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Case Notes

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CASE NOTES

JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY ACTION—1) ABSENT COMPELLING CIRCUMSTANCES, A REVIEWING COURT MAY NOT REQUIRE INFORMAL RULEMAKING PROCEDURES THAT EXCEED THOSE REQUIRED BY SECTION 553 OF THE ADMINISTRATIVE PROCEDURE ACT—2) AGENCIES MAY PLACE REASONABLE LIMITATIONS ON THE CONSIDERATION OF ALTERNATIVES PROPOSED UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT—*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519 (1978).

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[1] the United States Supreme Court reversed two separate decisions of the Court of Appeals for the District of Columbia Circuit. The opinion concerns particular responsibilities of administrative agencies under two federal statutes—the Administrative Procedure Act (APA)[2] and the National Environmental Policy Act (NEPA).[3] The portion of the opinion which reviews *Natural Resources Defense Council v. Nuclear Regulatory Commission* considers whether courts may require rulemaking procedures in excess of those guaranteed by section 553 of the APA.[4] The portion of the opinion devoted to *Aeschliman v. Nuclear Regulatory Commission* considers when NEPA requires administrative agencies to consider alternatives to agency action proposed by outside parties.[5]

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1. 435 U.S. 519 (1978). The decision was unanimous, Justices Blackmun and Powell not participating. It reviews the decisions in Natural Resources Defense Council v. Nuclear Regulatory Commission, 547 F.2d 633 (D.C. Cir. 1976), and Aeschliman v. Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir. 1976).

2. 5 U.S.C. §§ 551-559, 701-706 (1976).

3. 42 U.S.C. §§ 4321-4361 (1976).

4. 5 U.S.C. § 553 (1976). Rulemaking under § 553 requires notice in the *Federal Register* in most cases and an opportunity for "interested persons . . . to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation."

5. Section 102, 42 U.S.C. § 4332 (1976), requires "all agencies of the Federal Government" to include in any recommendation or report for legislation or major federal action "a detailed statement" on "[a]lternatives to the proposed action."

Natural Resources Defense Council v. Nuclear Regulatory Commission

In 1967, the Nuclear Regulatory Commission[6] granted Vermont Yankee Power Corporation a permit to build a nuclear power plant in Vernon, Vermont. When Vermont Yankee applied for an operating license several years later, the Natural Resources Defense Council (NRDC) objected on environmental grounds. A hearing on the license application was held before the Commission's Atomic Safety and Licensing Board at which the board refused to consider the environmental effects of fuel reprocessing disposal operations. The Commission upheld this ruling.

Shortly thereafter, the Commission instituted rulemaking proceedings on the question of whether the environmental effects of fuel reprocessing and waste disposal should be included in the Commission's cost-benefit analysis for nuclear reactor licensing. The Commission held a public hearing at which written and oral statements were received from all interested parties, but at which discovery and cross-examination were not permitted.[7]

After the conclusion of the hearing, the Commission issued a rule requiring a quantitative evaluation of the environmental effects of fuel reprocessing and disposal to be included in the cost-benefit analysis for each operating license. The Commission also approved the procedures which had been used at the hearing on the rule.

The NRDC appealed both the rule promulgated by the Commission and the Commission's issuance of Vermont Yankee's operating license. The court of appeals struck down the rule and remanded the operating license to the Commission for additional proceedings.[8]

The appellate court held that, absent an effective rule, the

6. The licensing and regulatory functions of the Atomic Energy Commission were transferred to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974, § 201, 42 U.S.C. § 5841(f) (1976). Hereinafter both the Atomic Energy Commission and the Nuclear Regulatory Commission will be referred to as the "Commission."

7. *See* 37 Fed. Reg. 24191 (1972). The Commission's procedures differed from the basic format established under § 553 of the APA to the extent that the Commission provided for oral testimony and questioning of participants by the hearing panel, and made available in advance, documentation forming some part of the factual basis of the rule. A later notice specifically precluded cross-examination. 38 Fed. Reg. 49 (1973).

8. 547 F.2d at 641, 655.

