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A Pipe by Any Other Name: Imperial Irrigation District and the Safe Drinking water Act – *Imperial Irrigation District v. EPA*

by

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A PIPE BY ANY OTHER NAME: IMPERIAL IRRIGATION DISTRICT AND THE SAFE DRINKING WATER ACT—*Imperial Irrigation District v. EPA*, 4 F.3d 774 (9th Cir. 1993)

I. INTRODUCTION

It has been twenty years since the federal government formally decided that the public deserved protection from its drinking water. The Safe Drinking Water Act¹ (SDWA) was enacted in 1974. Prior to its passage, the Bureau of Water Hygiene of the Public Health Service had released an exhaustive report, the “Community Water Supply Study,” which revealed serious problems with drinking water quality and with the treatment plants responsible for purification.² The legislative history of SDWA reveals that Congress acted “to assure that water supply systems serving the public meet minimum national standards for protection of public health.”³ Specifically, the House Report noted that problems had been discovered “with respect to small systems which serve the public, such as recreational areas, trailer parks, restaurants and gas stations, but which are not part of a community water system.”⁴ Congress finally passed the SDWA after four years of hearings and debate, and the legislation was signed by President Ford on December 16, 1974.⁵

In passing the legislation, Congress noted that the problems of unsafe drinking water were not limited to the customers of any one particular system. Instead, Congress observed that “the national economy may be expected to be harmed by unhealthy drinking water and the illnesses which may result therefrom.”⁶ To prevent such risk, the SDWA directs the Environmental Protection Agency (EPA) to set health-based standards for contaminants in drinking water and to require water supply system operators to come as close as possible to meeting those standards by using the best available technology that is economically and technologically “feasible.”⁷

In *Imperial Irrigation District v. EPA*,⁸ the Court addressed the question of whether a canal system operating primarily for agricultural purposes could be regulated under the SDWA.⁹ Addressing the company’s delivery system of canal and lateral networks, the court held that EPA exceeded its authority when it construed the term “piped” in the SDWA as applying to Imperial Irrigation District’s (IID) canal network.¹⁰

IID sells untreated canal water directly to an estimated 5,700 residential customers along the canals in rural areas not served by municipal water systems.¹¹ The company also sells water to cities, schools, restaurants and businesses,

¹42 U.S.C.A. §§ 300f-300j-26 (West Supp. 1993).

²Thomas J. Douglas, *Safe Drinking Water Act of 1974 — History and Critique*, 5 ENVIRONMENTAL AFFAIRS 501 (1976).

³H.R. REP. NO. 1185, 93rd Cong., 2d Sess., 1 (1974), reprinted in 1974 U.S.C.C.A.N. 6454.

⁴*Id.* at 6458.

⁵Douglas, *supra* note 2, at 502.

⁶H.R. REP. NO. 1185, *supra* note 3, at 6459.

⁷42 U.S.C.A. § 300g-1(b)(5).

⁸4 F.3d 774 (9th Cir. 1993).

⁹*Id.* at 774.

¹⁰*Id.* at 776.

¹¹*Id.* at 774-775.

which treat the water prior to delivering it to their customers.¹² The *Imperial* case is significant for two important reasons. First, it narrows the scope of the SDWA. Second, it limits the EPA's ability to look beyond the specific meaning of one particular modifier to the spirit of the legislation and congressional intent.

The case is also significant because it is one of first impression. The meaning of "piped" as it appears in the definition of a public water system in the SDWA had not previously been challenged or reviewed.¹³ Because the *Imperial* court decided that the EPA's interpretation of the statute was not permissible, the case limits the scope of the SDWA in rural areas or where drinking water is delivered through unconventional means. Furthermore, the court delivered its holding without any significant review of administrative interpretations of other environmental statutes.

This Note examines the spirit of the SDWA and the congressional intent of that legislation and analyzes the holding of *Imperial Irrigation District* in the context of that spirit and intent. While other legislation, notably the Clean Water Act (CWA),¹⁴ exists to protect the nation's water sources, only the SDWA is directly intended to address potable water. For those communities and individuals in rural areas that do not benefit from modern water systems, *Imperial Irrigation District* may prove to be a disaster. This Note will examine other instances of statutory construction and will focus on the analogous consideration of wetlands within the meaning and scope of the CWA. The principles of statutory construction cited by the court in *Imperial*, and those not acknowledged, offer alternative perspectives and approaches to the problem of canal or lateral provided drinking water.

II. *IMPERIAL IRRIGATION DISTRICT V. ENVIRONMENTAL PROTECTION AGENCY*

The Imperial Irrigation District has been delivering water, primarily for agricultural purposes, since 1911.¹⁵ That water is delivered through a system of "open canals and laterals."¹⁶ On December 23, 1992 the EPA issued an emergency order to the IID because it had allegedly provided unsafe drinking water to certain customers.¹⁷ These customers constituted "an estimated 5,700 residential customers along the canals in rural areas not served by the cities' water systems."¹⁸ While the IID controls the flow of waters, the residential customers owned and operated the actual ditches, pipes and other water conveyances and storage facilities that connected their homes to the Irrigation District's

¹²*Id.* at 774.

