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Ocean Dumping: An Old Problem Continues

I. Introduction

Prior to the enactment by Congress of the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA),¹ sewage sludge, dredged spoils, and industrial waste were routinely loaded on barges, towed to designated sites, and dumped into the ocean. Previous legislative attempts to control ocean dumping of refuse were limited in scope and inadequate to regulate the volume and toxicity of modern-day waste.²

By the early 1970's, Congress recognized that indiscriminate disposal of vast quantities of toxic waste was endangering both human health and the marine environment. In a climate of growing concern for environmental safety, Congress enacted MPRSA and four other statutes regulating waste disposal.³ MPRSA contains three titles. Title I, the subject of this Note, provides for a dumping permit program and directs the Environmental Protection Agency (EPA) to establish regulations for controlling ocean dumping.⁴ EPA's

1. 33 U.S.C. §§ 1401-1473 (1976 & Supp. V 1981).

2. Miller, *Ocean Dumping—Prelude and Fugue*, 5 J. Mar. L. & Com. 51, 53-57, 75 (1973). As early as 1675 the Governor of New York forbade the dumping of refuse into New York harbor. New York State attempted to regulate the dumping of waste into the harbor in 1857. Similar action was taken by New Jersey in 1882. Federal legislation was enacted in 1888 when it became obvious that the two state laws were inadequate.

H. R. Rep. No. 361, 92d Cong., 1st Sess. 9 (1971). "The entire question of ocean disposal . . . has been thrust into prominence by the dumping of nerve gas and oil wastes off the coast of Florida, by the dumping of sewage and other municipal wastes off New York harbor. . . ."

3. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (1976 & Supp. V 1981); Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. V 1981); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1976 & Supp. V 1981).

4. Title I—Ocean Dumping; Title II—Comprehensive Research on Ocean Dumping; Title III—Marine Sanctuaries, Pub. L. No. 92-532, 86 Stat. 1052 (1972).

regulations implementing MPRSA⁵ have been upheld in agency hearings⁶ and litigation.⁷

As a result of the regulations, substantial progress has been made in the last ten years in controlling the amount and types of waste disposed of in the ocean.⁸ However, dumping of sewage sludge continues at a high level in an area of the Atlantic Ocean known as the New York Bight.⁹

*City of New York v. EPA*¹⁰ illustrates municipal pressure to continue dumping. New York City challenged EPA's refusal to consider the City's application for a permit to continue ocean dumping beyond the 1981 deadline established in the regulation.¹¹ The District Court for the Southern District of New York left the 1981 deadline intact but held that it applies only to ocean dumping which EPA determines will unreason-

5. 40 C.F.R. §§ 220-229 (1982).

6. In re Interim Ocean Disposal Permit, No. PA-010, granted to the City of Philadelphia (before the EPA Administrator, Sept. 25, 1975). The EPA Administrator affirmed the action of the Regional Administrator, which required Philadelphia to phase out its ocean dumping of sewage sludge by 1981. 5 Env'tl. L. Rep. (Env'tl. L. Inst.) 30,003 (Dec. 1975).

7. *Bergen County Utilities Authority v. EPA*, 507 F. Supp. (D.N.J. 1981). Bergen County sought a writ of mandamus to force EPA to issue an ocean dumping permit. The District Court held that since Bergen County had no implementation plan to either meet EPA environmental criteria or to phase out ocean dumping by 1981, EPA's action in refusing to issue a permit was consistent with the regulation of MPRSA.

8. Council on Environmental Quality, *Environmental Quality—1980* (1981) at 16. Ocean dumping of all wastes regulated by EPA decreased from 10.8 million tons in 1973 to 8.7 million tons in 1979, largely due to a 49% decrease in industrial dumping. Dumping of sewage sludge increased 23% due to an increase in sewage treatment mandated by the Federal Water Pollution Control Act.

9. Environmental Protection Agency, *Annual Report to Congress Jan.—Dec. 1979* (1980) at 9. In 1979, 5.9 million wet tons of sewage sludge were dumped into the New York Bight. The New York Bight is an area of ocean extending from the end of Long Island to Cape May and seaward to the edge of the continental shelf. The active sewage sludge dumpsite in the New York Bight is located about twelve miles east of New Jersey and south of Long Island.

