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## Administrative Law - A Case against Retroactivity in Agency Permitting - City of Evanston v. Griffith

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## CASE NOTES

### ADMINISTRATIVE LAW—A Case Against Retroactivity in Agency Permitting. *City of Evanston v. Griffith*, 715 P.2d 1381 (Wyo. 1986).

On August 7, 1981, Amoco Production Company (Amoco) began construction of its Anschutz Ranch East oil and gas processing facility without first obtaining a permit<sup>1</sup> required by the Industrial Development Information and Siting Act (Act).<sup>2</sup> In April 1982, the Office of Industrial Siting Administration (Office)<sup>3</sup> informed Amoco that the project was in violation of the Act because it lacked an industrial siting permit.<sup>4</sup> The Office told Amoco to submit the entire facility to Industrial Siting Council (Council) permitting jurisdiction, or the Office would enforce the Act's penalties.<sup>5</sup> If Amoco complied, the Office said it would waive its mandatory penalty enforcement duty.<sup>6</sup> Amoco and the Office negotiated the jurisdictional issue for months without definitive result, and neither the Office nor the Council took steps to enforce injunctive or monetary penalties for violation of the Act.<sup>7</sup>

Finally, on July 13, 1983, Amoco applied for a siting permit.<sup>8</sup> On March 12, 1984, over two and one-half years after construction had begun, the

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1. Appendix to Appellee's Brief, Exhibit A at 1, 9, *City of Evanston v. Griffith*, 715 P.2d 1381 (Wyo. 1986) (No. 85-103). Wyoming's Department of Environmental Quality, Air Quality Division issued an Air Quality Permit for the facility on August 7, 1981.

2. WYO. STAT. § 35-12-106(a) (1977) provides that "No person shall commence to construct a facility, as defined in this act, in the state without first having obtained a permit issued with respect to such facility by the council."

3. *Id.* § 35-12-103. This section creates the Office, while its duty to enforce and administer the Act is established in *id.* § 35-12-105.

4. Letter from Richard C. Moore to David G. Wight, Amoco Prod. Co., Permit No. ISC-83-3 (Wyo. Indus. Siting Council March 12, 1984) (Document No. 4 dated April 14, 1982).

5. *Id.*; Letter from Richard C. Moore to David G. Wight, Amoco Prod. Co., Permit No. ISC-83-3 (Wyo. Indus. Siting Council March 12, 1984) (Document No. 7 dated June 11, 1982). In March 1981 the Wyoming Legislature amended the Act to give the Council permitting authority over gas processing plants, while retaining an existing exemption for gas producing facilities. 1981 Wyo. Sess. Laws ch. 127, § 1. Amoco maintained that the "Central Production Facility" was a production component of the plant and exempt from the Act's permitting requirements, while the Office evaluated it as part of the processing facility covered by the Act. Initial uncertainty over the project's cost and hence the Act's applicability led the Office propose to Amoco that, if Amoco would allow the Council to exercise permitting authority over the entire project, the Council would waive the statutory penalties.

6. WYO. STAT. § 35-12-119 (1977) provides that:

[w]henver the office determines that a person is violating any of the provisions of this section [by commencing to construct a facility covered by the Act without first obtaining a permit,] it shall refer the matter to the attorney general who may bring a civil action on behalf of the state . . . for injunctive or other appropriate relief against the violation and to enforce the act. . . .

7. In October 1982, Amoco and the Office signed an agreement in which the Office agreed not to challenge Amoco for violation of the Act and Amoco agreed not to object to any reasonable permit conditions on grounds that the Council lacked jurisdiction. Agreement, Amoco Prod. Co., Permit No. ISC-83-3 (Wyo. Indus. Siting Council Mar. 12, 1984) (Document No. 49 dated Oct. 14, 1982).

