

NOTES

Chemical Manufacturers Ass'n v. EPA: THE DISCRETION OF THE ENVIRONMENTAL PROTECTION AGENCY IN REGULATING INTERIM STATUS HAZARDOUS WASTE FACILITIES

I. FACTS OF THE CASE

In May 1980, the Environmental Protection Agency (EPA) promulgated closure regulations covering interim status hazardous waste facilities. The regulations required interim facilities to complete closure within 180 days after receiving the final volume of "waste." These regulations remained unchanged until EPA revised them in 1986. The 1986 revised regulations required closure within 180 days after receiving the final volume of "hazardous wastes." Union Carbide Chemicals (Union Carbide) and the Chemical Manufacturers Association (CMA) vigorously opposed these regulations arguing that, instead of being shut down, their interim status hazardous waste facilities should be allowed to continue receiving nonhazardous wastes.

In 1989, in response to these concerns, EPA amended the 1986 regulations. The amended closure regulations provided that interim status surface impoundments could continue operations after ceasing to receive hazardous wastes as long as they met one of two requirements: the facility either had to meet the minimum technological requirements imposed by the 1984 Amendments to the Resource Recovery and Conservation Act, or the facility had to remove all significant amounts of hazardous waste.

In November 1989, Union Carbide filed a petition for review of the 1986 and 1989 closure regulations. Union Carbide challenged the regulations as being arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. Specifically, Union Carbide complained that EPA, in drafting the regulations, violated the express intent of Congress by failing to adequately justify the regulatory choices it made, by acting irrationally and inconsistently in adopting the regulations, and by applying the wrong legal standards when examining the

need for the regulations. The court held that the challenged regulations were consistent with congressional intent, and that EPA did not act arbitrarily in promulgating the regulations. Union Carbide's and CMA's petitions for review were denied by the court. *Chemical Manufacturers Ass'n v. United States EPA*, 919 F.2d 158 (D.C. Cir. 1990).

II. HISTORICAL BACKGROUND

The Resource Conservation and Recovery Act of 1976 (RCRA) was enacted to require EPA to establish a regulatory program for the management of hazardous wastes.¹ Congress saw that technological progress and the economic growth of the country had created a need for regulating the disposal of the immense amount of hazardous waste produced.² RCRA attempted to resolve this overwhelming problem.

Subtitle C of RCRA provided a comprehensive framework for the treatment and disposal of hazardous wastes.³ Section 3004(a) of RCRA required EPA to draft regulations promulgating performance standards as necessary to protect human health and the environment.⁴ Compliance with these standards was required by permits that were issued authorizing the construction or operation of a hazardous waste facility.⁵ Facilities already in operation by November 19, 1980, were granted "interim status." Interim status facilities were treated as having been issued a permit until a final administrative disposition of their permit application was made.⁶ These facilities were required to apply for permits and to meet all the applicable performance standards to remain in operation.⁷ The facility at issue in *Chemical Manufacturers*, the Union Carbide-owned Holz Pond surface impoundment facility, had been granted interim status.

Congress extensively modified RCRA in the Hazardous and Solid Waste Amendments of 1984.⁸ The Amendments' major purpose was to discourage the use of land facilities for the stor-

1. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-92 (1989).

2. *Id.* § 6901(a)(2).

3. *Id.* §§ 6901-6941.

4. *Id.* § 6924(a).

5. *Id.* § 6925(c).

6. *Id.* § 6925(e).

7. *Id.*

8. *Id.* §§ 6901-92.

age and disposal of hazardous wastes.⁹ Section 3004(o) of RCRA specifically required new surface impoundments and landfills used for hazardous waste to meet certain minimum technological requirements. These requirements included the use of double liners and leak detection systems.¹⁰ The Amendments also stated that impoundment facilities that had been classified as having interim status on November 8, 1984, could not receive, store, or treat hazardous waste after November 8, 1988, unless such facilities were retrofitted to meet the technological requirements applicable to permitted facilities.¹¹

In March 1985, EPA revised its closure regulations covering interim status hazardous waste facilities. While the regulations had mandated closure within 180 days after the final receipt of "wastes," the revised regulations mandated closure within 180 days after the final receipt of "hazardous wastes."¹² EPA asserted that the closure provisions were environmentally necessary¹³ and rejected CMA's and Union Carbide's argument that these revisions were inconsistent with congressional intent of the 1984 Amendments. In addition, EPA argued that the revisions clarified an ambiguity in the original regulations, which it claimed were intended to require hazardous waste facilities to close within 180 days after the final receipt of hazardous waste.¹⁴ The revisions were promulgated as final regulations in May

9. *Id.* § 6901(B).