10. 543 F. Supp. 1084 (S.D.N.Y. 1981).

11. *Complaint for Declaratory and Injunctive Relief* (Mar. 24, 1980) at 10, 543 F. Supp. 1084, "declaring that regulation of [EPA] set forth at 40 C.F.R. 220.3(d) and elsewhere which limit issuance of interim ocean dumping permits beyond December 31, 1981 are null, void, arbitrary, capricious, and otherwise not in compliance with the law. . . ."

ably degrade the marine environment. In determining whether proposed ocean dumping is unreasonable, EPA must balance all the applicable factors contained in MPRSA.¹² The court found that EPA had not given adequate consideration to all the statutory factors in developing criteria for evaluating permit requests. The court then held that EPA must evaluate the City's ocean dumping permit application pursuant to criteria that consider all relevant factors contained in the statute, including the need for ocean dumping and the cost and potential consequences of land-based disposal.

12. 33 U.S.C. § 1412(a) (1976). "The Administrator shall establish and apply criteria for reviewing and evaluating such permit applications, and, in establishing or revising such criteria, shall consider, but not be limited in his consideration to, the following:

- (A) The need for proposed dumping.
- (B) The effect of such dumping on human health and welfare, including economic, esthetic, and recreational values.
- (C) The effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines, and beaches.
- (D) The effect of such dumping on marine ecosystems, particularly with respect to—
 - (i) the transfer, concentration, and dispersion of such material and its byproducts through biological, physical, and chemical processes,
 - (ii) potential changes in marine ecosystem diversity, productivity, and stability, and
 - (iii) species and community population dynamics.
- (E) The persistence and permanence of the effects of the dumping.
- (F) The effect of dumping particular volumes and concentrations of such materials.
- (G) Appropriate locations and methods of disposal or recycling, including land-based alternatives and the probable impact of requiring use of such alternate locations or methods upon considerations affecting the public interest.
- (H) The effect on alternate uses of the ocean, such as scientific study, fishing, and other living resource exploitation, and nonliving resource exploitation.
- (I) In designating recommended sites, the Administrator shall utilize wherever feasible locations beyond the edge of the Continental Shelf."

38 Fed. Reg. 28,613 (1973) contained the final EPA regulation for ocean dumping permits and EPA responses to public comments. The regulation is now codified at 40 C.F.R. §§ 220-229 (1982).

38 Fed. Reg. 28,618 (1973), codified at 40 C.F.R. § 227 (1982). Among the specifically prohibited substances were organohalogen compounds, mercury, cadmium, and oil.

City of New York v. EPA is an example of the dilemma society faces in deciding its degree of commitment to environmental protection and its willingness to pay for this protection. The ocean continues to be the most vulnerable and politically underrepresented part of the environment. Pressure from municipalities and industry to continue ocean dumping is likely to increase as various provisions of the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act are implemented.¹³

II. *City of New York v. EPA*

A. *The Facts*

New York City dumped several hundred tons of sewage sludge into the ocean each day under an interim permit issued by EPA. The conditions of the permit required the City to implement an alternative method of disposal by December 31, 1981. The City developed a plan for land disposal of sewage sludge that consisted of composting the sludge and spreading it at various sites throughout the city. The composting and land disposal method could only be used for about eight years due to the limited amount of landfill available. A long-term solution had not been chosen but the City was studying its options.¹⁴

In applying for a renewal of its permit, the City requested a target date in the late 1980's to implement a long-term alternative to ocean dumping. As part of the permit application, the City attempted to offer evidence showing that the potential adverse environmental consequences and the cost of short-term land disposal greatly exceeded the effects of ocean dumping. EPA refused to consider the City's evidence and issued an interim permit, with a December 31, 1981 dead-

13. Council on Environmental Quality, *Environmental Quality—1979* (1980) at 166.

14. The long-range plan developed by the New York State Department of Environmental Conservation recommended a centralized dewatering facility, three incinerator facilities, and disposal of the remaining ash at a hazardous waste landfill.

