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UNITED STATES DEPARTMENT OF JUSTICE

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POINTS TO REMEMBER

Decisions of Comptroller General Concerning Expenses of Indigents

COMPTROLLER GENERAL B-139703, August 27, 1959, 39 COMP. Gen. 133

1. Travel and Subsistence of Indigent's Attorney-Deposition

"[P]ayment by the Administrative Office of the United States Courts of the expenses of travel and subsistence of the indigent's attorney for attendance at a deposition examination is deemed proper under Rule 15 (c)."

2. Fees and Expenses of Expert and Fact Witnesses and Deponents

"With regard to compensation and expenses of witnesses--whether fact witnesses or experts--subpoenaed on behalf of an indigent defendant the conclusion appears required... that such items are payable out of such appropriations to the Department of Justice." "Moreover, this conclusion would apply to deponents' fees as well as to fees for witnesses appearing in court, since Rule 17(b) makes no distinction between the two..."

3. Expert Witness and Psychiatric Examination to Aid Court

"Where such an expert witness is appointed to aid the court in discharging its official duty, it would appear that the expense thereof should be charged to the [judiciary] appropriation. Similarly, where a psychiatric examination is ordered to aid the court in passing sentence, it would appear that the expense thereof should be borne by appropriations of the Administrative Office of the United States Courts."

4. Stenographic and Notarial Services - Depositions

"[U]nder the direction contained in Rule 17(b)...where the deponent is subpoenaed on behalf of an indigent defendant expenses of stenographic and notarial services must...be paid by the Department [of Justice]..."

5. Witness Fees and Expenses in Habeas Corpus Proceedings

"[A]uthority for charging the United States with witness fees and expenses in habeas corpus proceedings--whether State or Federal--resting in Rule 17(b), such costs are chargeable to the Department of Justice..."

6. Collection of Earnings by Marshal - Federal Habeas Corpus

"[W]e do not believe that the marshal is required to collect his earnings at the end of a Federal habeas corpus case, unless a judgment is rendered making the petitioner liable therefor. This conclusion is based upon the applicability of Rule 17(b) to habeas corpus proceedings. Where that rule is applicable it would appear to be within the discretion of the court as to whether a judgment for fees and costs will be rendered against the indigent."

7. Collection of Earnings by Marshal - State Habeas Corpus

"With respect to a state proceeding,...although the United States has an interest in protecting the rights of an indigent petitioner, it is not technically the respondent and therefore should not in any event bear the cost of the proceeding. In such cases the state should bear the costs if petitioner is successful and, if not successful, petitioner should bear the costs. In state proceedings, therefore,...the marshal is required to collect his earnings from the unsuccessful party to the action."

8. Collection of Earnings by Marshal-Seamen's Suits 28 U.S.C. § 1916

"It has been held that the provision allowing seamen to proceed without prepayment of costs does not remove the obligation to pay the costs or remove the costs from general connection with the case, but solely relates to the question of prepayment." "[T]here being no basis upon which a seaman may rely for the United States to pay fees or costs...the marshal is required to collect his earnings at the conclusion of the case."

COMPTROLLER GENERAL B-121306 of NOVEMBER 4, 1954

Court Ordered psychiatric examination of federal prisoner proceedings in habeas corpus is payable by Administrative Office of the U. S. Courts from appropriation for miscellaneous expenses for judiciary.

COMPTROLLER GENERAL B-132461 OF AUGUST 27, 1957

1. 18 U.S.C. § 4244 Expenses

"Any case wherein the examination unquestionable was for the purpose stated in section 4244 (mental competency after arrest and prior to the imposition of sentence or

prior to the expiration of any period of probation to understand the proceedings against him or properly to assist in his own defense) clearly would be chargeable to Department of Justice appropriations."

2. Psychiatric Examination to Determine Mental Competency to Stand Trial and Assessing Sentence (Dual Purpose)

"[T]he mere fact that a psychiatric examination may assist in assessing sentence as well as determining mental competency to stand trial would not preclude payment of the alienist witness fees from the applicable appropriation of the Department of Justice otherwise payable thereunder."

3. Court Ordered Psychiatric Examination of Witness

Defendant pleaded guilty. As witness in trial of co-defendant he claimed amnesia and court ordered psychiatric examination. "The examination...appears to have been for 'other court purposes'" and it was held that the AO pays.