10. *Id.* § 6924(o) provides in relevant part:

(1) The regulations under subsection (a) of this section shall be revised from time to time to take into account improvements in the technology of control and measurement. At a minimum such regulations shall require, and a permit issued pursuant to section 6925(c) of this title after November 8, 1984 by the Administrator or a State shall require-

(A) for each new landfill or surface impoundment, each new landfill or surface impoundment unit at an existing facility, each replacement of an existing landfill or surface impoundment unit, and each lateral expansion of an existing landfill or surface impoundment unit, for which an application for a final determination regarding issuance of a permit under section 6925(c) of this title is received after November 8, 1984-

(i) this installation of two or more liners and a leachate collection system above (in the case of a landfill) and between such liners; and

(ii) ground water monitoring. . .

The requirements of this paragraph shall apply with respect to all waste received after the issuance of the permit.

11. *Id.* § 6925(j).

12. 40 C.F.R. §§ 264.113(b), 265.113(b) (1986).

13. EPA Standards Applicable to Owners/Operators of Hazardous Waste Treatment, Storage & Disposal Facilities, 51 Fed. Reg. 16,445, 16,431-32 (1986).

14. *Id.*

1986.¹⁵

In August 1989, in response to CMA's and Union Carbide's concerns, EPA amended the 1986 regulations.¹⁶ Amended closure regulations provided that interim status surface impoundments could continue operations after ceasing to receive hazardous wastes as long as they either met the minimum technological requirements imposed by the 1984 Amendments or removed all substantial amounts of hazardous wastes.¹⁷ Union Carbide challenged the 1986 and 1989 regulations by continuing to allege that they contradicted Congress' express intent in enacting the 1984 Amendments. EPA responded by arguing that these regulations were promulgated under its statutory authority to issue regulations establishing standards for hazardous waste facilities, and this statutory authority was unaffected by the 1984 Amendments.

To review EPA's interpretation of its statutory authority, the court used the test provided by the Supreme Court in *Chevron v. Natural Resources Defense Council*.¹⁸ Under this test, a court must first consider whether Congress has directly addressed the issue in the statute.¹⁹ If the intent of Congress is clear, a court, as well as an agency, must give effect to the

15. *Id.*

16. 40 C.F.R. §§ 264.113, 265.113 (1989).

17. 40 C.F.R. §§ 264.113 and 265.113, as revised in 1989, provide in relevant part:

(a) Within 90 days after receiving the final volume of hazardous wastes, or the final volume of nonhazardous wastes if the owner or operator complies with all applicable requirements in paragraphs (d) and (e) of this section, at a hazardous waste management unit or facility, [or within 90 days after approval of the closure plan, whichever is later,] the owner or operator must treat, remove from the unit or facility, or dispose of on-site, all hazardous wastes in accordance with the approved closure plan. . . .

(b) The owner or operator must complete partial and final closure activities in accordance with the approved closure plan and within 180 days after receiving the final volume of hazardous wastes, or the final volume of non-hazardous wastes if the owner or operator complies with all applicable requirements in paragraphs (d) and (e) of this section, at the hazardous waste management unit or facility or [180 days after approval of the closure plan, if that is later] (c) [A]n owner or operator of a hazardous waste surface impoundment that is not in compliance with the liner and leachate collection system requirements in 42 U.S.C. §§ 3004(o)(1) and 3005(j)(1) or 42 U.S.C. § 3004(o)(2) or (3) or § 3005(j)(2), (3), (4) or (13) must:

. . . Remove all hazardous wastes from the unit by removing all hazardous liquids and removing all hazardous sludges to the extent practicable without impairing the integrity of the liner(s), if any.

18. *Chevron v. NRDC*, 467 U.S. 837 (1984).

19. *Id.* at 842.

express intent of Congress.²⁰ Neither a court nor an agency may impose its own construction on the statute.²¹ If the statute does not address the issue, or is ambiguous, a court must defer to the agency's interpretation.²² The Supreme Court noted, however, that such regulations are controlling only if they are not "arbitrary, capricious, or manifestly contrary to the statute."²³

III. THE COURT'S DECISION

The *Chemical Manufacturers* opinion is divided into two sections. First, the court considered whether EPA had exceeded its statutory authority when it promulgated the 1986 and 1989 regulations. Second, the court analyzed the regulations to determine whether they were arbitrary and capricious. The court concluded that EPA had the statutory authority to promulgate the regulations and that the regulations were not arbitrary and capricious, but were consistent with congressional intent.