line, for either ending all dumping or bringing the material to be dumped within the regulatory criteria.¹⁵ The City brought suit claiming that EPA was required by MPRSA to consider its evidence. The City contended that Congress did not intend to ban all ocean dumping, but only dumping which would unreasonably degrade the marine environment. The determination of whether there would be unreasonable degradation could not properly be made, the City argued, unless EPA considered the effect of ocean dumping at a particular site, and the cost and potential consequences of land disposal. The City maintained that EPA did not give adequate consideration to these statutory factors in establishing regulatory criteria.¹⁶

EPA contended that it was not required by MPRSA to consider the statutory factors in evaluating each permit application. Rather, MPRSA only required EPA to consider the factors in formulating its regulatory criteria for evaluating permit applications. EPA argued that Congress incorporated EPA's regulations into the 1977 Amendment to MPRSA and mandated a December 31, 1981 end to any ocean dumping which did not meet the criteria set out in the regulations. In addition, EPA contended that congressional refusal to amend MPRSA at New York's request in 1978 and 1979 showed that

15. 40 C.F.R. § 227.4 (1982). "Criteria for evaluating environmental impact. . . . If the applicable prohibitions, limits, and conditions are satisfied, it is the determination of EPA that the proposed disposal will not unduly degrade or endanger the marine environment and that the disposal will present:

- (a) No unacceptable adverse effects on human health and no significant damage to the resources of the marine environment;
- (b) No unacceptable adverse effect on the marine ecosystem;
- (c) No unacceptable adverse persistent or permanent effects due to the dumping of the particular volumes or concentrations of these materials; and
- (d) No unacceptable adverse effect on the ocean for other uses as a result of direct environmental impact."

16. Complaint for Declaratory and Injunctive Relief (Mar. 24, 1980) at 12, 543 F. Supp. 1084. "[EPA] shall adopt revised regulations or otherwise consider whether such dumping may unreasonably degrade or endanger human health or the environment in consideration of each of the criteria set forth at 33 U.S.C. 1412(a) including the need for such dumping and the relevant impact of land based alternatives. . . ."

Congress intended to ban ocean dumping of New York waste by the end of 1981.

The court in *City of New York v. EPA* was not asked to, nor did it, address the merits of the evidence the City offered in support of its permit application. Rather, the case was limited to the question of whether MPRSA required EPA to consider the City's evidence in evaluating the permit application. The court stated that it was for EPA to consider the validity of the City's claims. Thus, the central issue in *City of New York v. EPA* was whether EPA could deny an ocean dumping permit based on its regulatory criteria or whether it must evaluate ocean dumping permit applications on a case-by-case basis using all the relevant factors contained in the statute.

The decision examined the statutory language and legislative history and concluded EPA's interpretation of MPRSA was incorrect. The court found that EPA's regulation was not consistent with the statute and held that EPA must evaluate the City's permit application "pursuant to criteria that require consideration of all the statutory factors relevant to a reasoned determination."¹⁷

B. *The Reasoning of the Court*

1. *The Statutory Language and Legislative History*

The language of MPRSA required EPA to prohibit ocean dumping only if it found the dumping would be unreasonably harmful. In addition, MPRSA required EPA to balance the relevant statutory factors in reaching a decision on each permit application. The court decided that by placing conflict-

17. *City of New York v. EPA*, 543 F. Supp. at 1115.

The court decided that the doctrines of primary jurisdiction and exhaustion of administrative remedies did not apply. In June 1980, the City requested that EPA change the ocean dumping criteria to allow dumping beyond the 1981 deadline. In addition, the City filed a new application for a dumping permit to extend beyond 1981. Since EPA had not acted on either request, and had clearly indicated it would not issue ocean dumping permits beyond 1981 unless the regulatory criteria were met, the court determined that the City was entitled to judicial review. *Id.* at 1087.

ing factors in the statute, Congress intended for EPA to develop evaluation criteria that would weigh and balance the statutory factors. The balancing process would determine the reasonableness of ocean dumping in each instance.

