ORIGINAL

In the

Supreme Court of the United States

DOUGIAS M. COSTLE, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY,

PETITIONER

V.

PACIFIC LEGAL FOUNDATION ET AL.,

RESPONDENT

No. 78-1472

WASHINGTON, D. C.
December 5, 1979

Pages 1 thru 50

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

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Petitioner

v. No. 78-1472

PACIFIC LEGAL FOUNDATION ET AL.,

Respondent

Washington, D. C.

Wednesday, December 5, 1979

The above-entitled matter came on for argument at 11:50 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM H. ALSUP, Esq., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner.

ROBERT K. BEST, Esq., Pacific Legal Foundation, 455 Capitol Mall, Suite 465, Sacramento, California 95814; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Costle v. Pacific Legal Foundation.

Mr. Alsup, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM H. ALSUP, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ALSUP: Thank you Mr. Chief Justice, and may it please the Court:

The issue presented in this case concerns the meaning of the phrase "opportunity for public hearing" in section 402(a) of the Clean Water Act and the extent to which the Environmental Protection Agency may condition the availability of an adjudicatory hearing on the submission of a prior request for such a hearing setting forth a material issue of fact.

QUESTION: Your opening comment suggests to me that at some point I hope you will discuss whether there is a live case here any longer.

MR. ALSUP: Well, certainly I would be happy to address that now. We do believe there is a continuing controversy. I am not quite sure I follow the question, Mr. Chief Justice. Is there some particular reason that you might believe that the case is no longer a live controversy?

QUESTION: I have some feeling that it may be running out.

MR. ALSUP: Well, it is true that the original permit was granted, or extended in the action in question through December 17 of this year. But the case would not become moot even if this Court were to rule on the case sometime in the spring or next year, because there is a pending application for an additional permit by the City of Los Angeles and by operation of the Administrative Procedure Act -- I believe it is section 558(c) -- that application as long as the agency does not act on the pending application would extend by operation of law the expiration date in the existing permit.

So therefore if the Court, for example, were to rule one way or the other in April of next year and the agency in the summer of next year were to issue a -- act on the pending application and issue a new permit, the old permit at that point would expire by operation of law and not on December 17 of this month.

There is an additional reason why, it occurs to me, why the case would not be moot. And that is because the terms and conditions of this permit are the subject of an enforcement action in another lawsuit pending against the City of Los Angeles in the District Court in Los Angeles. And because of the preclusion clause in section 509 of the Water Act, the only means of determining the validity of the terms and conditions that are sought to be enforced are through a pre-

enforcement review suit such as the one at issue in this litigation.

The case arises on the following facts:

For several years the municipal sewage system of the City of Los Angeles has discharged treated sewage into Santa Monica Bay. Most of that sewage has only received primary treatment, that is a process by which the heavy solids sink to the bottom; and some 30 percent has received secondary treatment, which is an additional step which removes some of the chemical oxygen demand materials and suspended solids from the sewage.

This process results in two end products. One of these is effluent -- liquid effluent -- and the city pumps that into Santa Monica Bay through a pipe that is five miles long.

The second product is a muddy substance, liquidy substance called sludge and that is pumped into Santa Monica Bay through a different pipe. That one is seven miles long.

Now, under the Clean Water Act it is unlawful to pump these materials into Santa Monica Bay without a permit called a NPDES permit -- National Pollution Discharge Elimination System Permit -- which is set up the scheme in section 402 of the Act.

Now, although section 402 allows the States to operate their own NPDES program, that doesn't apply for discharges beyond the three-mile limit. So only the Environ-

mental Protection Agency may issue permits for the five- and the seven-mile outfalls that are involved in this case. There is also a one-mile outfall at this plant called the Hyperion plant in Los Angeles and for that one-mile outfall, because it falls within the three-mile limit, the State issues an NPDES permit.

Now, on August 18, 1975 the EPA issued such a permit for the five- and the seven-mile outfalls. And the State Water Quality Board issued a permit for the one-mile outfall. These were combined into a single document that received two numbers: a Federal permit number and a State permit number.

This document, this permit contains several compliance schedules which are designed as timetables to eventually get the polluter to meet the statutory requirements. And there are two of those compliance schedules that have been disputed in this case.

One of those compliance schedules governs the five-mile pipe through which the city pumps the effluent and it requires that 100-percent secondary treatment of all the effluent through that pipe eventually be attained rather than the 30 percent that it now achieves.

The second compliance schedule in this case is the so-called sludge out schedule. That one pertains to the seven-mile outfall and that schedule requires the City of Los Angeles to phase out completely its discharge of sludge through

that seven-mile outfall in Santa Monica Bay.

Now, with that background, the immediate issue in this case concerns the procedure used by EPA to implement the phrase "opportunity for public hearing" in section 402 which provides that the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant upon the condition that it meet a number of statutory requirements.

Now, in 1974 EPA published regulations that defined in detail how a person could go about getting various types of public hearings and the regulations, which are set forth at Part -- 140(c) of Part 125, describe three basic kinds of hearings.

First, there is a public legislative-type hearing at which the public can come and make oral arguments or written presentations on how they feel about the proposed action by EPA in either granting or denying a request for a permit.

The second is called an adjudicatory hearing. That is a trial-type hearing at which evidence is received and findings are made.

QUESTION: Those are kind of analagous to differences in the Administrative Procedure Act, are they not?

MR. ALSUP: They are analagous to rule-making versus adjudication under the APA. But we do take the position that adjudication does not necessarily mean that precisely the

types of adjudication under the APA or, for that matter, that rule-making would -- although we don't reach that question in this case -- but that the public legislative-type hearing doesn't necessarily have to follow sections 556 and 557 of the APA --

QUESTION: I realize that, but what I was getting at was that your distinction is similar to that made in the APA. One is kind of a regulation of legislative effect having broad effect on what the agency proposes to do interpreting a provision of the statute will have in future applicability to a broad number of people. And an adjudication being a much narrower determination of a factual nature as to what happened on a particular day or what didn't happen on a particular day.

