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## Horizons International v. Baldrige

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# RECENT DECISIONS

## Horizons International v. Baldrige

The United States, over the course of the past two decades, has experienced a trade deficit. Foreign enterprise seeking new markets have found the United States to be a haven. American producers, however, have been unable to balance the scales,<sup>1</sup> due in part to domestic antitrust restraints placed upon them. For this reason, Congress enacted the Export Trading Company Act of 1982.<sup>2</sup> This act is designed "to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular . . . by modifying the application of the antitrust laws to certain export trade."<sup>3</sup>

*Horizons International v. Baldrige*<sup>4</sup> marks the first appellate consideration of the ETCA. More specifically, the Third Circuit Court of Appeals has focused on Title III of the Act which is concerned with the granting of certificates of review<sup>5</sup> to appropriate enterprises engaged in export trading.

The purpose of a COR is "to give export trade associations and companies the comfort of certainty by providing an advance ruling of their immunity under the antitrust laws for the certified conduct."<sup>6</sup> A COR does not completely foreclose relief for one injured by anti-competitive conduct specified in and in compliance with the certificate, but it does limit remedies to injunctive relief, actual damages, the loss of interest on actual damages, and the cost of suit, including reasonable attorneys fees.<sup>7</sup> Treble damages and criminal sanctions cannot be imposed.

Thus, CORs are valuable assets for enterprises involved in export trade. In *Horizons International*, a joint venture of caustic soda

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1. Almstedt & Reinsch, *The Export Trading Company Act: An Analysis*, 2 B.U. INT'L L.J. 157, 157-58 (1983).

2. 15 U.S.C. § 4001 *et seq.* [hereinafter ETCA].

3. *Id.* § 4001(b).

4. 811 F.2d 154 (3d Cir. 1987).

5. Hereinafter referred to as COR or certificate.

6. *Horizons International et al. v. Baldrige et al.*, 612 F. Supp. 1560, 1561 (E.D. Pa. 1986).

7. 15 U.S.C. § 4016(b) (1982).

and chlorine manufacturers calling itself Chlor/Akali Producers International<sup>8</sup> was issued such a certificate by the Secretary of Commerce.<sup>9</sup> Subsequent to the grant of the certificate, and following the comment period contained in the publication of the application,<sup>10</sup> plaintiffs Horizons International, Inc. and Kenchem, Inc., both traders in caustic soda and chlorine, brought suit in a district court of the Eastern District of Pennsylvania, against the Secretary as well as the Department of Commerce and the Attorney General.

The district court, on grounds more fully set forth in this note, held that the grant of the certificate was "arbitrary, capricious, and an abuse of discretion" and that "the administrative record [was] inadequate because it fail[ed] sufficiently to address important aspects of the problem."<sup>11</sup> The Third Circuit reversed the district court, finding that its decision was incorrect in three respects: (1) judicial review should be limited to the agency record, (2) the record indicated that the agency action was justified, and (3) the Attorney General was not properly a party to the action. Before it could address these questions, however, it had to first decide whether appellate review of the district court decision was appropriate.

### I. Appellate Jurisdiction

The first question presented in the appeal of the district court decision was whether that decision was final under the Judicial Code<sup>12</sup> and thus reviewable by the Court of Appeals. The Third Circuit correctly held that it was.<sup>13</sup>

A "final decision" generally is "one which ends litigation on the merits and leaves nothing for the court to do but execute the judgment."<sup>14</sup> As oft-quoted<sup>15</sup> as this statement might be, it provides little insight for an appeal of the district court order in a proceeding to review administrative agency action. Likewise, as the court noted,

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8. The joint venture was comprised of B.F. Goodrich Co., Kaiser Aluminum & Chemical Corp., Occidental Chemical Corp., and Vulcan Materials Co. [hereinafter collectively Chlor/Alkali].

9. Responsibility for issuing CORs is vested in the Secretary of Commerce with a concurrence or acquiescence needed from the Attorney General. 15 U.S.C. § 4013(b) (1986 Supp.).

10. The application was submitted to the Federal Register for publication on Nov. 9, 1984, and published on Nov. 15, 1984, 49 Fed. Reg. 45203 (1984), and contained a twenty-day comment period. *Horizons International*, 811 F.2d at 157.

11. 624 F. Supp. at 1562.