Commission must consider the environmental impact of fuel reprocessing and disposal in each individual licensing proceeding.[9] Since the court of appeals found that the rulemaking procedures were insufficient for "ventilation of the issues,"[10] it also invalidated the rule. In reaching this conclusion, the court of appeals decided that the Commission failed to utilize the procedural devices available to it in a "sensitive, deliberate manner" and, as a consequence, the rulemaking record failed to fully develop the factual issues presented.[11]

Justice Rehnquist, writing for a unanimous Court, reversed and remanded. Initially, he found that the appellate court's decision rested primarily on what it perceived to be inadequacies in the Commission's rulemaking procedures rather than in any inadequacies in the rulemaking record.[12] In so doing, Justice Rehnquist concluded that the court had overstepped its powers.

Justice Rehnquist declared that a reviewing court may scrutinize the record to determine whether the agency has fulfilled its statutory obligations. It may not, however, require procedures other than those mandated by statute, at least not in the absence of "constitutional constraints" or "extremely compelling circumstances."[13]

The Court rested that part of its decision on the traditional judicial view of the administrative process. Under this view, an administrative agency is considered the best architect of its own rulemaking procedures.[14] The Constitution, the APA, and the agency's own enabling legislation simply set down certain minimal procedures which the agency must follow. But whether the agency utilizes any additional procedures, under this view, is entirely within the agency's discretion.[15]

The Court's view represents a significant departure from recent decisions by the courts of appeals,[16] and from some

9. *Id.* at 641.

10. *Id.* at 644, 654 n.58.

11. *Id.* at 653-54.

12. 435 U.S. at 540-41.

13. *Id.* at 543.

14. *Id.* at 544.

15. *Id.* at 546.

16. *See, e.g.*, Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1260 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 629-31, 649 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495, 503 (4th Cir. 1973); Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1016 (D.C. Cir. 1971); American Airlines, Inc. v. CAB, 359 F.2d 624, 632-33 (D.C. Cir.) (en banc), *cert. denied*, 385 U.S. 843 (1966).

scholarly analyses.[17] The decisions have suggested that, under certain circumstances, procedures in excess of those required by the APA might be necessary to ensure thorough discussion and public disclosure. Courts have suggested, for example, that trial-type procedures, including cross-examination, might be required when rulemaking involves issues that are technically complex and of great public importance.[18] Justice Rehnquist agreed that additional procedures sometimes might be appropriate, but states that the imposition of these procedures must remain with the agencies and not the courts.[19] Any other course of action would "seriously interfere with [the] process prescribed by Congress."[20]

In contrast, Judge Bazelon of the court of appeals attempted to offer reviewing courts a middle ground. Although he carefully avoided dictating to the Commission what specific procedures they should follow on remand, he indicated that a reviewing court should nonetheless make its own determination of whether agency procedures provide "a meaningful opportunity [for participation] in the proceedings as guaranteed by due process."[21] Justice Rehnquist's opinion, on the other hand, limited a reviewing court's scrutiny to whether the agency had complied with the procedures mandated by the APA, other statutes, and the Constitution unless "extremely compelling circumstances" are present.[22] The latter exception seems to be a narrow one, possibly limited to cases where

17. *See, e.g.*, Williams, *Hybrid Rulemaking Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975); Claggett, *Informal Action—Adjudication—Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 78. *But see* Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 ADMIN. L. REV. 199 (1974); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 234-49 (1974); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782 (1974); Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1313-30 (1972).

18. International Harvester Co. v. Ruckelshaus, 478 F.2d at 631 ("A right of cross-examination, consistent with time limitations, might well extend to particular cases of need, on critical points where the general procedure proved inadequate to probe 'soft' and sensitive subjects and witnesses."); Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971); American Airlines, Inc. v. CAB, 359 F.2d 624, 632-33, *cert. denied*, 385 U.S. 843 (1966).

19. 435 U.S. at 546.

20. *Id.* at 548.

21. 547 F.2d at 643.

