ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR



In re:	:	
Proposed Toxic Pollutant	:	
Effluent Standards for	:	FWPCA (307) Docket No. 1
Aldrin-Dieldrin et al	:	

Order

This case comes before the Administrator on appeal by the Registrants from a ruling of the Administrative Law Judge excluding certain testimony of Environmental Protection Agency witnesses on the ground that it was unresponsive and not specifically designed to rebut evidence previously introduced by industry's counsel (the "Objectors").

Briefly stated the facts of the case bearing on this appeal show that on December 27, 1973, the Environmental Protection Agency published in the Federal Register (38 Fed. Reg. 35389) certain "Proposed Toxic Pollutant Effluent Standards," for nine substances, citing as authority therefor section 307(a) of the Federal Water Pollution Control Act, as amended (FWPCA). Simultaneously, notice was given to "persons adversely affected by the proposed standards" for the purpose of filing their objections no later than

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January 18, 1974, and for a public hearing to be held on January 25, 1974. At that time, a hearing in the nature of a pre-trial conference was held before the Administrative Law Judge. On that date EPA issued its "Statement of Basis and Purpose" as required by the Rules of Practice issued by EPA (Title 40, C.F.R. §104.4, 39 Fed. Reg. 1027, December 27, 1973). A schedule of the submission of written testimony in affidavit form was established by the Administrative Law Judge and required interested parties to file those documents on or before March 15, 1974. Hearings began on the proposed effluent standards on April 8th.

On May 20th, during the course of the proceeding, the testimony of three EPA witnesses, Dr. Gilman Veith, Dr. Thomas Duke, and Mr. Alfred J. Wilson, was excluded by a ruling of the Administrative Law Judge.

Dr. Veith's testimony was excluded because the Administrative Law Judge ruled that his supporting exhibits had not been proffered in a timely fashion prior to the date of May 20th when first offered into evidence.

The testimony of both Dr. Duke and Mr. Wilson was excluded from the record as not being proper rebuttal to the previous testimony submitted by the opposing parties in that it contained new information and data to which the opposing parties had not had prior access.

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The Registrants submitted their appeal on June 6, 1974.

It is admitted by the Registrants that at the time these standards were proposed the underlying data base was not complete.

> Time limitations established by court order, [NRDC v. Fri, Civ. Action #849-73 (D.D.C.)], have required publication of these standards at this time, even though it is acknowledged that there may in some cases be inadequacies in the underlying data base. Public comment and technical data are solicited to assist in strengthening the standards. 38 Fed. Reg. 35388, 35389, December 27, 1973.

Registrants' position is that the intent of the Congress was to have the Administrator consider a wide range of data in setting standards under section 307(a) of the FWPCA, as amended. Thus, a hearing on proposed effluent standards has as its purpose the receipt of all evidence pertinent to the setting of those standards.

The Registrants further contend that the burden of going forward with the evidence should have been placed on the Objectors. The Registrants cite the Federal Water Pollution Control Act, which provides in section 307(a)(2) that a modification of a proposed standard may be made only if "the Administrator finds, on the record, that a modification of such a proposed standard (or prohibition) is justified based on a preponderance of evidence adduced at such hearings . . . ." Accordingly, the Registrants claim that the Objectors had the

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burden of proof and EPA had the right to put on its case following the introduction of industry's evidence. EPA should not have been limited to rebuttal affidavits.

Finally, the Registrants argue that even if EPA did have the burden of proof and was limited to rebuttal affidavits following industry's case, the rebuttal evidence was proper. It was proffered in response to industry's criticism of the insufficient data base supporting the proposed standard and was therefore admissible.

The Objectors contend that the Agency is barred from publishing as "proposed" standards, preliminary suggestions which are admittedly incomplete and based on inadequate scientific data. The Objectors believe that the Registrants attempted to use the hearing process to introduce new, expert testimony to remedy deficiencies in the Statement of Basis and Purpose which, if admitted, would have tended to completely revise the proposed standards while effectively limiting the opportunity for industry to respond to those revisions.

The particular relevancy of the proffered affidavits of the three EPA witnesses is not contended by the parties to this appeal. As the Objectors stated in their joint brief (Appendix, p. 4), ". . . [E]veryone involved in the proceedings to date, including both the Administrative Law Judge and the

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Objectors, have consistently agreed that the information set forth in the proffered affidavits would have been (generally speaking) relevant material for consideration in the formulation of proposed standards and could properly have been received in evidence if the information had been presented in the Agency's Statement of Basis and Purpose before the hearing began."