8. Appendix to Appellee's Brief, Exhibit A at 4, *City of Evanston v. Griffith*, 715 P.2d 1381 (Wyo. 1986) (No. 85-103).

Council granted Amoco a permit,<sup>9</sup> but made the permit's effective date retroactive to August 7, 1981.<sup>10</sup> The retroactive dating was the heart of the dispute in *City of Evanston v. Griffith*.<sup>11</sup>

Under Wyoming's sales and use tax statutes, extraordinary revenues are collected during boom times. The funds are then returned, in the form of impact assistance payments, to the counties and municipalities from which they were drawn.<sup>12</sup> These entities are entitled to such payments from the date construction commences on an industrial facility "under a permit" issued by the Council pursuant to section 35-12-106 of the Wyoming Statutes. After the Council issued its back-dated permit to Amoco, Evanston<sup>13</sup> applied to the Wyoming State Treasurer for impact assistance payments. The city asked for payments dating from August 7, 1981.<sup>14</sup> The Treasurer denied the request, interpreting the statutory language to restrict the city's entitlement to the period after a siting permit is actually issued. He only provided Evanston with impact assistance funds dating from March 12, 1984.<sup>15</sup>

Evanston petitioned in district court for review and a writ of mandamus, and sued for declaratory judgment to compel payment of the 3.2 million dollars the city would lose under the Treasurer's interpretation.<sup>16</sup> The district court certified the case directly to the Wyoming Supreme Court.<sup>17</sup> In a three to two decision, the court held that the Council may retroactively date a siting permit for the purpose of establishing when impact assistance payments are due under sections 39-6-411(c) and 39-6-512(d) of the Wyoming Statutes.<sup>18</sup>

This casenote examines the propriety of retrospective action. The examination starts with the analytical standards that federal courts have developed to aid in determining if an agency has exceeded its discretion by applying a decision retroactively. The casenote identifies the principles on which the Wyoming Supreme Court has relied in analyzing similar retroactivity issues, and examines the propriety of the *Evanston* decision.

9. *Id.*

10. *Id.*; see also *id.* Exhibit B at 3.

11. 715 P.2d 1381 (Wyo. 1986).

12. WYO. STAT. §§ 39-6-411(c), -511(d) (1977 & Cum. Supp. 1986). These sections provide: If any person commences after the effective date of this act to construct an industrial facility, as that term is defined in W.S. 35-12-102(a), under a permit issued pursuant to W.S. 35-12-106, . . . the state treasurer shall thereafter pay to the county treasurer . . . impact assistance payments from the monies available under

WYO. STAT. § 39-6-411(b)(i) (if proceeding under § 39-6-411(c)) or WYO. STAT. § 39-6-512(b)(i) (if proceeding under § 39-6-512(d)).

13. The city of Evanston, Uinta County, and the towns of Lyman and Mountain View were plaintiffs, then appellants in *Evanston*. Appellants' Brief, at 1, *City of Evanston v. Griffith*, 715 P.2d 1381 (Wyo. 1986) (No. 85-103). References to *Evanston* in this casenote refer to these entities as well.

14. Appendix to Appellee's Brief at 5.

15. *Id.*

16. *Evanston*, 715 P.2d at 1383.

17. *Id.*

18. *Id.* at 1382, 1385, 1387.

## BACKGROUND

Retroactive administrative decisions fall into one of two categories. Cases of "first impression" are those that clarify or add to ambiguous law.<sup>19</sup> "Second impression" cases substitute new law for old.<sup>20</sup> Retroactive decisions that clarify uncertain law are generally accepted as "natural, normal, and necessary" and hence are more likely to be sustained in court.<sup>21</sup> However, agency action retroactively replacing an old law with a new one raises questions of fairness to those who relied on the old law.<sup>22</sup>

Four federal decisions have charted the course of contemporary thinking on the subject. In *SEC v. Chenery Corp.*<sup>23</sup> the SEC confronted the problem of management securities trading during a corporate reorganization, an activity not clearly covered by any agency rule. In an adjudication order, the SEC established a new rule restricting management's role in reorganization decisions when questionable trading circumstances were found. In the same order, the SEC applied the rule retroactively to Chenery's activities.<sup>24</sup>