¹³42 U.S.C.A. § 300f(4). Specifically, the Act states only that the "term 'public water system' means a system for the provision to the public of piped water for human consumption, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals." *Id.*

¹⁴33 U.S.C.A. §§ 1251-1387 (West Supp. 1993).

¹⁵*Imperial Irrigation Dist.*, 4 F.3d at 774.

¹⁶*Id.*

¹⁷*Id.* at 775. See also PR NEWSWIRE, Dec. 23, 1992. News reports quoted the EPA's Water Management Division director: "This severely contaminated open canal drinking water system poses an immediate threat to the people using and drinking the water." *Id.*

¹⁸*Imperial Irrigation Dist.*, 4 F.3d at 774-775.

distribution system.¹⁹ The court noted that the chief purpose of that distribution system was to deliver water for agricultural purposes. Because they are open and unprotected, the canals and laterals are easily contaminated by various sources in the surrounding area, including pesticides, herbicides, and runoff from adjacent fields and roads.²⁰ The EPA began its investigation after the California Department of Health Services had seventy-seven samples of untreated canal water tested and found them to be contaminated with total coliform and, in some cases, fecal coliform or *E. coli*.²¹

The EPA issued its order, finding:

[T]hat the Irrigation District's 1,675 miles of canal network constitute a 'public water system' within the meaning of the SDWA. The order requires, among other things, that the Irrigation District submit (1) within 25 days, a plan describing the means by which the [IID] will make available to its 'drinking water customers' an alternative source of water; (2) within 30 days, a plan for monitoring canal water contaminants according to the SDWA's 'primary drinking water regulations'; (3) within 60 days, a plan for managing its irrigation water canals and laterals in compliance with the drinking water regulations; and (4) within 75 days, a plan specifying the means by which it will deliver water that meets the SDWA standards.²²

The IID petitioned for review of the administrative order, disputing that their canal network constituted a "public water system" under the meaning of the SDWA.²³ The EPA claimed authority to issue the order pursuant to section 300i(a) of the SDWA. Section 300i(a) states in relevant part, "where a contaminant in a public water system may present an imminent and substantial endangerment to the health of persons . . . [the Administrator] may take such actions as he may deem necessary in order to protect the health of such persons."²⁴ Defending the order, the EPA argued that the canal system in question met the definition of a "public water system." In reviewing the EPA's construction of the word "piped" in the SDWA,²⁵ the Court looked to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁶ and *Citizens for Clean Air v. Environmental Protection Agency*²⁷ for the appropriate standard.²⁸ The *Chevron*

¹⁹*Id.* at 775.

²⁰*Id.*

²¹*Id.* Total coliform, fecal coliform and *E. coli* are various strains of the colon bacillus found normally in all vertebrae intestinal tracts and occasionally virulent, causing pyelitis (an inflammation of the kidney and pelvis) or infantile diarrhea. THE AMERICAN HERITAGE DICTIONARY 292 (2d ed. 1982).

²²*Imperial Irrigation Dist.*, 4 F.3d at 775.

²³*Id.* at 776. Specifically, the IID argued that the canals in question were "neither a system for the provision of 'piped water' nor a system for the provision of water 'for human consumption.'" *Id.*

²⁴42 U.S.C.A. § 300i(a).

²⁵*Imperial Irrigation Dist.*, 4 F.3d at 774. The Court of Appeals exercised original jurisdiction pursuant to 42 U.S.C.A. § 300j-7(a)(2). *Id.*

²⁶467 U.S. 837 (1984). The case involved the use of "bubbles" in nonattainment regulations under the Clean Air Act. *Id.* Using such "bubbles," Chevron could offset one source of pollution by reducing pollution in another source. *Id.* In doing so, Chevron could avoid compliance with other offset requirements. The Natural Resource Defense Council (NRDC) objected to the EPA's decision to allow States to treat all pollution sources within the same plant or industrial complex as though they were contained within a "bubble." *Id.* Specifically, the NRDC argued that the EPA's decision was not based on a reasonable construction of the statutory term "stationary source." *Id.*

²⁷959 F.2d 839 (9th Cir. 1992). Petitions were filed for administrative review of a state agency's grant of a permit for construction of a solid waste incinerator. *Id.* The EPA denied the petitions.

