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Environmental Law—Administrative Law—FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972—FEDERAL COURT REVIEW OF EPA RECOMMENDATIONS TO STATE POLLUTION CONTROL AGENCY

Shell Oil Co. v. Train,
585 F.2d 408 (9th Cir. 1978)

Since the dawn of environmental legislation in the 1970's,¹ courts and litigants have tussled with problems of judicial review. Because of the stakes involved and the inscrutability of the statutes,² environmentalists and polluters alike seek redress in the courts.³ This often protracted litigation compounds the already tremendous administrative burdens and time pressures placed on the Environmental Protection Agency (EPA).⁴ *Shell Oil Co. v.*

¹ In 1971 Judge J. Skelly Wright wrote: "These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material 'progress.'" *Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971) (footnote omitted). See generally Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

² The Supreme Court has acknowledged the less than obvious character of complex environmental legislation. In *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975), dealing with statutory construction of the Clean Air Act, the Court stated: "Without going so far as to hold that the Agency's construction of the Act was the only one it permissibly could have adopted, we conclude that it was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts."

³ The major environmental statutes have each generated extensive histories of litigation over the nature of available judicial review. See, e.g., Parenteau & Tauman, *The Effluent Limitations Controversy: Will Careless Draftsmanship Foil the Objectives of the Federal Water Pollution Control Act Amendments of 1972?*, 6 ECOL. L.Q. I (1976); Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons From the Clean Air Act*, 62 IOWA L. REV. 713 (1977); Yarrington, *Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act*, 19 S.D. L. REV. 279 (1974).

⁴ "[I] acknowledge the importance of minimizing procedural complexity and delay in the issuance and enforcement of NPDES permits. Accordingly, I would be reluctant to create a rule which may result in protracted litigation prior to issuance." *Shell Oil Co. v. Train*, 585 F.2d 408, 418-19 (9th Cir. 1978) (dissenting opinion, Wallace, J.). See *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 849-50 (D.C. Cir. 1972) (court noted "need to avoid procedural strait jackets that would seriously hinder" the EPA's performance). The environmental acts typically contain specific administrative time schedules. See, e.g., Clean Air Act, §§ 107, 108, 109, 111(b), 42 U.S.C.A. §§ 7407, 7409, 7411(b) (West Supp. 1978); Federal Water Pollution Control Act Amendments of 1972, §§ 301(b)(1)(A), 304(a)(1), 304(b), 33 U.S.C. §§ 1311(b)(1)(A), 1314(a)(1), 1314(b) (1976). Typically, the overwhelmed EPA cannot comply. See *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 122 (1977).

*Train*⁵ presents a novel problem arising under the Federal Water Pollution Control Act Amendments of 1972⁶ (Act): whether a federal court can review an informal "recommendation" by the EPA that a state pollution control agency deny a National Pollution Discharge Elimination System (NPDES) permit.⁷ The Ninth Circuit properly denied review, but its opinion includes flawed reasoning and fails to expose the problems accompanying judicial review of EPA recommendations.

I

HISTORICAL BACKGROUND

Until 1972, primary responsibility for battling the national water pollution crisis rested on the states.⁸ Convinced that the states were losing badly,⁹ Congress took command and announced, in the Act, unequivocal goals¹⁰ and a new strategy. Unlike earlier federal legislation that featured general "water quality standards,"¹¹ the Act imposes direct, specific limitations on individual point sources.¹² The NPDES, which allows discharge of pollutants by permit only,¹³ forms the heart of the Act. Section

⁵ 585 F.2d 408 (9th Cir. 1978).

⁶ 33 U.S.C. §§ 1251-1376 (1976) [hereinafter cited as Act], as amended by Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

⁷ Act § 402, 33 U.S.C. § 1342 (1976).

⁸ The states "were to decide the uses of water to be protected, the kinds and amounts of pollutants to be permitted, the degree of pollution abatement to be required, the time to be allowed a polluter for abatement." S. REP. NO. 92-414, 92d Cong., 1st Sess. 8 (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3668, 3675; 2 SENATE COMM. ON PUBLIC WORKS, LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1426 (1973) [hereinafter cited as LEG. HIST.].

⁹ The Senate Committee on Public Works wrote: "After five years, many States do not have approved standards. Officials are still working to establish relationships between pollutants and water uses. Time schedules for abatement are slipping away because of failure to enforce, lack of effluent controls, and disputes over Federal-State standards." S. REP. NO. 92-414, 92d Cong., 1st Sess. 8 (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3675.

¹⁰ The Act requires attainment of water quality sufficient to support fish, wildlife, and recreation by 1983 (Act § 101(a)(2), 33 U.S.C. § 1251(a)(2) (1976)) and total elimination of pollutant discharge by 1985 (Act § 101(a)(1), 33 U.S.C. § 1251(a)(1) (1976)).

