Chicago-Kent Law Review

Volume 54 | Issue 2 Article 7

October 1977

Environmental Law

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Two environmental law cases decided in the past year by the Court of Appeals for the Seventh Circuit are of major significance. The first, *Scottsdale Mall v. Indiana*,[1] is important at least in part for what it fails to do. The second, *United States Steel Corp. v. Train*,[2] is a complex case, important first of all because of its potential impact on pollution in the environment around Gary, Indiana, and, secondly, because of its detailed treatment of the issues involved.

SCOTTSDALE MALL V. INDIANA

Scottsdale Mall v. Indiana[3] concerned an attempt by Indiana to avoid compliance with the National Environmental Policy Act[4] by withdrawing a highway project from a federal aid program in the final stages of the project. The project involved the construction of a twenty-eight mile bypass around the South Bend and Elkhart metropolitan area, originally programmed for construction in four segments. One segment had been completed using federal funds. By 1966 the three remaining segments had been scheduled, programmed and worked upon as a federal project.[5] Location hearings on the project were held pursuant to federal law.[6] The location of the second (mall) segment was established in 1967.

Prior to February 1975, Indiana had received $162,000 in federal funds to complete preliminary engineering studies on the project.[7] In 1973, Indiana requested federal authorization to proceed with land acquisition for the mall segment and was advised that an Environmental Impact Statement[8] was required. Indiana then advised the Department of Transportation[9] that the state would withdraw its application for federal funding of the mall segment.

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1. 549 F.2d 484 (7th Cir. 1977).
2. 556 F.2d 822 (7th Cir. 1977).
3. 549 F.2d 484 (7th Cir. 1977).
4. 42 U.S.C. §§ 4321-4347 (1970) [hereinafter referred to in the text and in footnotes as NEPA].
5. 549 F.2d at 486.
6. *Id.* at 487.
7. *Id.*
8. Hereinafter referred to in the text as EIS.
9. Hereinafter referred to in the text as DOT.

However, DOT informed Indiana that since all three remaining segments were part of the same project, an EIS would be required for all of the segments.

The State of Indiana submitted EIS's for each of the three segments. They were approved even though the EIS for the mall segment was procedurally deficient because it was not circulated for public comment pursuant to the NEPA[10] and the environmental regulations promulgated under this Act.[11] Later, however, the Secretary of DOT withdrew approval and required preparation of a new EIS. As a result, in late 1975, Indiana took steps to remove *all* remaining segments of the bypass from federal funding consideration, and stated that federal funds received for studies on the project were refunded by an accounting transfer to other federally funded projects.[12]

The district court concluded that since the state had withdrawn the project and had failed to obtain an EIS at the location stage as required by section 771.5(b) of the regulations,[13] its eligibility for federal funding was foreclosed. The district court held that the state's "decision not to comply with the eligibility procedures necessary to maintain [its] option to receive federal highway funds cannot have the paradoxical effect of producing federal involvement."[14] Consequently, since federal funding was no longer in question, the federal government could not require compliance with NEPA.

The circuit court disagreed, holding that the entire project constituted a "major federal action" for purposes of NEPA and that an EIS was required

10. 42 U.S.C. § 4332(2)(C) (1970). This section states, in part:
Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statements and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes.

Id.

11. 23 C.F.R. § 771.12(c) (1977). These regulations provide:
The draft EIS shall be circulated by the HA (highway agency) on behalf of FHWA (Federal Highway Administration) for comment and made available to the public at least 30 days before the public hearing and no later than the publication of first notice for the hearing or opportunity therefor.

Id.

12. *See* 549 F.2d at 487 for a discussion of the state's attempt to withdraw the project.

13. Section 771.5(b) of the regulations states:
In the development of the highway section, the negative declaration or EIS and section 4(f) statements and required processing under 16 U.S.C. 470(f) shall be completed during the location stage, prior to the selection of a particular location; except for those highway sections to which this part applies that had received location approval prior to the effective date of this part.
23 C.F.R. § 771.5(b) (1977).

