SKAGWAY v. EPA Cassandra's Prophecy Revisited

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THE CITY OF SKAGWAY, ALASKA, may long be remembered in American history as the first city to fall to the unrelenting forces of the Environmental Protection Agency (EPA). The fall of Skagway in many respects parallels the events surrounding the fall of the ancient City of Troy. Both cities were founded by a hearty people who had wandered far to establish a new way of life by the sea. Both cities became involved in a confrontation caused by the desire of one government to regulate the internal affairs of another. And both cities fell under siege for several years, with the penultimate event leading to the eventual destruction being the acceptance and taking into the city of a gift offered by the invaders. Troy accepted its Trojan horse; Skagway accepted its waste-water treatment plant. Cassandra warned the Trojans to beware of Greeks bearing gifts. The modern day equivalent to that lesson is: Beware of government agencies bearing gifts. Herein lies the story of Skagway versus EPA.

Submission

Skagway is a small community of 850 hearty persons who have chosen to make a life of their own, far from the population centers of our country. Geographically, Skagway, like many other small Alaskan communities, is 100 miles from nowhere. Situated on the northern end of Lynn Canal, a body of water that reaches 600 feet in depth and is consistently subject to twenty-foot tidal fluctuations, Skagway enjoys a circumstance desired by most Americans, a clean environment. There is no heavy industry in Skagway polluting the waters of Lynn Canal. Prior to 1978, domestic sewage treatment was minimal, consisting of a simple collector system that deposited wastes into the Lynn Canal. Notwithstanding the absence of a technologically advanced waste treatment system, health and water quality problems associated with sewage disposal were nonexistent. Local government consists of Mayor Robert Messegee and the members of the city council, who together administer a modest budget of $600,000. For decades the city's economic base has rested on the White Pass Railway, which recently has experienced financial reversals that threaten to make Skagway a ghost town.

The decline of Skagway's autonomy began in 1972, with the adoption of Public Law No. 92-500 (Federal Water Pollution Control Act Amendments) by Congress. The stated objective of the law was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." By definition, Lynn Canal is part of the nation's waters. But empirical examination, as noted above, attests to the fact that restoration and maintenance of the canal's integrity were unnecessary. The approach adopted by Congress, however, mandated that national standards were necessary to carry out the objectives of the law. For publicly owned treatment works in existence on July 1, 1977, "effluent limitations based upon

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secondary treatment as defined by the [EPA] Administrator" became the national standard. Congress, however, also indicated that it did not intend for the administrator to impose on marine discharges the concept of secondary treatment that had been developed for rivers, lakes, and streams (*A Legislative History of the Water Pollution Control Act Amendments of 1972,* House Committee on Public Works, 1973). The administrator thus had the flexibility to define secondary treatment for marine dischargers, like Skagway, not in terms of technology, but in terms of the absence of toxic substances and a "demonstration that such ocean discharges are not inconsistent with the purposes of the act." EPA's administrator refused to heed this advice, preferring instead to develop a single unalterable standard for all municipal dischargers. To meet these standards, Congress (1) authorized EPA to provide, for a period ending on July 1, 1974, financial assistance to construct secondary treatment plants and (2) established a permit program that required all dischargers to secure a permit to discharge or be in violation of the law.

Armed with Public Law No. 92-500, EPA officially arrived in Skagway on July 10, 1974, by issuing a permit requiring that Skagway meet the national secondary treatment standard (which on its face did not apply to Skagway) and build a treatment plant in order to meet the standard. EPA also offered financial assistance to pay for the construction of the "required" facilities on December 30, 1975. One condition of the financial assistance, however, was that Skagway "establish and implement a sewer user charge system . . . to assure that each recipient of waste treatment service will pay his proportionate share of the cost." As required by local law, the people of Skagway were given an opportunity to approve or disapprove the spending of their tax dollars to build EPA's treatment plant. In Cassandra-like fashion, the voters overwhelmingly turned the proposal down in July 1975. Faced with this most troubling display of independent thinking, the government initiated an educational effort to make the people of Skagway realize the consequences that would befall them if a waste-water treatment plant were not built in the city. The voters of Skagway were "persuaded" to reconsider approval of EPA's "gift," and in October of the same year, by the closest of margins, the people submitted to the pressures of Public Law No. 92-500.