¹¹ The Act's predecessor, the Federal Water Pollution Control Act of 1965, required states to develop water quality standards. 33 U.S.C. § 1160 (1970) (amended 1972).

¹² Act § 301(e), 33 U.S.C. § 1311(e) (1976). Point sources are facilities from which pollutants are discharged, such as oil refineries.

¹³ Act § 402(a), 33 U.S.C. § 1342(a) (1976). A prior federal permit system existed under the Refuse Act of 1899, 33 U.S.C. § 407 (1970) (amended 1972). However, it had limited application and did not function effectively. See S. REP. NO. 92-414, 92d Cong., 1st Sess. 5 (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3672; 2 LEG. HIST., *supra* note 8, at 1423.

402(a)¹⁴ authorizes the EPA administrator to issue the permits; section 402(b)¹⁵ empowers him to delegate permit authority to states submitting plans that comply with the Act's guidelines.¹⁶ The states may tighten the anti-pollution standards,¹⁷ but cannot relax them.¹⁸ Although the states may thus acquire substantial administrative authority, the EPA stands as guardian of the Act's integrity.¹⁹ State agencies must transmit all permit applications to the EPA, which can veto any permit that fails to satisfy the Act.²⁰

Section 509(b)(1),²¹ the Act's sole judicial review section, provides in part:

Review of the Administrator's action . . . (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such per-

¹⁴ 33 U.S.C. § 1342(a) (1976).

¹⁵ *Id.* § 1342(b).

¹⁶ Act § 101(b), 33 U.S.C. § 1251(b) (1976) states: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . and to consult with the Administrator in the exercise of his authority under this Act." Representative Wright, House Manager of the Act, remarked: "The managers . . . look for and expect State and local interest, initiative, and personnel to provide a much more effective program than that which would result from control in the regional offices of the Environmental Protection Agency." 118 CONG. REC. 33761 (1972), *reprinted in* 1 LEG. HIST., *supra* note 8, at 262.

¹⁷ Nothing in Act § 402(b), 33 U.S.C. § 1342(b) (1976) prevents the state programs from exceeding the Act's requirements.

¹⁸ Act § 402(b)(1), (b)(2), 33 U.S.C. § 1342(b)(1), (b)(2) directs that state programs must ensure compliance with Act § 301, 33 U.S.C. § 1311 (Effluent Limitations), Act § 302, 33 U.S.C. § 1312 (Water Quality Related Effluent Limitations), Act § 306, 33 U.S.C. § 1316 (National Standards of Performance), Act § 307, 33 U.S.C. § 1317 (Toxic and Pretreatment Effluent Standards), Act § 308, 33 U.S.C. § 1318 (Inspection, Monitoring and Entry), Act § 403, 33 U.S.C. § 1343 (Ocean Discharge Criteria), and other more limited requirements.

¹⁹ Disputes between the EPA and a state threaten the uniformity of application upon which the Act depends. *See* note 22 and accompanying text *infra*. Congress created the veto power to promote uniformity in administration. Some commentators expressed concern that, absent EPA veto power, the states would compete for industry through relaxed pollution standards. *See* 118 CONG. REC. 10250 (1972), *reprinted in* 1 LEG. HIST., *supra* note 8, at 472-73 (remarks of Gov. Anderson); 118 CONG. REC. 10662 (1972), *reprinted in* 1 LEG. HIST., *supra* note 8, at 577 (remarks of Rep. Reuss). If the EPA disagreed with a state over a central requirement of the Act, the dispute would likely reproduce itself in subsequent permit applications while the courts were deciding the issue. If one state implemented a relaxed requirement, others might follow suit. In *Shell*, there was a three-year lag between the issuance of the recommendation and the court of appeals decision. A similar time lag involving a veto would severely impede administration of the Act.

²⁰ Act § 402(d)(1), 33 U.S.C. § 1342(d)(1) (1976) (transmission to EPA); Act § 402(d)(2), 33 U.S.C. § 1342(d)(2) (1976) (veto power).

²¹ 33 U.S.C. § 1369(b)(1) (1976).

son. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

The legislative history reveals that Congress specified original review in the courts of appeals in order to achieve uniform determinations in matters of more than local importance,²² and to limit review in the interests of administrative efficiency.²³ Although the Act does not mention district court review, and the legislative history does not clearly indicate its availability for actions falling outside the categories of section 509(b)(1)(F),²⁴ some courts²⁵ have

²² Because many of these administrative actions are national in scope and require even and consistent national application . . . [t]his section specifies that any review of such actions shall be in the United States Court of Appeals for the District of Columbia. For review of permits issued under section 402 and other actions which run only to one region, the section places jurisdiction in the U.S. Court of Appeals for the Circuit in which the affected State or region, or portion thereof, is located.