14. 418 F. Supp. 296, 301 (S.D. Ind. 1976).

for the remaining three segments.[15] The court held that Indiana's "seeking and receiving federal approval at various stages of the project and receiving preliminary financial benefits so imbued the highway project with a federal character" that compliance with NEPA was required, notwithstanding withdrawal of the project from federal funding consideration.[16] The crucial set of factors was held to be Indiana's actions of seeking federal funding, programming the project for federal assistance, seeking and receiving federal approval of location and design, receiving federal funding for preliminary engineering, and beginning right-of-way acquisition pursuant to federal procedures.[17]

The court noted that to hold otherwise would frustrate the congressional directive to administer federal laws and regulations in accordance with NEPA policies "to the fullest extent possible."[18] The court specifically refused to determine "the precise point at which a federally programmed state highway project becomes *irrevocably* federal in character for NEPA purposes."[19]

The logic of the major premise of this case cannot survive analysis. First of all, the EIS is required *only* in a "recommendation or report on proposals for . . . major Federal actions. . . ."[20] NEPA's requirements are intended to serve as an aid in the federal decision-making process.[21] Therefore, in order for NEPA's requirements to apply, logically there must still be pending a federal decision on the project. In this case, there was clearly no longer any possibility of such federal decision.

It is obvious that if the project had been funded totally by the state from the beginning, NEPA would never have applied, because no federal decision would have been involved. It is also evident that under applicable federal regulations, which were not contested in this case, an EIS was not required for federal funding of any of the preliminary steps in this project. The EIS was required at the later stage of the project as a prerequisite to federal consideration of the project *for further funding approval*. Although the state had submitted EIS's for the remaining segments, it had chosen, in effect, to withdraw those EIS's as a basis for federal consideration of the project. It is not logical to require submission of an EIS for work that has

15. 549 F.2d at 489.
16. *Id.*
17. *Id.* at 489-90.
18. 42 U.S.C. § 4332 (1970).
19. 549 F.2d at 489 (emphasis added).
20. 42 U.S.C. § 4332(2)(C) (1970). *See* Kleppe v. Sierra Club, 427 U.S. 390 (1976); *see also* 115 CONG. REC. 29051-60, 40415-27, 40923-28 (1969).
21. Brown, *Applying NEPA to Joint Federal and Nonfederal Projects,* 4 ENV. AFFAIRS 135, 136 (1975).

been removed from federal consideration for funding for further work. Submission of an EIS is expensive and time-consuming. Where federal funds are no longer contemplated, such a requirement can only be intended to serve a punitive function. Even if one does not sympathize with the decision of Indiana to withdraw from federal funding to avoid further public controversy and expense, such withdrawal is certainly permitted, as noted by the district court in this case.[22] A circuit court slap on the wrist for exercising the prerogative is hardly warranted.

Scottsdale is clearly distinguishable from the line of cases that has raised the issue of when, in a project that is to be federally funded, the EIS must first be prepared. For example, in *Silva v. Romney*,[23] the Court of Appeals for the First Circuit held that a district court had the authority to enjoin a developer from continuing work on a housing project pending the outcome of an EIS by the Department of Housing and Urban Development.[24] The district court was so empowered because the nexus between the developer and HUD, which was financing the project, was so extensive that the developer was "in partnership,"[25] in effect, with the federal government. However, there was no challenge in *Silva* to the legitimacy of the EIS demand, nor was there any attempt by the developer to withdraw from federal funding.

Again, in *Scientists' Institute for Public Information v. Atomic Energy Commission*,[26] there was no question of continuing federal funding. Plaintiffs sought declaratory relief against the Atomic Energy Commission's[27] Liquid Metal Fast Breeder Reactor Program[28] pending the issuance by the AEC of a detailed statement about the program. The court held that the nature of the program demanded the immediate submission of such a report. The AEC conceded the necessity of an EIS for each particular facility contemplated by the LMFBR program and questioned only the requirement of an immediate report on the entire program. This was clearly not a case in which federal funding had been, or would be, terminated.