The court disagreed with EPA's contention that MPRSA only required that EPA consider the statutory factors in establishing its criteria, but not in applying the criteria to each permit application. The court was convinced that the circumstances presented in *City of New York v. EPA* were not an "appropriate instance" for EPA to disregard the need for ocean dumping and the potential adverse consequences of land disposal.

2. *The Regulations*

The decision found that the regulations were arbitrary and inconsistent with MPRSA for three reasons. First, EPA assumed, without considering the dumpsite, that there would be unacceptable harm if the criteria were not met; second, EPA assumed that technologically practical alternatives existed in all cases; and third, EPA assumed that land disposal was safe without evaluating the potential consequences.

3. *The 1977 Amendment to MPRSA*

The court rejected the EPA argument that Congress had incorporated the regulation into the statute. The court reasoned that if Congress had wanted to end all ocean dumping that did not satisfy EPA's regulatory criteria, it could have used such language in the Amendment. Rather, the court decided that Congress, by defining sewage sludge in terms of unreasonable degradation, had made the Amendment consistent with MPRSA. Both were governed by the same standard of unreasonable degradation to the marine environment. Thus, the court concluded that Congress had not enacted an explicit prohibition against ocean dumping which failed to meet EPA's regulatory criteria.

In addition, the court rejected EPA's argument that congressional refusal to amend MPRSA at the City's request in 1979 and 1980 showed that Congress intended to ban ocean

dumping of the City's waste by the end of 1981. The court did not consider the refusal significant because a House subcommittee rather than the full House or the Senate decided the refusal.

III. Analysis of the Decision

A. *The Statutory Language and Legislative History*

Read in the context of the stated purpose of MPRSA, "to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health . . . or the marine environment,"¹⁸ EPA's initial interpretation of the statute was correct. To read it otherwise is to defeat its stated purpose. The language of MPRSA is unambiguous: "The administrator shall establish and apply criteria for . . . evaluating . . . permit applications, and in establishing . . . such criteria, shall consider . . . the following [statutory factors]: . . ."¹⁹

Congress assigned EPA the task of deciding which statutory factors to incorporate into the evaluation criteria. The Court of Appeals for the District of Columbia Circuit in *National Wildlife Federation v. Costle*²⁰ found that the statutory language allowed EPA to disregard some statutory factors if it was appropriate to do so under the circumstances. Faced with the precedent of *National Wildlife Federation*, the court in *City of New York* was reluctant to find that Congress meant for each statutory factor to be included in the evaluation criteria. Thus, it simply asserted that this was not an appropriate instance for EPA to ignore some statutory factors. In substituting its own concept of which statutory factors are needed for rational decision making, the court ignores the

18. 33 U.S.C. § 1401(b) (1976).

19. See *supra* note 13.

20. 629 F.2d 118, 132 (D.C. Cir. 1980). The court in *National Wildlife Federation* found that the statutory language gave the Administrator the discretion to include or disregard statutory factors in establishing evaluation criteria. "The Act gives unqualified broad authority to the Administrator to weigh and consider the evaluation factors and, to the extent that he does so, the criteria he promulgates will 'reflect' the factors listed in the Act. . . ."

finding in *National Wildlife Federation* that Congress did not intend to limit the Administrator's discretion in establishing criteria or to require an application of the statutory factors on a case-by-case basis.

EPA took a properly conservative approach that was consistent with the stated purpose of MPRSA and with congressional recognition that the volume and toxicity of wastes that are disposed of in the ocean must be regulated if further harm to the environment is to be avoided.²¹ The debate on the legislation showed overwhelming support for vigorous enforcement. As one legislator commented, "Legislation like this marine protection act is an absolute necessity if we are to follow through on our cries for environmental clean up. If we want men like Bill Ruckelshaus to carry a strong stick, let's give them the strongest hickory rod we can find."²²