Court held that the EPA's definition of the term "source" was reasonable and a permissible construction of the statute given the policy of accommodating progress in reducing air pollution with economic growth.²⁹ In *Citizens for Clean Air* the Ninth Circuit held that, where the Clean Air Act is ambiguous, the Administrator's interpretation was based on a permissible construction of the statute.³⁰

In *Imperial*, the EPA argued that the meaning of the term "piped" was "ambiguous because it means either 'to convey by means of pipes' or 'to convey as if by pipes.'" ³¹ The agency contended that the IID's open canals and laterals satisfy the latter definition.³² The *Imperial* court remarked that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."³³ The court then stated that its role was to determine whether the EPA's answer was based on a permissible construction of the statute if that statute did not explicitly address the issue in question.³⁴ The EPA argued that its reading of the SDWA met the legislative and statutory intent " 'to assure that water supply systems serving the public meet minimum national standards for protection of public health,' and that [those] standards be applied 'to protect health to the maximum extent feasible.'" ³⁵ Taking notice of the EPA's invocation of the spirit of the SDWA,³⁶ the *Imperial* court nevertheless took a plain meaning approach to the term "piped,"³⁷ and rejected the EPA's reasoning.³⁸ Finding that the ramifications of expanding the application of the SDWA is properly a Congressional matter, the court held that the EPA had exceeded its authority and vacated the order.³⁹

Id. *Citizens for Clean Air* argued that EPA should have considered recycling as a possible best available control technology as required by the Clean Air Act and filed for judicial review. *Id.*

²⁸*Imperial Irrigation Dist.*, 4 F.3d at 776.

²⁹467 U.S. at 866.

³⁰959 F.2d at 848.

³¹*Imperial Irrigation Dist.*, 4 F.3d at 776.

³²*Id.*

³³*Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

³⁴*Id.* (citing *Chevron*, 467 U.S. at 843).

³⁵*Id.* (quoting H.R. 1185, 93rd Cong., 2d Sess. 1, 10 (1974)).

³⁶*Id.*

³⁷*Id.* According to the court:

[B]ecause neither Congress nor the EPA has supplied a special definition for the term 'piped,' the common understanding of the word must control. The term 'piped' has a plain and unambiguous meaning. It means to convey or conduct by means of pipes, as distinct from open river channels or canals.

Id.

³⁸*Id.* The court stated:

[W]e find the EPA's contention . . . strained at best. The EPA's allegation that the [IID's] open canals and laterals constitute a 'piped' system goes far beyond the plain meaning of the statute. If Congress had intended to apply the SDWA's strict standards to water systems delivering water via open conveyances as well as to systems using pipes, it would not have used the term 'piped.'

Id.

³⁹*Id.* at 777.

III. THE SAFE DRINKING WATER ACT

The SDWA, as amended in 1977, 1980 and 1986, requires the EPA to set maximum levels for contaminants in sources that deliver water to users of public water systems.⁴⁰ The SDWA sets health-based standards⁴¹ for contaminants in drinking water and requires suppliers⁴² and operators⁴³ to meet those standards using the best available technology that is economically and technologically feasible.⁴⁴

The legislative history of the SDWA does not address the intended definition or scope of the term “piped.” Congress did make it clear that it only intended to exempt from public water system coverage an:

entity which would otherwise qualify as a ‘public water system’ within the meaning of the bill, if it only distributes and stores water but does not collect, treat, or sell it and if it relies entirely on a public water system to provide the water which the entity ultimately makes available to the public.⁴⁵

However, the court in *Imperial* never reached the issue of whether IID was a “public water system,”⁴⁶ and there is no similar discussion of congressional intent regarding the meaning or scope of the term “piped.”⁴⁷

The House Committee’s recorded thoughts on the matter, though, suggest that the SDWA was designed to cover all sources of drinking water.⁴⁸ That Congress did not confine its concern or intent solely to piped sources of drinking water is suggested in the specific provisions for sole source aquifers.⁴⁹ Congress noted that unsafe drinking water was a national problem, in part because sources were often underground where contaminants were not bound by political or legislative boundaries.⁵⁰ Congress made it very clear that an exemption will be granted only in rare cases where the systems “merely store

⁴⁰42 U.S.C.A. § 300g-1(a)(2) (West Supp. 1993).

⁴¹*Id.* § 300g-1(b)(4). “Each maximum contaminant level goal established under this subsection shall be set at the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety.” *Id.*

⁴²*Id.* § 300f(5). “The term ‘supplier of water’ means any person who owns or operates a public water system.” *Id.*

⁴³*Id.* § 300f(5). The term “operator” is not defined separately and so presumably applies to any individual who is a supplier of water but who does not actually own the public water system in question.

⁴⁴*Id.* § 300g-1(b)(5). “For the purposes of this subsection, the term ‘feasible’ means feasible with the use of the best technology, treatment techniques and other means which the Administrator finds, after examination for efficacy under field conditions and not solely under laboratory conditions, are available (taking cost into consideration).” *Id.*

⁴⁵H.R. REP. NO. 1185, 93d Cong., 2d Sess., 1, 16 (1974), reprinted in 1974 U.S.C.C.A.N. 6454, 6469.