S. REP. NO. 92-414, 92d Cong., 1st Sess. 85 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3751; 2 LEG. HIST., *supra* note 8, at 1503. The provision for review in the District of Columbia Circuit was dropped in the final Act.

²³ The House Report stated: "The Committee believes with the number and complexity of administrative determinations that the legislation requires there is a need to establish a clear and orderly process for judicial review. Section 509 will ensure that administrative actions are reviewable, but that the review will not unduly impede enforcement." H. REP. NO. 92-911, 92d Cong., 2d Sess. 136 (1972), *reprinted in* 1 LEG. HIST., *supra* note 8, at 822-23. There was particular concern about whether the EPA could meet the time requirements prescribed by the Act. *See* S. REP. NO. 92-414, 92d Cong., 2d Sess. 85 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3750; 2 LEG. HIST., *supra* note 8, at 1503. The concern was justified. *See* E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 122 (1977).

²⁴ The House Report stated "that the inclusion of section 509 is not intended to exclude judicial review under other provisions of the legislation that are otherwise permitted by law." H. REP. NO. 92-911, 92d Cong., 2d Sess. 136 (1972), *reprinted in* 1 LEG. HIST., *supra* note 8, at 823. While the House bill provided for original review of the enumerated actions in district court, the conference committee substituted exclusive review in the courts of appeals, with no mention of district court review. S. REP. NO. 92-1236, 92d Cong., 2d Sess. 147-48 (1972) (conference report), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3824-25; 1 LEG. HIST., *supra* note 8, at 330-31. This change undercuts the House Report comment that § 509 was not intended to limit district court review. The Senate Report accompanying the Act stated: "The Courts have granted [judicial] review to those being regulated and to those who seek 'to protect the public interest in the proper administration of a regulatory system. . .'. Since precluding review does not appear to be warranted or desirable, the bill would specifically provide for such review within controlled time periods." S. REP. NO. 92-414, 92d Cong., 1st Sess. 85, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3750; 2 LEG. HIST., *supra* note 8, at 1503. This comment indicates that the Senate Committee on Public Works felt a need to define and control judicial review, and felt that § 509(b) accomplished that purpose.

²⁵ *See* Washington v. EPA, 573 F.2d 583, 588 (9th Cir. 1978); Save the Bay, Inc. v. Administrator, 556 F.2d 1282, 1293 (5th Cir. 1977); C.P.C. Int'l, Inc. v. Train, 515 F.2d

found such review available under section 10 of the Administrative Procedure Act (APA).²⁶

Several courts have wrestled with the availability of review for EPA veto decisions. In *Save the Bay, Inc. v. Administrator*,²⁷ the Fifth Circuit considered an EPA determination not to veto a permit, and found a very limited district court review available under section 10 of the APA.²⁸ In *Mianus River Preservation Committee v. Administrator*,²⁹ the EPA failed to review a permit. The Second Circuit held that review of this administrative decision was unavailable in the courts of appeals.³⁰

Prior to *Shell*, in *Washington v. EPA*,³¹ the Ninth Circuit decided that an EPA veto of a state agency decision was not an "action" for purposes of section 509(b)(1)(F).³² The court reasoned that this section was designed solely for the period during which the Administrator of the EPA had direct responsibility for permit issuance; the provision was inapplicable once the state assumed responsibility.³³ However, the court found that review was available in district courts under the APA.³⁴

II

SHELL OIL CO. v. TRAIN

In 1971 Shell sought a discharge permit for a combined petroleum refinery and organic chemical plant. In 1973 the EPA approved California's NPDES program. The California Regional Water Quality Review Board (Regional Board) classified Shell's facility as a Class E refinery.³⁵ Shell sought classification as a Class D facility or, alternatively, a variance³⁶ from the Class E re-

1032, 1038 (8th Cir. 1975). *But see* E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112 (1977) (regulations specifying effluent limitations under Act § 304, 33 U.S.C. § 1314 (1976) reviewable in courts of appeals, not in district court as held below and in C.P.C. Int'l, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975)).

²⁶ 5 U.S.C. § 701-06 (1976).

²⁷ 556 F.2d 1282 (5th Cir. 1977).

²⁸ The review extends only to whether EPA had considered all relevant factors and no unlawful factors in making its determination. *Id.* at 1296.

²⁹ 541 F.2d 899 (2d Cir. 1976).

³⁰ *Id.* at 909-10.

³¹ 573 F.2d 583 (9th Cir. 1978).

³² *Id.* at 586-87.

³³ *Id.* at 586. *See* text accompanying note 16 *supra*.

³⁴ *Id.* at 588.

³⁵ *See* Subpart E—Integrated Subcategory, 40 C.F.R. § 419.50 (1978).