MR. ALSUP: That is generally correct, but there is some similarity in this sense: that both of these hearings are directed to whether or not a license should be issued. And in that sense there is -- even at public hearing -- a specific concrete action before the house.

QUESTION: So that the legislative-type hearing that you described is more like an adjudicatory hearing than it would be under the APA.

MR. ALSUP: I think that is correct.

Then there is a third type of hearing -- although the regulations don't call it a hearing -- and that is where

if someone had a legal objection to the issuance of a permit, that legal objection could be referred to the general counsel of the agency, the parties would have an opportunity to submit briefs; and although there wouldn't be an oral argument or evidence received, the agency through the general counsel would still determine, or make a ruling, on that statutory or legal objection.

MR. CHIEF JUSTICE BURGER: We will resume at 1:00 o'clock, Mr. Alsup.

(Thereupon, at 12:00 o'clock noon, the proceedings in the above-entitled matter were recessed, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION

1:01 P.M.

MR. CHIEF JUSTICE BURGER: You may resume, Mr. Alsup.

ORAL ARGUMENT OF WILLIAM H. ALSUP, ESQ. (RESUMED),

ON BEHALF OF PETITIONERS

MR. ALSUP: Thank you, Mr. Chief Justice, and may it please the Court:

As I was saying before the recess, the regulations promulgated in 1974 provided for basically three types of hearings: the public legislative-type hearing, the adjudicatory hearing and the procedure by which legal objections could be determined by general counsel.

The regulations also imposed threshold requirements for each of these type hearings. The public legislative-type hearing would only be held if, after giving public notice of what the EPA intended to do, the Regional Administrator determined that there was significant public interest in the proposed action.

The adjudicatory hearing would be held only if someone presented a question -- not just someone, but an interested party presented a request for an adjudicatory hearing that set forth a material issue of fact. And the regulations were quite specific on that, they said the request to be denied, and must be denied, if no such requests presenting

a material issue of fact were filed.

And then finally the only requirement for getting a legal determination was that someone submit a request stating an objection based on legal grounds to proposed course of action.

In the present case, when the 1975 permit was issued -- on August 18 of 1975 -- the EPA announced its proposed action of issuing the permit to the City of Los Angeles. It gave notice -- public notice -- held a public hearing and then issued a permit. That is the permit that I described a moment ago containing the compliance schedules.

No one at that time sought review under section 509 of the Act to have that action set aside.

Similarly, when that permit expired by its own terms in early 1977, the agency went through that same procedure: held a public hearing, received comments at that hearing, extended the permit for six months through June 30, 1977 with no other modification other than simply extending the expiration date of the permit. Once again, no one challenged that action.

Then, on April 27, 1977, EPA announced, and this was looking forward to the June 30 deadline when the permit would expire again, EPA announced that it proposed to extend the permit once again, this time to December 17 of this year. The agency made this announcement by publishing in the Los

Angeles Times on April 27 a statement saying what it proposed to do, saying that requests -- invited the public to file requests for the public-type hearing and stated that one would be held if there were significant public interest in the action. And, in addition, stated that there would also be an opportunity under the regulations for requests for an adjudicatory hearing.

QUESTION: Mr. Alsup, could I interrupt there, because I have some difficulty, frankly, understanding the City of Los Angeles' position in the case.

What did you do, just extend the date by which the changes had to be made, the sludge out and the improvement on the liquid? Is that all that happened, it gave Los Angeles more time to comply?

MR. ALSUP: The action that was taken on both occasions was really to extend the expiration date of the permit itself.

QUESTION: All right.

MR. ALSUP: It did not not modify in any the compliance schedule deadline dates --

QUESTION: I see.

MR. ALSUP: -- that were in the original permit in 1975.

Now, it is true that Los Angeles believes that EPA somehow acquiesced in the State schedule for compliance which

was extended by the State, we believe that Los Angeles is in error on that and that EPA never acquiesced in and never modified its own compliance schedule to achieve the so-called ultimate sludge out.

QUESTION: I quite really haven't been able to understand how just merely extending the termination date of the permit, how could that adversely affect the City of Los Angeles in any way?

MR. ALSUP: Well, I don't think it would, in one sense; and, that is because by law the city must have one of these permits. Otherwise, they have to discontinue discharging altogether. So, in a sense, they are really not complaining about the existence of the permit but rather the conditions, the compliance schedule that was imposed in that permit.

QUESTION: They are saying that the Federal permit should have been modified to follow the State schedule.

MR. ALSUP: I actually think they are saying much more than that. Their basic position seems to be as does BLF's and Kilroy's that the compliance schedule should be eliminated altogether because there is no environmental harm in pumping that sludge into the ocean; and that there should be no compliance schedule at all but rather what EPA should do is set some maximum effluent level that could be perpetually achieved by the city by continuing to pump forever into the ocean.

QUESTION: That is a position they could have taken back in -- when the original August 18, '75 permit was issued, isn't it?

MR. ALSUP: That is absolutely right, they could have taken that position. They did not.

QUESTION: And they could have taken it again in January of '77, and they didn't.

MR. ALSUP: That is correct.

QUESTION: I see.

MR. ALSUP: And I have to say I don't think they took that position even in the extension that occurred in June of 1977, although they had taken that position in correspondence with the agency concerning a grant to the city to assist it in its waste water treatment.

Well, again, no one commented on this April 27 notice, no one requested a public legislative-type hearing; even the City of Los Angeles, and a personal copy was mailed to them of this proposed action.

And so on June 2, 1977 the Regional Administrator determined to go ahead and extend the permit with the compliance schedules intact as before.

Now, that action triggered the ten-day period within which someone could file a request for an adjudicatory hearing and on June -- that is under the regulations -- and on June 13, Mr. Kilroy did; he filed it, being represented by the

Pacific Legal Foundation.