12. 28 U.S.C. § 1291 (1982) provides:

The Courts of Appeals . . . shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States . . . (emphasis added).

13. *Horizons International*, 811 F.2d at 158-59.

14. *Catlin v. U.S.*, 324 U.S. 229, 233 (1945).

15. WRIGHT, LAW OF THE FEDERAL COURTS § 101 n.5 (4th ed. 1983) [hereinafter WRIGHT].

decisions dealing with adjudicatory or adversarial agency actions have minimal precedential impact on the question of the appealability of a judicial review of agency actions which involve licensing.<sup>16</sup>

Thus, the court distinguished *Bachowski v. Usery*<sup>17</sup> which involved a decision by the Secretary of Labor not to institute a suit to set aside a labor union election, which under the Labor-Management Reporting and Disclosure Act,<sup>18</sup> he alone could do. Upon remand from the Supreme Court, the district court ordered the Secretary to count the ballots. Because this order did not decide the ultimate issue of whether the Secretary must file suit, the Third Circuit held on appeal that the order was interlocutory and thus nonreviewable under Section 1291.

In following "a pragmatic approach to the question of finality,"<sup>19</sup> the Court of Appeals found three distinctions which precluded *Bachowski* from being "precedential in the present context." First, Chlor/Alkali had a vested interest in the COR issued by the Secretary while *Bachowski* had nothing. Second, Chlor/Alkali was deprived of its vested rights while *Bachowski*, having nothing, lost nothing. Third, the statutory scheme of the ETCA and the LMRDA are "entirely different."<sup>20</sup> The real distinction, however, lies in the effects of each order. In *Bachowski*, regardless of the recount of the ballots, the district court would again have the case before it to determine whether the Secretary was required to bring a suit. However, in *Horizons International*, the district court need never again concern itself with the case unless an aggrieved party brings an action for a second, separate review.

The court likewise summarily rejected *Marshall v. Celebrezze*<sup>21</sup> as affecting its decision since the order there "plainly was no more than an interlocutory step and an adjudicative proceeding."<sup>22</sup> Disregarding *Marshall* on this ground may be nothing more than superficial rhetoric as borne out in the court's adoption of *United Steelworkers of American Local 1913 v. Union R.R. Co.*<sup>23</sup> as a precedent. This case involved the review of an agency action which awarded benefits under the Railway Labor Act.<sup>24</sup> Like the agency in *Marshall*, the Railroad Labor Board acted in a wholly adjudicatory ca-

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16. *Horizons International*, 811 F.2d at 159.

17. 545 F.2d 363 (3d Cir. 1976).

18. 29 U.S.C. § 141-87 (1982) [hereinafter LMRDA].

19. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 306 (1962). Because of the indefiniteness of the term "final decision," the Supreme Court has taken to a piecemeal methodology in determining the appealability of district court orders. In some areas, the issue is well-settled, but in others, a case-by-case determination is necessary. See WRIGHT *supra* note 15.

20. *Horizons International*, 811 F.2d at 159.

21. 351 F.2d 467 (3d Cir. 1965).

22. *Horizons International*, 811 F.2d at 159.

23. 648 F.2d 905 (3d Cir. 1981).

24. 45 U.S.C. § 151-88 *et seq.* (1982).

capacity. Still, the *Union R.R.* is more analogous to *Horizons International*, and so the court's reliance upon it is not faulty. Each involved the judicial denial of an interest vested by the agency, while *Marshall*, like *Bachowski*, involved an appellee with no vested rights. More important, though, each involved a district court order setting aside the agency action and remanding the case to the appropriate agency for further action which the district court might not again review.<sup>25</sup>

The *Horizons* decision leaves unresolved the question of whether appellate review would be appropriate under section 1291 were the Secretary to deny the COR in the district court, upon judicial review, to set aside the agency decision. Based upon *Union R.R.* and *Horizons International* an appellate court would be hard-pressed to find appellate review appropriate. This is as it should be. Where the Secretary had denied the COR, it would be the administrative agencies (the rulemakers)<sup>26</sup> which have been aggrieved by the district court decision, and which will have ample opportunity to alleviate this grievance upon remand or in subsequent litigation. In the situation presented in *Horizons International*, the aggrieved party is the applicant who may never have another opportunity for appellate review.