³⁶ *See* Effluent limitation guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available, 40

quirements. In 1975 the EPA "recommended,"³⁷ without formal veto, that the Regional Board deny the variance. The Board followed the recommendation. Under California law,³⁸ Shell sought review of the Regional Board's decision by the California Water Resources Control Board (State Board). At the same time, Shell commenced actions in federal district court³⁹ and the Court of Appeals for the Ninth Circuit.⁴⁰

The Ninth Circuit quickly dismissed, finding no "federal action" sufficient to invoke jurisdiction under section 509(b)(1)(F).⁴¹ In the district court action, Shell alleged that the recommendation was in effect a veto, and therefore was reviewable under *Washington v. EPA*.⁴² The court dismissed the petition for lack of subject matter jurisdiction; the court held that Shell had demonstrated nothing more than "advice" by the EPA,⁴³ and that "failure to disapprove a state administrative action" did not constitute federal action sufficient to invoke federal review.⁴⁴ Shell appealed to the Ninth Circuit.

Meanwhile, after the district court and initial Ninth Circuit opinions, but before issuance of the present opinions, the State Board reversed the Regional Board and granted the variance.⁴⁵ By the time the Ninth Circuit reviewed the district court's decision, the EPA had recast the recommendation as a veto.⁴⁶ The court considered only the effect of the EPA's recommendation; it

C.F.R. § 419.52 (1978). Variances are authorized by Act § 402(d)(1), 33 U.S.C. § 1342(d)(1) (1976) (transmittal to EPA) and Act § 402(d)(2), 33 U.S.C. § 1342(d)(2) (1976) (veto). See *Shell Oil Co. v. Train*, 585 F.2d 408, 416 (9th Cir. 1978) (dissenting opinion, Wallace, J.).

³⁷ The "recommendation" was given pursuant to a "memorandum of understanding" between the EPA and the Regional Board. 585 F.2d at 411. This informal recommendation process is not explicitly sanctioned in the Act. However, Act § 402(d)(1), 33 U.S.C. § 1342(d)(1) (1976) provides that states must forward every permit request to the EPA and must give the agency notice of every action taken, including granting the permit. The notice provision of § 402(d)(1) seems to envision a sub-veto interaction between states and the EPA. See note 92 *infra*.

³⁸ CAL. WATER CODE § 13320(a) (West Supp. 1978).

³⁹ *Shell Oil Co. v. Train*, 415 F. Supp. 70 (N.D. Cal. 1976), *aff'd*, 585 F.2d 408 (9th Cir. 1978).

⁴⁰ *Shell Oil Co. v. Train*, No. 75-2070 (9th Cir., Sept. 30, 1975).

⁴¹ *Id.*

⁴² 573 F.2d 583 (9th Cir. 1978). See text accompanying notes 31-34 *supra*.

⁴³ *Shell Oil Co. v. Train*, 415 F. Supp. 70, 77 (N.D. Cal. 1976), *aff'd*, 585 F.2d 408 (9th Cir. 1978).

⁴⁴ *Id.* at 77-78.

⁴⁵ 585 F.2d at 412.

⁴⁶ *Id.* The dissent also felt that these developments should be disregarded for purposes of the present determination. *Id.* at 418 (dissenting opinion, Wallace, J.).

registered less than eager anticipation of Shell's impending appeal of the EPA's veto.⁴⁷

In affirming the district court's dismissal, the *Shell* majority construed the complaint to allege that the EPA had somehow compelled the Regional Board to deny the permit and variance.⁴⁸ They felt that such "undue influence" or "coercion" analysis would endanger countless cooperative federal-state programs,⁴⁹ presumably by raising tenth amendment problems.⁵⁰ Because the Supreme Court has long held such programs constitutional,⁵¹ the majority found Shell's allegations "unsupported and . . . unsupportable."⁵² They distinguished *Washington v. EPA* on the ground that it had involved an actual veto.⁵³ The majority also noted that review was unavailable under section 10 of the

⁴⁷ *Id.* at 412.

⁴⁸ *Id.* at 413.

⁴⁹ *Id.* at 413-14.

⁵⁰ *Id.*

⁵¹ *Id.* The court cited *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947), and *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937). *Oklahoma* held that § 12 of the Hatch Act, allowing the Civil Service Commission to remove a state official for political activities, did not run afoul of the tenth amendment. *Steward Machine* held that a tax credit provision for states with unemployment programs did not violate the tenth amendment. The court also mentioned *National League of Cities v. Usery*, 426 U.S. 833 (1976) as an example of potential constitutional problems. In that case, however, the Supreme Court found a federal requirement invalid as a violation of the tenth amendment (*id.* at 852), indicating that the presence of tenth amendment problems should not be a barrier to judicial consideration.