22. 435 U.S. at 543.

agency rulemaking has departed grossly from well-established prior agency practices.[23]

Justice Rehnquist expressed concern that if reviewing courts have free reign to impose supplemental procedures on remand, agencies might take a defensive posture and require the full panoply of trial-type procedures in most rulemaking proceedings. This result would create uncertainty and undermine section 553 of the APA, which establishes "the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking proceedings."[24] Since rulemaking under section 553 need not rest exclusively on information obtained through a hearing, it is unreasonable to expect a direct correlation between the adequacy of the rulemaking record and the type of procedural devices employed at a rulemaking hearing if, in fact, one is held at all.[25]

Admittedly the federal courts may not be well-equipped to second guess an agency about which procedures would be best for particular rulemaking proeedings. Commentators have argued, however, that the federal courts are the institution of government most politically able to determine whether policy issues of great importance have been accorded more than summary treatment in agency rulemaking.[26] Because the legislative and administrative processes are responsive mainly to short-term, exigent, and politically expedient considerations, they are not always sensitive to the longer-term implications of the choices agencies make. The appellate courts which have scrutinized rulemaking records in the past to determine the adequacy of the procedures used have occasionally been able to moderate precipitious agency action.[27] *Vermont Yankee* calls an abrupt end to this development. Reviewing courts are warned not to "explore the procedural format" utilized by an agency nor "to impose upon the agency [the court's] notion of which procedures are 'best' or most likely to further some

23. *Id.* at 542.

24. 5 U.S.C. § 553 (1976).

25. 435 U.S. at 546-48.

26. *See, e.g.*, Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. L. REV. 417 (1976).

27. *See* Mobil Oil Corp. v. FPC, 483 F.2d at 1260; International Harvester Co. v. Ruckelshaus, 478 F.2d at 629-31, 649; Walter Holm & Co. v. Hardin, 449 F.2d at 1016.

vague, undefined public good."[28] A result likely to flow from this development is that litigants, industrial and environmental alike, now will find it more difficult to forestall agency action through obstructionist legal tactics.[29]

Aeschliman v. Nuclear Regulatory Commission

The second portion of the *Vermont Yankee* decision reviews the court of appeals decision in *Aeschliman v. Nuclear Regulatory Commission.*[30] *Aeschliman* arose out of a 1969 petition by Consumers Power Company for a permit to construct two nuclear reactors in Michigan. Various intervenors opposed the petition because they considered the agency's environmental impact statement (EIS) inadequate.[31]

Among other objections, the intervenors claimed that the EIS section on alternatives failed to consider the alternative of energy conservation. The Commission's appeal board upheld the Commission's decision to grant the permits because the proposed alternative fell outside the "rule of reason" standard set forth in *Natural Resources Defense Council v. Morton,*[32] and therefore did not have to be considered. Under this standard, agencies are not required to consider remote or speculative alternatives. The appeal board found that, in view of what it considered a lack of evidence documenting the practicality and effectiveness of the conservation alternative, the alternative was speculative.[33]

Judge Bazelon, again writing for the court of appeals, rejected the "rule of reason" standard as the proper threshold test for determining whether an alternative must be considered. After citing a long line of NEPA cases which have placed the burden on the agency to investigate all proffered alternatives, he stated: "[A]n intervenor's comments on a draft EIS raising a colorable alternative not presently considered therein must only bring 'sufficient attention to the issue to stimulate

28. 435 U.S. at 549.

29. The Court's focus on procedural issues left unresolved the important substantive issue of whether radioactive wastes will cause unacceptable environmental harm when stored or reprocessed. Thus, on remand, the court of appeals now must consider whether the government's position in this regard is justified.

30. 547 F.2d 622 (D.C. Cir. 1976).

31. *See id.* at 625.

32. *In re* Consumers Power Co., ALAB-123, RAI-73-5-331 (May 18, 1973), *citing from* Natural Resources Defense Council v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972).