A. EPA's Statutory Authority

The court applied the *Chevron* test to review EPA's interpretation of section 3005(j) of RCRA.²⁴ This section requires interim status surface impoundment facilities to stop receiving, storing, or treating hazardous wastes after November 8, 1988, unless the facility has been retrofitted to meet technological requirements imposed on permitted facilities.²⁵ Union Carbide asserted that, in the 1984 Amendments, Congress intended to relieve EPA of the authority to require unretrofitted surface impoundment facilities to close once they ceased receiving hazardous wastes.²⁶ Though the court disagreed with this interpretation, Union Carbide continued to rely heavily on a controversial exchange between two senators to support its assertion.²⁷ These senators were Senator Randolph, the ranking minority member of the Senate Committee on Environment and Public Works, and Senator Chafee, the floor manager for the 1984 Amendments. During this exchange, Senator Randolph

20. *Id.*

21. *Id.* at 842-43.

22. *Id.*

23. *Id.* at 844.

24. *Chemical Mfrs. Ass'n v. EPA*, 919 F.2d 158, 162 (D.C. Cir. 1990).

25. 42 U.S.C. § 6925(j).

26. *Chemical Mfrs. Ass'n*, 919 F.2d at 163.

27. *Id.*

stated that, "[i]f hazardous wastes were no longer received at the impoundment after the [four] year date in the Amendment, the impoundment could otherwise continue to operate as it has."²⁸ Senator Chafee responded by agreeing that, "[i]t would not be proper to require that the impoundment be closed out permanently prematurely if it can handle wastes that are not hazardous wastes while being protective of human health and the environment."²⁹ Union Carbide argued that this exchange indicated a clear congressional intent to prevent EPA from closing unretrofitted facilities. EPA, on the other hand, argued that this statement expressed congressional intent not to statutorily require the closure of unretrofitted facilities.

The court rejected both arguments, maintaining that congressional intent was not clear.³⁰ The court, however, did find that EPA's interpretation of the section was reasonable and consistent with the purposes of RCRA and the 1984 Amendments.³¹ The court concluded that the explicit statutory purpose of the 1984 Amendments, to discourage the use of land impoundments for the storage and disposal of hazardous wastes, enhanced rather than diminished EPA's prior authority to promulgate regulations necessary for the protection of human health and the environment.³² For these reasons, the court chose to defer to EPA's interpretation of its authority under section 3004(a) and permitted EPA to continue regulating the receipt of hazardous waste by unretrofitted surface impoundment facilities.³³

B. The Nature of the Regulations

Union Carbide charged that EPA's regulations were arbitrary for five reasons: (1) EPA failed to consider the usefulness of unretrofitted surface impoundments for the disposal of non-hazardous wastes, (2) EPA failed to justify the requirement that unretrofitted surface impoundments be emptied of hazardous wastes in order to remain open, (3) the requirement that unretrofitted surface impoundments be closed or be emptied was irrational and inconsistent with other EPA regulations, (4) EPA used the incorrect legal standard in promulgating the 1989 regu-

28. 130 CONG. REC. 20,847-48 (1984).

29. *Id.*

30. *Chemical Mfrs. Ass'n*, 919 F.2d at 164.

31. *Id.*

32. *Id.* at 165.

33. *Id.*

lations, and (5) the 1989 regulations constituted a reversal of policy without adequate support in the record.

1. EPA's Consideration of the Usefulness of Unretrofitted Surface Impoundments

Although Union Carbide argued otherwise, the court found that EPA had not failed to consider the usefulness of unretrofitted surface impoundments for the continued disposal of nonhazardous wastes.³⁴ Union Carbide's argument was undermined by the fact that the principal focus of EPA's 1989 regulations were to accommodate CMA's and Union Carbide's objections to the "retrofit or close" rule of the 1986 regulations.