## II. The Appropriate Record

Perhaps the most immediate impact upon judicial consideration of CORs issued under the ETCA will be the Third Circuit's decision to limit the appropriate record for review, with one very limited exception, to that compiled by the Departments of Commerce and Justice. A district court presiding over such an appeal can only consider that evidence which the administrative agencies had considered and had made a part of their report, except where the bare record made failed to disclose the factors considered by the agency or the agency's construction of the evidence in its record. In that situation, additional evidence should be gathered by the district court.<sup>27</sup>

The ETCA is silent on the issue of what is the appropriate record.<sup>28</sup> The legislative history, however, states that "[n]ormally the administrative record shall be adequate so that it will not be neces-

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25. Quoting *Union R.R.*, 648 F.2d at 909, the court stated:

When a district court's order can be characterized as a final disposition of the present litigation or when dismissal of the appeal will have the practical effect of denying later review, we have recognized that the exercise of appellate jurisdiction under Section 1291 may be appropriate.

*Horizons International*, 811 F.2d at 159-60.

26. 15 U.S.C. § 4020 (1986 Supp.) confers upon the Secretary, with the concurrence of the Attorney General, the power to promulgate rules and regulations under the ETCA.

27. *Horizons International*, 811 F.2d at 160.

28. See 15 U.S.C. § 4015 (1986 Supp.).

sary to supplement it with additional evidence."<sup>29</sup> Exactly what Congress meant by this language has created quite a difference of opinion.

It should be noted at the outset that four different scopes of review are possible in this situation: (1) *de novo* review, (2) supplementation of the record to determine possible grounds for a remand, (3) no additional evidence except where no administrative record exists, or (4) no additional evidence whatsoever.

Both the district court and the Court of Appeals recognized that *de novo* review would be inappropriate.<sup>30</sup> Both found that Section 10 of the Administrative Procedures Act<sup>31</sup> applied to questions arising under the ETCA,<sup>32</sup> and that the recent Supreme Court interpretations of that provision in *Citizens of Overton Park, Inc. v. Volpe*<sup>33</sup> and *Camp v. Pitts*<sup>34</sup> denied the use of *de novo* review. Both likewise held that a review limited solely to the administrative record would not be proper in all situations. However, they divided on when it would be proper.

The narrow view was announced by the Court of Appeals relying heavily upon its reading of *Overton Park*. The Third Circuit proclaimed the following:

[t]he Supreme Court recognized [in that decision] that where

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29. H.R. Rep. No. 924, 97 Cong., 2d Sess. 27, reprinted in 1982 U.S. Code Cong. & Admin. News 2501, 2511.

30. *Horizons International*, 811 F.2d at 162; 624 F. Supp. at 1574.

31. 5 U.S.C. § 706 (1982) [hereinafter APA]. This section states in pertinent part as follows:

To the extent necessary to decision and when presented, a reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

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(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

32. Perhaps both courts were premature in finding the APA applicable to the ETCA. As appellees Horizon International and Kenchem Inc. point out in their appellate brief, the legislative history of the ETCA does not compel the use of the APA to any hearing procedure the Secretary of Commerce might establish. H.R. Rep. No. 924, 97 Cong. 2d Sess. 27 (1982). It would be anomalous to hold that it would apply to a district court review. Even more persuasive is the Congressional decision to adopt the House version of 15 U.S.C. § 4105 which calls for an "erroneous" standard of review, rather than the Senate bill which specifically allowed for review under the APA. Brief of Appellant at 23-26, *Horizons International v. Baldrige*, 811 F.2d 154 (3d Cir. 1987) (Nos. 86-1135 and 86-1144). The first argument is addressed and rejected by the district court, 624 F. Supp. at 1574.

33. 401 U.S. 402 (1971).

34. 411 U.S. 138 (1973).

the bare administrative record did not disclose the factors considered by an agency or the agency's construction of the evidence in its record, the district court may require the administrative officials who participated to give testimony. To this extent, and only to this extent, may courts reviewing agency action pursuant to Section 10 of the APA ordinarily go beyond the agency record.<sup>35</sup>

Regardless how often illogical this narrow scope of review may pose in some situations,<sup>36</sup> it appears that the Third Circuit interpretation of *Overton Park* is correct. The Supreme Court would only allow additional evidence in three situations. Where agency fact finding procedures in an adjudicatory proceeding are inadequate, and where issues not before the agency are raised in a court proceeding to enforce nonadjudicatory agency action, *de novo* review under 5 U.S.C. § 706(2)(f) is appropriate.<sup>37</sup> And, as the Third Circuit indicated, where the administrative record is inadequate for a determination of whether the proper factors were considered by the agency, a more limited fact gathering may be done.<sup>38</sup>

