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CASE NOTES

ADMINISTRATIVE LAW—Federal Water Pollution Prevention and Control Act of 1972—Jurisdiction to Review Effluent Limitation Regulations Promulgated Pursuant to the Act by Environmental Protection Agency Lies in Circuit Courts. *E.I. DuPont de Nemours & Co. v. Train*, 528 F.2d 1136 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3585 (U.S. April 19, 1976) (No. 75-978).

Plaintiffs, eight corporations engaged in the manufacture and sale of chemicals, brought an action against the Administrator of the Environmental Protection Agency (EPA) seeking review of certain regulations¹ promulgated by the Administrator under the Federal Water Pollution Prevention and Control Act of 1972 (Act).² The district court dismissed the complaint for lack of subject matter jurisdiction on the grounds that only the courts of appeals had jurisdiction to review the regulations.³ The Court of Appeals for the Fourth Circuit affirmed.⁴

The Water Pollution Control Act was passed in 1948.⁵ Its primary objective was the control of interstate water pollution which endangered the health or welfare of persons in states adjoining those where pollutants were discharged. Responsibility for the restriction of pollutants lay primarily with the states.⁶ Federal enforcement was available only after an elaborate procedure of public hearings before a hearing board which would recommend whether or not federal officials should bring a federal suit to secure abatement of the pollution.⁷ The Act was amended in 1956⁸ and 1965,⁹ but the amendments did nothing to change the basic scheme of the statute. Thus, federal

1. 40 C.F.R. pt. 415 (1975). The provisions applicable to discharges resulting from the production of sulfuric acid are codified at 40 C.F.R. §§ 415.210-16 (1975).

2. Pub. L. No. 92-500, 86 Stat. 816 (codified in scattered sections of 12, 15, 31, 33 U.S.C.).

3. *E.I. DuPont de Nemours & Co. v. Train*, 383 F. Supp. 1244 (W.D. Va. 1974), *aff'd*, 528 F.2d 1136 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3585 (U.S. April 19, 1976) (No. 75-978).

4. 528 F.2d at 1142.

5. Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155.

6. Brief for Respondent EPA at 6, *E.I. DuPont de Nemours & Co. v. Train*, No. 74-1261 (4th Cir. March 10, 1976).

7. Water Pollution Control Act of 1948, Pub. L. No. 80-845, § 2(d), 62 Stat. 1155.

8. Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498.

9. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903.

intervention to secure the abatement of pollution could take place only after an elaborate conference and hearing procedure similar to that created by the 1948 Act. In 1970 further amendments¹⁰ regulated the discharge of oil and other hazardous substances into navigable waters through a federally administered permit program; but again, the scope and mechanical operation of the Act made direct federal control of pollution onerous.

The present Federal Water Pollution Prevention and Control Act was passed in 1972 with the purpose of (1) promoting a shift in emphasis in the Act's policy from regulation of the quality of bodies of water to regulation of effluents discharged into the water, and (2) making clear the important function of the states by recognizing that they possessed the primary responsibility to prevent, reduce, and eliminate pollution of navigable waters.¹¹ The Act also created a "permit" granting plan which provides for state participation in applying both the Act and EPA regulations.

The issuance of permits for the discharge of pollutants is governed by section 402 of the Act.¹² The states may grant such permits where the applicant's facility complies with sections 301 and 304 of the Act which prescribe effluent limitations.

Section 301 sets out the policy of the Act in the context of a general prohibition of all effluent discharges, except as provided by law.¹³ It then establishes a timetable for the "achievement" of effluent limitations, but contains no express mandate as to who is to achieve them. Section 301 does provide that effluent limitations are to be determined in accordance with effluent limitation "guidelines," issued in the form of regulations under section 304(b).¹⁴

10. Federal Water Pollution Control Act Amendments of 1970, Pub. L. No. 91-224, 84 Stat. 91.

11. 33 U.S.C. § 1311 (Supp. IV, 1974).

12. *Id.* § 1342.

13. Section 301 provides in pertinent part:

(a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 U.S.C. §§ 1312, 1316, 1317, 1328, 1342, 1344 (Supp. IV, 1974)] the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved —

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works

33 U.S.C. § 1311 (Supp. IV, 1974).

14. Section 304 provides in pertinent part:

(a)(1) The Administrator . . . shall develop and publish . . . criteria for water quality

. . . .

(b) For the purpose of adopting or revising effluent limitations under this Act the

Thus, the guidelines established under section 304(b) are an important step in the attainment of the statutory objectives announced by section 301.

Actions of the EPA Administrator taken under sections 301 and 402 are expressly reviewable in the court of appeals.¹⁵ But the statute conferring this jurisdiction, section 509, is silent as to which court has jurisdiction to review actions of the Administrator taken under section 304(b).¹⁶

In order to determine the absence or existence of subject matter jurisdiction,¹⁷ the *DuPont* court was required to determine whether the Administrator's authority to promulgate effluent limitation regulations is derived, at least in part, from section 301.¹⁸ If he has such authority under section 301, the Administrator can set absolute effluent limitations.¹⁹ If he does not have such authority, the states, in their capacity as issuers of effluent discharge permits under section 402, will establish effluent limitations for individual permit applicants as part of the permit-issuing process.²⁰ Those state-

Administrator shall . . . publish . . . regulations, providing guidelines for effluent limitations . . . Such regulations shall . . . (2)(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act [33 U.S.C. § 1311 (Supp. IV, 1974)] . . .