4. Statement by Judge as to Responsibility for Costs

"[T]he statement by a judge that the cost of such examination is chargeable to the Department of Justice is not of itself determinative of the propriety of payment of the cost from your appropriation."

5. Defense Motion for Psychiatric Examination - Violation of Probation Conditions

The expense of a psychiatric examination is properly chargeable to the Department of Justice under 18 U.S.C. 4244 regardless of the fact that an accused, at the time of filing of the motion is under arrest for violation of the conditions of his probation.

COMPTROLLER GENERAL B- 139703 OF SEPTEMBER 8, 1960

Psychiatric examination of indigent habeas corpus petitioner questioning confinement at Saint Elizabeths Hospital, federal institution, ordered on behalf of indigent rather than for benefit of court. Held that the fee of the doctor is payable from the Department of Justice appropriation for fees and expenses of witnesses, and that said fee is not payable from any District of Columbia appropriation.

COMPTROLLER GENERAL B-177540 OF APRIL 3, 1963, 52 COMP. GEN.

Psychiatric services for conditional release of Saint

Elizabeths Hospital patient were provided at the instance of, and clearly for the primary benefit of, the court. Indigent did not request the appointment of an independent psychiatric expert. Criminal Justice Act not applicable because services not requested by indigent. Rule 28 FRCrP not applicable because proceeding is civil. Court has "inherent power" to "produce at its own motion expert services which are deemed necessary to determine the matter before it" and expenses so incurred are properly "payable from appropriations available to the judicial branch..."

COMPTROLLER GENERAL B-139703 OF AUGUST 25, 1970, 50 COMP. GEN. 128

1. Examination Fee - Motion by Indigent - Sanity at Time of Offense and Competency to Stand Trial

"We do not consider the Criminal Justice Act to in any way affect the established financial responsibility of the Department of Justice for a mental competency examination in a section 4244 proceeding." "We consider an examination on motion of the defendant for the purpose of establishing insanity at the time of the offense as involving the Criminal Justice Act and thus for payment by the Administrative Office from funds appropriated for the implementation of that act." "In the event of a defense motion for a psychiatric examination for the dual purpose of determining competency to stand trial, a section 4244 purpose, and insanity at the time of the offense a Criminal Justice Act purpose, it would appear that as the initial determination must be that of the competency of the defendant to stand trial, the basic expense should be borne by a Department of Justice appropriation and any additional expense for the purpose of determining insanity at time of offense should be charged to the Criminal Justice Act appropriation."

2. Psychiatrist's Witness Fee - Motion by Indigent

"We are of the view that the fee of a psychiatrist called to testify on behalf of an accused entitled to expert services under subsection (e) of the Criminal Justice Act is for payment pursuant to that act. [I]t preempts the payment of expert witness fees to the exclusion of the general provisions of Rule 17(b)..." [T]he Administrative Office of the United States Courts is responsible for the psychiatrist's witness fee."

3. Expert Services Requested by Indigent - Expenses exceed Maximum Allowable Under CJA

Where expert services of the type contemplated by the

Criminal Justice Act are requested by an indigent's counsel, but the expenses incurred exceed the maximum allowable under the act, the Department of Justice is not obligated under Rule 17(b) to pay all or part of the expenses. "[W]e see little, if any, justification for ignoring the limitation on the fee of an expert set forth in subsection (e) of the act."

4. Psychiatric Examination Fee - Motion by Probationer Charged With Violation of Probation Conditions

In Revocation of Probation proceedings, CJA not applicable. In a section 4244 proceeding to determine whether the hearing for revocation of probation should go on, the Department of Justice is responsible for the payment of the examination fee. In deferred sentencing or revocation of probation proceedings coupled with deferred sentencing, "whether the cost of a psychiatric examination in such a proceeding is for payment under the Criminal Justice Act or under 18 U.S.C. 4244, depends on the purpose of such examination."

(Administration Division)

CIVIL DIVISION
Assistant Attorney General Harlington Wood, Jr.

SUPREME COURT

GOVERNMENT PERSONNEL

SUPREME COURT UPHOLDS CONSTITUTIONALITY OF THE HATCH ACT

United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO (Sup. Ct., No. 72-634, decided June 25, 1973; D.J. 35-16-352)

The Supreme Court, on our appeal, reversed the 3-judge district court and upheld the constitutionality of the Hatch Act's ban on active political management and political campaigning by federal civil servants. The Court reaffirmed what is referred to as the "basic holding" of its earlier opinion in United Public Workers v. Mitchell, 330 U.S. 575 -- i.e., "that plainly identifable acts of political management and political campaigning may constitutionally be prohibited on the part of federal employees."

