U.S. District Court Decision in Northwest Environmental Advocates, et alv. Environmental Protection Agency: EPA *Must* Regulate Ballast Water Discharges

Date: April 11, 2005

I - The District Court Case

Congress enacted the Clean Water Act (CWA) in 1971. The Act required that the Environmental Protection Agency regulate the discharge of industrial and municipal wastes into the navigable waters of the United States, from "any point source". This regulation was to be accomplished by issuing National Pollution Discharge Elimination System (NPDES) Permits that would impose treatment requirements on such discharges. Since the CWA's enactment, the Environmental Protection Agency (EPA) has asserted that it need not regulate ballast water discharges, as point source discharges, under the provisions of the Clean Water Act, 33 U.S.C. § 1251(a). EPA has consistently taken the position that it had the absolute discretion to regulate, or to exempt from regulation, such discharges from the CWA's permitting requirements.

In 1999, a coalition of environmental groups filed a rule making petition with EPA requesting that the exempting regulations, found at 40 C.F.R. §122.3(a), be revoked. EPA refused to consider the petition. As a result, in 1999, a lawsuit was filed in U.S. District Court, in San Francisco, seeking an order requiring EPA to consider the petition. After the Court ordered that EPA do so EPA, for unknown reasons, decided not to file an appeal with the 9th Circuit.

After consideration of the environmental groups' petition, EPA rejected it. As a result, a Coalition of five environmental groups challenged EPA's refusal to revoke its regulatory exemption of the shipping industry. The Coalition asserted that this refusal was inconsistent with EPA's statutory authority under the Clean Water Act and that it was also, "arbitrary, capricious and an abuse of discretion", to fail to do so, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

The U.S. District Court granted the Plaintiff's Motion for Summary Judgement and ruled against the EPA on all procedural and substantive issues raised in the case, in a decision handed down on March 30, 2005. The ruling compels EPA to regulate all ballast water discharges, whether they are in ocean ports or on the Great Lakes.

The Government's decision whether to appeal this ruling will not be reached for some time. First, the Department of Justice and EPA must decide whether to file an appeal of the District Court's decision. That decision must be reached no later than 60 days after the Court enters its final judgment. It is expected that the Court will do so after a status conference scheduled for April 15, 2005. There will be consultations between EPA, the Coast Guard, the White House, and possibly the State Department, before any final decision to appeal is reached. If an appeal to the 9th Circuit is filed, resolution of that appeal could take another year.

II - Regulatory and Political Implications of This Decision and of an Appeal

Unless Congress is persuaded by the shipping industry to enact one of the pending ballast

water treatment bills (i.e. Inouye-Stevens Ballast Water Management Act or the soon to be re-introduced Levin-Collins National Aquatic Invasive Species Act) then EPA will obtain, by default, the sole policy setting control over the timing of the implementation of treatment requirements, over setting the standards for treating all ships' ballast water and over determining which ships, if any, would be exempt from any retro-fitting requirements because of their age. These regulations would be issued pursuant to the notice and comment rule making provisions of the Administrative Procedure Act.

A.

As of today, EPA has no staff or funding to conduct a brand new regulatory program, although it is possible that funds currently allocated for other purposes could be reprogrammed to this task. In any event, whatever order is ultimately issued by the District Court, after the April 15 status conference, it will still take EPA, and the Coast Guard, many months, and likely a year or more, to put a new regulatory program in place. EPA has a long standing reputation for moving slowly in issuing new regulations. This is one reason that Congress is determined to impose treatment standards in each of the pending ballast water treatment bills. It does not want to mandate that treatment standards be issued and then wait 5 years for EPA to prepare a NEPA required Environmental Impact Statement (on which the which the Coast Guard is now working pursuant to NISA) and to subsequent judicial second guessing because some environmental group thinks the standard is too weak or a shipping group thinks that it is unreasonably stringent.

B.

It is unclear how the politics of the appeal will play out. The initial defense raised by EPA was that the District Court lacked subject matter jurisdiction to hear the case because the Clean Water Act gave the Court of Appeals exclusive jurisdiction to hear challenges to EPA issued regulations. The District Court rejected this argument on the grounds that since EPA never issued any regulations, there were no regulations for the 9th Circuit to review.