The U.S. Supreme Court upheld the SEC's retroactive decision. Noting that every case of first impression has a retroactive effect, the Court developed the basic test for evaluating retroactivity in the federal courts.<sup>25</sup> The *Chenery* test first requires assessing the ill effects of retroactively applying a new rule or law.<sup>26</sup> A court must then analyze the extent to which a current rule's application would produce a result conflicting with "a statutory design" or the equities in the case.<sup>27</sup> If retroactivity's ill effects are less than the injurious effects of applying the current standard, retroactivity is allowed.<sup>28</sup>

*Chenery* is recognized as the source of authority concerning limitations on an agency's power to establish new policies through retroactive decisionmaking.<sup>29</sup> Although *Chenery* itself was a first impression case, its balance test has also been applied to second impression cases.<sup>30</sup>

The second important federal retroactivity case applied *Chenery* in a case of second impression. In *Retail, Wholesale and Department Store Union v. NLRB*,<sup>31</sup> the court of appeals added an optional set of five specific considerations to the *Chenery* balance test.<sup>32</sup> Using this more detailed in-

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19. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20:7, at 23 (2d ed. 1983).

20. *Id.*

21. *Id.*

22. *Id.*

23. 332 U.S. 194 (1947).

24. *Id.* at 197-99.

25. *Id.* at 203.

26. *Id.*

27. *Id.*

28. *Id.*

29. 2 K. DAVIS, *supra* note 19, § 7:25, at 119.

30. *Id.*

31. 466 F.2d 380 (D.C. Cir. 1972).

32. *Id.* at 390. The five considerations are:

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely

quiry, the court struck down a retroactively-applied NLRB order. The court determined that the hardship the order worked on a company relying on an earlier NLRB rule was "altogether out of proportion" to the public ends to be accomplished under the new rule.<sup>33</sup>

The Wyoming federal district court strictly applied the *Retail* principles as derived from *Chenery*, in a ruling which the Tenth Circuit affirmed.<sup>34</sup> *Stewart Capital Corp. v. Andrus*<sup>35</sup> involved a retroactive decision by the Interior Board of Land Appeals (IBLA) that changed the application standards for oil and gas leases.<sup>36</sup> The Tenth Circuit affirmed the lower court's invalidation of the IBLA's retroactive decision. The court also praised Judge Kerr for employing "a highly rational balancing test for determining whether an administrative decision . . . ought to be applied retroactively or prospectively."<sup>37</sup> As *Stewart* indicates, *Retail* expanded the coverage of *Chenery* beyond cases of first impression clarifications, into the realm of second impression retroactive overrulings.

In *Linkletter v. Walker*,<sup>38</sup> the third key federal case, the Court limited the retroactive effect of a decision to overrule past law. The case involved the application of a judicial decision, however, agencies look to the courts for guidance in determining the propriety of overruling laws retroactively.<sup>39</sup>

In its analysis of the extent to which a new rule of evidence should be given retroactive effect, the *Linkletter* Court focused on three factors: the purpose of the new rule, the extent of reliance on the old rule, and the effect that a retroactive application of the new rule would have on the administration of justice.<sup>40</sup> The Court found widespread reliance on the old rule and anticipated a tremendous burden on the court system if the new rule was retroactively applied to every case decided under the old standard. Consequently the Court limited the retroactive application of the new rule to only those cases still awaiting resolution by the courts.<sup>41</sup>

Finally, in the fourth central case, *Chevron Oil Company v. Huson*,<sup>42</sup> the U.S. Supreme Court applied the *Linkletter* three-prong test to help determine if an overruling decision should be retroactively applied.

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attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

*Id.*

33. *Id.* at 393 (quoting *NLRB v. Guy F. Atkinson*, 195 F.2d 141, 149 (9th Cir. 1952)).

34. *Stewart Capital Corp. v. Andrus*, 701 F.2d 846, 848, 850 (10th Cir. 1983).

35. 701 F.2d 846 (10th Cir. 1983).

36. *Id.* at 846, 847.

37. *Id.* at 848.

38. 381 U.S. 618 (1965).

39. 4 K. DAVIS, *supra* note 19, § 20:7, at 23.

40. *Linkletter*, 381 U.S. at 636.

41. *Id.* at 637-40.

42. 404 U.S. 97 (1971).