Because the statute on its face does not enumerate the specific acts that are prohibited, but, rather, incorporates by reference "those acts of political management or political campaigning that were prohibited [for federal employees] ***before July 19, 1940, by determination of the Civil Service Commission," plaintiffs argued that the statute was unconstitutionally vague and overbroad. The court rejected this argument, accepting our contention that the statute had to be construed in light of the post-enactment decisions and regulations of the Civil Service Commission. Construing the Act in this manner, the Court concluded that it was neither unduly vague nor impermissibly overbroad.

Also, while not expressly asked to rule on the constitutionality of any of the particular prohibitions set forth in the Civil Service Commission regulations, the Court did indicate that most of the specific prohibitions were clearly lawful -- i.e., not violative of the First Amendment. In this connection, the Court did recognize that there might be some difficulty with the prohibitions against partisan campaign endorsements and speech-making. However, the Court noted that "[e]ven if the provisions forbidding partisan campaign endorsements and speech-making were to be considered in some respects unconstitutionally overbroad, we would not invalidate the entire statute as the district court did."

Staff: Joseph B. Scott (Civil Division)

COURTS OF APPEAL

DISCOVERY

FIFTH CIRCUIT HOLDS THAT NEWLY ADOPTED RULE 30(b) (6) MAY NOT BE USED TO OBTAIN DOCUMENTS IN THE POSSESSION OF THE GOVERNMENT OUTSIDE THE JUDICIAL DISTRICT WHERE THE SUIT IS PENDING.

Inalouise Cates v. LTV Aerospace Corp., (C.A. 5, No. 72-2954, decided June 26, 1973; D.J. 233278-356)

Counsel for the wife of a Navy pilot killed in a plane crash sued the plane's manufacturer, and in connection with that suit sought to obtain the Navy's Aircraft Accident Report (AAR). Counsel attempted to do this by serving the commanding officer of a local Navy Air Station with a Rule 30(b)(6) request to name a person who could be deposed concerning the accident, along with a subpoena duces tecum to bring the AAR to the deposition. The United States opposed the subpoena but did not make designation as required by Rule 30(b)(6). The district court ordered the documents produced, and overruled our subsequently asserted claim of executive privilege as to the AAR.

On appeal, the Fifth Circuit reversed. Observing that it was deciding "a question of first impression" under the recently adopted Rule 30(b)(6), the court concluded that "Rule 30(b)(6) provides a procedure to use in determining the proper person to depose" but does not abrogate the requirements of Rule 45(d)(2) which limit the court's subpoena power over documents. The court therefore required the plaintiff to go to Washington, where the Secretary of the Navy is located, to obtain the report. In addition, the court concluded that the order could not be sustained as an appropriate sanction for the failure to designate a party to be deposed, since Rule 37(a)(2) merely authorizes an order compelling designation and not the production of documents.

Staff: William D. Appler, (Civil Division)

SOCIAL SECURITY

DISTRICT OF COLUMBIA CIRCUIT UPHOLDS CONSTITUTIONALITY OF STATUTE EXCLUDING PHILIPPINE COMMONWEALTH SERVICEMEN FROM SOCIAL SECURITY COVERAGE.

Welfredo Lagtapon v. Secretary of Health, Education and Welfare (C.A.D.C., No. 71-2060; June 27, 1973; D.J. #137-16-223)

The claimant in this action sought Social Security parent's benefits based upon his deceased son's service in the Philippine Commonwealth Army

during World War II. By Presidential order, the Philippine Army had been called into the military service of the United States during World War II. In 1950, Congress provided Social Security coverage to "any individual who served in the active military or naval service of the United States during World War II." 42 U.S.C. 417. The Social Security Administration denied claimant's application for benefits on the basis of a 1946 statute. 38 U.S.C. 107(a), which specifies that service in the Philippine Commonwealth Army "shall not be deemed to have been active military * * * service for the purpose of any law of the United States conferring * * * benefits upon any person by reason of" his military service.