B. *The Regulations*

The court viewed EPA's failure to consider the condition of the dumpsite as extreme and unreasonably conservative. EPA's regulatory approach was conservative but it was not unreasonable. The decision seems to suggest that the provisions of MPRSA could be fulfilled by regulations which would allow continued dumping of harmful material so long as the dumping did not cause further deterioration of the marine environment. Under an assumption which equates unreasonable degradation with additional degradation at a given dumpsite, MPRSA would have little or no effect on areas of the ocean already heavily polluted, such as the New York Bight. It is unlikely Congress envisioned such a limited role for MPRSA. Nothing in the language or legislative history of MPRSA suggests that Congress was willing to exempt heav-

21. S. Rep. No. 451, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 4234, 4236. Subtle changes may already have started a chain reaction in that direction. The true costs of our environmental destruction have never been subjected to a proper accounting. The credits are localized and easily demonstrated by the beneficiaries, but the debits are widely dispersed and are borne by the entire populations. . . ."

22. 117 Cong. Rec. 31,153 (1971) (statement of Rep. Hillis).

ily polluted areas of the ocean from the statute. Therefore, it can be concluded that the condition of the New York Bight was a major target of the legislation.

C. *The 1977 Amendment to MPRSA*

The court's interpretation that the 1977 Amendment to MPRSA was adopted "to halt EPA's practice of issuing permits for the dumping of unreasonably degrading materials on grounds of local economic hardship"²³ falls short of what Congress intended. If the court's interpretation was correct, the Amendment would have been unnecessary. EPA published revised ocean dumping regulations in January 1977, which contained the December 31, 1981, deadline for compliance with the evaluation criteria.²⁴ Congress was fully aware of the 1981 deadline in the regulations when the Amendment was enacted in October 1977.²⁵ Congress was also aware that municipalities would be reluctant to expend funds to end ocean dumping.²⁶ Thus, the 1981 deadline was viewed as a clear signal to municipalities that they must implement alternative disposal methods or comply with the evaluation criteria in the regulation.

The court cites judicial precedent as its rationale for

23. *City of New York v. EPA*, 543 F. Supp. at 1113.

24. 42 Fed. Reg. 2470 (1977), codified at 40 C.F.R. § 220.3(d) (1982).

25. H.R. Rep. No. 325, 95th Cong., 2d Sess., reprinted in 1977 U.S. Code Cong. & Ad. News 3262, 3264. "EPA clearly indicated that it intends to end, by 1981, any ocean dumping which unreasonably degrades . . . human health . . . or the marine environment. . . ."

26. 123 Cong. Rec. 34,586 (1977) (statement of Sen. Sarbanes): "[I]t is clear that if the dumping of sewage sludge off shore . . . is to be halted, a deadline must be established. Many municipalities now dumping have not undertaken, in a serious way, the effort to find alternate disposal methods for the increasing amount of sewage they are generating. . . . The 1981 deadline for all dumpers of harmful sewage sludge will provide clear notice that these municipalities will have to develop alternatives so that ocean dumping will end once and for all."

H.R. Rep. No. 325, 95th Cong., 2d Sess., reprinted in 1977 U.S. Code Cong. & Ad. News 3262, 3264. "In particular, the committee is concerned with EPA's reluctance to establish firm phase-out dates for harmful ocean dumping and, more importantly, with EPA's continued sanctioning of the ocean dumping of materials—such as sewage sludge—which cannot meet EPA's own Ocean Dumping Criteria. In response to this concern, the committee believes it is necessary to codify EPA's stated goal of ending the ocean dumping of sewage sludge. . . ."

discounting a congressional subcommittee's refusal to grant the City's request, in 1979 and 1980, for an extension of the 1981 deadline.²⁷ The court viewed the subcommittee action as not reflective of the will of Congress. However, as the Court of Appeals for the Second Circuit in *Wisdom v. Norton* noted, "failure to enact the proposed amendment . . . may just as logically be interpreted as acquiescence in [agency] policy"²⁸ In *United States v. Southwestern Cable Co.*, the United States Supreme Court decided that the "views of one Congress as to the construction of a statute adopted many years before by another Congress have, very little, if any, significance"²⁹ However, in *City of New York*, the subcommittee action took place within two years of the adoption of the 1977 Amendment. Except for the New York metropolitan area, all other municipalities had ended ocean dumping of sewage sludge. The subcommittee heard expert testimony on both sides of the issue and received formal written statements. While the result of the subcommittee hearings may not be dispositive of congressional intent, it indicates that the subcommittee, after hearing the testimony of interested parties, determined that the City should not be exempt from the 1981 deadline.