⁴⁶*Imperial Irrigation Dist.*, 4 F.3d 774, 777 (9th Cir. 1993).

⁴⁷*Id.* The court remarked only that “[w]e conclude that Congress has made its intent clear. Because neither Congress nor the EPA has supplied a special definition for the term ‘piped,’ the common understanding of the word must control.” *Id.* at 776.

⁴⁸H.R. REP. NO. 1185, 93d Cong., 2d Sess., 1, 8 (1974), reprinted in 1974 U.S.C.C.A.N. 6454, 6461. “It is the Committee’s intent that EPA, the States, and the public water systems begin now to maximize protection of the public health insofar as possible and to continue and expand these efforts as new more accurate data, technology, and monitoring equipment become available.” *Id.*

⁴⁹42 U.S.C.A. § 300h-6.

⁵⁰H.R. REP. NO. 1185, 93d Cong., 2d Sess., 1, 8 (1974), reprinted in 1974 U.S.C.C.A.N. 6454, 6461.

and distribute water provided by others, unless that business sells water as a separate item or bills separately for water it provides.”⁵¹

Nowhere in the SDWA legislative history, however, does the term “piped” appear.⁵² Instead, Congress generally focused on the sale and distribution of water.⁵³ Furthermore, the legislative history itself suggests that the qualifying term “piped” is less important than the court in *Imperial* would believe. Congress defined a public water system as “a system which has 15 or more service connections or regularly serves 25 or more persons, regardless of whether the system is publicly or privately owned or operated.”⁵⁴ However, the definition fails to mention the term “piped.”

The Safe Drinking Water Act Amendments of 1986 also made no references to the term “piped” or any other qualifying manner of conveyance which would limit the scope of the SDWA.⁵⁵ In fact, the 1986 Amendments expand the scope of the original Act by including the “sole aquifer source” provision.⁵⁶ The legislative history of the 1986 amendments noted “an urgent need for protection of the nation’s ground water resources to provide present and future supplies of safe drinking water.”⁵⁷ Congress had recognized that drinking water comes from a variety of sources and that the SDWA needed to be more expansive in scope.⁵⁸ The 1986 amendments thus attempted to respond to that recognition.

The court in *Imperial* based its holding on the plain meaning of the term “piped.”⁵⁹ Other judicial constructions and definitions may be gleaned from the publication “Words and Phrases.”⁶⁰ Two cases cited in that publication, *Standard Oil Company of California v. State Board of Equalization*⁶¹ and *Wofard Heights Associates v. County of Kern*⁶² set forth definitions of the term “piped” that supported the court’s holding.

⁵¹*Id.* at 6469.

⁵²*Id.*

⁵³*Id.*

Any distributor of water for human consumption, whether public or private, would be subject to the primary regulations unless he can show that he receives his water supplies from a system which is subject to the regulations and he does not charge consumers for the water that he provides By this provision the Committee intends that primary regulations would apply to housing developments, motels, restaurants, trailer parks, an other businesses serving the public if the business in question maintains its own well or water supply.

Id. at 6469-70.

⁵⁴*Id.* at 6469.

⁵⁵S. REP. NO. 56, 99th Cong., 1st Sess., 1 (1985), reprinted in 1986 U.S.C.C.A.N. 1566.

⁵⁶42 U.S.C.A. § 300h-6.

⁵⁷S. REP. NO. 56, 99th Cong., 1st Sess., 1, 20 (1985), reprinted in 1986 U.S.C.C.A.N. 1566, 1585.

⁵⁸*Id.*

⁵⁹*Imperial Irrigation Dist.*, 4 F.3d at 776.

⁶⁰*Id.* at 774.

⁶¹114 Cal. Rptr. 571 (1974). The case involved a suit over tax assessed on liquified petroleum gas. *Id.* That gas was transported from tank delivery trucks to storage facilities near an injection well. *Id.* Delivery was facilitated through a rubber or neoprene tube or hose. *Id.* Plaintiff contended that hose was a “line” or “pipe” while defendant contended it was not. *Id.* at 574.

⁶²32 Cal. Rptr. 870 (1963). The case involved a suit for damages over water pipes damaged by heavy machinery used to repair a highway. *Id.* Plaintiff had conveyed the land under the highway to the county but claimed that the deed retained the right to use the subsurface for pipes and pipelines. *Id.* The defendant county claimed that the phrasing of the deed contained a reservation clause that controlled the earlier words “pipe” and “pipeline.” *Id.* at 872.