*Chevron* involved a tort claim brought under a federal statute which was unclear regarding the applicable statute of limitations.<sup>43</sup>

The Court examined the propriety of retroactively applying a recent decision requiring the application of a state statute of limitations rather than laches under Admiralty law.<sup>44</sup> The Court looked to see if the new rule could be classified as either a case of first or second impression, and decided it fit into both categories. Then the Court examined the new law's purpose according to *Linkletter* principles and determined that purpose would be thwarted by retrospective application. Finally the Court decided that retroactivity would produce "substantial inequitable results" by denying the claimant his day in court. On the basis of these three determinations, the Court denied retroactive application of the new rule, limiting it to only prospective application.<sup>45</sup>

The Wyoming Supreme Court has applied both *Linkletter* and *Chevron* to determine whether a change in law should operate retroactively. In *Adkins v. Sky Blue, Inc.*,<sup>46</sup> the court analyzed reliance, purpose, and the "substantial inequities" factors to block the retrospective overruling of an earlier law.<sup>47</sup>

The issue in *Adkins* was a bar owner's liability to third parties injured by an intoxicated bar patron. Prior to 1983, third parties could not hold the bar owner liable.<sup>48</sup> The court's 1983 *McClellan v. Tottenhoff*<sup>49</sup> decision authorized such claims. In *Adkins* the court had to determine if the new law applied retroactively to claims arising before *McClellan* was announced.<sup>50</sup>

The court focused its analysis on three factors: reliance on the old standard, and the purpose of the new law and the case's equities.<sup>51</sup> According to the court, because bar owners justifiably relied on the old law shielding them from third party claims, they did not carry the expensive insurance such exposure would warrant.<sup>52</sup> The court then examined the three-fold purpose of the new law, and stated that retroactive application of *McClellan* would neither serve nor affect those purposes.<sup>53</sup> For these reasons<sup>54</sup> the court determined that the retroactive application of *McClellan* would be "manifestly unfair."<sup>55</sup>

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43. *Id.* at 100-02.

44. *Id.* at 105-09.

45. *Id.* at 107, 108.

46. 701 P.2d 549 (Wyo. 1985).

47. *Id.* at 552-54.

48. *Id.* at 550-51.

49. 666 P.2d 408 (Wyo. 1983).

50. *Adkins*, 701 P.2d at 551.

51. *Id.* at 552-53.

52. *Id.* at 553.

53. *Id.*

54. *Id.* at 553-54. The *McClellan* court also specifically used the word "henceforth," providing another reason for prospective operation only.

55. *Id.* at 553.

## THE PRINCIPAL CASE

In *Evanston* the Wyoming Supreme Court confronted a claim by Evanston to state impact assistance funds based on a retroactive Council permit. To determine if retroactivity was justified, the court examined both the Siting Act and the tax payment statutes.

The court analyzed the case as one of statutory construction, concluding that the critical language in the tax rebate statute was "ambiguous" since the State Treasurer and Evanston disagreed over its meaning.<sup>56</sup> To resolve the ambiguity, the court examined legislative intent and the language of the tax and siting statutes. The court stated that the Siting Act's purpose was to protect Wyoming's environment and the social and economic fabric of its communities from the impacts of massive, unregulated industrial development.<sup>57</sup> To accomplish this end, according to the court, the Act may be used to "force developers to mitigate impacts through the construction of physical facilities such as housing, schools, or sewers," or to finance other needed mitigation measures.<sup>58</sup> The only limit on the Council's power to determine when construction under a permit commences "is the requirement that local governments be given a chance to alleviate impacts."<sup>59</sup>

The court viewed the sales and use tax statutes as advancing "the same purposes as the mitigation mechanisms in the Siting Act."<sup>60</sup> In concert, both the siting and tax statutes operate to financially assist impacted communities.<sup>61</sup> The court then determined the only way to serve this purpose was to rule the retroactive permit valid.<sup>62</sup> The majority examined the equities involved and declined to punish the community.<sup>63</sup> It determined Evanston had no control over the Council's belated actions or the Office's waiver of statutory violations.<sup>64</sup>