As I mentioned though, the regulations require that any such requests set forth a material issue of fact if you want to have a trial-type hearing. That is section 125.36(c). The Regional Administrator looked at the request and concluded that it only raised legal issues and so advised Pacific Legal Foundation and said: "You don't raise factual issues, you raise legal issues. I am referring your legal issues to our third procedure, that is the general counsel will now determine the validity of your legal objections."

And the Pacific Legal Foundation on behalf of Kilroy was asked to file a brief on those issues. And Pacific Legal Foundation did and said, "These are the issues that we plan to raise and we meant to raise; and it is clear from that brief which is in the record that those were not factual issues, those were purely legal issues."

Now, the general counsel then ruled against BLF, and that should have been the end of the case, in our view. However, it wasn't. Pacific Legal Foundation, Kilroy, the City of Los Angeles, and now the City of Torrance, which is a neighbor to Los Angeles, filed petitions for review under section 509 in the Court of Appeals for the Ninth Circuit. The Court of Appeals ruled against EPA. It didn't question the general counsel's treatment of the legal issues, which were the only issues ever tendered to the agency. That somehow

never was addressed. Rather, the Court of Appeals set aside the sludge out schedule, that is the one that applies to that seven-mile pipe, and said: "You can't enforce that any more because you, EPA, did not provide an adjudicatory hearing."

QUESTION: Was that sua sponte on the court's part?

MR. ALSUP: No.

QUESTION: It must have been urged by somebody.

MR. ALSUP: There were many arguments urged and I think it is fair to say that the drift of that argument was probably presented to the Ninth Circuit; not specifically though, but I think that it was. And our position on that was: Well, no request setting forth any material issue of fact was filed with the agency. And that is why we didn't hold an adjudicatory hearing.

And here is the interesting way that the Ninth Circuit got around that problem. They said, the Ninth Circuit said: "Well, this opportunity for public hearing contemplates that you must routinely hold an adjudicatory hearing even if no one requests one, unless the EPA is prepared to show on judicial review that its decision rests upon facts about which there could be no plausible factual dispute."

This is a pretty onerous burden because it would permit -- and I would like to explain later -- a complete stranger to the proceedings to walk into the Ninth Circuit

and say, "They didn't hold an adjudicatory hearing and I have now identified a factual issue that I think is in dispute."

QUESTION: Now, how would they get into the Ninth Circuit?

MR. ALSUP: By --

QUESTION: By intervention at that stage?

MR. ALSUP: By filing a petition under section 509 within I believe it is 90 days of the time that the final action is taken.

QUESTION: You say any stranger, any citizen.

MR. ALSUP: Just as the City of Torrance did in this case, a complete stranger to the proceedings walks into the Ninth Circuit.

QUESTION: He is a party aggrieved, is that it?

MR. ALSUP: He acts as any interested person may seek review. The City of Torrance believes that it is aggrieved, in fairness to the city, because the sludge-out schedule they say will cause the City of Los Angeles to bury it in a land-fill that is near the City of Torrance. And I think that is the reason that they are concerned over this action.

QUESTION: Well, I suppose the Ninth Circuit would say that if you scheduled an adjudicatory hearing and some people had notice and didn't show up, they would be bound by your resolution, whatever possible factual issues there may be or not.

MR. ALSUP: Well, the Ninth Circuit didn't actually say that.

QUESTION: I suppose consistent with their theory they could say, no, they wouldn't be bound.

MR. ALSUP: I think that is correct. They might say -- I believe that the theory of the Court of Appeals was that the EPA has an affirmative duty to get in there and dig out all the possible factual issues that might exist. And then even if no one showed up at the hearing, to flush out those issues.

QUESTION: Imagine you had an enemy -- imagine you had an opponent, and go at it that way.

MR. ALSUP: The Ninth Circuit did not actually say that but we think that is the practical implication.

In our view, if it would be permissible -- if the Ninth Circuit might say, "Well of course if that happened you wouldn't have to hold a hearing if no one showed up."

But our response to that is: Well, if that is true, then why should we be required to hold a hearing at all if no one bothers to even request one? We don't think that those are substantially greater burdens to place on the public.

Well, our basic disagreement with the Ninth Circuit's holding is twofold:

First of all, the phrase "opportunity for public hearing" does not prohibit the agency from imposing reasonable threshold requirements on the availability of a hearing. And

barring at the threshold those people who don't satisfy those threshold requirements. This was the holding of the court in the Storer case and the Weinberger v. Hynson case and in the Kleppe case, among others.

For example, in the Storer case the FCC issued a rule, the statute there said anyone could have a hearing on their license; it seemed to be mandatory. But in fact the Court said: "No, the FCC can say we are not going to issue a license to someone who already owns more than X number of radio stations, so that those people would just be barred at the threshold." And the Court went further to say that the FCC would entertain waivers of that policy; but it would only entertain waivers and they still wouldn't be entitled to a hearing unless the facts set forth in the application for waiver were sufficient, if true, to warrant a waiver in the opinion of the FCC.

In the Kleppe case, which involved an Act under which coal operators were assessed with fines, the statute there said, just like it does here, "opportunity for public hearing before those fines are assessed." But this Court held, no, the agency can issue a regulation saying that you have to request that hearing. And if you don't request the hearing, then it is deemed to be waived.

And we have almost an identical-type regulation in this case.

It seems to use then that the issue is whether or not this requirement for an adjudicatory hearing -- that is set forth a material issue of fact -- is one which is a reasonable threshold requirement under the decisions of this Court.

And we think it is, for this reason: If it is not a factual issue, then there is no need for evidence or an evidentiary hearing. If it is not a material issue, then there is no need to consider it anyway. And if there is no request made, it is reasonable to conclude people have no factual objection to the course of action that the agency proposes to take.

The second basic objection that we have is that this imposes an onerous burden on EPA. Now, of course if the statute calls for it, then we have to live with it.

