California* DECISION

Two approaches have been used by different courts to determine whether federal agencies must comply with the procedural requirements of state permit programs under either the Clean Air Act Amendments of 1970 or the Federal Water Pollution Control Act Amendments of 1972. Generally, the court in *Kentucky v. Ruckelhaus* approached the problem by finding that the legislative history of Section 118 of the Clean Air Act referred only to substantive requirements and thus upheld the federal agency's argument that it was exempted from state regulation.²⁸ On the other hand the courts in the *Alabama v. Seeber* and *California v. Environmental Protection Agency* cases, while acknowledging that an isolated reading of the legislative history of Section 118 (Section 313 in the Clean Water Act) was possible, looked to the words of the section, the overall scheme of the act, and the congressional purpose, as the best guides to interpreting the section.²⁹

One logical reason for the difference in approaches to the problem is what the respective courts found to be the attitude of the federal government towards complying with the substantive standards of the state pollution control systems. The court in *Kentucky v. Ruckelhaus* found that federal facilities in Kentucky have cooperated with the state commission in compliance with air quality and emission standards.³⁰ On the other hand, the California Water Resources Board had great difficulty in obtaining federal

27. Pub. L. No. 92-500, § 510, 86 Stat. 816 (1970) (codified at 33 U.S.C. § 1356 (Supp. III, 1973)).

28. *Kentucky v. Ruckelhaus*, 497 F.2d 1172, 1176 (6th Cir. 1974).

29. *California v. Environmental Protection Agency*, *supra* note 6, at 969; *Alabama v. Seeber*, 502 F.2d 1238, 1247 (5th Cir. 1974).

30. *Kentucky v. Ruckelhaus*, *supra* note 28, at 1177.

agency compliance with effluent discharge standards.³¹ The courts in both the *California* and *Alabama* cases found the legislative history of the act to indicate that federal compliance with state pollution standards has been very slow.³² Thus, noting the good federal compliance with state air quality standards in Kentucky, the Sixth Circuit Court of Appeals did not feel as compelled to find the legislative history of Section 118 (Section 313 of the Clean Water Act) ambiguous as did the Fifth Circuit Court of Appeals in the *Alabama* case or the Ninth Circuit Court of Appeals in the *California* case.

The legislative history of both the Clean Air Act and the Clean Water Act is ambiguous. Some segments tend to show a congressional intent requiring federal agency compliance with substantive standards only, while other segments tend to show a congressional intent to require federal agencies to meet "all control requirements as if they were private citizens."³³

With reference to the Clean Water Act, the evidence is clear and unequivocal that federal agencies must comply with all state requirements regarding water pollution control and abatement. Under the Act, Section 313 mandates federal agency compliance with state requirements "to the same extent . . . as any person."³⁴ Sections 401 and 402 of the Act allow the state to impose conditions on the granting of a permit.³⁵ Such conditions can only be developed by an administrative proceeding in which the permit requirements for the individual discharger can be specified. The evidence is not quite so convincing with respect to the Clean Air Act. Similar to Section 313 of the Clean Water Act, Section 118 of the Clean Air Act mandates federal agency compliance with state requirements "to the same extent [as] any per-

31. *California v. Environmental Protection Agency*, *supra* note 6, at 966. See Robie, *State Viewpoint*, 7 NAT. RES. LAW. 231, 235 (1974).

32. *California v. Environmental Protection Agency*, *supra* note 6, at 969; *Alabama v. Seeber*, *supra* note 29, at 1244-45.

33. S. REP. NO. 92-414, 92nd Cong., 2nd Sess. (1972) (U.S. CODE CONG. & AD. NEWS 1972, 3668, 3733); *Alabama v. Seeber*, *supra* note 29, at 1244-45; *Kentucky v. Ruckelhaus*, *supra* note 28, at 1176.

34. Pub. L. No. 92-500, § 313, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1323 (Supp. III, 1973)).

35. Pub. L. No. 92-500, §§ 401, 402, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1341, 1342 (Supp. III, 1973)).

son."³⁶ The Clean Air Act does not establish a permit system, but the Act does provide that states may implement and enforce their own plans with regard to air pollution.³⁷ The State of Alabama has such a plan, the central mechanism of which is a permit system.³⁸

Further, Section 313 (Section 118 in the Clean Air Act) should not be interpreted to mean that federal agencies may merely provide state agencies with the information on the state permit application while being licensed by the EPA. For this interpretation to be correct, Congress would have intended that a dual permit issuing system be established—a state system for private sources and an EPA system for federal sources of pollution. Section 402 of the Clean Water Act does not refer to a dual permit issuing authority but instead authorizes a state to issue permits.³⁹ Section 110 of the Clean Air Act authorizes states to implement and enforce plans.⁴⁰ Neither Section 313 of the Clean Water Act nor Section 118 of the Clean Air Act bestows on the Administrator partial permit granting authority over federal agencies.⁴¹

EPA's argument also assumes that federal agencies will cooperate with state pollution control authority in the establishment of discharge standards. Congress was aware that prior to the Clean Air and Clean Water Acts this cooperation did not exist.⁴²

Third, since under the Clean Water Act states may impose conditions to the granting of permits, EPA's interpretation necessitates a congressional intention that EPA implement and enforce a different permit system in each state with reference to federal agencies. This interpretation is

36. Pub. L. No. 91-604, § 118, 84 Stat. 1676 (1970) (codified at 42 U.S.C. § 1857 (f) (1970)).

37. 42 U.S.C. §§ 1857(c) (2), (d) (1) (1970).