The majority dismissed the potential for abuse under a retroactive permitting scheme by developers who would build without a permit. The court noted that a developer's prudent business sense and the Council's authority to deny a permit provided incentive for compliance with the Act. Further, the court noted that the Act also provides for the enforcement of sanctions against developers who fail to obtain permits before they begin construction. Though the court found the Act's procedure for enforcing fines unclear, it stated that "[v]iolations ripe for injunctive relief should be identified by the office and referred to the attorney general."<sup>65</sup>

The court indicated that instead of overlooking the statutory violations, the Office could have sought an injunction to halt the plant's opera-

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56. *City of Evanston v. Griffith*, 715 P.2d 1381, 1383-84 (Wyo. 1986).

57. *Id.* at 1384.

58. *Id.*

59. *Id.* at 1386 n.8.

60. *Id.* at 1384-85.

61. *Id.*

62. *Id.* at 1385.

63. *Id.* at 1386.

64. *Id.*

65. *Id.*

tion, or could have fined Amoco up to ten thousand dollars per day for building without a permit.<sup>66</sup> Moreover the court reasserted the importance of Evanston's immediate financial requirements.<sup>67</sup>

In his dissenting opinion, Justice Thomas asserted that the clear language and intent of the Act does not give the Council authority to issue permits retroactively. He determined that the Act requires developers to submit project proposals to the Council for a permitting evaluation before, not after, construction actually commences.<sup>68</sup> For example, the Council's ability to change a facility's location contemplates permit issuance first, then construction.<sup>69</sup>

Thomas maintained that the Act's penalty provisions are designed to enforce pre-construction permitting. They impose on the Office a mandatory duty to refer any violations of the Act—such as construction without a permit—to the state attorney general's office for further action.<sup>70</sup> He noted that the Office failed to perform its statutory duty. The majority decision, he wrote, allows the Office and Council to waive statutory penalties for violations of the Act.<sup>71</sup> Justice Thomas concluded that the court, by encouraging retrospective Council action, encourages project developers to build without complying with the Act, and to "wait and see what happens."<sup>72</sup>

Neither the majority nor dissenting opinion specifically relied on *Chenery*, *Retail*, *Linkletter*, or *Chevron*, to guide its analysis of the retroactivity issue in *Evanston*. The court did however examine and weigh three factors common to these guiding federal cases. Both the majority and dissenting opinions centered their analyses on, first, the purpose of the siting and tax statutes; second, the equity to Evanston of allowing the permit to operate retroactively; and third, the ultimate effect investing retrospective permitting power in the Council would have on the future administration of the Act.<sup>73</sup>

#### ANALYSIS

At first glance *Evanston* does not fit neatly into the retroactivity line of cases. In 1984 the Council decided that, contrary to the Act's language, a developer need not obtain a siting permit before actual project construction. By back-dating Amoco's permit, the Council certified that Amoco's project had "complied" with the Act three years before the permit ever issued. The Council's retroactive finding of compliance, however, is similar to the retroactive finding that management trading during a corporate

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66. *Id.*

67. *Id.*

68. *Id.* at 1387-88.

69. *Id.* at 1388.

70. *Id.*

71. *Id.*

72. *Id.* at 1389.

73. *Id.* at 1384-89.



reorganization violates federal law.<sup>74</sup> Both retroactively apply new agency standards and should be subject to the same test.

The *Evanston* court endorsed the Council's decision by narrowly interpreting the Act's purpose. Initially the court identified the broad purpose of the Siting Act: to protect Wyoming's environment and communities from the impacts of large industrial development. The court even mentioned the Act's usefulness as a means of forcing developers to finance a community's impact mitigation needs.<sup>75</sup> Issuing a permit to a project like Amoco, long after construction has begun, serves to release state impact assistance funds to compensate for impacts that have already occurred. A retroactive permit, however, provides no opportunity to secure developer financing of impact mitigation measures before or during initial construction, when a community's needs are often great.<sup>76</sup>

Under the Act, the Council's only means of forcing such front-end financing is to withhold the permit, preventing a developer from starting to build until the proposal is thoroughly analyzed. After the project's impacts are anticipated, a developer's mitigation obligations can be settled by agreement prior to the issuance of a permit or established as conditions in the permit itself.<sup>77</sup> Contrary to the purpose cited by the court, post-construction permitting allows industrial development to proceed unregulated, and only provides communities post-impact compensation. The Act's power to finance pre- and mid-construction impact mitigation for future communities should not be jeopardized by post-construction permitting to reimburse one city.