33. *Id.*

the Commission's consideration of it.'"[34] Applying this line of reasoning, Judge Bazelon found the Commission's rejection of the energy conservation alternative to be arbitrary and capricious and inconsistent with NEPA's mandate to the Commission.[35]

The Supreme Court, in reversing the court of appeals, disagreed more with Judge Bazelon's application of his conclusions to the facts of the case than with his interpretation of NEPA or his rejection of the "rule of reason" standard. Justice Rehnquist stated that the Commission's decision must be evaluated in terms of the information it had at the time it made its decision. Intervenors, he stated, must at least alert the Commission to their position and contentions:

> Common sense . . . teaches us that the "detailed statement of alternatives" cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.[36]

In this case, the Commission acted prior to the emergence of public concern with the "energy crisis" and before it had formally ruled that its licensing board must consider conservation alternatives.[37] Moreover, its decision was rendered prior to the time that the Council on Environmental Quality guidelines for agency implementation of NEPA required consideration of conservation as an alternative.[38] Thus, while accepting Judge

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34. 547 F.2d at 628 (quoting Indiana & Mich. Elect. Co. v. FPC, 502 F.2d 336, 339 (1974)).

35. *Id.* at 629.

36. 435 U.S. at 551. Justice Rehnquist states earlier in the opinion that "[t]o make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of *feasibility*." *Id.* (emphasis added).

37. 435 U.S. at 552.

38. Council on Environmental Quality guidelines that suggested the need to incorporate energy conservation considerations in environmental impact statements did not appear until August 1, 1973. *See* 40 C.F.R. § 1500.8(a)(4) (1976); 38 Fed. Reg. 20550, 20554 (1973). It should be noted, however, that the intervenor's brief to the Court pointed out that the Commission had repeatedly testified to Congress, as early as two years prior to the preparation of the Consumers Power EIS, that the Commission had recognized its statutory obligation to consider this alternative when processing permit and license applications. Consumers Power Co. v. Aeschliman, No. 76-528, Brief for Respondents at 38.

Bazelon's proposition that intervenors need only raise a "colorable alternative" to trigger Commission consideration, Justice Rehnquist nonetheless found that "in light of the facts available [to the Commission]" its action was not arbitrary or capricious:

> [T]he role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review.[39]

The Supreme Court also rejected an alternative ground offered by the court of appeals for its judgment in *Aeschliman.* The court of appeals remanded the report of the Commission's Advisory Committee on Reactor Safeguards (ACRS)[40] because the court found that the report's use of technical jargon and its oblique reference to "other problems" raised in previous reports failed to inform the public of the safety or hazards of the proposed facilities.

The Supreme Court, however, determined that the public disclosure function of the ACRS Report was subordinate to its principal function of assisting the Commission. Justice Rehnquist complained that it would border on the "Kafkaesque" for a reviewing court to invalidate a licensing determination after the passage of seven years "because one report refers to other problems . . . discussed at length in other reports available to the public."[41] To do so would interfere with the choice of Congress to "at least try nuclear energy [as an alternative]" under a review process "in which courts are to play only a limited role."[42] The tenor, if not the precise holding, of *Aeschliman* strongly suggests that the Supreme Court will look with disfavor on any future interference by the appellate courts in the nuclear licensing process.

Conclusion

Vermont Yankee's greatest significance lies in its reversal of the trend, especially apparent in the District of Columbia

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39. 435 U.S. at 555.

40. The ACRS is required to review each construction permit application for the purpose of informing the Commission of the "hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards. . . ." 42 U.S.C. § 2039 (1976).

41. 435 U.S. at 557.

42. *Id.* at 558.

Circuit, toward requiring rulemaking procedures that are more elaborate than those required by section 553 of the APA when complex and sensitive issues of great public importance are involved. The decision also is significant in that it provides the first definitive interpretation of what alternatives an agency must consider under NEPA. To the extent that the decision reaffirms the threshold test employed by the court of appeals, the decision may provide benefits to the environmentalists who, at least nominally, were the losers in this case.

Allan F. Wichelman

ENVIRONMENTAL LAW—FEDERAL REVIEW OF STATE ADMINISTRATIVE AGENCY DECISION UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM IS ONLY AVAILABLE WHEN OFFICIAL EPA ACTIONS ARE INVOLVED—*Shell Oil Co. v. Train,** 585 F.2d 408 (9th Cir. 1978).