But in the Du Pont case, Du Pont v. Train, this Court construing the very same statute said that it would be reluctant to construe the Clean Water Act to impose an onerous burden on the agency, because it would be hard to believe that Congress intended such a burden to be imposed.

This is very analagous to what would happen here. Each year the agency issued about 2200 of these permits but in the past only about 100 adjudicatory hearings have been held.

Under the practical implication of the Ninth Circuit's opinion, the agency in most cases would now begin to hold

hearings not in just 100 but in close to 2200 cases a year. Because if we didn't do that, we would have to bear what the Ninth Circuit called "a very heavy burden of showing that a hearing would have served absolutely no purpose."

So that the practical thing to do to avoid that problem would simply be to hold one of these hearings, receive evidence, if the Ninth Circuit eventually required that, rather than to do what we do now; and that is simply to see if anyone requests one on a material issue of fact.

I would like to reserve the balance of our time for rebuttal, with the Court's permission.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Alsup.

Mr. Best.

ORAL ARGUMENT OF ROBERT K. BEST, ESQ.,

ON BEHALF OF RESPONDENTS

MR. BEST: Mr. Chief Justice, and may it please the Court:

The underlying dispute which causes this litigation to go forward is a dispute over a project in the City of Los Angeles which is called the Interim Sludge Disposal Project.

Now, it is true when we challenged the permit we were concerned about other issues but the primary underlying concern was this Interim Sludge Disposal Project which has been mentioned by Mr. Alsup. This project created a substantial controversy when it was first announced by EPA

in a negative declaration in November of 1976. Now, it is true that the permit requirements were issued in 1975 but if you look at the permit as it is contained in the appendix, you will see that it does not say what the disposal project is going to be when the sludge discharge is terminated; it does not detail what it is going to be.

So interested parties had no way of knowing what they were dealing with until the negative declaration announced the content, and that is when the controversy first arose.

I think the Court should understand that what this project is and, in particular, what this project is not. It is argued in the brief and Mr. Alsup has indicated that this project proceeds pursuant to a compliance schedule which is going to terminate the sludge discharge. It does not do that. This project is what it says it is, it is an interim project, an interim sludge disposal project which modifies the sludge discharge pending some eventual decision about what the sludge discharge should be.

This modification, in essence what happens, instead of pumping the sludge out into the ocean it goes through large centrifuges, centrifuges split into two products: one, a semi-liquid goo which is the main product of the sludge, which is supposed to be trucked through huge gondola trucks and dumped in landfills in the Los Angeles area. And the estimates, if you read the City of Los Angeles' description of this, which

is in the appendix, it says that if you live along that route one of these huge trucks is going to pass your home every 3-1/2 minutes.

Now, there still remains the primarily liquid product which is produced by the centrifuges, which still contains high concentrations of sludge particles and other materials in the sludge. Under this project, that continues to be discharged out into the ocean.

So we are not implementing the requirements of the Water Act, we are not terminating the sludge discharge by this interim sludge disposal project. And that is one of the concerns that needs to be addressed in any public hearing.

QUESTION: What do you have to say about Mr. Alsup's assertion and in the briefs that no factual issues were raised initially?

MR. BEST: Are you referring to the request for an adjudicatory hearing, Mr. Chief Justice?

QUESTION: Yes.

MR. BEST: We would have two answers to that.

Initially, I will describe for you our view of the facts as they progressed, which is considerably different from the description by Mr. Alsup. We believe that under the facts which progressed we had no way of putting into a request for a hearing detailed factual issues. The purpose of the request of a requirement for the statement of factual issues

of course is to be able to determine whether the factual issues upon which the agency's decision rests are in dispute, not just factual issues in general. But at the time we had to prepare the request for adjudicatory hearing, EPA had withheld from us the decision, they had withheld any information as to why the reasons for the decision. They have provided us only with a telephone call which said, "We took the action on June 2, if you want an adjudicatory hearing you must request it today."

That is why when you look in the record, it is a telegraphic request for hearing that was prepared in a matter of a couple of hours to meet a mandate by the Environmental Protection Agency that it be on file within two days.

So we believe that under those facts, the fact that this request for hearing stated only general issues is acceptable.

Besides that, we had been in dispute with EPA. EPA knew what the issues were we were concerned about. Before the Court of Appeals --

QUESTION: When was the hearing scheduled; how long after was it until there was a hearing?

MR. BEST: There has never been the hearing.

QUESTION: I know, but you submitted a request for a hearing.

MR. BEST: There was never scheduled. It was denied.

QUESTION: And you requested that,you posed legal issues, or what?

MR. BEST: When we submitted the request for hearing we were interested in raising the issues relating to the interim sludge disposal project, which are factual issues: when should it be implemented, can we get the trucks, what landfill should be utilized; these are factual issues.

The request for hearing does say should the compliance schedule in the permit go forward, pending the environmental studies that will give us the information relating to what landfill should be used, and so forth. But it is the compliance schedule for the interim sludge disposal project that is challenged in that request for hearing. And we believe that that was a specific enough notice of the factual issues we wanted to litigate. The EPA before the Court of Appeals admitted that. It stated to the Court of Appeals that the only issues that were made were procedural legal issues and issues relating to the interim sludge disposal project.

And so we believe that in fact it did raise the factual issues.

QUESTION: I am just trying to get the chronology in mind.

You said the negative declaration in November of 1976, I believe it was, advised you of the interim sludge disposal project?

MR. BEST: That is correct.

QUESTION: And then after that, if I have my notes correct, there was a public hearing in January of 1977 concerning the preceding six-month extension.

Was the matter that you are now interested in having the subject of hearing, the subject of that hearing?

MR. BEST: It was not discussed at that hearing.

Let me briefly recount the facts so you can have your chronology straight, Mr. Justice Stevens.

After the negative declaration, the controversy arose and we became involved. We sent to the City of Los Angeles and said, "That is a bad project, let's talk about what should be done." And the City of Los Angeles said, "There is nothing we can do about it, it is required by the Environmental Protection Agency in a permit."