Under the 1989 regulations, unretrofitted surface facilities may remain open so long as they are emptied of accumulated hazardous wastes.³⁵ The court found that EPA had a number of sound policy reasons supporting their decision to revise the regulations to allow some facilities to delay closure and to continue receiving hazardous waste. These policy reasons were driven by the desire to avoid disincentives to waste minimization, to prevent unnecessary disruption of operations at facilities with remaining capacity, and to avoid imposing unnecessary economic burdens on certain facilities.³⁶ Thus, the court found absolutely no support for Union Carbide's assertion that EPA had adopted the 1989 regulations without taking account of the remaining usefulness of facilities for the receipt of nonhazardous wastes.³⁷

2. The Adequacy of EPA's Justification

Union Carbide asserted that the record revealed no analysis of the likelihood of leaks from surface impoundments that were not emptied of hazardous wastes. Union Carbide further contended that the record contained no indication that EPA considered alternatives such as groundwater monitoring or corrective action.³⁸

The court refuted Union Carbide's allegation that EPA failed to analyze the likelihood of leaks from unretrofitted sur-

34. *Id.* at 166.

35. 40 C.F.R. §§ 264.113, 265.113.

36. *Chemical Mfrs. Ass'n*, 919 F.2d at 166.

37. *Id.*

38. *Id.*

face impoundments that continued to store hazardous wastes.³⁹ The court also found that the record did show that EPA had considered and then rejected monitoring and corrective action as inadequate to protect human health and the environment.⁴⁰

Regarding the likelihood-of-leaks analysis, the court noted that EPA explained, at several points in the record, that the accumulation of nonhazardous wastes on top of hazardous wastes significantly increases the risk of leaks because these wastes typically take the form of liquids or partial solids surrounded by liquids. The continued accumulation of liquids tends to form a pressure head that forces downward dispersion.⁴¹ If the lining is not adequate, containment is often not possible.⁴² The court maintained that its role in this proceeding was not to second guess EPA's scientific judgements.⁴³ The court also found that EPA's actions were in accordance with Congress' determination that preventive measures are preferable to corrective action when dealing with hazardous waste management issues.⁴⁴ Subsequently, the court concluded that EPA had examined the data, had satisfactorily explained its action, and had formed a rational connection between the facts found and the choice made.⁴⁵ Thus, the court held that EPA adequately justified its actions.

3. Rationality and Consistency in Comparison with Other EPA Regulations

Union Carbide further asserted that the EPA regulations were too broad because they applied equally to all surface impoundments, including those impoundments retrofitted to meet the requirements of the 1984 Amendments and not required to close or be emptied of hazardous wastes.⁴⁶ The court disagreed with this assertion because while the regulations applied to all surface impoundments, EPA had always stressed the special risk of a leak from an unretrofitted surface impoundment that continued to receive nonhazardous wastes.⁴⁷ There-

39. *Id.*

40. *Id.*

41. *Id.* at 167.

42. *Id.*

43. *Id.* (citing *New York v. EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988)).

44. *Id.* at 167.

45. *Id.* at 168.

46. *Id.*

47. *Id.*

fore, EPA may require unretrofitted surface impoundment facilities to close or to be emptied even when they do not leak. Accordingly, the court found that it was not irrational for EPA to conclude that RCRA's preference for prevention over correction would mandate such a conclusion.⁴⁸

Union Carbide also asserted that EPA acted irrationally in failing to require the closure or emptying of landfills that did not meet RCRA's minimum technological requirements. The court explained that the pressure head forcing the downward dispersion of liquids, possibly rupturing an inadequate lining, is a phenomenon that occurs only with liquids. Liquids are generally banned from placement or disposal in landfills.⁴⁹ For this reason, the more stringent regulations designed to combat the pressure head problem were not applicable to landfills. The court therefore concluded that EPA acted rationally in imposing more stringent requirements on unretrofitted surface impoundment facilities than on either landfills or retrofitted facilities.⁵⁰

4. The Legal Standard

Union Carbide argued that EPA used the wrong legal standard in creating the 1989 regulations because it relied on the "significantly improved protection" of human health and the environment standard, which was found only in the preamble to the 1986 closure regulations.⁵¹ Instead, Union Carbide argued EPA should have used the statutory standard of "necessary to protect" human health and environment.⁵² EPA agreed that the "necessary to protect" standard was the correct one to apply, but denied that it failed to use it. The court found that although EPA did state that the 1986 closure regulations would "significantly improve" protection of health and the environment, this statement was immediately preceded by another declaring that EPA was promulgating the regulations pursuant to its authority to promulgate resolutions "as necessary to protect human health and the environment."⁵³ The court stated:

More importantly, the explanations provided by the EPA in

48. *Id.*

49. *Id.*

50. *Id.*

51. EPA Standards Applicable to Owners/Operators of Hazardous Waste Treatment, Storage & Disposal Facilities, 51 Fed. Reg. at 16,432.