The *Horizons International* court also quoted at length from the more recent decision of *Florida Power & Light Co. v. Lorion*<sup>39</sup> which oddly enough does not support such a limited scope of review. The Supreme Court in that case stated as follows:

[i]f the record before the agency does not support the agency action, *if the agency has not considered all relevant factors*, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, *is to remand to the agency for additional investigation or exploration*. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such inquiry.<sup>40</sup>

Arguably the action of the district court in *Horizons International*, in admitting additional evidence for the limited purpose of determining whether the Department of Commerce<sup>41</sup> considered all relevant

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35. *Horizons International*, 811 F.2d at 162, citing *Citizens of Overton Park, Inc. v. Volpe*, 401 U.S. at 420.

36. For example, the district court opinion amply indicates a failure on the part of the administrative agencies to consider significant information in their review, 624 F. Supp. at 1575-1582, information which, had it been considered, would have arguably demanded a contrary administrative decision.

37. 401 U.S. at 415.

38. See *Horizons International*, 811 F.2d at 160-63.

39. 470 U.S. 729 (1985).

40. *Id.* at 732 (emphasis added).

41. The administrative record was prepared solely by the Department of Commerce. The Justice Department concurred in the granting of the COR by its acquiescence. *Horizons International*, 811 F.2d at 167.

factors in its decision, in remanding the case for further consideration,<sup>42</sup> falls squarely within this excerpt from *Florida Power & Light*. The action is further supported by a recent Ninth Circuit decision<sup>43</sup> which permits a reviewing court to go outside the administrative record "for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision."<sup>44</sup>

Still, despite the district court's extended review of the additional evidence, failure to justify how the situation presented entitled it to expand the limitations of *Overton Park* made this review improper.

The Third Circuit's decision is supported in another way. Congress intended the procedure for granting CORs to be swift. When an aggrieved party possessing new evidence can appear after the statutory comment period has passed and have its new evidence considered, the efficacy of the COR procedure is hampered. This more than any other reason supports the decision of the Court of Appeals.

### III. The Merits

Given its adoption of a narrow scope of review, the Third Circuit eliminated the need for a lengthy discourse on the merits of the administrative decision. Indeed, all it had to do was consider the statutory factors which Congress required the Commerce Department to consider, and look to the administrative record to see if they were, in fact, considered. An elaborate review, like that of the district court, would have been inappropriate.<sup>45</sup>

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42. "The plaintiffs have submitted evidence to support their contention that Chlor/Alkali cannot meet the Export Trading Company Act's certification standards. This evidence includes 'relevant data' necessary to the determination of Chlor/Alkali's eligibility for certification. Without this data, the agencies will have 'failed to consider . . . important aspect[s] of the problem' *Horizons International*, 624 F. Supp. at 1574, citing *Motor Vehicle Manufacturers Association v. State Farm Automobile Insurance Co.*, 463 U.S. 29, 43."

43. *Asarco, Inc. v. United States Environmental Protection Agency*, 616 F.2d 1153 (9th Cir. 1980).

44. *Id.* at 1160.

45. It should be noted that the district court concluded, after considering additional evidence and subsequently turning its attention solely to the administrative record, that the agencies failed to articulate a satisfactory explanation for the COR issued in this case, with respect to both the certification of chlorine and caustic soda exports.

The court first found that the decision to allow privileged conduct in chlorine exports was "questionable." All of the members of Chlor/Alkali would not presently be exporting chlorine, as the administrative record indicated, and since the ETCA did not extend to "[c]onduct that does not constitute export trade, export trade activities, or methods of operation," it was not eligible for certification. 624 F. Supp. at 1580 quoting Initial Guidelines 48 Fed. Reg. 5937, 15938 (1983). In addition, the court examined the anticompetitive history of the chlorine-alkali industry and found that it suggested a high potential for illegal activity. 624 F. Supp. at 1581. Thus, it found that the agency's conclusion that "the applicant's members, even in concert, would not likely have price setting power as a group in the U.S." to be "questionable" and to preclude summary judgment. *Id.*

The district court likewise found that the administrative record raised issues concerning