Thus the groundwork was laid. EPA imposed on tiny isolated Skagway, whose minimal domestic sewage discharge simply disappeared in the water volume and flows of the Pacific Ocean, the same treatment standards developed for massive toxic-waste discharges by major population and industrial centers into freshwater lakes and rivers. To achieve these contrived standards, EPA had prevailed upon the community to build a $3.5 million sewage treatment plant and had cajoled the unsuspecting city fathers into accepting federal assistance and into appropriating the local funds necessary to build the plant. The plans, specifications, and estimates for the proposed project were all approved by EPA.

Revolution

All went smoothly for Skagway until the winter of 1978 when construction of EPA's treatment plant was completed. Several problems arose that had been unanticipated by the city fathers and had gone unnoticed by EPA during the approval process. Apparently the plant was designed and constructed at the wrong elevation so that at the times of the frequent extremely high tides, the waters of Lynn Canal backed up into the plant and rendered it useless. It was also discovered that, because of the unexpected water intrusion, the plant received four times as much water to treat as had been expected. It was impossible for the EPA-required-and-approved plant to achieve the EPA-required treatment standards on the total volume of water. The final straw was loaded on the back of Skagway when the city fathers received notice of the cost to the city for the over 40,000

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gallons of high-priced diesel fuel required each year to operate such a plant in such a remote location. Thus, Skagway had a white elephant on its hands—a plant required and approved by EPA that did not work, a plant unwanted by the community and unnecessary for protection of the nation's waters, a plant that could bankrupt the city, and a plant that EPA had no legal authority either to require or fund.

On May 24, 1979, the city fathers met to discuss possible solutions to the problems the community faced. In addition to the outrageous folly of the plant itself and the costs associated with it, other issues preoccupied the minds of the decision makers on that day. Congress had taken action in December 1977, to require EPA to give consideration to modified treatment standards for marine dischargers. Section 301(h), added to the law by the Clean Water Act of 1977, adopted the general criteria suggested in 1972 for marine secondary treatment, which included preventing the discharge of toxic pollutants and maintaining water quality consistent with the purposes of the act. Thus, Congress had eliminated any basis for continuing to require secondary treatment—which for Skagway amounted to "treatment for treatment's sake."

In August and September of 1978, Skagway had filed applications for modification of its discharge requirements under this new law. In addition, the original permit had expired two months prior to this meeting and Skagway had on file with EPA an application for a new permit. Contrary to the statutory requirement that action on such application be taken "within a reasonable time," EPA had failed to act on any of these applications. The city fathers therefore had no idea what treatment standards would ultimately be applied to Skagway. Moreover, to add insult to injury, EPA was intimating that it might not pay for the unworkable plant it had required Skagway to build. After giving due consideration to these concerns, the mayor of Skagway moved in clear and unmistakable language to suspend operation of the plant, effective July 1, 1979, until determinations could be made on how to make the plant work, on what standards would be applied to Skagway, and on who was going to pay for the operation of the plant. The motion was carried unanimously. The revolution had begun.

On June 6, 1979, EPA responded to this challenge by informing Mayor Messegee that a

> decision to willfully fail to make a reasonable attempt to meet the permit limitations could subject the City of Skagway to civil or criminal penalties under Section 309 of the Clean Water Act. Additionally, payment of your construction grant could be withheld.

Nine days later EPA clarified the position to be taken with regard to the monies owed to the City of Skagway for construction of the treatment plant by stating that unless the treatment plant remained operational, no funds were coming. (As of early 1980 EPA had withheld in excess of $300,000 due to Skagway.) The true nature of the "gift" was finally revealed.