The *Stanford* court held that Standard's delivery of gas through a hose was incidental to the overall delivery and did not meet the exemption from taxation.⁶³ In so holding, the court determined that the legislative construction of piped in this instance was a fixed system that ordinarily served a geographic area.⁶⁴ The *Stanford* court defined pipe as "a long hollow cylinder (as of metal, clay, concrete, plastic) used for conducting a fluid, gas, or finely divided solid and for structural purposes; typically: metal tubing in standard diameters and lengths threaded at the end for joining."⁶⁵

The *Woffard* court held that a deed which reserved the right to construct "any pipe, pipelines, pole, pole lines, wire, conduit or any other form of installation" included the right to install and maintain water pipes.⁶⁶ The court concluded that the clause following "conduit" did not modify the previous terms "pipe" and "pipeline."⁶⁷ The court reached its decision by comparing the plain meaning of "pipe" with one of the definitions of "conduit."⁶⁸ Faced with a potentially ambiguous deed, the court noted that qualifying words could be construed as referring to the words immediately preceding, not to more remote words about which uncertainties or ambiguities exist in a statute's meaning.⁶⁹ The *Woffard* court went on to say "that, unless the context or the evident meaning requires a different construction, the effect of a limiting clause is confined to the last antecedent."⁷⁰

A similar analysis can be applied to the SDWA provision at issue here. While the *Woffard* court's definition of "pipe" supports the *Imperial* court's emphasis on the water conveyance aspect of the term, the *Woffard* court's reasoning seemed to allow for a contextual adaptation of a particular statutory term.⁷¹ The court distinguished between "pipe" and "conduit," defining the former as a conveyance of liquid or gases, and the latter as a receiver and protector of electric wires.⁷² Nonetheless, the full definition of conduit may refer to a channel or pipe, and may convey both liquids and electric cables.⁷³ Furthermore, the *Woffard* court defined pipe as "any long tube or hollow body of wood, metal, earthenware, or the like, as to convey water."⁷⁴ Indeed, the court in *Woffard* distinguished the meaning of conduit and pipe only for the express purpose of the deed at issue in that case. The actual distinction between conduit and pipe is not definite, and the *Woffard* court's expansion of the scope of the term "pipe" is evident in the inclusion of the words "or the like."⁷⁵

⁶³*Standard Oil Co.*, 114 Cal. Rptr. at 574.

⁶⁴*Id.* at 573-74.

⁶⁵*Id.* at 571. See also *Woffard Heights Assoc.*, 32 Cal. Rptr. at 872.

⁶⁶*Woffard Heights Assoc.*, 32 Cal. Rptr. at 872.

⁶⁷*Id.* at 873.

⁶⁸*Id.* at 872.

⁶⁹*Id.* at 873.

⁷⁰*Id.*

⁷¹*Id.* at 872. The court expanded the meaning of the word "pipe," agreeing with the appellant's contention "that the connotation of the very words 'pipe' and 'pipelines' presupposes structures for the flow of liquids or gases and in their specific meaning the flow of water." *Id.*

⁷²*Id.*

⁷³THE AMERICAN HERITAGE DICTIONARY 307 (2d ed. 1982).

⁷⁴32 Cal. Rptr. at 873.

⁷⁵*Id.*

As noted above, the courts in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁷⁶ and *Citizens for Clean Air v. EPA*⁷⁷ addressed the question of a permissible construction of a statute.⁷⁸ The question in *Imperial*, then, was whether the EPA's construction comported with the *Chevron* standard.⁷⁹ The Supreme Court in *Chevron* found that congressional intent was difficult to ascertain from any absolutist reading of statutory language.⁸⁰ Instead, the Supreme Court noted that, while a "word may have a character of its own not to be submerged by its association," the "meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea."⁸¹ The court in *Citizens for Clean Air* also held that judicial review must consist of a "deferential review of the entire agency action."⁸² Thus, the Ninth Circuit itself recognized that the meaning of a particular term must also be considered in context.⁸³

In *United States v. Riverside Bayview Homes*,⁸⁴ the Supreme Court employed such contextual interpretations to rule that wetlands adjacent to, but not regularly under, water may be considered "waters" under the Clean Water Act (CWA).⁸⁵ The CWA was read to cover "groundwater" in order to protect and preserve wetlands. The Court looked to the broader congressional interest in protecting the nation's wetlands, and went beyond the narrow definition of "water" covered by the CWA.⁸⁶ In *Riverside*, the Court stated that:

⁷⁶467 U.S. 837 (1984).

⁷⁷959 F.2d 839 (9th Cir. 1992).

⁷⁸See *supra* notes 26-27 and accompanying text for an analysis of statutory construction.

⁷⁹*Imperial Irrigation Dist.*, 4 F.3d at 776. The *Chevron* court stated:

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 843.

⁸⁰467 U.S. at 861. The Supreme Court differs from the *Imperial* court in its analysis of the general statute while searching for congressional intent. The Supreme Court in *Chevron* stated:

We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress. We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation. To the extent any congressional 'intent' can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.