In all these cases, plaintiffs specifically alleged unconstitutional coercion. Neither the court of appeals nor the district court opinion, 415 F. Supp. 70 (N.D. Cal. 1976), indicates that Shell alleged unconstitutionality. Judge Wallace quoted the "essence" of the complaint:

Although the application for a variance was ostensibly made to and the variance was ostensibly denied by the Regional Board, and although the Permit was ostensibly issued by the Regional Board, the Administrator, through his subordinates, made all material decisions by which the variance was denied and by which the Permit issued and instructed the Regional Board to follow those decisions.

585 F.2d at 417 n.5 (dissenting opinion, Wallace, J.). If federal reversal of a state permit involves "coercion," then that "coercion" is explicitly authorized by the Act's veto provision, § 402(b), 33 U.S.C. § 1342(b) (1976). Shell did not challenge the constitutionality of EPA recommendations or of the veto provision; the allegation of functional equivalence between a recommendation and a veto should raise no constitutional issue. The language of the complaint alleged that the Regional Board acquiesced in the EPA's decisions. The cases cited by the majority involving overt constitutional challenges are inapposite.

⁵² 585 F.2d at 414.

⁵³ *Id.* at 413.

APA⁵⁴ because the recommendation was not final⁵⁵ and because adequate review was available in the state courts.⁵⁶

Judge Wallace, in dissent, rejected the majority's federalism analysis and read Shell's complaint to allege that the recommendation functioned as a veto, and should be reviewed as such.⁵⁷ Because vetoes are authorized by the Act,⁵⁸ this reading raises no constitutional issues.⁵⁹ Judge Wallace felt that "informal vetoes" should be reviewed in the same terms as actual vetoes.⁶⁰ Consequently he viewed the case as presenting a factual question as to whether the EPA actually "made" the decision to deny the variance.⁶¹ Since a motion for pretrial dismissal requires the court to accept the opposing parties' allegations,⁶² the dissent would have remanded the case to the district court.⁶³

III

ANALYSIS

A. The Availability of Nonstatutory Judicial Review

Many administrative statutes provide for review of agency action in the courts of appeals.⁶⁴ Courts and commentators quarrel, however, over the availability of "nonstatutory" judicial review, or review of actions not included in the statutes' review provisions.⁶⁵ Section 10 of the APA⁶⁶ authorizes and limits nonstatutory review. Review is available for final agency actions

⁵⁴ 5 U.S.C. §§ 701-06 (1976).

⁵⁵ The court argued that the fact that "[t]he decision that Shell sought to have the district court review no longer has any operative significance . . . shows at a minimum that the challenged decision was not final." 585 F.2d at 414.

⁵⁶ *Id.*

⁵⁷ *Id.* at 420-21 (dissenting opinion, Wallace, J.).

⁵⁸ Act § 402(b), 33 U.S.C. § 1342(b) (1976).

⁵⁹ See note 51 *supra*.

⁶⁰ 585 F.2d at 419 (dissenting opinion, Wallace, J.).

⁶¹ *Id.* at 420.

⁶² *Id.* at 418.

⁶³ *Id.* at 421.

⁶⁴ See 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3568 (1975).

⁶⁵ See, e.g., K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 28.08 (1976); Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387 (1970).

⁶⁶ 5 U.S.C. § 704 (1976).

which have no other adequate remedy in court,⁶⁷ and are not precluded from review by statute⁶⁸ or committed to agency discretion by law.⁶⁹ Oft-quoted Supreme Court decisions have spoken of a strong presumption of reviewability absent "clear and convincing evidence" of contrary legislative intent.⁷⁰ Similarly, in *Citizens to Preserve Overton Park v. Volpe*,⁷¹ the Court construed the APA's discretion exception narrowly to apply only when the statute is "drawn in such broad terms that in a given case there is no law to apply."⁷²

Lower courts employ criteria for reviewability more flexible than either the Supreme Court or APA formulations. Professor Davis writes:

Whether or not the agency finds "law to apply," courts generally follow the presumption of reviewability unless (a) congressional intent, whether or not clear and whether or not explicitly stated, is discernible to cut off review, (b) the issues are for some reason deemed inappropriate to judicial determination, or (c) the courts find some other reason they deem sufficient for denying review.⁷³

Essentially, courts may find actions unreviewable because of perceived legislative intent,⁷⁴ or for any other good reason.⁷⁵

⁶⁷ *Id.*

⁶⁸ *Id.* § 701(a)(1).

⁶⁹ *Id.* § 701(a)(2).

⁷⁰ See, e.g., *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 156 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

⁷¹ 401 U.S. 402 (1971).

⁷² *Id.* at 410 (quoting S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)).

⁷³ K. DAVIS, *supra* note 65, § 28.16-1, at 641 (1976). See generally *id.* §§ 28.08 to 28.16-1.