Indiana Lookout Alliance v. Volpe[29] is also distinguishable. That case concerned an extensive Iowa highway construction program, one seven mile segment of which was to be federally funded. While the court held that portions of the highway construction beyond the seven mile segment could

22. *See* 549 F.2d at 488 for a discussion of the district court opinion.
23. 473 F.2d 287 (1st Cir. 1973).
24. Hereinafter referred to in the text as HUD.
25. 473 F.2d at 290.
26. 481 F.2d 1079 (D.C. Cir. 1973).
27. Hereinafter referred to in the text as AEC.
28. Hereinafter referred to in the text as LMFBR.
29. 484 F.2d 11 (8th Cir. 1973).

require the issuance of an EIS, the decision rested upon the court's assumption that Iowa desired to keep open its options to secure federal funds and would apply for such funds as its construction program progressed.[30] By contrast, the Indiana State Highway Commission in *Scottsdale* clearly indicated it no longer desired federal assistance.

Likewise, *Scottsdale* is distinguishable from *San Antonio Conservation Society v. Texas Highway Department*[31] in which the Court of Appeals for the Fifth Circuit enjoined construction of a federal-aid highway until the Secretary of DOT completed an environmental impact report. In that case, Texas argued that the court had no power to compel the state to comply with federal law because Texas was determined to complete the project with its own funds, if necessary. This argument failed to persuade the court that the highway was not a federal project subject to federal law. However, unlike Indiana in the *Scottsdale* case, Texas believed itself eligible for federal funds, had requested participation in a federal-funding program and had no present intention of withdrawing its application.[32] In *Scottsdale*, by contrast, further federal approval had been rendered moot and, therefore, all NEPA requirements likewise should have been held moot.

In *Scottsdale*, the Seventh Circuit was apparently so interested in punishing Indiana for avoiding compliance with the NEPA that it failed to recognize that there was no longer a function to be served by an EIS in that case. The district court's decision was correct and should not have been reversed.

UNITED STATES STEEL CORP. V. TRAIN

United States Steel Corp. v. Train[33] concerned the granting of an Environmental Protection Agency[34] discharge permit for United States Steel Corporation's Gary Works, pursuant to the Federal Water Pollution Control Act.[35] Under the FWPCA, discharge of any pollutant by any person is prohibited, except as specifically permitted by administrative action pursuant to the Act.[36] An existing source, such as the Gary Works, could obtain permission to discharge a pollutant by applying for a National Pollutant

30. *Id.* at 16.
31. 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972).
32. 549 F.2d at 489.
33. 556 F.2d 822 (7th Cir. 1977).
34. Hereinafter referred to in the text as EPA.
35. 33 U.S.C. §§ 1251-1376 (Supp. IV 1974) [hereinafter referred to in the text as FWPCA]. Section 1342(a)(1) provides, in part, "the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant. . . ." 33 U.S.C. § 1342(a)(1) (Supp. IV 1974).
36. 33 U.S.C. § 1311(a) (Supp. IV 1974).

Discharge Elimination System[37] permit.[38]

The Gary Works had obtained a permit that included both federal and state restrictions on the discharge of pollutants at each plant. Federal technology-based effluent limitations were set in two stages: "best practical control technology currently available,"[39] to be met by July 1, 1977;[40] and "best available technology economically achievable," to be met by July 1, 1983.[41] More stringent state limitations were also provided.[42] The *U.S. Steel* case concerned 1977 state and federal limitations.