Id. at 861-62.

⁸¹*Id.* at 860-61 (citation omitted).

⁸²959 F.2d 839, 846 (9th Cir. 1992).

⁸³*Id.* Reviewing the EPA's contextual definition of the statutory term "available," the court noted that even if in error, the error was not prejudicial: "a technology's effectiveness must be considered at some point to determine whether it is the 'best' technology. The Administrator's rationale applies with equal force to a 'best' as well as to an 'available' determination." *Id.* at 848.

⁸⁴474 U.S. 121 (1985). *Riverside Bayview Homes, Inc.* owned 80 acres of marshy land intended for a housing development near the shores of Lake St. Clair in Macomb County, Michigan. *Id.* The Corps of Engineers, believing that the property was an "adjacent wetland" within the meaning of the Clean Water Act regulating the "waters of the United States," filed suit to enjoin respondent *Riverside Bayview Homes* from filling in and developing that property. *Id.* at 124.

⁸⁵*Id.*

⁸⁶*Id.* The Court noted:

On a purely linguistic level, it may appear unreasonable to classify “lands,” wet or otherwise, as “waters.” Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under section 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat.⁸⁷

Looking to Congress’ purpose in passing the CWA, the Court concluded that “[p]rotection of aquatic ecosystems . . . demanded broad federal authority to control pollution, for ‘[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’ ”⁸⁸ In fact, *Riverside* has since been read to suggest that the whole hydrologic system, including groundwater, can be regulated under the CWA.⁸⁹

Congress’ purpose in enacting the SDWA reveals a similar concern. The legislative history specifically stated that “the Federal government also has a responsibility to ensure the safety of the water its citizens drink.”⁹⁰ The SDWA was enacted precisely because there was no other mechanism in place to assure such safety.⁹¹

IV. THE NARROWING OF THE SDWA

Imperial Irrigation District v. EPA has two important consequences in regards to the SDWA. First it represents an unfortunate, limited reading of the SDWA. Second, it clarifies or obfuscates, depending on one’s perspective, the debate over administrative agency discretion regarding reasonable statutory construction. The individuals affected by the court’s holding are primarily rural and poor.⁹² Since they are primarily farmers, they often live outside the effective reach of the usual municipal amenities. In today’s world, few could imagine getting their drinking water from anything other than an anonymously connected faucet. Presumably, Congress did not envision a scenario where drinking water would be provided by anything other than an ordinary pipe. We all take the existence of pipes for granted.

But, for all the importance the *Imperial* court attaches to it, the term “piped” still appears only once in the entire text of the SDWA.⁹³ No reference

In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into ‘navigable waters’ . . . the Act’s definition of ‘navigable waters’ as ‘the waters of the United States’ makes it clear that the term ‘navigable’ as used in the Act is of limited import.”

Id. at 133.

⁸⁷*Id.* at 132.

⁸⁸*Id.* at 132-33 (citation omitted).

⁸⁹Guy V. Manning, Comment, *The Extent of Groundwater Jurisdiction Under the Clean Water Act After Riverside Bayview Homes*, 47 LA. L. REV. 859, 887 (1987).

⁹⁰H.R. REP. NO. 1185, 93d Cong., 2d Sess., 1, 8 (1974), reprinted in 1974 U.S.C.C.A.N. 6454, 6461.

⁹¹*Id.* “The Committee has concluded that present legislative authority is inadequate to assure that the water supplied to the public is safe to drink.” *Id.* at 6456.

⁹²Terry Kanakri, *Ventura County Poverty Rate Drops*, DAILY NEWS OF LOS ANGELES, February 9, 1993, at TO3. Imperial County had the highest poverty rate in the state of California at 23.8 percent. *Id.*

⁹³42 U.S.C.A. §§ 300f-300j-26 (West Supp. 1993). See also *supra* text accompanying note 49 for the proposition that Congress did not limit its concern to piped water.

to the term is made in the 1977,⁹⁴ 1980⁹⁵ or 1986⁹⁶ amendments. While the absence of the term “piped” from the Committee definition⁹⁷ may only be an omission or oversight, the fact that the term does not appear anywhere else in the legislative history or in the Act itself suggests that Congress was more concerned with the provision of safe drinking water than in the actual manner of conveyance.

Further, as the *Woffard* Court’s discussion of the term “pipe” indicated, the term can be read flexibly.⁹⁸ Certainly, a canal or lateral is a conduit and functions similarly to a pipe in conveying water.⁹⁹ At the very least, the issue is more complicated and deserving of more analysis than the court in *Imperial* provided. Indeed, the Supreme Court has stated that “overlapping, illustrative terms” are intended to enlarge the scope of agency regulation.¹⁰⁰ The same reasoning can be applied to the SDWA and the significance of the term “piped.” Given congressional concern for safe drinking water and small rural communities,¹⁰¹ “piped” could be read expansively to provide more protection, not less.