In affirming the denial of benefits, the Court of Appeals first held that 38 U.S.C. 107(a) prevented claimant's son from obtaining Social Security coverage on the basis of his military service. Finding rational bases for the statute, the court then rejected claimant's equal protection and due process challenges. It held that the purpose of the 1950 act extending Social Security coverage to World War II veterans was to restore benefits which servicemen had lost by having been removed from the civilian work force. As the Social Security Act did not then apply to the Philippines, Philippine Army veterans had not lost any benefits. The court also noted that when Social Security benefits were extended to veterans in 1950, the Philippines had become an independent country.

Staff: Anthony J. Steinmeyer, (Civil Division)

UNEMPLOYMENT COMPENSATION PROCEDURE

TENTH CIRCUIT AFFIRMS DISMISSAL OF ACTION CHALLENGING THE CONSTITUTIONALITY OF CERTAIN STATE ADMINISTRATIVE PROCEDURES IN THE HANDLING OF UNEMPLOYMENT INSURANCE APPEALS.

Dorothy Davis Barr v. United States of America, (C.A. 10, No. 71-1740; decided April 30, 1973; D.J. No. 78-49-15

Plaintiff, an unsuccessful claimant for unemployment insurance compensation, brought this action against the Secretary of Labor of the United States and the Departments of Labor and Employment of the States of New York and New Mexico, seeking declaratory and injunctive relief.

Claimant quit her job in New York and moved to New Mexico, where she applied locally for New York unemployment compensation. Her application was denied by New York. Claimant here challenged the interstate appeals procedure under which New Mexico would take her testimony and transmit it to the New York agency for appellate consideration. She asserted that because

the procedure denied her the opportunity to subpoena New York witnesses to appear in New Mexico, and thereby deprived her of confrontation and cross-examination, it therefore violated her Due Process right to a fair hearing, and that federal funding of the program violated 42 U.S.C. 503(a), which prohibits payment to a State which does not provide a "fair hearing" to applicants.

The Court of Appeals affirmed the dismissal of the action against the United States, holding that "[t]he district court was correct in its determination that no claim was asserted against the United States upon which relief could be granted, but the complaint might well have been dismissed against it on jurisdictional grounds."

> The functions of the Secretary of Labor in relation to state administration of unemployment compensation laws and regulations are, to the extent the appellant would have the Secretary coerced by the court, discretionary. Mandamus, including the statutory remedy provided by Section 1361, will not lie to direct the manner in which discretionary acts of governmental officials are to be performed not to direct or influence the exercise of discretion in making such decisions.

Staff: Ronald R. Blancz, (Civil Division)

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Wallace H. Johnson

SUPREME COURT

ENVIRONMENT

N.E.P.A.; IMPACT STATEMENTS BY I.C.C.; STANDING TO SUE; FEDERAL COURTS; JURISDICTION TO ENJOIN RAILROAD RATE SUSPENSION; N.E.P.A. DOES NOT REPEAL JURISDICTIONAL PROHIBITIONS IN SEC. 15(7), INTERSTATE COMMERCE ACT.

United States et al. v. Students Challenging Regulatory Agency Procedures (SCRAP) et al. S. Ct. Nos. 72-535, 72-562, June 18, 1973; D.J. File 90-1-4-501).

At the end of 1971, the Nation's railroads applied to the Interstate Commerce Commission for a 2.5% surcharge on freight rates. I.C.C. may, under section 15(7) of the Interstate Commerce Act (49 U.S.C. sec. 15(7), suspend the surcharge's operation for up to seven months, pending an investigation and decision as to its lawfulness. But here the I.C.C. refused to make a 15(7) suspension, Ex parte 281, Increased Freight Rates & Charges, 1972 (Feb. 1, 1972), and the surcharge took effect. I.C.C.'s refusal to suspend was over protests from shippers and environmentalists alleging that the rate structure discriminated against recyclable commodities.

SCRAP sued in federal district court to enjoin the 2.5% surcharge, because I.C.C. had not then issued an environmental impact statement called for by the National Environmental Policy Act (42 U.S.C. sec. 4332(C). A three-judge district court, convened pursuant to 28 U.S.C. sec. 2325, granted the injunction on July 10, 1972: 346 F. Supp. 189 (D.D.C.). The I.C.C., Supreme Court under 28 U.S.C. sec. 1253.

With Justice Powell abstaining, the Supreme Court reversed by a 6 to 2 margin. From Justice Stewart's majority opinion, plus one concurrence (Blackmun, J., joined by Brennan, J.) and one partial concurrence (White, J., joined by Burger, C. J., and Rehnquist J.), the dispositive holding was that federal district courts lack jurisdiction to temporarily suspend by injunction railroad rates

> * * * a power that had been clearly taken away by § 15(7) of the Interstate Commerce Act. [Stewart, J., Slip Opinion 23.]