The court did believe it necessary, however, to first provide background on the effect of certification under Title III of the ETCA. Noting the similarity between that title and the Webb-Pomerance Act of 1918,<sup>46</sup> and finding the latter to be defective for its failure to confer antitrust immunity,<sup>47</sup> the court indicated that the primary thrust of Title III was to provide the exporter with a binding Attorney General opinion which would absolve it from antitrust liability. Similarly, the court had noted that Section 303(a)<sup>48</sup> of the ETCA borrows from Section 5 of the Federal Trade Commission Act,<sup>49</sup> and contains other language similar to Section 2(a) of the Robinson-Patman Act.<sup>50</sup> Arguably, *Horizons International* would justify a plaintiff filing an action under Section 306(b)(1) for injunctive relief, actual damages, interest and costs to rely upon decision rendered pursuant to these analogous antitrust statutes.

Particular attention is given to private actions by the court in setting out the consequences of the issuance of a certificate. It sets forth the following six maxims:

(1) the legal standards set forth in Section 303(a) are a complete substitute for legal standards which would otherwise apply by virtue of the antitrust laws;

(2) private plaintiffs may sue to enforce the Section 303(a) standards, seeking either injunctive relief or damages;

(3) private plaintiffs must in such a suit overcome the presumption in Section 306(b)(3) that conduct complying with a certificate comports with the legal standards of Section 303(a);

(4) private plaintiffs may recover only actual, not treble, damages for a violation of Section 303(a) legal standards;

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the certification of caustic soda exports. Because the Herfindahl-Hirshman Index calculations done by the agencies for Relevant Domestic Markets placed the Chlor/Alkali certification in the analogous category of mergers which the Justice Department would be "likely to challenge" . . . in all but 'extraordinary cases,'" it concluded that the agency action regarding caustic soda was erroneous. *Id.*

46. 15 U.S.C. § 61-66 *et seq.* (1982).

47. *Horizons International*, 811 F.2d at 164.

48. 15 U.S.C. § 4013(a) (1986 Supp.). It provides:

A certificate of review shall be issued to any applicant that establishes that it specify export trade, export trade activities, and methods of operation will —

(1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,

(2) not unreasonably enhanced, stabilized, or depressed prices within the United States of the goods, wares, merchandise, or services of the class supported by the applicant,

(3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise or services of the class exported by the applicant and

(4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.

49. 15 U.S.C. § 45(a)(1) (1982).

50. 15 U.S.C. § 13(a) (1982).

(5) private plaintiffs who win may recover attorneys' fees and cost of suit, but are liable for attorneys' fees and cost of suit if they lose; and

(6) conduct not in compliance with a certificate is not exempted from treble damage recovery under Section 4 of the Clayton Act.<sup>51</sup>

Through dicta and basically a restatement of Title III, this portion of the Third Circuit's decision will prove instructive for future litigants bringing actions pursuant to Section 306(b). Less instructive is that part of the opinion discussing actions by the attorney general pursuant to Section 304(b)(2)<sup>52</sup> in that the court has deferred consideration of what constitutes the "national interest" under this section until subsequent actions.

With this, the court proceeded to differentiate this particular private action from that brought pursuant to Section 306. Since it is to set aside a COR and not to receive any personal relief, it is brought against the agencies which have, perhaps, erroneously issued the COR. This is important in determining how the court is to proceed on the merits. Under Section 306, the reviewing court must look to the certificate and the alleged injurious actions of the certificate holder to see whether these actions are anticompetitive and may go beyond the certificate only if the injured party shows the action is not presumptively valid. The certificate remains intact regardless of the outcome. Conversely, under Section 305, the focus is upon the decision to issue the COR to determine whether it was properly issued. The administrative record serves as the basis for the review.

In *Horizons International*, the plaintiffs first challenged the procedure followed by the Commerce Department in advertising the application for the COR as required by the ETCA.<sup>53</sup> Though technically the notice was defective in that it was published in the Federal Register later than the statutory deadline and it contained erroneous information, the court, placing substance over form, found that this insignificantly affected the plaintiff's right to comment and to seek judicial review.<sup>54</sup>

More significantly, the court rejected three substantive arguments proffered by plaintiffs which caused the district court to set aside Chlor/Alkali's COR. Finding that the Secretary had considered the first two contentions, that members of Chlor/Alkali have a history of engaging in domestic anticompetitive activity and that Chlor/Alkali will have the potential to exclude competitors from the

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51. *Horizons International*, 811 F.2d at 166.