We then proceeded to write to the Environmental Protection Agency, and that letter is in the record, where we said, "Wait a minute. We don't want these requirements included in any future permit and we specifically ask that before they are included in any future permit, that the agency go through the full public participation requirements in the Act."

Now, the Environmental Protection Agency says that wasn't a request for a legislative-type hearing, because we didn't use the word "hearing." All we asked for was the full public participation requirement.

QUESTION: When was that done?

MR. BEST: That was done in December of 1976.

QUESTION: Just before --

MR. BEST: Shortly before that, there had been an announcement in the Los Angeles Times that this permit was going to be reconsidered, the terms and conditions were going to be reconsidered.

The action that EPA took then, in January of 1977, was to temporarily defer action on a final decision of what to do with the permit. They said, "We need more time" -- this is in the record as well -- "We need more time to review these requirements in this permit, so we are going to extend this temporarily while we review the requirements in the permit."

QUESTION: You don't contend that the notice in the L.A. Times in December was not sufficient to give you an opportunity to be heard as to the issues specified in the notice, do you?

MR. BEST: No, we do not contend that. The notice in the L.A. Times as to the January issue was deficient, because it was issued strictly by the State Board. The Environmental Protection Agency never issued a notice as to that January meeting.

So they went forward and conducted their action without adequate notice. But when we saw the action we didn't object to the action, so we didn't raise any claims against the

action.

QUESTION: Well, wasn't there a December notice published by the EPA?

MR. BEST: There was not. In the record is our request for that notice, and the notice they sent back to us was published by the Regional Board. There was no notice published by the Environmental Protection Agency.

QUESTION: And you say the publication by a Regional Board is insufficient.

MR. BEST: It is insufficient for the Environmental Protection Agency.

Now, this is a part --

QUESTION: Why is it insufficient? Why can't it delegate?

MR. BEST: Because the Environmental Protection Agency maintains as a position in this action that the Regional Board has no authority as to its permit. Nobody realized this at the time but the Environmental Protection Agency says, "Now, the actions taken by the Regional Board modifying the compliance schedule were in fact not valid, were not actions of the Environmental Protection Agency."

If the actions taken by the Board modifying the permit are not valid, then the actions by the Board notifying that they are going to have hearings on modifications would not be valid as to EPA.

In addition --

QUESTION: Take a kind of down to earth example of a typical State procedure where probating a will you have a requirement the executor give notice ten days that the will will be offered for probate. And a notice is published that the will of so and so will be offered for probate at 9:30 in such and such a division of such and such a court. And someone comes in later and proves that although that notice was given conformed to the statute in every way, actually it wasn't the executor that authorized its publication, it was somebody else, although it complied with all the substantive requirements of the statute.

Would you say such a notice was deficient?

MR. BEST: I would not argue such a notice was deficient, Mr. Justice Rehnquist, but that is not the facts in this case.

First of all, as I say, EPA maintains that the State Board has no legal authority to act for or bind the Environmental Protection Agency. That is the position of the Environmental Protection Agency, as I understand it.

QUESTION: Where do we find that?

MR. BEST: You can determine that from the Solicitor.

The other point is the notice by the Regional Board does not comply with the Environmental Protection Agency's regulations as to what should be in a notice for the Environ-

mental Protection Agency's action.

QUESTION: Can you tell me now where we would find that in this Appendix or in these briefs?

MR. BEST: Which record is that?

QUESTION: The statement that you just made, even a ministerial act can't be delegated to the regional body.

MR. BEST: There is nothing in the briefs that say that. It is the Environmental Protection Agency which maintains in its brief and in the reply brief in particular, that the actions by the State Board are not binding on the Environmental Protection Agency.

QUESTION: Well, but to say it is not binding isn't the same thing as saying that notice published by the State Board may not be an adequate substitute for a notice required by a statute from the Environmental Protection Agency.

MR. BEST: Mr. Justice Rehnquist, I am willing to accept that statement. But I would again point out, first of all, that the notice as published did not meet the requirements of the Environmental Protection Agency's regulations. The State Board published its notice pursuant to State law, which has completely different requirements concerning the content of the notice.

The second thing is we have never challenged the adequacy of that notice, and I don't wish to challenge it today. We did not challenge the January proceeding, because the

January proceeding was satisfactory to us. It extended the time for the permit so that they could reconsider the requirements in the permit. And that is what we wanted to have done. And it was our argument that more time was necessary, we had to change this compliance schedule in order to get the time to consider these issues. And so we did not challenge that issue.

QUESTION: Can I ask you another question in trying to understand the chronology.

Have they started hauling the sludge pursuant to the Interim Sludge Disposal Project yet?

MR. BEST: The Interim Sludge Disposal Project is not under way.

As I understand it --

QUESTION: When is it --

MR. BEST: -- the centrifuges are still in storage here on the East Coast.

QUESTION: Does the record tell us when it may get under way?

MR. BEST: It will not get under way as long as the stay put in effect by the Ninth Circuit remains in effect.

QUESTION: Well, the permit that is now in effect expires a couple of weeks from now, as I understand it.

MR. BEST: The permit by its term expires on December 17.

QUESTION: Is it not probable that before it can be extended again there will have to be some kind of a notice of a proceeding to extend it again?

MR. BEST: We believe before it can be extended again EPA must go back through its entire process, issue its notice, give us our public hearing, and if necessary --

QUESTION: If it gives you that notice before -- between now and December 17 -- will you then have an opportunity to argue everything you want to argue concerning the Interim Sludge Disposal Project?

MR. BEST: That is correct, Mr. Justice Stevens.

QUESTION: Then why do we have to decide --

MR. BEST: Because the Environmental Protection Agency refuses to start the permit proceedings. We have asked them what --

QUESTION: If they vacated the stay just today; if they vacated the stay, what would happen?