The majority invoked the rules of statutory construction to determine legislative intent without first looking to the four corners of the statute for further elucidation.<sup>78</sup> All portions of an act must be read with reference to each other; every word, clause and sentence must be given effect.<sup>79</sup> The Act's language indicates that its purpose is broader than merely providing communities money to reduce the stress of facility development. The Act also requires a developer to provide information to help anticipate and evaluate impacts. This information is of value to surrounding communities only if available before construction actually begins.

In a permit application, a developer must provide among other things "evaluations of, or plans and proposals for alleviating" fourteen specific categories of project-related social and economic effects.<sup>80</sup> The Act also

74. *SEC v. Chenery Corp.*, 332 U.S. 194, 197-99 (1947).

75. *Id.* at 1384.

76. C. Wohlers, *Industrial Facility Siting in Wyoming: The Hampshire Energy Syn-fuel Project 35-40* (1984) (unpublished master's thesis, available at Office of Industrial Siting Administration).

77. *Id.* at 5. 104-06, 116, 135.

78. *Evanston*, 715 P.2d at 1384.

79. *Adobe Oil and Gas Corp. v. Getter Trucking, Inc.*, 676 P.2d 560, 563 (Wyo. 1984).

80. WYO. STAT. § 35-12-108(a)(xii) (1977 & Cum. Supp. 1986). The categories include: (1) scenic resources; (2) recreational resources; (3) archeological and historical resources; (4) land use patterns; (5) economic base; (6) housing; (7) transportation; (8) anticipated growth of satellite industries; (9) sewer and water facilities; (10) solid waste facilities; (11) police and fire facilities; (12) educational facilities; (13) health and hospital facilities; (14) water supply.

requires an applicant to describe how it proposes to prevent facility emissions or discharges from adversely affecting eight specific elements of the human and natural environment.<sup>81</sup>

Only after considering these and other factors may the Council then issue a permit.<sup>82</sup> A permit should be denied if the social, economic, and environmental effects of the facility "will substantially impair the health, safety and welfare" of present and future residents in the affected area.<sup>83</sup> Once a facility is built the Council cannot retroactively erase injuries that may have occurred. Certain costs are nonreimbursable, such as crimes that occur due to inadequate police protection, or lung ailments caused by inadequate emissions controls. Also, if a permit is issued retroactively, the Council cannot change the facility's location as the Act allows.<sup>84</sup> The informational requirements of the permitting process point to the purpose of allowing local governments, project developers, and the Office and Council to evaluate anticipated impacts.<sup>85</sup> Once the necessary information is obtained, steps may be taken to mitigate impacts *before* they occur. To give this purpose effect, the permitting process must occur prior to actual construction.

Read in harmony with the rest of the statute, the Act's penalty provisions are designed to enforce pre-construction permitting. Even the court noted that the Act provides for the enforcement of sanctions against "developers who fail to obtain permits before they begin construction."<sup>86</sup> The Act states that no person shall commence to construct a facility without first obtaining a siting permit.<sup>87</sup> To enforce this, the Act provides that "whenever the office determines that a person is violating [this or other prohibitions,] it shall refer the matter to the attorney general."<sup>88</sup>

In April 1982, the Office notified Amoco that facilities then under construction "require[d] that a permit application be filed."<sup>89</sup> If Amoco failed to comply, the Office indicated that it had "no other alternative but to refer the matter to the Attorney General for appropriate enforcement action under the Act."<sup>90</sup> The Office knew that Amoco was violating the Act's prohibition against construction without a permit, but did not take the mandatory step of referring the matter to the attorney general.