52. 15 U.S.C. § 4014(b)(2) (1986 Supp.).

53. *Id.* § 4012(b)(1).

54. *Horizons International*, 811 F.2d at 168-69.

export market, and having perceived neither of considerable merit, the Court of Appeals found a reasonable basis for the decision.<sup>55</sup> Likewise, the court explored the administrative record in order to resolve the question of whether the Secretary erred in allowing certification of chlorine experts, plaintiff's third contention. Once again, the court decided that because the record reflected that one member of the joint venture was exporting this commodity and another proposed to do so, the COR was properly granted.<sup>56</sup> Thus, the court applied a laissez-faire approach to review of the agency's decision,<sup>57</sup> and finding it not to be "arbitrary, capricious, an abuse of discretion, or a violation of the Export Trading Company Act,"<sup>58</sup> it reversed the district court and upheld the issuance of the certificate to Chlor/Alkali.

#### IV. Dismissal of Attorney General

The final issue decided by the court was whether to grant the Government's motion to dismiss the Attorney General and the Justice Department from the litigation. The motion was based upon the contention that the ETCA does not authorize judicial review of the Attorney General's concurrence in the Secretary's decision to grant a COR.<sup>59</sup> Specifically, Section 305(a)<sup>60</sup> of the ETCA provides for judicial review only where "*the Secretary grants or denies, in whole or in part, an application for a certificate of review or for an amendment to a certificate, or revokes or modifies the certificate pursuant to Section 414(b) of this Title.*"<sup>61</sup> In this case, any aggrieved person is permitted to bring an action in any district court to set aside the determination as erroneous. The Government believed this language made "clear that the subsection authorizes review of only the Secretary's ultimate decision,"<sup>62</sup> while the plaintiff-appellees found that the language did not "expressly preclude judicial review of the actions of the Attorney General."<sup>63</sup>

The district court found that the statute was "ambiguous" and concluded that "it would be illogical for the act to provide for a review of certification but to limit such review to the Secretary's ac-

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55. *Id.* at 168-69.

56. *Id.* at 169.

57. *See supra* notes 33-38 and accompanying text.

58. *Horizons International*, 811 F.2d at 169.

59. Brief for Appellant Government at 45, *Horizons International v. Baldrige*, 811 F.2d 154 (3d Cir. 1987) (Nos. 86-1135 and 86-1144).

60. 15 U.S.C. § 4015(a) (1986 Supp.).

61. *Id.* (emphasis added).

62. *See supra*, note 59 at 46.

63. Brief for Appellees at 48, *Horizons International v. Baldrige*, 811 F.2d 154 (3d Cir. 1987) (Nos. 86-1135 and 86-1144).

tions.”<sup>64</sup> It considered the role played by the Attorney General in the statutory scheme, particularly under Section 303(b)(3),<sup>65</sup> and found him to be a necessary party<sup>66</sup> to the action.

Again the Court of Appeals reversed the district court’s decision, but only upon the facts presented by this appeal. The court held that Section 305(a) did not require, and Congress did not intend, that the Attorney General be a party when a person aggrieved by the issuance of a COR seeks judicial review of this action.<sup>67</sup> The court explicitly did not decide the necessity of the Attorney General as a party where either he or the Secretary deny a certificate and the unsuccessful applicant seeks review,<sup>68</sup> although other language indicates that he may not be a necessary party where only the Secretary denies a COR.<sup>69</sup>

Unlike the district court and the parties, the Third Circuit Court placed very little emphasis on the language and legislative history of Section 305(a). Instead it based its limited decision upon three grounds. First, it found that the aggrieved plaintiffs could have the certificate set aside in an action against the Secretary alone, thus making the Attorney General unnecessary for a just adjudication. Second, it found that the Attorney General had played a “*de minimis* role” in the issuance of the COR.<sup>70</sup> Third, the court reasoned that because the Attorney General may later bring a suit under Section 306(b)(5)<sup>71</sup> to enjoin activities authorized by the certificate, it would be an anomaly to have him a party to a suit which

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64. *Horizons International*, 624 F. Supp. at 1570-71.