38. *Alabama v. Seeber*, *supra* note 29, at 1242.

39. Pub. L. No. 92-500, § 402(a) (3), 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1342(a) (3) (Supp. III, 1973)).

40. Pub. L. No. 91-604, § 110, 84 Stat. 1676 (1970) (codified at 42 U.S.C. §§ 1857(c) (2), (d) (1) (1970)).

41. Pub. L. No. 92-500, § 313, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1323 (Supp. III, 1973)); Pub. L. No. 91-604, § 118, 84 Stat. 1676 (1970) (codified at 42 U.S.C. § 1857(f) (1970)).

42. H. R. REP. NO. 91-1146, 91st Cong., 2nd Sess. (1970) (3 U.S. CODE CONG. & AD. NEWS 1970, 5356, 5359-60); S. REP. NO. 92-414, 92nd Cong., 2nd Sess. (1972) (2 U.S. CODE CONG. & AD. NEWS 1972, 3668, 3733-34).

contrary to the congressional aim of enforcing the act with a minimum of paperwork and intra-agency conflict.⁴³ This reasoning cannot be applied to the Clean Air Act because no reference to permit systems is made in the Act.

Fourth, both the Clean Air and Clean Water Acts contain a section granting the states authority to enforce any limitation relating to pollutant discharge or any requirement relating to pollution control and abatement.⁴⁴ Neither act expressly prohibits states from requiring federal agencies to apply for and obtain a state permit before discharging pollutants.

Thus a proper interpretation of Section 313 and Section 118 of the Clean Water and Clean Air Acts, respectively, appears to require federal facilities to seek state permits before discharging pollutants. Therefore the approach and the conclusion reached by the *Alabama* and *California* cases appears correct.

This conclusion is not "unduly burdensome" to federal agencies. The President can exempt federal agencies from compliance with the Acts if the burden placed on them is contrary to the paramount interests of the United States.⁴⁵ Further, with reference to the Clean Water Act, it would be more time consuming and thus more burdensome for a federal agency to deal first with a state pollution control agency and then with the EPA, than to deal only with a state pollution control agency.

APPLICATION OF THE *California* RESULT

It was shown above that the Clean Air Act and Clean Water Act ought to be uniformly interpreted to require federal agencies to comply with state permit systems concerning the control and abatement of pollution. This conclusion also holds true with regard to the Noise Control Act of 1972.⁴⁶ This Act contains a section forcing federal agencies to comply

43. 33 U.S.C. § 1251(f) (Supp. III, 1973).

44. 42 U.S.C. § 1857(d)(1) (1970); 33 U.S.C. § 1356 (Supp. III, 1973).

45. 33 U.S.C. § 1323 (Supp. III, 1973); 42 U.S.C. § 1857(f) (1970).

46. 42 U.S.C. § 4901 *et seq.* (Supp. III, 1973).

with state requirements to abate environmental noise.⁴⁷ This section is nearly identical to Sections 118 and 313 of the Clean Air Act and Clean Water Act, respectively. Further, the Noise Control Act permits states to regulate noise levels through licensing.⁴⁸ Thus the similarities in the terminology and scheme of the three pollution control acts require a uniform interpretation of the acts with respect to federal agencies.

This conclusion is reinforced by what the permit process does to help states enforce compliance with their discharge standards.⁴⁹ Permit applications provide vital information as to the type, volume and location of facility pollution discharge. If a facility lacks the capability to meet the state standards, it will be prevented from polluting. If a facility can meet its discharge standards, the permit-issuing agency has the information required to monitor the discharges. Thus, continuing compliance with discharge standards is assured. Finally, the information received in permit applications allows local or state authorities to ascertain the total volume of pollution theoretically being discharged within a state or portion thereof.

This result will increase federal agency cooperation with state permit issuing authorities. Permit issuing authorities have the power to move the permit issuing process forward quickly or slowly. A lack of cooperation by federal agencies can result in state permit-issuing authorities denying or revoking operating permits. If this occurs, the burden is then on the federal agency to seek administrative or judicial relief from such a determination by proving compliance.⁵⁰ Although it is doubtful whether federal activity can be inhibited until the case is reviewed, the resulting publicity is likely to have a coercive effect on federal agencies.

CONCLUSION

The Court of Appeals for the Ninth Circuit was correct when it decided in *California v. Environmental Protection*

47. 42 U.S.C. § 4903(b) (Supp. III, 1973).

48. 42 U.S.C. § 4905(e)(2) (Supp. III, 1973).

49. Comment, *Local Control of Pollution From Federal Facilities*, *supra* note 23, at 986.

50. 33 U.S.C. §§ 1341(a)(2), (a)(4) (Supp. III, 1973).

Agency that federal agencies must comply with all state permit requirements under Section 313 of the Federal Water Pollution Control Act. This decision will increase federal agency cooperation with state water pollution control authorities to control and abate the discharge of pollutants into the states' waters. It appears that the *California* decision can be generalized to force federal agencies to comply with permit programs enacted by states under the 1970 Clean Air Act and the 1972 Noise Control Act. Recently, the Supreme Court granted certiorari to hear the *Kentucky* and *California* cases.⁵¹ If the Supreme Court does not consistently construe the various pollution control acts in favor of federal compliance with state permit requirements, Congress should amend the Acts to ensure that result.

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51. *Kentucky v. Train*, 43 U.S.L.W. 3493 (Mar. 18, 1975); *Environmental Protection Agency v. California*, 43 U.S.L.W. 3674 (June 23, 1975).