On July 2, 1979, a day that will long be remembered in infamy, the City of Skagway shut down the treatment plant. This action was taken by Skagway in spite of EPA's threats to withhold the funds owed the city and unleash the fury of the government legions upon the city.

On July 16, 1979, Mayor Messegee appealed to a higher authority and requested the President of the United States to relieve the city from the burdens imposed by EPA. In closing his message Mayor Messegee stated, "Please help me, Mr. President. I don't want to go to jail and I don't want my citizens to be harassed by the EPA giant." His plea for help went unanswered.

Retaliation

On July 20, 1979, EPA summoned the full power of the entire federal government to its aid and filed an enforcement action against the City of Skagway seeking $10,000 a day in civil penalties for every day the plant was shut down. In addition, EPA requested that the court order Skagway to do the impossible—to operate the nonfunctional plant at secondary treatment levels. The enforcement action rests upon three basic facts which, if true, apparently will require the city fathers to surrender the keys of the city to EPA. The first fact is that Skagway's (expired) permit requires compliance with the unnecessary and inapplicable secondary treatment standard. This fact is beyond

dispute. (When the permit was issued on July 10, 1974, EPA failed to inform the City of Skagway that the secondary treatment requirements in Clean Water Act were applicable only to "publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974." But the treatment plant the city had to build did not exist on July 1, 1977, and was not approved until after June 30, 1974. Thus, it appears that EPA snuck one in on Skagway.) The second fact is that the treatment plant was not being operated in compliance with the (expired) permit. Again, this fact is beyond dispute. Indeed, a consulting engineering firm's study of the Skagway plant, which was supplied to EPA in November 1979, explained that because of the cold temperatures and infiltration problems, the EPA-approved treatment system (as planned and designed) could *never* meet the national standard. The final fact relied on is that Skagway has refused to enforce a user charge system as required by EPA in the construction grant. Again, this fact is beyond dispute. Based upon these undisputed facts, EPA moved for summary judgment.

In June 1980, the District Court in Alaska, utilizing the wisdom of Solomon, required Skagway to operate its treatment plant for ninety days, and required EPA to act on Skagway's application for modification of the requirements of its plant within the same period of time. As of this writing, Skagway has complied with the order but EPA has not. The suit still remains on file, however, and it only takes simple arithmetic to get an idea of the ultimate disaster that awaits the City of Skagway if EPA emerges victorious. First, at a maximum penalty of $10,000 a day, Skagway is potentially liable to EPA in the amount of $2,350,000. Given its annual budget it will take Skagway approximately four years to pay such a fine. Second, additional sums are going to have to be spent to operate the treatment plant at secondary treatment as required by EPA. This may involve tearing the plant down and building a new one at the proper elevation or it may entail the expenditure of an estimated $1.5 million to correct the infiltration problem that EPA was required by law to avoid in the first place. (The cycle begins again.) It should also be kept in mind that operating the facility at secondary treatment requires in excess of 40,000 gallons of high-priced diesel fuel a year. With no funds available to pay this operating expense, Skagway potentially could be liable for another enforcement action and additional fines.

Finally, one facet of the Skagway situation that EPA has totally ignored is that the White Pass Railway, which forms the economic base of Skagway, lost several millions of dollars in fiscal year 1978–79 and that the city's inhabitants face the real possibility of losing their primary employer. EPA's reaction was predictable. Its only responsibility in this matter is to regulate discharges into the waters of the United States. Anything else is somebody else's problem.

Epilogue

In spring 1979 Skagway, faced with the possibility of long and expensive legal battles to preserve its existence, called upon the Pacific Legal Foundation (a public interest law firm). With this representation, the City of Skagway has initiated its own legal battle against EPA. Three actions are under way.

Skagway has learned, however, not to put all its trust in reasonable interpretation and application of the laws. The concept of self-help still has meaning in the far Northwest.

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Would the Greek army take back its horse? Such a noble gesture of making a return gift is unparalleled in the annals of EPA conquests. The citizens of other small communities should carefully watch to see if the new administrator at EPA will accept the "gift" with the grace befitting the government of a free people. ■