52. 42 U.S.C. § 6924(a).

53. *Id.*

the immediately succeeding paragraphs indicate that it believed the closure regulations were the only means of ensuring that human health and the environment would be protected adequately, given the leakage risks associated with facilities that are equipped neither with the technology required by § 3004(o) nor with the final "cap" required to be installed at the end of the facility's life.⁵⁴

The court, therefore, was satisfied that EPA applied the correct legal standard in promulgating the 1989 regulations.⁵⁵

5. The 1989 Regulations: A Reversal in Policy?

The final Union Carbide argument considered by the court was that the 1989 regulations constituted a reversal of policy without adequate support in the record. EPA asserted that the regulations were not a reversal of policy but were a clarification of an ambiguity in the original regulations.⁵⁶ Using a deferential standard of review, the court agreed with EPA and classified the 1986 and 1989 closing regulations as "extensions of current regulations" not as "rescissions of prior action."⁵⁷ Yet "even if the higher standard of security applicable to reversals" had been applied, the court said it would have found that EPA's justifications for the 1989 regulations were sufficient and strongly supported by Congress' adoption of the 1984 Amendments, which strengthened EPA's regulatory powers under the RCRA.⁵⁸

IV. ANALYSIS

Congress' express purpose in adopting RCRA was to regulate the disposal of hazardous wastes.⁵⁹ Congress realized that disposing of hazardous wastes without careful planning and management could present a serious hazard to human health and the environment.⁶⁰ The *Chemical Manufacturers* decision has given EPA the power to effectuate this congressional intent.

The issue presented in *Chemical Manufacturers* was not one of first impression; EPA's interpretation of its governing statutes was addressed in the *Chevron* decision five years ear-

54. *Chemical Mfrs. Ass'n*, 919 F.2d at 169.

55. *Id.*

56. *Id.*

57. *Id.* at 170.

58. *Id.*

59. 42 U.S.C. § 6902 (1989).

60. *Id.* § 6901(b)(2).

lier.⁶¹ The importance of these decisions stems from the courts' willingness to acknowledge EPA's latitude in drawing conclusions from technical and scientific data and making decisions from that data when those decisions are reasonable and consistent with the statute's purpose. This allows EPA to make decisions that are unpopular with industry without the fear of lengthy litigation. All that is necessary for EPA to prevail is a showing of consistency with a statute, if congressional intent is clear, or a permissible interpretation, when congressional intent is unclear. Judicial deference will result in EPA being able to more swiftly and efficiently promulgate regulations that promote the objectives of RCRA.

The *Chemical Manufacturers* decision is clearly consistent with the purposes of RCRA and the 1984 Amendments of discouraging disposal, storage, and treatment of hazardous waste at land facilities. While this decision will cost industry and the consumer more today, costs will ultimately be saved because of the difficulty of monitoring facilities for dangerous leaks if the facilities have neither double containers nor leak detectors. The damage to the environment and to human health far outweighs the costs of these minimal technologies for the prevention of leaks.

Industry will also benefit from avoiding the immense cleanup costs that would be incurred if a leak did occur. While critics of these regulations will claim that the likelihood of a leak is small, the fact is that the amount of money spent on retrofitting these facilities is minute compared to the costs of cleaning up a leak. Because leaks are very likely to cause groundwater contamination, industry should be willing to spend the money now to avoid the great cost of decontaminating groundwater later. As it is impossible to put a price tag on the plant, fish, and animal life that could be harmed by the leak, it is important to allow EPA to regulate hazardous waste facilities. Industry should not lose sight of the fact that EPA's goal is the protection of the environment, and the courts must continue to allow EPA to reach this goal by not limiting its power.

V. CONCLUSION

The court in *Chemical Manufacturers* properly interpreted RCRA as allowing EPA to prohibit the continued receipt of

61. See *Chevron v. NRDC*, 467 U.S. 837, 843-58 (1985).

nonhazardous wastes by unretrofitted surface facilities. This decision will allow EPA greater latitude in interpreting its governing statutes in the future. The court, by allowing EPA such broad discretion in rulemaking, also reinforced the role of administrative agencies in the government process. Administrative agencies are limited in scope to specific areas of administration. As such, agencies can exercise a higher level of expertise than can be expected of Congress, where members are expected to deal with an increasingly wide range of problems and topics. Deference to the expertise of EPA in *Chemical Manufacturers* is a step toward curtailing today's environmental crises and preventing the crises of tomorrow.

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