The Gary Works was constructed on a massive landfill in Lake Michigan as the world's largest steel mill.[43] Before the Gary Works and other large industrial plants were built in the Calumet region, the Gary beach was the center of a major fishing industry.[44] Since being built, however, the Gary Works has discharged such great amounts of chemical effluents into the Grand Calumet that fish habitat has collapsed, the downstream river bottom has become composed of minute iron particles and the river has become completely unfit for any type of recreation.[45] Over a ton of cyanide is discharged daily into the river. In fact, the Gary Works has been the single largest polluter of Lake Michigan for decades,[46] and the Public Health Service has charged that the Gary Works is contributing to a practically irreversible pollution of the Lake.[47] Nonetheless, past attempts to enact and enforce adequate controls on pollution by the Works have been frustrated consistently.[48]

At trial, U.S. Steel raised a series of objections when confronted with charges that it violated EPA permit conditions. First, the company contended that the EPA Administrator was required in the permit hearing to determine the validity of Indiana's water quality standards, since no judicial review was provided for by Indiana.[49] The court disagreed and held that under the FWPCA, state limitations supersede less stringent federal limitations, and that the Administrator had already, in a separate proceeding, considered and approved the applicable Indiana water quality standards[50] as

37. Hereinafter referred to in the text as NPDES.
38. 33 U.S.C. § 1342 (Supp. IV 1974).
39. Hereinafter referred to in the text as BPT.
40. 33 U.S.C. § 1311(b)(1)(A) (Supp. IV 1974).
41. 33 U.S.C. § 1311(b)(2)(A) (Supp. IV 1974) [hereinafter referred to in the text as BAT].
42. 556 F.2d at 837-38.
43. Greer, *Obstacles to Taming Corporate Polluters: Water Pollution Politics in Gary, Indiana*, 3 ENV. AFFAIRS 199, 200 (1974).
44. *Id.*
45. *Id.* at 200-01.
46. *Id.* at 201.
47. *Id.* at 202.
48. *Id.* at 199-211.
49. 33 U.S.C. §§ 1311(b)(1)(C), 1311(b)(2), 1316(d), 1370 (Supp. IV 1974)).
50. 40 C.F.R. § 120.10 (1976) (promulgated pursuant to 33 U.S.C. § 1313 (Supp. IV 1974)).

consistent with the FWPCA. The Administrator's approval could have been challenged in this case, but the court held that U.S. Steel's claim in this regard failed to allege any incompatibility with federal law and was, therefore, insufficient in law.[51]

Second, U.S. Steel alleged that the state's limitations on certain chemicals were impossible to achieve given present technology. The court responded by finding that even if this were true, it did not follow that the limitations were invalid, because the legislature intended that states be free to force technology, even at the cost of economic and social dislocations caused by plant closings.[52] The court also rejected the company's claim that both the state's chemical and thermal limitations were arbitrary, because, under the FWPCA, the Administrator had no authority to question either the necessity of the limitations or the validity of the standards which the limitations were intended to achieve.[53]

Third, the company argued that technology-based limitations on Gary Works outfalls should be no more stringent than past operating levels. The EPA contended that in some instances past operations did not reflect careful and efficient operation required under NPDES, so that it was appropriate to disregard extremely high discharge values in monitoring data. The court found that the EPA's method of analysis was acceptable and that the EPA is entitled to use its expertise on the subject in judging reliability or representativeness of data.[54] In addition, the court found that to use limitations based on past operations might include "a factor for human or mechanical lapses that should not be tolerated."[55] Although the limits proposed by U.S. Steel would actually have allowed an increase in pollutant discharge, the company argued that this was justified because their proposal was actually consistent with EPA's guidelines for the steel industry. The court held that EPA's guidelines had not been shown to be anything other than a rough approximation, subject to modification based on performance data in setting actual limitations.[56]

Concerning surface runoff, the court held that it had not been determined what effect surface runoff would have on discharge levels and treatment facilities. Consequently, the court would not accept U.S. Steel's argument that surface runoff would increase the concentration of total

51. 556 F.2d at 837. The state regulations may still be contested on federal constitutional grounds in a federal suit against the state in a district court where jurisdiction and venue are proper.
52. *Id.* at 838.
53. *Id.* at 839.
54. *Id.* at 842.
55. *Id.*
56. *Id.*

suspended solids[57] and should be exempted.[58]

Fourth, the company challenged the EPA's conclusion that recycling constituted BPT for the iron-making blast furnaces at the Gary Works on three grounds:

> (1) EPA failed to consider the six factors set forth in § 304(b)(1)(B) as 'relating to the assessment of [BPT],' and therefore the agency's designation or recycling as BPT was improper. (2) Installation of a recycling system would cause violations of the sulphate limits in the permit, and therefore recycling is not a 'practicable' technology for Gary Works. (3) A recycling system cannot be built and placed in operation at Gary Works before July 1, 1977, and therefore is not 'currently available' to U.S. Steel.[59]

On the first ground, that the EPA's designation of recycling as BPT was improper, the court held that technology-based effluent limitations, guidelines and BPT are uniform national standards and are not to vary from plant to plant.[60] Since the BPT for this category and class of point source had already been determined on a nationwide basis and constituted a proper basis for establishing the TSS limitations for the Gary Works permit, the EPA was not required to consider the six section 304(b)(1)(B) factors again in its permit proceeding.[61] The EPA could have considered, however, whether a variance from the national standards was warranted under the United States Supreme Court's holding in *DuPont v. Train*.[62] The court found, in fact, that this is basically what the EPA did in the permit proceeding, and that the EPA had implicitly concluded that a variance was not in order.[63] The court reviewed that conclusion and determined that it was reasonable to determine that any necessary retrofitting to provide recycling in the older blast furnaces was feasible in light of similar retrofitting at other plants.[64]

The court, in deciding the company's second contention that recycling is not practicable technology for the Gary Works, said that the TSS limitations based on recycling as BPT were not rendered unacceptable because of the resulting potential violation of state permit limitations.[65] U.S. Steel asserted that no technology was known that would allow it to decrease sulphate discharges to a level allowed by state sulphate limitations.[66] The

57. Hereinafter referred to in the text as TSS.
58. 556 F.2d at 843.
59. *Id.* at 844.
60. *Id.*
61. *Id.*
62. 430 U.S. 112, 128 (1977).
63. 556 F.2d at 845.
64. *Id.* at 846.
65. *Id.* at 847.
66. *Id.* at 846.

court held that recycling as BPT was not thereby rendered impractical and that neither was a variance justified. It was found that to consider more stringent state limitations as a factor in determining whether to grant a variance would permit strict state limitations to create a loophole for avoiding compliance with federal standards.[67] To do so would frustrate legislative intent because "[a]n important reason for Congress' adoption of nationally applicable federal effluent limitations was to prevent individual states from attracting industry by adopting permissive water quality standards."[68]

U.S. Steel's third contention, that there was not time to construct and put in operation the recycling system, was held to have no merit, on the grounds that there was time to do so when the permit was first issued, and "litigation . . . seeking a variance from national standards . . . is carried out on the polluter's time, not the public's. . . ."[69] In addition, the court stated: "Temporal feasibility of BPT installation is not included in the § 304(b) factors and should not be a ground for a variance. Consideration of that factor would emasculate the mandatory nature of the July 1, 1977 compliance deadline."[70]

The EPA permit involved requiring U.S. Steel to conduct a monitoring program, study the environmental impact of the cooling-water intakes for the Works and submit a proposal for meeting the section 316(b) requirements that "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."[71] The court held that this requirement applies on its face to all technology-based effluent limitations applicable to a point source and is intended to be implemented through sections 301[72] and 306[73] standards.[74] The study was held to be well within the EPA's authority.[75]

U.S. Steel also challenged the EPA's legal authority to impose effluent limitations and study and monitoring requirements on the company's discharges of acid wastes into a deep well. The court rejected this challenge[76] because the EPA's permit program is subject to the same requirements as apply to a state permit program,[77] and the EPA requires that state permit

67. *Id.* at 847.
68. *Id.*
69. *Id.* (citing Train v. Natural Resources Defense Council, 421 U.S. 60, 92 (1975)).
70. 556 F.2d at 847.
71. 33 U.S.C. § 1326(b) (Supp. IV 1974).
72. 33 U.S.C. § 1311 (Supp. IV 1974).
73. 33 U.S.C. § 1316 (Supp. IV 1974).
74. 556 F.2d at 849-50.
75. *Id.* at 850.
76. *Id.* at 851-52.
77. 33 U.S.C. § 1342(a)(3) (Supp. IV 1974).