This interpretation of 15(7)'s jurisdictional limitations was supported by Arrow Transportation Co. v. Southern R. Co., 372 U.S. 658 (1963). The enactment of NEPA by Congress had not repealed 15(7) for purposes of restoring to the federal courts limited jurisdiction over rate suspensions.

Justices Douglas and Marshall dissented on the jurisdictional issue, and the line up for and against jurisdiction is tabulated below:

FOR JURISDICTION	AGAINST JURISDICTION
Douglas, J.	Stewart, J..
Marshall, J.	Blackmun, J. Brennan, J.
	White, J. Burger, C. J. Rehnquist, J.

This disposition left open the question of the correct timing for I.C.C.'s issuance of a NEPA impact statement (Stewart, Jr., Slip Opinion 27, fn. 22).

The majority, by a 5 to 3 margin, did hold that SCRAP had standing to litigate the general question of railroad rates on recyclable commodities, even though SCRAP was not a shipper but an unincorporated association of five law students alleging, without denial,

> that they were "adversely affected" or "aggrieved" within the meaning of § 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702 and they point specifically to the allegations that their members used the forests, streams, mountains and other resources in the Washington Metropolitan Area for camping, hiking, fishing and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities. The District Court found these allegations sufficient to withstand a motion to dismiss. We agree. [Stewart, J., Slip Opinion, 14.]

The line-up for and against standing is tabulated below:

FOR STANDING	AGAINST STANDING
Stewart, J.	White, J. Burger, C. J.
Blackmun, J. Brennan, J.	Rehnquist, J.
Douglas, J. Marshall, J.	

Of the five-member majority favoring standing, Justices Blackmun and Brennan would broaden standing to encompass litigants alleging "irreparable and substantial" harm to the environment without requiring them to prove that they, "* * * in their individual capacities * * * in fact were injured."

Staff: Edward R. Korman (Assistant to Solicitor General); William Cohen (Lands and Natural Resources Division)

ENVIRONMENT

CLEAN AIR ACT: INTERPRETATION OF SECTION 110 OF THE CLEAN AIR ACT (42 U.S.C. 1857c-5)

Sierra Club v. Ruckelshaus, No. 72-804, D.J. 90-5-2-3-12.

This case, which was brought by the Sierra Club and three other environmental groups, involves the interpretation of Section 110 of the Clean Air Act. That section requires that all states submit to the Administrator of the Environmental Protection Agency a plan which provides for the implementation, maintenance and enforcement of the primary and secondary ambient air quality standards established pursuant to another section of the Act. The Act provides that the Administrator shall approve or disapprove each plan provides for or contains eight specific items, i.e. the attainment of the primary and secondary ambient air quality standards, emission limitations and schedules, establishment or appropriate monitoring and analysis devices, a review procedure for the location of new sources, adequate provisions for intergovernmental cooperation, assurances from each state that it will have adequate personnel funding and authority to carry out its plan, provisions for periodic inspection and testing of motor vehicles and provisions for any necessary revisions in the plans. The Act requires that the Administrator shall approve or disapprove each plan within four months after the date required for submission of the plan to him. The scheduled date for the approval or disapproval of the plans was May 31, 1972.

On May 24, 1972, the Sierra Club and others filed an action in the District Court of the District of Columbia alleging that the state implementation plans will, if approved, permit the degradation of existing air quality and states which have air cleaner than the national standards if the Administrator approves the plans according to the provisions of Section 110 and its accompanying regulations. The plaintiffs took the position that since the preamble of the Clean Air Act states that the purpose of the Act is to "protect and enhance the quality of the nation's air resources" that it was a violation of the Act to allow any ambient air which is cleaner than the national standards to ever reach national standards. The Government took the position that Section 110 specifically requires the Administrator to approve or disapprove plans based on the eight items contained therein and does not require the Administrator to consider any other factors. The Government also pointed out that Section 116 of the Act (42 U.S.C. 1857d-1) specifically allows any state or political subdivision thereof to adopt or enforce any standard, limitation or requirement which is more stringent than the national standards. Thus if states desired to have air cleaner than the national standards they were entirely free to pass laws to ensure this. This position is also re-enforced by the preamble which states that "the prevention and control of air pollution and its source is the primary responsibility of the states and local governments."