⁷⁴ Legislative history can reveal implied intent to preclude review. See *Ted Bates & Co. v. FTC*, 515 F.2d 367, 370 (D.C. Cir. 1975); K. DAVIS, *supra* note 65, at § 28.09. In *Boire v. Greyhound Corp.*, 376 U.S. 473 (1963), the Supreme Court used legislative history to preclude review in a situation strongly analogous to *Shell*. Section 10 of the National Labor Relations Act, 29 U.S.C. § 160 (1976), provides for review of "final orders" in the courts of appeals. The statement does not expressly preclude review of other decisions. The Supreme Court, citing legislative intent to delay review until after elections had been held, concluded that certification decisions were not "final orders" reviewable in the courts of appeals. *Id.* at 479. The Court further held that legislative intent precluded district court review, except under the narrow exception of *Leedom v. Kyne*, 358 U.S. 184, 189 (1958), where the NLRB "attempted exercise of [a] power that had been specifically withheld." 376 U.S. at 480.

⁷⁵ In discussing the 1976 amendments to the federal question statute, 28 U.S.C. § 1331 (1976), the House Committee on the Judiciary noted that the amendments left the scope of

B. Federal Court Review of EPA Recommendations

Shell contended, and the dissent accepted, that reviewability of recommendations should be a question of fact.⁷⁶ Shell sought access to district court to prove that the EPA's recommendation functioned as a veto and demanded equivalent reviewability. While this theory does not disinter the constitutional ghosts that troubled the majority,⁷⁷ it falters over considerations of legislative intent and simple practicality. Ad hoc determination of reviewability cannot coexist peacefully with the Act's goals of limiting review for administrative efficiency,⁷⁸ and preserving substantial state autonomy.⁷⁹

Shell's theory would allow plaintiffs into court to litigate the threshold question of whether an EPA recommendation was in fact a veto. During the initial factual inquiry, the court would focus on the state decisionmakers. Because the EPA cannot compel a state agency to accept a recommendation, the court would have to determine that the state officials accepted the recommendation as conclusive.⁸⁰ Thus, informal EPA "advice" would in effect subject the state agency to federal review. This result clashes with the Act's goal of preserving state autonomy.⁸¹ Moreover, the court would have to inquire into the mental processes of the decisionmakers—a burdensome and probably inconclusive procedure.

If the court found an "informal veto," the focus of the trial would shift to the EPA for evaluation of the recommendation on the merits—another burdensome and time consuming determination. Since the Act does not mention recommendations, let alone provide standards for their use, the court would have to go fish-

judicial review unaffected. See H.R. REP. NO. 94-1656, 94th Cong., 2d Sess. 15 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6135. The committee provided a list of limitations on judicial review:

These . . . include, but are not limited to, the following: (1) extraordinary relief should not be granted because of the hardship to the defendant or to the public ("balancing the equities") or because the plaintiff has an adequate remedy at law; (2) action committed to agency discretion; (3) express or implied preclusion of judicial review; (4) standing; (5) ripeness; (6) failure to exhaust administrative remedies; and (7) an exclusive alternative remedy.

Id. at 12, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6132.

⁷⁶ See note 51 & 61 and accompanying text *supra*.

⁷⁷ See notes 51-52 and accompanying text *supra*.

⁷⁸ See note 23 and accompanying text *supra*.

⁷⁹ See note 16 and accompanying text *supra*.

⁸⁰ See text accompanying note 61 *supra*.

⁸¹ See note 16 and accompanying text *supra*.

ing for "law to apply."⁸² Moreover, it might well have to decide the merits on an inadequate record.⁸³ Even if the court found an "informal veto" and held it unwarranted under the Act, the court could not bind the state agency or state courts. Regardless of the factual determination, the state remains the technical decision-maker and the federal court exercises no jurisdiction over it.⁸⁴ The only value of a judgment on a recommendation would be to influence the state decision,⁸⁵ or to forestall a subsequent EPA veto. In either case, federal review is duplicative and unnecessary.⁸⁶

Review of recommendations would also impose an undesirable rigidity on federal-state interactions. The Act is designed to allow the states to make the bulk of permit decisions.⁸⁷ Large scale EPA intervention is objectionable because it infringes on state autonomy and spreads the EPA too thin. If recommenda-

⁸² See text accompanying notes 71-72 *supra*; see generally K. DAVIS, *supra* note 65, §§ 28.16 & 28.16-1 (1976). On Shell's theory, the court would apply the law applicable to vetoes: to justify a recommendation of denial, the permit would have to violate the Act's guidelines. Courts have limited ability to judge technical determinations on the merits, and usually confine their review to whether the agency took a "hard look" at the problem. See Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 541-42 (1974). Judge Leventhal ought to know. See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973) (majority opinion, Leventhal, J.). One virtue of the recommendation process is that it enables the EPA to give general guidance without taking burdensome "hard looks" at individual permits. In any case, the EPA cannot be fairly held to a veto-level review on the merits simply because the state acquiesced in the recommendation. Instead, the state decision should be reviewed in state court. See text following note 93 *infra*.