MR. BEST: If they vacated the stay, that would delight the Environmental Protection Agency, because then they could go ahead and enforce this permit which has these requirements that we want modified.

QUESTION: Well, isn't it going to take them more than between now and December 17 to start hauling sludge?

MR. BEST: It certainly will. But the key is by not acting, by inaction the Environmental Protection Agency auto-

matically extends the permit pursuant to section 558 of the EPA because the City of Los Angeles has filed an application for a new permit, which includes some of these modifications we are concerned about.

QUESTION: Well, can't you get a hearing in connection with that extension?

MR. BEST: We certainly can.

Our concern is -- Mr. Justice Stevens, our concern here today is that if the stay is vacated and EPA does nothing, then this case merrily goes forward and they can require the permit to be implemented. I assume that they will proceed with their enforcement action that they have already filed against the City of Los Angeles where they are asking the Court to order the City of Los Angeles to implement the Interim Sludge Disposal Project. And I presume they will proceed with that and they will just not issue a new permit.

QUESTION: We are now touching on what I asked the Solicitor General at the outset: What are we really doing here now?

MR. BEST: Quite frankly, Mr. Chief Justice, we don't understand why we are here, because the Environmental Protection Agency should be going through the process of issuing a new permit. If that process were under way, there would be no reason for us to be here today.

The problem is the Environmental Protection Agency

is not, and they have told us that they will not initiate proceedings on this permit until the courts resolve what procedural requirements they have to go through. I assume that means this honorable Court. And that is why we are concerned.

The permit proceedings should have been initiated six months ago. For a permit as complicated as this it takes at least four, possibly more months to go through the process to get it issued. Under EPA's new regulations for the NPDES permits, a noncontroversial permit takes two months before it goes into effect.

QUESTION: Well, the EPA simply disagrees with the Ninth Circuit's interpretation of the opportunity for hearing language in the statute, as I understand it.

MR. BEST: That is the case they are presenting to this Court. We do not believe that in fact that case even arises out of the Ninth Circuit decision. First of all, remember the Ninth Circuit -- before the Ninth Circuit was never an issue as to what type of a hearing should be held. No hearing was held. So it wasn't a question of should this be a legislative-type hearing or an adjudicatory-type hearing. It is just a question as to whether any type of hearing should have been held. We argue that there was substantial public interest in this matter, it was well known the Administrator had filed -- the Regional Administrator had filed an affidavit

under penalty of perjury saying it was controversial and that the legislative-type hearing should have been held. The EPA says, "Well, if nobody asks for a hearing, then that means there is no public interest."

We pointed out that EPA's public participation regulations which apply to the NPDES permit, and which the EPA entirely ignores in this lawsuit, require that a hearing be held not only if there is significant public interest but also if there is pertinent information to be gained. Clearly there is pertinent information to be gained here, and the Ninth Circuit so held.

QUESTION: Well, then, the EPA wants us to reverse the Ninth Circuit.

MR. BEST: That is right. The EPA wants you to reverse the Ninth Circuit so that the stay will be lifted and so that their interpretation of the Ninth Circuit decision that it requires them to conduct an adjudicatory hearing will be off the book. We don't believe the Ninth Circuit decision requires them to conduct an adjudicatory hearing in all cases.

The general holding of the Ninth Circuit that goes beyond the facts of this case is limited to the statement that under section 402 of the Water Act, considering the legislative history about using these hearings for public participation and involvement of citizens, when a hearing is not held under

section 402 and it is challenged, the Environmental Protection Agency must present some kind of a record -- some kind of a record to the Court to justify that there was no reason for a hearing, preferably by showing that none of the facts upon which the decision rest are in dispute. That is the general holding.

QUESTION: Well, ordinarily aren't those things resolved by having someone come in and say there are factual issues and they are as follows and we want a hearing; was that done here?

MR. BEST: Resolved before the Court, Mr. Chief Justice?

QUESTION: No, no, the hearing that EPA said, in effect, it was waived. The EPA says that no one asked for a hearing here.

MR. BEST: That is correct. No one asked for the legislative-type hearing, because we received no notice that the legislative-type hearing was under way. We did ask -- Mr. Kilroy asked for an adjudicatory-type hearing.

QUESTION: That is what the Court of Appeals has ordered.

MR. BEST: The remand language, Mr. Justice White, says "proper hearing."

We believe that the Court of Appeals said EPA did not conduct a legislative-type hearing.

When you read the beginning of --

QUESTION: Yes, but the court's language is that it was unable to deny an adjudicatory hearing on the ground that none of the material facts upon EPA's decision rests are disputed.

MR. BEST: The court does use that language. I would point out --

QUESTION: Well, so --

MR. BEST: But here the adjudicatory --

QUESTION: Do you think it would comply with the remand order if an adjudicatory hearing was not held?

MR. BEST: We certainly do, and I will explain why. An adjudicatory hearing was requested -- Mr. Justice White, an adjudicatory hearing was requested and so if the Court found that the request was raised was adequate, then EPA was obligated to give an adjudicatory hearing; and since the request was on file.

The beginning of this section -- if you read the beginning of this section where the court analyzes the question about: Can we order a hearing when there has been no request? Should there have been a hearing held before the June 2 decision? These are the questions the court addresses. That applies to the legislative hearing, it doesn't apply to the adjudicatory hearing. Only the legislative hearing is held before the June 2 decision. Only the legislative hearing was there no requests

submitted.

And so we believe what the Ninth Circuit was saying is essentially it followed the flow of the case. It said, let's look at the legislative hearing. Can we order a legislative hearing where there has been no hearing requested?

And it concluded that under the facts of this case, the facts that no hearing was requested, was insufficient. And it went on and discussed an adjudicatory hearing and concluded that likewise -- in the language of the court -- "a hearing after an adjudicatory hearing is better than no hearing at all."

QUESTION: So we listen to this argument and we take the case under submission. What would be the status of the case a couple of months from now?