The point made and its significance to this review bear not so much on the relevancy, materiality or competency of the evidence proffered, but rather on maintenance of fundamental fairness, due process, and orderly presentation of that evidence. The Registrants' brief addresses at length appropriate means by which to insure the Objectors are not prejudiced by the new material, they admit is contained in their "rebuttal" affidavits. Certainly neither side may be denied the fair opportunity for the presentation of its own case nor may it be denied a fair opportunity to examine the evidence presented by an opposing party. It is apparently the Registrants' view that the scope of "rebuttal" evidence is so broad as to encompass virtually any evidence having a bearing on the validity or efficacy or possible revisions of the proposed standards. By this reasoning evidence which was not directly responsive to the Objectors' case or directly supportive of the standards and Statement of Basis

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and Purpose originally proposed by the Registrants would be considered "rebuttal" evidence. Under such theory EPA by presenting "rebuttal" evidence could, in effect, offer modifications or its own proposed standards during the course of the hearing. The Administrative Law Judge correctly rejected this broad theory of "rebuttal" evidence and determined that "rebuttal" evidence must be directly responsive to the Objectors' case.

Beyond the narrow question of whether evidence was correctly identified as "rebuttal," is the question of the basic purpose of the administrative hearing itself which appears to give rise to the real differences precipitating this appeal. The Registrants contend, as mentioned earlier, that the purpose of the hearing is to assemble a wide range of data pertinent to the setting of toxic pollutant effluent standards. Indeed, section 307(a) of the Act does require the Administrator to take into account, in setting effluent standards for a toxic pollutant, "the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms . . . ."

Again, it is indisputable that there are a number of issues which the Administrator is required by statute to

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consider in the standard-setting process. It is, however, clear from both the statute and the regulations that publication in the Federal Register of proposed standards must necessarily follow consideration of all the matters set out in section 307(a). Further, it should be noted that the statute in section 307(a)(2) provides that in the absence of modifications adduced upon a preponderance of the evidence such proposed standard (or prohibition) shall be promulgated. This would appear to impose a statutory requirement that the standards as proposed be premised upon as thorough and complete a basis for promulgation as can be made by the Agency prior to the hearing stage. Subsequent alteration of the proposals can only result from a consideration of proposed modifications presented at the administrative hearing. A close reading of Section 104.6 of Title 40, Code of Federal Regulations (39 Fed. Reg. 1027, December 27, 1973) relating to this matter of objections to the proposed effluent standards, would indicate that when these suggested modifications are made, they are made by the public and not the proposing Agency. Were it the intent of the legislation to establish the administrative hearing as a mere information-gathering forum for purposes of insuring an adequate data base prior to proposal of effluent standards, it could have so provided. It did not.

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The regulations of the Agency implementing this legislation also viewed the hearing as a forum for consideration of Objectors' suggested modifications to proposed standards. This is clear from section 104.6 of the regulations in which the form and content of objections are dealt with in considerable detail. Conspicuously absent from the regulations are any corresponding provisions with respect to proposed modifications or revisions of the proposed standards by EPA. Similarly, the regulations clearly require a complete identification not only of the proposed standards but of all necessary supporting data and information by EPA prior to the commencement of a hearing (see Section 104.4, 39 Fed. Reg. 1027, December 27, 1973). The regulation requires a Statement of Basis and Purpose which must give an explanation of how the standard was derived, the supporting scientific and technical data, and such other information as is necessary prior to the hearing. The purpose of this requirement is to inform the interested public so that responsive objections may be submitted, thus joining the issues and providing a focus for the submission of the Objectors' responsive case.

If section 307(a)(2) of the Act and the regulations are to be construed properly, it necessarily follows that at the subsequent hearing the Agency must go first and present its case in chief, which supports the standards as proposed by the Agency and which permits the scientific data and

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information already identified in the Statement of Basis and Purpose to be introduced into the record. Nothing further is authorized or contemplated in the statute or implementing regulations. To suggest otherwise would require the Objectors to present evidence for modification of standards for which no explanation, documentation or supporting evidence existed.

In the broad sense, the proponent of a proposed rule has the burden with respect to such modification. More specifically, the statute here imposes yet a further burden upon the proponents of a proposed modification. They must show upon a preponderance of the evidence of record the justification for such proposed modification (section 307(a)(2) of the Act). No such additional burden is imposed upon the Agency proposing the standards. In this context, the statute and the regulations view the hearing as a forum for a consideration of Objectors' proposed modifications.

In view of the foregoing, the ruling of the Administrative Law Judge denying the admission into evidence of EPA-offered affidavits of Dr. Gilman Veith, Dr. Thomas Duke, and Mr. Alfred J. Wilson is sustained.

May 10, 1974
Date

John R. Quarles, Jr.
Deputy Administrator

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