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81. *Id.* § 35-12-108(a)(xi). A permit application shall contain, among other things, "[T]he procedures proposed to avoid constituting a public nuisance, endangering the public health and safety, human or animal life, property, wildlife or plant life, or recreational facilities which may be adversely affected by the estimated emissions or discharges[.]"

82. *Id.* §§ 35-12-114(b)(iii), -(a)(iv).

83. *Id.*

84. *Id.* § 35-12-114(c).

85. Local governments that will be affected by the proposed facility qualify automatically as parties to the permit proceeding and receive a copy of the permit application. *Id.* § 35-12-112(a)(ii).

86. *City of Evanston v. Griffith*, 715 P.2d 1381, 1386 n. 7 (Wyo. 1986).

87. WYO. STAT. § 35-12-119(a)(i) (1977).

88. *Id.* § 35-12-119(d).

89. Letter from Richard C. Moore to David G. Wight, *supra* note 4.

90. *Id.*

Through its discussion and decision, however, the court indicated that the Office has the discretion to “overlook” violations of the Act. The court concluded from the statute that “violations . . . *should be identified* by the Office and referred to the attorney general.”<sup>91</sup> It translated the statutory language, “whenever the office determines,” as giving the Office authority to see, but fail to “identify” violations.<sup>92</sup> Despite the court’s argument, the provision’s mandatory referral language and the statute’s larger scheme point to less ambiguity or Office discretion. The Office and Council could use such discretion to arbitrarily enforce or refrain altogether from enforcing the Act. Such arbitrary power would render meaningless the statutory prohibitions against either building a project without first obtaining a permit or operating in violation of permit requirements.

Yet the court indicated that the penalties under this scheme will ensure enforcement of the Act’s permitting requirement. “No developer would knowingly risk large sums of money on a project if that project might be enjoined from operation or saddled with a fine of \$10,000 per day.”<sup>93</sup> However, the facts in *Evanston* itself demonstrate the weakness of this contention.

Amoco did not apply for a permit until two years after construction had actually commenced. In this case the statutory penalties failed to secure swift compliance with the Act.<sup>94</sup> Further, Amoco was not discouraged from openly proposing further project construction in 1983 “even if a permit had not been issued at that time.”<sup>95</sup> In this particular case, the Office and Council contributed to the delay by waiving their mandatory obligation to pursue sanctions. Also, this was not the first time a developer had proceeded with construction without a permit, despite the threat of penalties. In 1978 the Black Butte Coal Company commenced construction of a coal mine without first getting a siting permit, and paid 100,000 dollars for its violation.<sup>96</sup>

The statutory penalties are meaningless if the Council exercises retroactive permitting power. Even if the penalties are enforced, the Act’s purpose is not merely to collect fines for the state’s general fund<sup>97</sup> or to enjoin project construction. Rather, the Act’s purpose is to ensure proper mitigation of development impacts. Once a project is commenced the political and economic ramifications of closing down or heavily fining a

91. *City of Evanston v. Griffith*, 715 P.2d 1381, 1386 n.7 (Wyo. 1986) (emphasis added).

92. *Id.* at 1386.

93. *Id.*

94. At \$10,000 per day for every day the Act is violated, Amoco could have been fined over \$9,400,000 for the period from August 7, 1981, when construction commenced, to March 12, 1984, when the Council permit authorizing construction of the plant was actually issued. WYO. STAT. § 35-12-119(b) (1977).

95. Minutes of Industrial Siting Council meeting, p. 1 (Oct. 20, 1982).

96. The Black Butte Coal Company’s unpermitted coal mine qualified as a “facility” under the Act and hence was subject to the Council’s permitting jurisdiction. The Office sought to enforce fines for violation of the Act, and the attorney general settled with the company for \$100,000, with the possibility of \$200,000 more. Consent Decree at 5, *State of Wyoming v. Black Butte Coal Co.*, No. 97-20 (1st Judicial Dist. Jan. 6, 1982).

97. WYO. STAT. § 35-12-119(e)(1977).

large project discourage such penalties, particularly in light of the Council's responsibility to prevent serious injury to the economy of the affected area.<sup>98</sup> Thus, by building without a permit, a developer can coerce the Council into issuing a back-dated permit. As *Evanston* shows, the Council would rather trigger funds to an affected community than pursue fines against a developer.