EPA could appeal both the jurisdiction issue and the District Court's substantive determination that ballast water discharges are not exempt from regulation under the Clean Water Act or it could choose only to challenge the Court's substantive conclusion as to the statute's scope.

If the 9th Circuit ruled that it, and not the District Court, should have heard the original case, that would likely be a pyrrhic victory for EPA. The 9th Circuit is especially fond of expansive readings of environmental statutes and the broadest interpretation of any agency's regulatory authority under them. On that basis, it would probably reach the same substantive conclusion reached by the District Court: the Clean Water Act does not give EPA discretion to exempt ballast water discharges from its NPDES permit regulations. If the 9th Circuit sustained the District Court's subject matter jurisdiction over this issue, it will almost certainly sustain the District Court's view of the reach of the Clean Water Act since the 9th Circuit is probably the appeals court most favorable to expanding federal regulation of the environment.

The politics of this issue within the Administration, and thus the Justice Department's ultimate decision about filing an appeal, are not clear. The Administration has not made any decision

about submitting the IMO Treaty to the Senate. It has taken no position on either the Inouye-Stevens BMA bill or the Levin-Collins NAIS legislation. If no appeal is filed, that could obviate the need for such legislation since EPA would already be required to act. This would leave the policy setting initiative with the Administration and take it away from Congress.

For this reason, Congress may decide to act more quickly that it originally planned, in moving either the BMA or NAIS bills for the same reason. Congress does not want to lose control over the ballast water issue to EPA and the Coast Guard, both of which have moved very slowly on the issue for the past 15 years. However, since Congress did not even return until April 6, the impact of this ruling on its thinking is not yet known. It may also wait until the Justice Department decides to file an appeal, on EPA's behalf, before deciding its course of action. Since DOJ has 60 days from entry of the Court's Final Order to file the Notice of Appeal, the decision making process will probably drag on for another 9 or 10 weeks, since that Order has not yet been entered. (As a matter of Justice Department policy, only the Solicitor General may authorize the filing of an appeal. As a matter of domestic policy setting, it's a whole different story.)

C.

The other unknown factor is the State Department. The White House has given the State Department the final decision recommending authority as to submitting the IMO Ballast Water Treaty for Senate ratification. (The National Security Council agreed to this because it has more important issues to worry about, like Iranian and North Korean nuclear weapons.) The State Department has its own view of the world. It would be unhappy if Congress legislatively overrode the UN/IMO Treaty by enacting its own ballast water bill that nullified the IMO Treaty because the legislation contained more stringent enforcement standards than does the Treaty. It would be equally unhappy if the District Court's decision was not appealed, however, because that would allow a judge to "interfere" with State's treaty negotiating authority and the ratification process. Since this is what already happened when the double hull oil tanker regulations, mandated by Oil Spill Prevention Act of 1990, overrode a pending IMO Treaty on that issue, State - and the IMO - would be very unhappy to have that happen again. Nevertheless, it could.

D.

Beyond this, the shipping industry's reaction to the Court's decision is also a critical, and unknown, factor. If this ruling causes the ship owners to start pressuring Congress to move one of the ballast water bills, then legislation might be on the President's desk by September. The industry's decision will depend on whether it fears the EPA issuing regulations without additional Congressional guidance or whether it is more afraid of whatever legislation comes out of the Senate Commerce and EPW Committees and the House Transportation Committee.

III - Court Rules That EPA is Required to Regulate Ballast Water Discharges By the Clean Water Act

After resolving several complex procedural issues, relating to the District Court's subject matter jurisdiction, and the applicable statute of limitations for filing the challenge, in favor of the Plaintiffs, the Court then turned to the substantive issue of whether EPA had the requisite statutory authority to exempt ships' ballast water discharges from regulation. The Court held that EPA was required to regulate such discharges under the Clean Water Act.