At a hearing on May 24, 1972, the court denied plaintiff's motion for a temporary restraining order. A hearing on the plaintiff's motion for a preliminary injunction was held on May 30, 1972. After the hearing (during which the court refused to allow the Government witnesses to testify regarding the irreparable harm which could be caused by the preliminary injunction) the court issued a preliminary injunction. The order required the Administrator to review again all the state plans which had been submitted to him. Within four months the Administrator was to approve any state plan or portion thereof which effectively prevents the significant deterioration of existing air quality and to disapprove any state plan or portion thereof which fails effectively to prevent the significant deterioration of existing air quality. Further, the Administrator was required to promulgate within six months regulations which approved or disapproved any state plans or portions thereof in accordance with the first portion of the order. On June 2, 1972, the court issued a written memorandum opinion, the substance of which had been read at the conclusion of the hearing on May 30, 1972. After reviewing the preamble and the legislative history of the Clean Air Act the court states that the Clean Air Act is based in important part on a policy of non-degradation of existing Clean Air Act and the Administrator's regulations with regard to implementation plans (40 CFR Section 51.12(b) is contrary to the legislative policy of the Act and is therefore invalid. The Court went on to say that the plaintiffs had made a showing in, based on the four criteria set forth in Virginia Petroleum Jobbers Association v. Federal Power Commission, 359 F.2d 921 (1958) that injunctive relief was proper.

The Government filed a notice of appeal and oral argument was held in the United States Court of Appeals for the District of Columbia Circuit on October 27, 1972. On November 1, 1972, the court affirmed, per curiam, the decision of the District Court. The United States Supreme Court granted certiorari and heard oral argument on April 18, 1973. On June 11, 1973, the Supreme Court, by a equally divided court, affirmed the lower court decision.

As the result of the Supreme Court's decision, the Administrator must now comply with the order of the District Court which requires that regulations be promulgated which disapproved of any state plan which allows significant deterioration and approves any state plan which does not allow significant deterioration.

Staff: James R. Walpole

COURTS OF APPEAL

MANDAMUS

NECESSITY OF ALLEGING SUBSTANTIAL INJURY.

Ben Yellen, et al. v. Rogers C. B. Morton, et al. (C.A. D.C. No. 72-;545, June 18, 1973; D.J. File No. 90-1-2-864)

Ben Yellen complained that by contract and statute (Section 6, Boulder Canyon Project Act of 1928) the Secretary of the Interior was required to regulate electric power rates in the Imperial Valley in Southern California. The Court declined to rule on the merits of the legal arguments, noting instead that it was admitted that power operations returned only a little over 7% on assets. This was dispositive of the case, as "Plaintiffs did not make even a threshold showing of abuse of discretion or disregard of duty."

Staff: Carl Strass

ENVIRONMENT

CLEAN AIR ACT; ADMINISTRATIVE ACT; NATIONAL ENVIRONMENT POLICY ACT; EPA'S APPROVAL OF STATE AIR POLLUTION CONTROL PLAN NOT SUBJECT TO THE APA OR NEPA; NO ADJUDICATORY HEARING REQUIRED, BUT A LIMITED LEGISLATIVE HEARING MAY BE REQUIRED.

Duquesne Light Company, et al. v. EPA and St. Joe Minerals Corporation v. EPA, (C.A. 3, Nos. 72-1542 and 72-1543, June 5, 1973, D.J. File Nos. 90-5-2-3-48, 90-5-2-3-44)

Three power companies and a zinc producer filed petitions pursuant to Section 307 of the Clean Air Act with the Court of Appeals for the Third Circuit challenging the EPA Administrator's approval of the Pennsylvania air pollution control implementation plan. The Clean Air Act provides that states must submit plans to the Administrator prescribing measures for the purpose of attaining and maintaining the national ambient air quality standards previously promulgated by the Administrator. Such plans are to be adopted by the States only after reasonable notice and a hearing. The Act further provides that the Administrator has four months to approve or disapprove submitted plans.

After filing their petitions, petitioners moved that the matter be remanded to the Administrator on the following grounds: (1) that the Administrator had failed to comply with the Administrative Procedure Act and Due Process because he failed to hold hearings of any kind or provide the opportunity to comment upon the submitted plans prior to his approval; and (2) that the Administrator had failed to comply with the National Environmental Policy Act because he did not prepare an environmental impact statement prior to his approval.