⁸³ If EPA makes recommendations without a "hard look" (see note 82 *supra*), there will likely be a scanty record. Courts sometimes take the adequacy of the record into consideration in determining reviewability. See *Save the Bay, Inc. v. Administrator*, 556 F.2d 1282, 1291-92 (5th Cir. 1977).

⁸⁴ The controlling federal review statutes, 33 U.S.C. § 1369(b)(1) (1976) (Act) and 5 U.S.C. § 704 (1976) (APA), provide only for the review of federal agency action, not that of a state agency. Because a state can impose requirements stricter than those provided in the Act (see note 17 and accompanying text *supra*), a state denial of a permit should not generate "arising under" jurisdiction under 28 U.S.C. § 1331 (1976).

⁸⁵ Since, even under Shell's formulation, reviewability depends on state acquiescence, the initial state decision will have been made well before review of the recommendation. The fact that a federal judgment might "influence" a subsequent state agency or court decision hardly justifies federal review. Judge Wallace in dissent felt that a state court might order the state to comply with a federal recommendation. 585 F.2d at 420 (dissenting opinion, Wallace, J.). Judge Wallace supported this unlikely result by citing California regulations, and the "Memorandum of Understanding" between the State Board and the EPA. *Id.* at 416 n.4. His analysis falters; the cited provisions refer to vetoes, not recommendations. In fact, in *Shell* the State Board overruled the recommendation. *Id.* at 412.

⁸⁶ There is little efficiency in anticipating vetoes which may not occur.

⁸⁷ See note 16 and accompanying text *supra*.

tions are to be reviewed because they are functionally "vetoes," presumably they must meet the same standards.⁸⁸ Consequently, exposure to federal review would hold the EPA responsible for the merits of every permit upon which it made a recommendation. Such a requirement would drastically limit the flexibility of recommendations and probably curtail their use altogether.⁸⁹

Recommendations allow the EPA to give general advice without invoking the "all-or-nothing" consequences of a veto. It can make recommendations without dictating state decisions, without committing itself to full-scale investigation of the permits, and without exposing itself to federal review. The recommendation is one factor used by the state in a more comprehensive decision-making process. The Act's policies of state autonomy⁹⁰ and limitation of review⁹¹ support these goals. Such "sub-veto" level interaction is consistent with the Act's provisions authorizing EPA review of permits.⁹²

⁸⁸ See note 82 and accompanying text *supra*.

⁸⁹ If a recommendation is reviewable on the merits as a veto, the EPA would have to make a veto-level investigation. There would be no apparent reason to make a recommendation rather than a veto. Since vetoes were intended to be used sparingly and only for exceptionally significant permits, federal-state relations would be unduly restricted. Representative Wright, House manager of the Act, remarked: "I must give added emphasis to this point. The managers expect the Administrator to use [the veto] authority judiciously; it is their intent that the Act be administered in such a manner that the abilities of the States to control their own permit programs will be developed and strengthened." 118 CONG. REC. 33761 (1972), reprinted in 1 LEG. HIST., *supra* note 8 at 262. The Senate Report stated: "[T]he Committee expects that, after delegation, the Administrator will withhold his review of proposed permits which are not of major significance." S. REP. NO. 92-414, 92d Cong., 1st Sess. (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3737; 2 LEG. HIST., *supra* note 8, at 1489.

⁹⁰ See note 16 and accompanying text *supra*.

⁹¹ See note 23 and accompanying text *supra*.

⁹² While not expressly mentioning recommendations, Act § 402(d)(1), (d)(2), 33 U.S.C. § 1342(d) (1976) provides:

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification [regarding interstate pollution problems], or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of [the Act].

Interstate pollution problems aside, vetoes only result when the EPA objects *after* the state has proposed to issue the permit. Nonetheless, the state must transmit the initial application to the EPA, and notify them of every "action related to the consideration" of the permit. These provisions are superfluous if the EPA cannot comment on the application in the initial stages.

A degree of subterfuge may result if the state automatically acquiesces in recommendations of denial, or if the EPA uses recommendations only when vetoes will inevitably follow.⁹³ These abuses are best checked by ensuring that the state make an accurate initial decision, based on a full consideration of the application. There is no need for federal review of every state agency action—if the states are given decisionmaking authority, their courts must be presumed competent to review these decisions.