Sections 1311(a) and 1342(a) of the Clean Water Act (CWA) prohibit the discharge of "any pollutant" unless the discharge is authorized by an NPDES permit. The term "pollutant" includes solid waste, garbage and biological materials. See 33 U.S.C. §1362(6). The CWA defines the term "discharge of any pollutant " as meaning , "any addition of any pollutant to the navigable waters from any point source". See 33 U.S.C. § 1362(12)(A). Finally, a point source is defined as including, "any vessel or other floating craft from which pollutants may be discharged", 33 U.S.C. §1362(14). Based on the foregoing, the Court found that the Clean Water Act demonstrates the 'clear intent' of Congress to require that NPDES permits [be issued] before discharging pollutants into the nation's navigable waters."

The Court rejected EPA's contention that Congress had effectively acquiesced in its decision not to regulate such discharges because EPA had issued the challenged exemption more than 30 years ago and had never legislatively overturned it. The Court rejected this contention because the Agency's interpretation of the statute was clearly in conflict with stated Congressional intent.

The controlling case on this issue is *Chevron, U.S.A., Inc. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron,* the Court established the standard for judging whether an agency's interpretation of a statute, as evidenced by subsequently issued regulations, conflicted with Congressional intent:

> When a Court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question of whether Congress directly spoke to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the Court determines that the Congress has not addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . Rather, if the statute is silent or ambiguous with respect to a specific issue, the question for the Court *is whether the agency's answer is based on a permissible construction of the statute*, 476 U.S. at 842-43 (emphasis added).

The Court held that, "in this case the [sought to be regulated] discharges. . fall within the NPDES permit requirements under the CWA, are clearly articulated and there is a 'well defined meaning' [applied to those requirements]". Therefore, under *Chevron,* the Court is not required to determine if EPA's decision [not to regulate ballast water discharges] was a reasonable interpretation [of the CWA]; *rather the Court is required to determine if the regulation reflects the 'unambiguously expressed intent of Congress*'", Opinion at page 14.

Moreover, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 169 (2001), the Supreme Court ruled that, "Courts should recognize

Congressional acquiescence only with extreme care." In that case, the Supreme Court pointed out that there is often a tenuous relationship between the actions of the session of Congress that originally enacted the statute and later actions, or inactions, of other sessions of Congress. Because subsequent "history is less illuminating than contemporaneous evidence. . .[the agency] faces a difficult task in overcoming the plain text and import of [the statute]", 531 U.S. at 170, quoted in the Opinion at page 14.

The District Court also rejected EPA's reliance on *Bob Jones University v. United States*, 461 U.S. 574 (1983), In *Bob Jones*, the Court held that:

> Congress held precise hearings on the issue of whether a tax exempt college could engage in racial discrimination in admissions, making it 'hardly conceivable that Congress - and in that setting any member of Congress - was not abundantly aware of what was going on and because no fewer than 13 bills introduced to overturn the IRS ruling had failed [to pass]. Absent such overwhelming evidence of acquiescence we are loath to replace the plain text and original understanding with an amended agency interpretation.

The Court found that, in this case, "nothing the EPA presents in support of its Congressional acquiescence theory comes close to 'the overwhelming evidence of acquiescence' required by the Supreme Court.

EPA also sought to rely on enactment of the Non-Indigenous Nuisance Prevention and Control Act (NANPCA), in 1990, and the National Invasive Species Act (NISA), in 1996, as proof that Congress had, in fact, agreed with EPA's interpretation of the Clean Water Act. The Court held that neither act was "intended to limit the CWA with respect to ballast water discharges and that Congress even stated so in NISA.[1] The Court also held that NISA only applied to aquatic nuisance species whereas the CWA covered the discharge of many other pollutants found in ballast water including sediment, debris, rust and interior coatings that flaked off the inside of ballast tanks. Opinion at page 16.

Finally, the Court rejected EPA's contention that since Congress had, "comprehensively revisited the CWA in 1997, 1987 and 1981, and had not overturned EPA's decision to exempt ballast water discharges, that it must have approved of EPA's regulatory decision to exclude ballast water discharges form CWA regulation. "[T]his is not the overwhelming evidence [of Congressional] acquiescence required by the [Supreme] Court's decision in SWANCC" [or in *Bob Jones University v. United States*.] Opinion at page 17.

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[1] See 16 U.S.C. 4711(b)(2)(C). That section of NISA stated that, "the regulations issued under this sub-section shall. . .not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water." Also see §4711(c)(2)(J) which imposed the identical limitation on any guidelines issued implementing the prior subsection.