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Chlorine Chemistry Council & Chem. Mfrs. Ass'n v. Envtl. Prot. Agency, 206 F.3d 1286 (D.C. Cir. 2000)

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activities.

Brian L. Martin

Chlorine Chemistry Council & Chem. Mfrs. Ass'n v. Envtl. Prot. Agency, 206 F.3d 1286 (D.C. Cir. 2000) (finding Environmental Protection Agency's December 1998 rule adopting a zero maximum contaminant level goal for chloroform was arbitrary and capricious and in excess of authority, thus vacating the rule).

The Safe Drinking Water Act ("SDWA") directs the Environmental Protection Agency ("EPA") to set standards for the regulation of certain drinking water contaminants. For each contaminant, EPA sets a maximum contaminant level goal ("MCLG"), defined as the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety. Once EPA sets the MCLG, it promulgates an enforceable standard, known as the maximum contaminant level ("MCL"). The MCL reflects practical considerations while remaining as close to the MCLG as is feasible.

In 1994, respondent EPA issued a proposed rule setting at zero the MCLG for chloroform based on an absence of data at the time to suggest a level below which no potential carcinogenic effects would occur. In 1998, experts presented scientific evidence demonstrating exposure to chloroform below some threshold level posed no risk of cancer. Although EPA accepted this finding, it established the MCLG for chloroform at zero in its December 1998 final rule.

The Chlorine Chemistry Council and Chemical Manufactures Association (collectively "Council") petitioned the court to review this rule and instruct EPA to promulgate a non-zero MCLG using the best available peer-reviewed science. After briefing but prior to oral argument, EPA moved for a voluntary remand to consider its Science Advisory Board's ("SAB") pending report on chloroform. The court denied the motion. The court explained that since EPA had made no offer to vacate the rule, EPA's proposal left Council subject to a rule that they claimed was invalid.

On February 11, 2000, the day of oral argument, EPA released the SAB's draft report on chloroform. The report stated chloroform does not act directly on a cell's DNA, and thus low doses of chloroform involve no carcinogenic effects. After consideration of the draft report, EPA filed a motion to vacate the zero-level MCLG for chloroform.

In its motion to vacate, EPA claimed Council lacked standing because it failed to demonstrate actual injury from the MCLG. Council contended that a zero MCLG exposed it to greater liability under the Comprehensive Environmental Response, Compensation, and Liability Act. The court found Council's exposure to higher clean-up costs at least substantially probable with a zero MCLG, as compared

with a nonzero one. Thus, the court ruled Council had standing.

EPA contended its motion to vacate obviated the need for the court to issue an opinion. However, the court disagreed explaining that mere vacatur would not provide an adequate remedy if it found EPA's action was unlawful.

On the merits, Council argued EPA's decision to adopt a zero MCLG in the face of scientific evidence establishing that chloroform is a threshold carcinogen was inconsistent with the SDWA. The SDWA mandates for an agency action based on science, the agency shall use best available peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices. Council asserted that in promulgating a zero MCLG for chloroform, EPA overrode the "best available" scientific evidence.

EPA provided five arguments in defense of its action. First, it argued establishing a nonzero MCLG for chloroform would be a "precedential step" representing a major departure from prior regulatory decisions related to chloroform. In rejecting this argument, the court explained a nonzero MCLG simply results from the steadfast application of the relevant rules.

Second, EPA supported its action on the ground that it could not complete deliberations with the SAB before the rulemaking deadline. The court rejected this argument stating that failure to consult with the SAB is no reason for EPA to reject best available evidence.

Third, EPA justified its decision not to adopt a nonzero MCLG because it had to reevaluate one of its underlying technical assumptions. Upon this reevaluation, EPA believed the MCLG would fall into an interval between 70 and 300 parts per billion. In rejecting this argument, the court reasoned the uncertainty on this issue may have provided support for choosing the lowest nonzero MCLG from within that interval, but found no support for EPA choosing an MCLG outside the range of uncertainty.

Fourth, EPA asserted its decision to publish an MCLG of zero pending further review of the scientific evidence was entirely reasonable since the MCLG has no actual effect on the final MCL. The court disagreed. Again, the court found no justification for EPA's disregard of its own scientific findings.

Finally, EPA asserted the zero MCLG merely presented an "interim risk management decision" pending the final SAB report. The court presented two reasons for rejecting this argument. First, the court explained whether EPA adopted the 1998 scientific evidence as its "ultimate conclusion" was irrelevant to whether those findings represented the "best available" evidence. The court noted all scientific conclusions are subject to some doubt. However, Congress requires EPA to take action based on the best available evidence *at the time* of the rulemaking. Second, EPA cannot avoid taking action simply by dubbing its action "interim."

In the end, the court found EPA's December 1998 final rule

adopting a zero MCLG for chloroform was arbitrary and capricious and in excess of statutory authority. Thus, the court vacated the rule. Additionally, the court planned to issue a separate order for briefing on additional remedies.

Kris A. Zumalt

Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs, 109 F. Supp. 2d 30 (D.C. 2000) (granting environmental groups' motion for summary judgment as a result of inadequate Army Corps of Engineers' analysis of environmental impacts in environmental assessments for proposed barge-casino projects requiring Clean Water Act and Rivers and Harbors Act permits).

Based on its analyses documented in separate environmental assessments ("EAs"), the United States Army Corps of Engineers ("Corps") issued Findings of No Significant Impact ("FONSIs") and thereafter granted the necessary permits under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act for three proposed Mississippi coast casino projects. Alleging the inadequacy of each EA, several environmental groups, including Friends of the Earth, Inc. ("FOE"), successfully challenged the Corps' determination that each proposed floating-casino project would not result in significant environmental impacts, and thus, did not require the preparation of environmental impact statements ("EISs") prior to issuing the permits.

Specifically, FOE alleged the Corps failed to adequately consider the relevant direct, indirect, and cumulative impacts of the proposed projects as required under the National Environmental Policy Act. The court found the Corps' consideration lacking in each respect. The court outlined the four-step analysis applicable to judicial review of an agency's decision to forego preparation of an EIS in favor of an EA. The court must determine whether (1) the agency accurately identified the appropriate environmental issues; (2) the agency took a "hard look" at the concern in preparing the EA; (3) if a FONSI is issued, the agency must be able to make a convincing case for its finding; and (4) if the agency finds a significant impact, an EIS must be prepared unless modifications or conditions imposed upon the project reduce that impact to a minimum.

The court recognized the strong presumption in favor of upholding decisions of the Corps and the applicable deferential standard of review. However, the court recognized its duty to make a thorough, in-depth review of the Corps' decision to ensure the agency adequately considered all relevant factors and reached a rational decision. Pointing to the fact that each state and federal agency which commented on the proposed projects expressed concern about the potential environmental impacts and suggested that the Corps prepare