IV. Aftermath of the Decision

In the last decade, EPA has made slow progress in forcing dumpers out of the ocean.³⁰ Ocean dumping of industrial

27. *Wisdom v. Norton*, 507 F.2d 750 (2d Cir. 1974), *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

28. 507 F.2d at 757.

29. 392 U.S. at 170.

Ocean Dumping Deadline Oversight, 1979: Hearings on H.R. 1963 and H.R. 2519 before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries, 96th Cong., Sess. 96-40 (1980). The hearing record contains 400 pages of reports, statements, and testimony.

Id. at 138, 139. The testimony reconfirmed that the New York Bight is heavily polluted and that the capacity of that part of the ocean to assimilate more waste has been reached or exceeded. In addition to ocean dumping of treated sewage sludge, New York City dumps 350 million gallons of raw sewage into the Hudson River and surrounding waters each day.

30. See *supra* note 8.

waste has decreased substantially³¹ but ocean dumping of sewage sludge remains an open question. It may be too soon to predict what impact the decision in *City of New York v. EPA* will have on future EPA criteria for evaluating ocean dumping permit applications. EPA had been examining its ocean dumping policy for some time and was considering relaxing the evaluation criteria for granting permits.³² At a minimum, the decision will be seen as adding judicial backing for the view that the current criteria are too restrictive.³³

It is unfortunate that EPA has apparently chosen a course that will relax its "restrictive policy towards ocean waste disposal" at a time when the pressures for ocean dumping are increasing.³⁴ The combination of EPA's decision not to appeal in *City of New York*³⁵ and the apparent imminent relaxation of the ocean dumping regulations³⁶ has not been lost on those who would like to continue or begin ocean dumping of sewage sludge. Six New Jersey municipalities that had been under EPA orders to cease ocean dumping in the New York Bight have filed suit to continue dumping beyond 1981.³⁷ The District of Columbia has filed an application for an ocean dumping permit, in part, because of community opposition to land disposal.³⁸ The political realities of finding land disposal sites and the economic realities that require a strong commitment to implement alternative disposal methods stand in sharp contrast to the vulnerability of the oceans. Without a strong protective stance from EPA and the courts, the advances made in improving the marine environment under MPRSA may be lost.

If the 1982 House Merchant Marine and Fisheries Committee hearings produce recommended legislation reaffirm-

31. *Id.*

32. 11 Env't Rep. (BNA) 2137 (Mar. 27, 1981).

33. 11 Env't Rep. (BNA) 2245 (Apr. 24, 1981).

34. 11 Env't Rep. (BNA) 2137 (Mar. 27, 1981).

35. 12 Env't Rep. (BNA) 1266 (Jan. 29, 1982).

36. 12 Env't Rep. (BNA) 1221 (Jan. 22, 1982).

37. 12 Env't Rep. (BNA) 646 (Sept. 25, 1981).

38. 12 Env't Rep. (BNA) 1147 (Jan. 15, 1982).

ing the ocean dumping ban, Congress may have an opportunity to provide specific guidance to EPA and to the courts.³⁹ However, if Congress is unwilling to act, it seems likely that ocean dumping of sewage sludge will continue unabated in the New York Bight. The remarks of one commentator made shortly after MPRSA was enacted seem particularly appropriate:

Congress has done its work, and done it well, in enacting the Ocean Dumping Act. The issue now is enforcement. The legal tools are available. . . . Without a demand or a will to enforce them, the current legislation will be to no avail. Let us hope in this one instance that history will not be repeated, but that enforcement will lead to many steps to keep the oceans healthy and clean.⁴⁰

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39. 12 Env't Rep. (BNA) 1266 (Jan. 29, 1982).

40. Miller, *Ocean Dumping—Prelude and Fugue*, 5 J. Mar. L. & Com. at 75.