programs cover disposal of pollutants into wells.[78] The court supported this interpretation[79] by reference to general provisions and definitions of the FWPCA,[80] and to the legislative history of the FWPCA.[81]

Further, the permit's schedules of compliance were attacked by U.S. Steel as arbitrary. This argument was summarily rejected by the court.[82] The company argued that the EPA's delay in promulgating national effluent guidelines entitled the company to an extension of the July 1, 1977, deadline for BPT-based effluent limitations. The court held that the inclusion of past dates in the EPA compliance schedule did not prejudice U.S. Steel because the EPA indicated that it would not prosecute for noncompliance therewith. Consequently, invalidation of the entire schedule was not necessary.[83] The court also held that the mandatory nature of the statutory deadline precluded an extension, and that permit requirements properly imposed are enforceable by the statutory timetable whether or not they are based on national guidelines.[84]

The *United States Steel* case points out several troublesome aspects of the FWPCA. If effluent limitations imposed by states are truly impossible to achieve by the specified time, then it is little comfort to the polluter and to others put out of work or out of business that the state was intended to be free to force technology. Even if such unattainable state requirements were to be later modified, the economic dislocation would still have taken place, with potentially drastic and long-term effects on people and the economy. If, instead of closing a plant, the EPA were to impose a fine, even this would amount to imposing an inequitable burden on the industry as a result of impossible requirements. "Forcing" technology amounts to an attempt to predict the unpredictable and can amount to a misguided attempt to prevent malingering by industrial polluters. Such an approach can ultimately lead to limitations that are simply not enforced—a very real possibility in a community where the polluter is a major source, if not the primary source, of local income.

A related problem is that state and federal requirements may not be compatible in light of reasonably foreseeable technology. For example, if U.S. Steel were accurate in stating that it simply would not be able to recycle *and* meet sulphate limitations by the time specified, then this

78. 33 U.S.C. § 1342(b)(1)(D) (Supp. IV 1974).
79. *See* 556 F.2d at 852 for a discussion of the court's interpretation of the legislative history of the FWPCA.
80. 33 U.S.C. §§ 1342(a)(1), 1362(6)(B) (Supp. IV 1974).
81. 556 F.2d at 852-53.
82. *Id.* at 853.
83. *Id.* at 854.
84. *Id.*

incompatibility of NPDES components should have been precluded or the variance should have been granted. If impossibility of compliance is the problem, then some means of lessening the incompatibility should be provided. Past pollution by U.S. Steel and other major industries would not justify unreasonable current effluent requirements, and incremental progress is certainly better than none at all.

Even with these reservations, however, the *United States Steel* decision comes as somewhat of a milestone in the long struggle to repair the damage to the nation's waters. Although the Seventh Circuit's approach in this case is not without its problems, overall it is the correct approach.

CONCLUSION

The contrast between the quality of the *Scottsdale Mall* case and that of the *U.S. Steel* decision is striking. This contrast leads one to question whether the strength of the latter and the weakness of the former are due to: (1) authorship by different judges;[85] (2) the fact that NEPA is a relatively broad and general piece of legislation, while the FWPCA is relatively specific in relevant areas and thus forces solutions to such problems; or (3) a desire of the Seventh Circuit bench to achieve the respective results. The *Scottsdale Mall* case, for all its recitation of dates, figures, and facts, is a superficial and inappropriate decision. By comparison, the lengthy *U.S. Steel* decision is notably logical and consistent.

85. The *Scottsdale Mall* case was heard by Judges Pell and Bauer, of the Seventh Circuit, and Judge Campbell, of the United States District Court for the Northern District of Illinois, while *United States Steel v. Train* was decided by Judges Cummings and Tone, of the Seventh Circuit and Judge Campbell, of the United States District Court for the Northern District of Illinois.