MR. BEST: The status of the case a couple of months from now, I would certainly hope that it would be moot, that the Environmental Protection Agency will start it procedures to issue a new permit.

I cannot say what EPA will do.

QUESTION: Do we have to wait a couple of months? Thirteen days will take you beyond the 17th of December.

MR. BEST: Yes, but, Mr. Chief Justice, I have to emphasize that under section 558 of the APA this permit remains in effect as long as the City of Los Angeles has filed an application for a new permit and the EPA has not acted. And

so by just not acting, EPA will extend this permit for as long as -- until the city decides to mandate it.

QUESTION: Of course the entire thing is subject to a stay of the Court of Appeals.

MR. BEST: It is subject to a stay of the Court of Appeals. But if this Court were to remand for mootness, we would lose that stay.

QUESTION: Well, what if we -- what if two months from now we decided against you, what would the EPA have to do?

MR. BEST: Well, I would hope that if the decision goes against us, that it would be remanded to the Court of Appeals to reconsider in light of the decision of this Court.

QUESTION: By that time the -- if we decide against you, the stay is dissolved, the EPA has held all the hearing that it needed to hold -- the only thing is, the permit has expired.

MR. BEST: The permit will not expire until a new permit is issued.

QUESTION: I know, but they are going to have to start over.

MR. BEST: That is right. They should have started over six months ago.

QUESTION: But I suppose they had some interest in finding out what they had to do when they started over.

MR. BEST: They maintained to us that that is what they -- why they are --

QUESTION: That is what they are maintaining now, too.

MR. BEST: That is right, that they were not taking action on this permit until they know what is required.

QUESTION: What if we decide for you; what happens?

MR. BEST: If you decide for us, then we will go back to the Environmental Protection Agency and ask them to start the proceedings on the new permit. We are not interested in --

QUESTION: So in any event, whichever way the case is decided, all you are talking about is what kind of procedures should the EPA follow in issuing the new permit.

MR. BEST: Well, quite honestly --

QUESTION: That is your position, I take it?

MR. BEST: Our position is that the EPA's procedures as put out in its original regulations, the regulations which were in effect at the time of this, were adequate. And that the Court of Appeals did not invalidate any of those regulations. We maintained that we complied with those regulations and that therefore we should have had a hearing. We maintained that those regulations required EPA to conduct the legislative hearings.

Now, we have serious reservations about the adequacy of the new regulations relating to adjudicatory hearings, because

they are much more onerous than the old ones. But that is not at issue.

QUESTION: Perhaps you can explain something that would help me. On page 22-A of the opinion, reading the end of the paragraph, Section 4 of the Ninth Circuit's opinion, the last sentence is:

"An adjudicatory hearing undoubtedly will yield a record that will provide the reasons for the extension."

Then in a few other places in the final paragraphs under the title of Remand and Guidelines, the language is "a proper hearing."

Now, is "a proper hearing" to be treated, the adjective "proper" to be treated as equivalent to the adjective "adjudicatory"?

MR. BEST: Mr. Chief Justice, we believe not. We believe that the Court of Appeals deliberately used the adjective "proper" instead of the adjective "adjudicatory" and it remanded it for a proper hearing. Remember, the court says in its opinion that if it were presented with an adequate record demonstrating that what had been done was proper, it would have to reconsider its decision that it was not -- that the opportunity for hearing had not been given. And it did not say what that record need to be.

QUESTION: Of course no one would dispute the proposition that there ought to be a "proper" hearing, if

that means the hearing required by law.

MR. BEST: We believe it means a hearing as required by EPA's regulations.

QUESTION: And what kind of a hearing is that, again?

MR. BEST: There are two kinds of hearings.

QUESTION: Which one does "proper" mean?

MR. BEST: We believe that it means start over again with the legislative-type hearing, because the hearing in EPA's context is a two-step process. Much like section 554 of the APA, the adjudicatory provision of the APA lays out a two-step process. First, you have an informal addressing of the issues, where you present your complaint and you try to resolve it. If that is unsatisfactory and you are unable to resolve your differences, then you go forward to a formal. We believe that in essence that is the hearing concept within section 402 as EPA's regulations defined it. So a "proper" hearing requires that EPA go back and start with the informal resolution process, in other words the legislative-type hearing. And if we can resolve our differences there, the case would end there.

QUESTION: When you get a legislative -- there is nothing in here about the legislative.

MR. BEST: That is a term that was adopted by the Environmental Protection Agency in their brief to describe the initial hearing which they hold without going through the adjudicatory provisions. It is a non-adversary hearing that

you start out.

QUESTION: Mr. Best, is there anything in the record that now requires the Interim Sludge Disposal Project to commence?

MR. BEST: The Interim Sludge Disposal --

QUESTION: Any order oustanding? Is there anything that now requires Los Angeles to go forward with that project?

MR. BEST: The permit itself, except --

QUESTION: By what date; what date does it have to start doing that?

MR. BEST: Well, unfortunately this is one of the issues that we wish to address in the adjudicatory hearing. The dates are all passed. The dates by which --

QUESTION: They are all what?

MR. BEST: Passed.

QUESTION: Passed.

MR. BEST: When EPA took its action on June 2 and extended the permit, the dates in EPA's permit were already missed, they were already in the past. And that was one of our complaints, how do we know when this thing is going to be implemented or how when you are extending a permit --

QUESTION: How much leadtime did the permit purport to allow? How much time was there between the entry of the order that told Los Angeles to get started and the time they were supposed to get started?

MR. BEST: Well --

QUESTION: Just approximately.

MR. BEST: The requirement to initiate the project was supposedly triggered by what is called "concept approval." Again, I would point out EPA has never given concept approval. What was given was a concept approval by the State Board. That is a non-ministerial action.

QUESTION: Well, if EPA has not given concept approval and if that is what triggers it, then I would suppose there is no outstanding requirement that they start.