C. *A Proposal for Reform*

Superior alternatives to federal review of recommendations exist. State courts should review state decisions, and federal appellate courts should review subsequent EPA vetoes. This process would permit binding review of the decisionmaking agency, on an appropriate record, without the metaphysical inquiry into who “made” the decision. EPA recommendations should not be reviewed in federal courts. Under the criteria for reviewability adopted by the lower federal courts, the most straightforward rationale is that recommendations are simply “inappropriate for review.”⁹⁴ Recommendations are informal and advisory, and unsuited to review on the merits. Courts could also persuasively deny review on grounds that the recommendations are committed to agency discretion,⁹⁵ that alternative remedies are available,⁹⁶ or that legislative intent impliedly precludes review.⁹⁷ Courts might also find recommendations unreviewable because they are not “final,” but this ground is less compelling.⁹⁸

⁹³ Short of a veto, the EPA has no direct leverage over the state. Recall of the state's permit authority is unlikely absent unusual circumstances. Vetoes are to be used sparingly, in matters of exceptional importance. See note 89 and accompanying text *supra*. In such cases the EPA might prefer to make a veto and defend it expeditiously, rather than allowing the matter to meander through state court. Assuming the EPA took a “hard look” at the problem, it could probably defend the veto with relative ease. See note 82 *supra*.

⁹⁴ See language quoted in text accompanying note 73 *supra*. See generally *Davis Assocs., Inc. v. Secretary*, 498 F.2d 385, 390 (1st Cir. 1974) (denying review of a housing decision because issues not appropriate for review); K. DAVIS, *supra* note 65, §§ 28.08 & 28.16-1 (1976).

⁹⁵ See notes 71, 72 & 82 and accompanying text *supra*.

⁹⁶ See notes 56 & 67 and accompanying text *supra*.

⁹⁷ See note 74 and accompanying text *supra*.

⁹⁸ See notes 55, 67 & 89-92 and accompanying text *supra*. Judge Wallace, in dissent, felt that the action was final. 585 F.2d at 420. Because EPA recommendations are, in theory, subject to reversal by the State Board, they are nonfinal. It can be argued, however, that because recommendations contemplate “expected conformity,” they are final actions. See *id.*

Vetoes, on the other hand, must be reviewed in federal court. They represent final, determinative EPA decisions. *Washington v. EPA* notwithstanding,⁹⁹ the courts of appeals should exercise original jurisdiction under section 509(b)(1)(F).¹⁰⁰ Further, allowing review of vetoes to flounder in district court violates the Act's goals of uniformity and administrative efficiency.

The proposed scheme rejects Shell's "functional equivalence" theory by establishing the reviewability of recommendations and vetoes as matters of law. State courts will consider EPA recommendations in the context of reviewing state agency actions. Federal courts of appeals will expeditiously resolve federal-state disputes that survive in the form of an EPA veto. The scheme reduces administrative delays and allows a flexible balance between federal guidance and state autonomy.

Daniel W. Emery

⁹⁹ 573 F.2d 583 (9th Cir. 1978). See text accompanying notes 31-33 *supra*.

¹⁰⁰ The *Washington v. EPA* court misapplied precedent. It cited *Mianus River Preservation Comm'n v. Administrator*, 541 F.2d 899 (2d Cir. 1976), and *Save the Bay, Inc. v. Administrator*, 556 F.2d 1282 (5th Cir. 1977), as direct authority, failing to distinguish between an actual veto and decisions not to review or not to veto permits. The EPA is not required to review state permits, or even to veto them where the permit concededly violates the Act. See Act § 402(d)(3), 33 U.S.C. § 1342(d)(3) (1976); *Save the Bay, Inc. v. Administrator*, 556 F.2d at 1294. It is difficult to characterize a failure to veto as an action "issuing or denying" a permit. A veto, on the other hand, absolutely denies the permit. Act § 402(d)(2)(B), 33 U.S.C. § 1342(d)(2)(B) (1976).

In *Mianus River*, the court explicitly stated that its holding did not extend to cases where the EPA was actually involved in the state decision, and intimated that *Shell* might be such a case. 541 F.2d at 909. The court also expressed its opinion, in which the EPA apparently concurred, that a veto would be reviewable in the courts of appeals under Act § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) (1976). *Id.* at 909 & n.26.

Even the *Shell* majority agreed with this conclusion. Apparently unencumbered by precedent (*Washington* was decided one year before in the same circuit), the majority said of the subsequent EPA veto: "That decision is reviewable in this court under 33 U.S.C. § 1369(b)(1)." 585 F.2d at 412.

Recommendations, on the other hand, do not "deny" permits—the state is free to ignore the recommendation. The Act's goals of limiting review and preserving state autonomy militate against stretching § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) (1976) to include recommendations. See note 16 *supra*; text accompanying notes 81 & 87 *supra*.

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