The Court granted the petitioners' motion to remand, ruling that (1) the APA is not applicable to the plan approval process; (2) due process does not require that an adjudicatory hearing be held by the Administrator prior to his approval of the plan; (3) since the petitioners are liable to sanctions under the Clean Air Act before they have had an opportunity either to complete their state administrative and judicial remedies or to be heard in a legislative hearing before the Administrator, the Court ordered EPA to elect either to refrain from imposing any penalties on the petitioners during the pendency of their state administrative and judicial actions, so long as such actions are pursued by the petitioners in good faith and with due diligence, or to provide the petitioners with a limited legislative hearing concerning their economic and technological objections to the plan in accordance with the expeditious timetable set forth by the Court; (4) that the environmental impact statement requirement of NEPA does not apply to the action of the Administrator approving a state implementation plan; (5) that, in view of the limited nature of this remand, the Pennsylvania plan remains in effect, except as it applies to the petitioners.

Staff: John E. Varnum and Bradford F. Whitman

ENVIRONMENT

CLEAN AIR ACT; REQUIREMENT OF STATE OPERATION PERMIT FOR FEDERAL FACILITIES.

State of Alabama, et al. v. Lynn Seeber, et al. (D.C. Ala., June 5, 1973; D.J. 90-5-2-3-89)

This case involves an attempt by the State of Alabama to require the Department of the Army and the Tennessee Valley Authority to obtain air pollution control operating permits pursuant to State law. This suit also seeks to have the Administrator of the Environmental Protection Agency commence action to require the two above agencies to obtain the State permits.

Section 118 of the Clean Air Act, 42 U.S.C. 1857f, provides that every department or agency of the Federal Government shall comply with Federal, State, interstate, and local requirements "respecting control and abatement of air pollution" to the same extent that any person is subject to such requirements. The State of Alabama took the position that this provision means that all Federal agencies located in the State of Alabama must apply for and obtain air pollution control operating permits the same as nongovernmental sources must do. The Government took the position that Federal facilities must definitely comply with all state and local air pollution control requirements respecting control and abatement of air pollution. Such requirements would be those which directly relate to emissions, e.g. state or local emission standards must be complied with. The Government's emissions must be controlled to the same extent that all other sources in the State are controlled. However, the Government took the position that Federal facilities need not comply with state or local administrative procedures. The application for and obtaining of an operating permit were not items which related to the control and abatement of air pollution. Insofar as the state would desire information regarding the emissions from federal facilities, the Government would supply such information to the state. However, the Government need not apply for and, in effect obtain permission from, the state in order to carry on its necessary functions. In support of this position the Government cited the decision California, et al. v. Stastny, et al., 4 ERC 1447 (C.D., Cal., 1972), appeal pending, C.A. 9, No. 72-2905. The Government also argued that the Administrator of the Environmental Protection Agency is under absolutely no obligation to take action to require Federal agencies to apply for and obtain state and local air pollution control operation permits.

After a hearing on the Government's motion to dismiss all defendants, the court issued an order granting Government's motion.

Staff: James R. Walpole

ENVIRONMENT

RIVERS AND HARBORS ACT; RESTORATION OF AREA ILLEGALLY DREDGED AND FILLED.

United States v. Little Duck Key Corp. (S.D. Fla., No. 72-1475 Civ. WM, April 23, 1973; D.J. 62-17M-51)

This case involves a civil action brought by the United States pursuant to 33 U.S.C. 403 against a developer in Florida. The defendant had built wooden fishing piers, constructed rock breakwaters, connected inland boat basin with navigable waters, and built a wooden fishing pier in a navigable waterway of the United States. The defendant discussed the permit requirements of 33 U.S.C. 403 with the U. S. Army Corps of Engineers but never obtained such permits. The action by the Government sought to enjoin any further work by the defendant and to require the defendant to restore the area to its condition prior to the illegal work.

The court ruled in favor of the United States and ordered the defendant to take immediate action to remove all structures placed within the navigable waters of the United States. The defendant was also ordered to prepare to take immediate action to replace a sufficient quantity of earthly material between its boat basin and the navigable waters so as to terminate any connection between the two. Before the defendant began any of this work it was ordered to give 15 days notice in writing to the Corps of Engineers.

Staff: Assistant United States Attorney
Robert N. Reynolds (S.D. Fla.)