MR. BEST: We pointed that out to the Court of Appeals and it has been one of our arguments, the EPA says the State Board gave -- the complaint against the City of Los Angeles alleges that concept approval was given and refers to the State Board action as starting concept approval. Then I believe that by the implementation of the dates that the -- it was April 1, 1980 when the full project had to be implemented. It was staged, it was implemented and staged. I believe April 1, 1980 was the final date for it to be fully implemented, given the date of concept approval.

QUESTION: If no appeal had been, no petition had been sought here and none granted, what would have happened in the meantime?

MR. BEST: If before the Supreme Court no petition --

QUESTION: No, no. If there had been no effort to

bring the case here, what would have happened?

MR. BEST: In the courts at all, Mr. Chief Justice, or in this Court?

QUESTION: Just here.

MR. BEST: I believe in that case what would have happened is that EPA would have started over again with a new permit for Los Angeles and we would be operating under a new permit.

QUESTION: That would have been quite a while ago, some months ago.

MR. BEST: Some months ago.

I only have a few seconds and if I may make one final point, I would like to urge the Court to remember the public participation requirements of the Act. This is a major permit -- the city of Los Angeles' permit -- in a major urban area that was issued for a 2-1/2-year period, with absolutely no public participation; in fact with steps that deliberately precluded public participation. We need the hearing to address these issues about this very unsatisfactory project.

I thank you.

MR. CHIEF JUSTICE BURGER: Mr. Alsup, you have about four minutes left.

REBUTTAL ARGUMENT OF WILLIAM H. ALSUP, ESQ.,

ON BEHALF OF PETITIONER

MR. ALSUP: Thank you, Mr. Chief Justice, and may it

please the Court:

I would like to try to address this question of whether or not the case will become moot and whether anything rides upon this proceeding in this Court.

A very lot -- a great deal rides upon whether or not this permit is enforceable or not. There is now pending in the City of Los Angeles in the District Court for the Central District of California an enforcement action brought by the United States by the EPA to enforce this very compliance schedule; however, the Ninth Circuit has stayed that enforcement action, pending the resolution of this case.

If this Court were tomorrow to rule in our favor, that stay would be lifted and our enforcement action against the City of Los Angeles would proceed immediately. And what we are trying to do in that case is to have the city comply with the condition in the permit that required by April of 1980 for the city to discontinue putting sludge in the ocean.

QUESTION: Why did the Ninth Circuit tie its stay of the U.S. enforcement action in the District Court to this Court's action in this case?

MR. ALSUP: I don't know the answer to why the Ninth Circuit did that. But the order does read "pending final resolution of this litigation." And I suppose what motivated the Ninth Circuit was that they knew that the Government was attempting to enforce the terms and conditions of the permit

that had been extended. And since the Ninth Circuit had declared that to be an illegal action, that the Ninth Circuit thought that it was best not to allow the Government to continue to enforce it.

QUESTION: The Ninth Circuit felt that if it were affirmed here, that the Government failed in its enforcement proceedings in the District Court?

MR. ALSUP: I suppose what the Ninth Circuit contemplated was that if our petition were not granted or we lost in this Court, that then the enforcement action would be permanently enjoined. I think that is what was in the mind of the Ninth Circuit.

QUESTION: Then you would have to start over, as your friend put it?

MR. ALSUP: Well, that is correct; but you know that is only one-half of the possible outcomes. The other one-half of the outcome is that tomorrow or reasonably soon -- even February or March -- this Court were to affirm what EPA did and then our enforcement action would proceed, the stay would be lifted and we would then be able to have enforced the permit that now exists and the conditions in that permit, rather than wait until the entire administrative process goes through it again.

Now, this permit does not expire on the 17th. That is by operation of section 558(c) of title V which provides

that so long as there is a timely application for renewal the permit or license in existence continues by operation of law to remain in effect.

So, for example, if -- I should say that these are complicated, it has been complicated by the 1977 amendments which allow under section 301(h) an additional application to be made by the city. It is quite lengthy. They have made that application, a lot of other cities have made those 301(h) applications, and not a one of them has been acted on yet because of the scientific review that is necessary. It may be many months before the Environmental Protection Agency is able to act on the pending applications for renewal.

By virtue of 558(c), in the meantime -- which could be as many as 11 or 12 months -- the existing permit does not expire. And that is the reason this case has not become moot.

QUESTION: Mr. Alsup, when do they have to start hauling --

Assume you prevail and the permit remains in effect because there is a pending application for extension. Must they commence promptly to haul the sludge overland?

MR. ALSUP: Absolutely; in our view.

Now, the city resists that view and that is part of the litigation in Los Angeles. But our position in that enforcement action in Los Angeles is that concept approval,

true, was given by the State, but that nonetheless triggered the compliance schedule that is at page 18 of the Appendix and required, many months ago, for the city to start phasing out putting the sludge in the ocean and putting it somewhere else. And by April of 1980, it was originally contemplated that that process would be complete. Now it is way behind schedule because the city has fought us on this. But, nonetheless, it is our position that the compliance schedule in the permit is already operative and they are in violation of that compliance schedule.

QUESTION: Is it the Federal Government's responsibility to approve of where the sludge is taken, or is it merely the Federal Government's position that it can no longer go in the ocean?

MR. ALSUP: The latter is our basic position. The permit simply says whatever you do with it, you can't put it in the ocean. And, the city, you can come up with your own scheme.

The city did come up with its own scheme and it is called the Interim Sludge Project. They decided to put it in landfills.

It gets a bit complicated, because then they came to the Environmental Protection Agency and said: "Would you help us fund this project"?

And it was at that point that the EPA said: "Yes,

we will consider funding your project."

And so the EPA is in fact involved on the funding side of approving the so-called Interim Sludge Project.

But had there never been any funding, the permit by its own terms would have said whatever you do with it, you cannot continue to put it in the ocean after April 1980.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:54 o'clock p.m., the case in the above-entitled matter was submitted.)