Moreover, if the Supreme Court could determine that the term “navigable,” as it appears in the CWA, is negligible,¹⁰² then the limitations of the dictionary meaning of “piped” should at least be measured against the larger significance of a “public water system.” Applying similar reasoning to the SDWA, one can argue that the term “piped” is also negligible or of limited import, in light of its absence elsewhere in the legislation and Congress’ overriding concern for public health. However, the court in *Imperial* failed to follow such an analysis. Instead, the Ninth Circuit Court of Appeals placed little emphasis on the concern for health.¹⁰³ Deprived of the SDWA’s protection, IID’s poorer, rural customers have no other means by which to compel IID to provide safe drinking water.

Furthermore, even Congress recognized the limitations of the original Act.¹⁰⁴ The 1986 Amendments address sole aquifer and underground

⁹⁴H.R. REP. NO. 338, 95th Cong., 1st Sess., 1 (1977), reprinted in 1977 U.S.C.C.A.N. 3648. The 1977 amendments were enacted primarily to reauthorize appropriations and to extend deadlines for State primary enforcement responsibility. *Id.*

⁹⁵H.R. REP. NO. 1348, 96th Cong., 2d Sess., 1 (1980), reprinted in 1980 U.S.C.C.A.N. 6080. The 1980 amendments were also primarily concerned with adjusting deadlines. *Id.*

⁹⁶See *supra* note 55 and accompanying text for a statement regarding this amendment.

⁹⁷See *supra* note 45 and accompanying text for a discussion of the legislative history.

⁹⁸See *supra* note 71 and accompanying text for the *Wofford* court’s treatment of the term “pipe”.

⁹⁹*Woffard Heights Assoc.*, 32 Cal. Rptr. at 870. See *supra* notes 71-75 and accompanying text for a discussion of the flexibility of a “plain meaning” approach.

¹⁰⁰See *supra* text accompanying note 86 for the court’s more expansive reading.

¹⁰¹See *supra* note 50 and accompanying text for a discussion of Congressional concern with the safety of the nation’s drinking water.

¹⁰²*Id.*

¹⁰³See *supra* notes 24-39 and accompanying text for a discussion of the EPA’s argument regarding its authority to protect the safety of the public water system and the court’s rejection of the argument.

¹⁰⁴S. REP. NO. 56, 99th Cong., 1st Sess., 1 (1985), reprinted in 1986 U.S.C.C.A.N. 1566. In the general statement the Senate remarked that the 1986 Amendments would “establish new procedures and deadlines for the setting of national primary drinking water standards, modify public water system requirements, establish a national monitoring program for unregulated contami-

sources.¹⁰⁵ Congress noted that too many sources of drinking water had escaped the intended jurisdiction of the original statutory language.¹⁰⁶ This legislative history of the 1986 amendments indicates that the SDWA was not intended to be limited only to those sources of drinking water that met the plain dictionary meaning of “piped.”¹⁰⁷ Drinking water may be provided through pipes; however, it does not originally come from pipes. Senator Duremberger noted this fact and expressed the intent of Congress when he remarked that “the public concern for the quality of drinking water, particularly in large cities drawing water from rivers and other unprotected surface water supplies, provided the impetus that was needed to first enact the Safe Drinking Water Act of 1974.”¹⁰⁸ As the above discussion of the CWA indicates, wetlands fell in a grey area but were rescued by the courts.¹⁰⁹ Canals and laterals fall in a similarly undefined area under the SDWA, but were abandoned by the Ninth Circuit.

Perhaps the decision here will prompt Congress to act again. The SDWA has been amended previously;¹¹⁰ Congress could amend it again and specifically address the question of canals and laterals and the import and scope of the term “piped” as it currently appears. Nevertheless, the legislative history of the SDWA that does exist and the scope of the legislation itself suggest that the IID drinking water distribution system should have been more carefully considered.¹¹¹ The *Imperial* court, however, refused to exercise its discretion. The message sent is disturbing: if individuals do not receive their drinking water from an instantly recognizable and generic source, the SDWA offers no protection. Furthermore, Congress already found a direct relationship between the public health aspects of drinking water and interstate commerce.¹¹² Additionally, even if the States are likely to be uncomfortable with federal interference with such a critical issue as safe drinking water for their own residents, by enacting the SDWA, Congress found such interference to be necessary.¹¹³ Why, then, can the SDWA not be stretched to cover canals and laterals if the CWA can stretch to cover wetlands and perhaps even groundwater? The court in *Imperial* never fully addressed, let alone explored, the issue.

Congressional intent regarding the standard of excellence to be imposed by the SDWA was that only treatment techniques available to the more sophisticated metropolitan and regional public water systems were to be covered.¹¹⁴

nants, augment underground waste injection control requirements, improve enforcement authority under the Act and establish a sole source aquifer demonstration program.” *Id.*

¹⁰⁵See *supra* notes 56-57 and accompanying text for remarks on the sole aquifer.