65. 15 U.S.C. § 4013(b)(3), which provides in pertinent part “[t]he certificate of review shall specify . . . (3) any terms and conditions the Secretary or Attorney General deems necessary to assure compliance with the standard of subsection (a) of this section.”

66. A “necessary party” has been defined as one:

having an interest in the controversy, and who ought to be made [a] part[y], in order that the court may act on the rule which requires it to decide on, and finally determine the entire controversy, and to complete justice, by adjusting all the rights involved in it . . . [but whose] interests are separable from those of the parties before the court, so that the court can proceed to a decree, and to complete and final justice, without affecting other persons not before the court.

*Shields v. Barrow*, 7 How. 130, 139, 15 L.Ed. 158 (1854).

67. *Horizons International*, 811 F.2d at 169-70.

68. *Id.* at 170.

69. *Id.* at 169. The court states “[i]f concurrence has been withheld he might well be a necessary party when an applicant sought judicial review.” Although this sentence is indefinite as to who would have to deny the certificate for the Attorney General to be a party, the preceding sentence refers to actions of the Attorney General only. Such a construction would only be logical, for there is no more a necessity to have him a party where the Secretary denies a certificate with no action by the Attorney General than where the Secretary approves an application and the Attorney General summarily concurs. Thus, it appears the only proper time to name the Attorney General as a party is when he has vetoed the Secretary’s approval of a COR application.

70. Had the Attorney General played a more significant role in the issuance of the Chlor/Alkali certificate, the court does not indicate whether it would have issued a contrary result. See *supra* note 41. Given the other grounds for the decision, this was unlikely.

71. 15 U.S.C. § 4016(b)(5).

will have an impact on the later action. The Attorney General would have to play the inconsistent roles of defender and challenger of the certificate in the separate actions.

Whether the Third Circuit has determined this issue correctly is debatable. Despite the Government's argument to the contrary, the statute is not clear. Legislative guidance by way of an amendment to the statute would certainly be helpful. In the interim, *Horizons International* should suffice at least where the procedural posture of the case is the same.

## V. Conclusion

Given the court's decision regarding the appropriate record, it did not reach an issue raised by the Government which, due to its nature, the district court did not address. That issue is whether the lower court's order requiring the Secretary to consider specific evidence previously unaddressed by the agency exceeded the agency's powers under the ETCA.<sup>72</sup> In particular, the district court had remanded for the Secretary to determine whether there existed an ongoing conspiracy in the Chlor/Alkali industry.

Resolution of this issue would surely have aided the Secretary in defining more specific grounds upon which to issue a COR. Because of the Third Circuit's decision with regard to supplementation of the administrative record, such guidance can only come where the agencies provide no grounds for the decision to issue or deny a COR and the reviewing court remands for consideration of the specific issue. As the Government points out, however, even where this occurs, such an order which would in effect require the Secretary to bring proceedings prosecutorial in nature may be in excess of the district court's authority as an Article III court.<sup>73</sup>

Still, the Third Circuit has decided several questions left unresolved by the ETCA which will provide guidance in later actions under Sections 303(a) and 305(a) of the Act. Where the certificate is issued with the concurrence of the Attorney General, a challenge to this action should not include the Attorney General as a party. A recipient of a certificate who subsequently loses the certificate in a judicial review sought by an aggrieved party will not be precluded from appealing the decision to set it aside. A district court reviewing the grant of a COR under this section will be required to apply the Administrative Procedure Act, and thus will be limited to reviewing the administrative record only, except where the record fails to disclose the factors considered by either the Departments of Commerce

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72. Brief for Appellant Government at 40, *Horizons International v. Baldrige*, 811 F.2d 154 (3d Cir. 1987) (Nos. 86-1135 and 86-1144).

73. *Id.* at 44.

or Justice. Where the record is adequate, its review will be confined to determining whether the agencies considered all relevant factors, and whether the subsequent decision was arbitrary, capricious, or an abuse of discretion under the APA or erroneous under the ETCA.

Future decisions interpreting the ETCA will no doubt shed more light on the Act and the opinion in *Horizons International*. Perhaps these decisions will provide guidance to the administrative agencies beyond that found in Section 303(a),<sup>74</sup> something which *Horizons International*, given the procedural posture of the case, could not do. For the time being, however, this decision should prove very beneficial to any person who feels himself aggrieved by the issuance or denial of a certificate of review.

*Glenn M. Campbell*

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74. 15 U.S.C. § 4013(a).