Shell Oil Company operates an industrial complex composed of a petroleum refinery and an organic chemical manufacturing plant near Martinez, California. In June, 1971, Shell applied to the California Regional Water Quality Control Board (California Regional Board) for a permit to discharge pollutants into the navigable waterways adjacent to the facility. However, between the filing of the application and the California Regional Board's action, Congress created the National Pollutant Discharge Elimination System (NPDES),[1] empowering the Administrator of the Environmental Protection Agency (EPA) to issue discharge permits regulating the nature and quantity of various wastes. Although states were urged to establish and administer their own discharge programs, the state programs required approval by the Administrator of the EPA.[2] In addition, the EPA retained a veto power over any state discharge permit granted.[3]

California adopted a program in compliance with the NPDES under which the California Regional Water Quality Control Board was given the responsibility for carrying out the directives.[4] Under the new directives, the Board reviewed Shell's application in October, 1974, and classified the complex as a Class "E" refinery. Shell then sought a variance to the classification in order to operate under Class "D" guidelines,[5] asserting that their plant was "fundamentally different" from other complexes given the same classification. The effect of a Class "D" rather than a Class "E" classification is generally

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* In his official capacity as the Administrator of the Environmental Protection Agency.

1. 33 U.S.C. § 1342 (1976).

2. *Id.* § 1342(b).

3. *Id.* § 1342(d)(2).

4. CAL. WATER CODE §§ 13370-13389 (West Supp. 1978); 39 Fed. Reg. 26,061 (1974).

5. The EPA has produced a guideline (Effluent Guidelines and Standards) for both types of plants in Shell's complex which classifies them from "A" to "E" in increasing order of complexity. 40 C.F.R. § 419.10-.56 (1974).

that the former allows a larger discharge of pollutants using factors such as the size of the manufacturing plant and the processes used.[6] The California Regional Board, after receiving the EPA's opinion recommending rejection of the application, denied the variance.[7]

Shell appealed the denial of the variance to three forums: to the United States Court of Appeals for the Ninth Circuit under its power to review actions by an administrator of a federal agency;[8] to the State Water Resources Control Board under its power to review the denial by the Board;[9] and to the federal district court, contending that the EPA's "advice" constituted federal action reviewable in that court. The Ninth Circuit held that it had no jurisdiction since there had been no act by the Administrator of the EPA. The State Water Resources Board affirmed the Class "E" refinery classification but reversed the variance issue, leaving only the appeal to the federal district court.

Judge Robert Peckham dismissed Shell's complaint for lack of subject matter jurisdiction.[10] Holding that the EPA had only informally advised the California Regional Board regarding the variance and thus had not been the catalyst for the behind-the-scenes coercion as Shell alleged, the court concluded that there existed no federal action: therefore, the EPA was not a proper party in the litigation.[11]

In affirming the district court, the Ninth Circuit, Judge Hufstedler speaking for the majority, held that the actions of the EPA in advising the California Regional Board did not "transform the state agency action into federal agency action reviewable in federal court."[12] The court's analysis focused on the advisory capacity the EPA was intended to hold under the NPDES and the prior judicial construction the Clean Water Act had received by the federal courts.

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6. Environmental Protection Agency Development Document No. 440-1/73-014 (April, 1974) (Summary and conclusions of document on file at Santa Clara Law Review).

7. Shell Oil Co. v. Train, 585 F.2d 408, 411 (1978).

8. 33 U.S.C. § 1369(b)(1)(F) (1976). The Ninth Circuit Court of Appeals dismissed Shell's petition, holding that the denial was "not an act of the Administrator of the EPA such as would give this Court jurisdiction." Shell Oil Co. v. Train; No. 75-2070 (9th Cir., Sept. 30, 1975).

9. California Regional Water Quality Control Board, Order No. 75-11 (1975). Appeals of this type are authorized by CAL. WATER CODE § 13320(a) (West Supp. 1978).

10. Shell Oil Co. v. Train, 415 F. Supp. 70 (N.D. Cal. 1976).

11. 415 F. Supp. at 77-78.