The court in *Evanston* gave effect to only part of the Act's purpose—that of providing a post-impact reimbursement from the state—by allowing the Council to issue a permit retroactively and by condoning the Office's waiver of its mandatory enforcement duty. At the same time its decision laid the groundwork for the future frustration of the Act's larger purpose of helping communities plan and finance impact alleviation measures in advance of project development.<sup>99</sup>

The court was thus able to avoid the "purpose" question by narrowly construing the Act's purpose. After disposing of that issue, the court then proceeded to analyze the equities. It concluded that *Evanston* was not at fault for the permitting delay, and that denying the city's request for impact assistance money would constitute an unjust penalty visited on an innocent victim.<sup>100</sup> Bolstered by its constricted view of the Act's purpose, the court concluded that the equities ran in favor of *Evanston*. The balance, however, is not simply between an innocuous, new application of the Act and *Evanston*'s right to impact assistance money.<sup>101</sup> Under a broader interpretation of the Act's purpose, the equities require weighing *Evanston*'s short-term gain against the Act's emasculation. This balance should favor the Act.

Though such a decision would penalize *Evanston*, the effective enforcement of the Act's pre-construction permit requirement would ultimately prove of greater benefit to other communities. If dissatisfied with this result, the Wyoming Legislature could expand the Council's permitting authority to specifically include retroactivity and could empower to the Office to waive statutory penalties. The legislature created the Council and Office; it should be the legislature's decision whether to redefine their responsibilities.

The *Evanston* court, in effect, followed the *Chevron* analysis, by examining the Act's purpose, the equities of the case, and the effect of retroactivity on the law's operation. However, the *Chevron* analysis includes other equally important factors that must be considered, such as a party's reliance on the old rule of law.<sup>102</sup> In *Evanston* the parties did not rely on the Act. Indeed *Amoco* proceeded as if the Act would not be properly enforced, an activity to which *Evanston* acquiesced.

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98. *Id.* § 35-12-114(b)(iii).

99. *City of Evanston v. Griffith*, 715 P.2d 1381, 1388-89 (Wyo. 1986) (Thomas, C. J., dissenting).

100. *Id.* at 1386.

101. *Id.* at 1384.

102. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971).

This leads to the equally important *Chevron* consideration of “prior history”, which *Retail* stated as: “Whether the new rule represent[s] an abrupt departure from well established practice or merely attempt[s] to fill a void in an unsettled area of law?”<sup>103</sup> An examination of past Council practice indicates that, except for the Anschutz Ranch East facility, developers have invariably been required to obtain a siting permit prior to actual construction.<sup>104</sup> Had the court more explicitly applied the federal analysis, the overall disadvantage of retroactivity, that is, the Act’s emasculation, would have been more obvious.

#### CONCLUSION

Though not relying per se on the established case law on retroactivity, the Wyoming Supreme Court’s analysis of the issue in *Evanston* focused on three central elements of the established analytical approach. A more explicit application of the *Retail* and *Chevron* guidelines could have brought into sharp focus the adverse consequences of retroactivity in *Evanston*.

The court’s decision in *Evanston* undermines the Act’s function as a reliable mechanism for alleviating the impacts of large-scale industrial development projects. By issuing a retroactive permit, the Council can provide communities merely post-construction impact assistance, ignoring critical pre-impact informational and financial needs. If penalties for violating the Act can be waived, developers are encouraged to build first and wait and see what happens. As a result of expanded permitting and enforcement discretion, the Council and Office can now arbitrarily determine what protection, if any, the Act provides to Wyoming’s communities and environment.

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103. *Retail, Wholesale and Dep’t Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

104. Telephone interview with Richard C. Moore, Director, Office of Industrial Siting Administration (Sept. 16, 1986). Prior to the Amoco Anschutz Ranch East permit, the Council had issued a total of 17 permits. All were issued before construction actually commenced. The Black Butte Coal Co. Commenced construction without a permit and was heavily fined for violating the Act, but never received a permit. See *supra* note 96.