¹⁰⁶S. REP. NO. 56, 99th Cong., 1st Sess., 1, 2 (1985), reprinted in 1986 U.S.C.C.A.N. 1566, 1567.

¹⁰⁷See generally, *Id.*

¹⁰⁸132 CONG. REC. S6284-02 at 6285 (1986).

¹⁰⁹United States v. Riverside Bayview Homes, 474 U.S. 121 (1985). See also *supra* text accompanying note 86 for the court’s treatment of the scope of water.

¹¹⁰See *supra* note 40 and accompanying text for a discussion of previous amendments to the SDWA.

¹¹¹See *supra* notes 45-58 and accompanying text for a discussion of the SDWA’s legislative history.

¹¹²H.R. REP. NO. 1185, 93rd Cong., 2d Sess., 1, 8 (1974), reprinted in 1974 U.S.C.C.A.N. 6461.

¹¹³Manning, *supra* note 89, at 886.

¹¹⁴Douglas, *supra* note 2, at 523 (citing 1974 U.S.C.C.A.N. at 6470-71).

Treatment techniques commonly available to smaller sized systems were not to be considered acceptable models.¹¹⁵ The holding, which seemingly excludes all canal systems from the scope of the SDWA, is contrary to that intent. May municipalities and public water systems threatened by or unwilling to pay the cost of compliance with the SDWA simply abandon a “piped system” for a much more hazardous system of canals, laterals and open ditches? Such reasoning would apparently negate Congress’ original intent to afford the greatest protection possible to the public.

Secondly, even if a review of the meaning of “public water system” still resulted in a finding for Imperial Irrigation District, the court’s refusal to analyze that issue in the context of the definition of a public water system set forth in § 300f(4) demonstrates a disturbing lack of thoroughness in a matter of such consequence. Even if the concept of *ejusdem generis*¹¹⁶ governs the analysis, there is more than one way to read § 300f(4). The term “piped” follows that of “public water system” which, in turn, is given the specific meaning followed in the rest of the subsection.¹¹⁷ In fact, the definition of a “public water system” requires only that the system provide water that will be piped to the public for human consumption.¹¹⁸ Assuming that most of the customers affected by the IID court ruling have a system of pipes, faucets and other plumbing to actually receive the water provided by IID, that provision can easily be fitted within the definition of a public water system set forth by § 300f(4). In other words, while the SDWA states that a “public water system” must provide piped water to the public, it does not absolutely establish that the original system itself consist of pipes. SDWA coverage of sole source aquifers and wellheads makes that perfectly clear.¹¹⁹ Neither can be described as a piped source of water. Aquifers and wellheads are sources of drinking water that generally find their way to the public through pipes or faucets of one kind or another. The situation is analogous to the IID’s customers’ reception of canal-fed drinking water through their own pipes and faucets.

V. CONCLUSION

The legislative record indicates that the primary purpose of the SDWA was to provide safe water for public consumption. The Imperial Irrigation District both supplied more than twenty-five individuals with drinking water and distributed water. Consequently, the term “piped,” as used in the SDWA, should be read in accordance with the general principles set forth by the Congress in its definition of a “public water system.” Of course, there may be other objections to classifying the Imperial Irrigation District as a public water system, but the court failed to reach that issue. The absolute vision of the scope and appli-

¹¹⁵*Id.*

¹¹⁶Under this form of statutory construction, “where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated.” BLACKS LAW DICTIONARY 464 (5th ed. 1989).

¹¹⁷42 U.S.C.A. § 300f(4).

¹¹⁸*Id.* “The term ‘public water system’ means a system for the provision to the public of piped water for human consumption, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.” *Id.*

¹¹⁹42 U.S.C.A. §§ 300h-6, 300h-7.

cation of the term “piped” that prevented such an evaluation is extreme and did a disservice to the spirit and intent of the SDWA and the Act’s concern for the public welfare. Previous courts looked to this spirit and intent when deciding environmental issues that, arguably, were of less immediate consequence to the public’s health.¹²⁰

Indeed, as argued above, § 300f(4) of the SDWA can be read to support the contention that the term “piped” is satisfied by the mechanical constructs and conveyances used by the actual customers to bring water into their homes once the water is purchased from IID. Accordingly, the IID delivery system of canals and laterals falls within the plain meaning of § 300f(4)(a), which includes “any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system.”¹²¹ Therefore, under either method of statutory construction, IID should have fallen within the purview of the SDWA.

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¹²⁰474 U.S. 121. *See supra* text accompanying note 85 for a more expansive reading of water in a wetlands issue.

¹²¹42 U.S.C.A. § 300f(4)(a).