12. 585 F.2d at 413.

The majority noted that the NPDES was simply another form of federal-state cooperative federalism, and "the concept of undue influence and duress was inappropriate in this context."[13] Furthermore, when dealing with administrative agencies implementing federal programs directly regulating the states, the court found that ongoing federal-state consultations are necessary in order to achieve compliance with the programs.

In its argument, Shell relied on *Washington v. Environmental Protection Agency,*[14] in which the Administator of the EPA had vetoed an NPDES permit issued to the Scott Paper Company by the state of Washington. Scott filed suit in district court challenging the Administrator's objections. On appeal, jurisdiction was affirmed based on section 10 of the Administrative Procedure Act,[15] which recognizes the necessity for judicial review of an administrative agency's decisions when there are no other adequate remedies. There is a clear difference between *Washington* and *Shell.* In *Washington,* the EPA Administrator had officially vetoed the state agency's action; in *Shell,* the Administrator had only recommended action. Distinguishing *Washington* in that manner and noting that advice could not be equated with coercion, as alleged by Shell, the court affirmed the district court's dismissal for lack of jurisdiction.[16]

The majority also determined that section 10 of the Administrative Procedure Act was not applicable. That section limits review to "final agency action for which there is no adequate remedy in a court. . . ."[17] As the California Regional Board's decision was subject to modification by the California State Water Resources Control Board or alternatively by the California courts of general jurisdiction the court held that this foreclosed review under the Act.

In his dissent, Judge Wallace argued that there was no substantial difference between the case at bar and *Washington v. EPA.*[18] In this instance, he stated, the Administrator informally controlled the terms by which an NPDES permit was

13. *Id.* at 414.
14. 573 F.2d 583 (9th Cir. 1978).
15. 5 U.S.C. §§ 701-706 (1976).
16. 585 F.2d at 412-13.
17. 5 U.S.C. § 704 (1976), *discussed at* 585 F.2d at 414.
18. 585 F.2d at 419.

granted by compelling the California Regional Board to reject Shell's request. The distinction he noted was that in *Washington* the Administrator vetoed the permit directly and formally but his action here was indirect and informal. Therefore, he contended, the limitations described in the permit were actually determined by the EPA; and under *Washington,* Shell also should be able to obtain federal jurisdiction.

Additionally, the dissent contended that the complaint should not have been disposed of summarily. Since the complaint asserted that the EPA was directly involved in the denial of the variance and the district court was required to take these averments as true, the dissenting opinion maintained that, as under the *Washington* holding in which the EPA also exercised direct action, the complaint should have proceeded to be decided on the merits.[19]

Shell Oil Co. v. Train clearly establishes that only official actions taken by the EPA when dealing with state-issued NPDES permits will be reviewable in federal court. Even when the Administrator's advice is the controlling factor in the state's decision regarding a permit, appellants will be required to exhaust state administrative and judicial procedures before gaining standing in federal courts.

An interesting sidelight occurred while the jurisdictional aspect of this decision was being appealed in the federal courts. After the California State Water Resources Control Board affirmed the classification of Shell's complex as a Class "E" refinery but reversed the denial of the variance,[20] the EPA Administrator filed a formal veto to the variance.[21] That action permitted Shell to obtain federal jurisdiction under *Washington.* However, no appeal was subsequently filed and the period for bringing such action expired. Therefore, Shell is still required to operate under Class "E" guidelines.

Stephen D. Pahl

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19. *Id.* at 418.

20. In the Matters of the Petition of Shell Oil Company for Review of Orders Nos. 75-11 and 77-6, California Water Resources Control Board, Order No. WQ 76-12 (Aug. 19, 1976).

21. Decision of the EPA Administrator regarding Cal. Water Resource Control Bd. Request for Approval of Alternative Effluent Limitation for Shell Oil Co., Martinez, Cal., pursuant to 40 C.F.R. § 419.52. Cal. State Bd., Order No. WQ 76-R EPA Variance FDF, 76-09 (June 30, 1978).