33 U.S.C. § 1314 (Supp. IV, 1974).

15. Section 509(b)(1) provides:

Review of the Administrator's action (A) in promulgating any standard of performance under section 306 [33 U.S.C. § 1316 (Supp. IV, 1974)], (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or treatment standard under section 307 [33 U.S.C. § 1317], (D) in making any determination as to a State permit program submitted under section 402(b) [33 U.S.C. § 1342], (E) in approving or promulgating any effluent limitation or other limitation under section 301 [33 U.S.C. § 1311], 302 [33 U.S.C. § 1312], or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

33 U.S.C. § 1369(b)(1) (Supp. IV, 1974). In addition to the states which qualify to issue effluent discharge permits, the Administrator has the authority to issue such permits under section 402 [33 U.S.C. § 1342].

16. 33 U.S.C. § 1369 (Supp. IV, 1974).

17. 528 F.2d at 1137.

18. *Id.* at 1142.

19. *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1035 (3d Cir. 1975).

20. *Id.* at 1035-36.

established limitations will be based on effluent limitation guidelines promulgated by the Administrator under section 304, and not on EPA regulations issued under section 301 which prescribe actual effluent limitations.²¹

Other circuit courts have ruled on this issue prior to *DuPont*. In *CPC International Inc. v. Train*²² plaintiffs, manufacturers of corn products, sought review of the same regulations that were before the court in *DuPont*. The controversy focused on the relationship between section 301 and the effluent limitation guidelines for existing plants promulgated under section 304(b). The Administrator argued that the contested regulations were promulgated under both section 301(b) and section 304(b).²³ The Eighth Circuit concluded that the Act did not grant the Administrator any "separate power under § 301 to promulgate by regulation effluent limitations for existing sources."²⁴

The court's analysis of the statutory construction issue commenced with the observation that section 301 made no provision for EPA promulgation of effluent limitations by regulation.²⁵ Since specific provisions for promulgation of other regulations were expressly set out elsewhere in the Act, the failure of Congress to include such a provision in section 301 was not oversight, particularly in view of the unambiguous language in these sections.²⁶ The court also noted the specificity with which the Act spells out the procedures for promulgation and enforcement of regulations, and the fact that issuance of permits pursuant to the permit granting program established by section 402(d)(2) is clearly governed by guidelines promulgated under section 304(b).²⁷

The court found support for its conclusion that effluent limitations were to be achieved under the section 402 permit program, and not by promulgation of separate regulations issued under section 301, in the legislative history of the Act. A statement made in testimony before the Senate subcommittee considering the Act by then

21. 528 F.2d at 1139.

22. 515 F.2d 1032 (8th Cir. 1975).

23. *Id.* at 1037.

24. *Id.* (footnote omitted).

25. *Id.*

26. *Id.* at 1038. As examples the court cited §§ 306(b)(1)(B), 307(a)(2), (b), (c) of the Act, 33 U.S.C. §§ 1316(b)(1)(B), 1317(a)(2), (b), (c) (Supp. IV. 1974).

27. *Id.* at 1038.

EPA administrator William Ruckelshaus was particularly persuasive.²⁸ Ruckelshaus' testimony indicated his understanding that effluent limitations would be established as part of the permit-issuing process:²⁹

[W]e believe that such Federal guidance is especially important in the area of effluent limitations. This concept is new in the law. It would be difficult and needlessly duplicative for each State to gather all the scientific, industrial, and technological information upon which effluent limitations must be based. Federal leadership must be provided here so that the States, in setting effluent limitations, have a clear idea of the task.

The Eighth Circuit also noted a statement³⁰ of Representatives Abzug and Rangel which was attached to the Report on the House version of the bill.³¹ The statement argued for nationally promulgated effluent limitations standards from existing point sources, and criticized the absence in the original version of the bill of any provision for federal review of state permits under section 402.³² The *CPC* court thus confidently concluded that the Administrator had no authority to promulgate effluent limitation regulations under section 301 of the Act, and that his actions were taken by virtue of the authority conferred by section 304.³³

The other courts of appeals which have ruled on the authority of the Administrator to promulgate effluent limitation regulations under section 301 have reached results consistent with the holding in *DuPont*. In *American Iron and Steel Institute v. EPA*³⁴ the Third Circuit reconciled the clear Congressional intent that the states

28. *Id.* at 1039-40.

29. *Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess., ser. H9, pt. 1, at 19 (1971).

30. 515 F.2d at 1041.

31. H.R. REP. NO. 911, 92d Cong., 2d Sess. (1972), reprinted in SENATE COMM. ON PUBLIC WORKS, 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 871 (Comm. Print 1973) [hereinafter cited as LEGISLATIVE HISTORY].

32. [T]he bill should give EPA authority

(a) to review all permit applications; and

(b) to prevent the issuance of any permit to which it objects.

Further, the bill should require that EPA withdraw approval of any state permit program which is not being administered in accordance with the law and conditions of approval.

LEGISLATIVE HISTORY 871.

33. 515 F.2d at 1037.

34. 526 F.2d 1027 (3d Cir. 1975).

have discretion in issuing permits with the promulgation of absolute effluent limitations by requiring that effluent limitations prescribed by the Administrator not be exceeded:³⁵

[T]he section 301 limitations represent both the base level or minimum degree of effluent *control* permissible and the ceiling (or maximum amount of effluent discharge) permissible nationwide within a given category, and the section 304 guidelines are intended to provide precise guidance to the permit-issuing authorities in establishing a permissible level of discharge that is more stringent than the ceiling.

Moreover, the court recognized the particular competency of the EPA to construe and administer the Act, saying that "where an Act of Congress is fairly susceptible of differing constructions, the interpretation made of it by the agency charged with its administration should be given considerable deference."³⁶

In attempting to resolve pronounced inconsistencies in the legislative history of the Act, the *American Iron* court relied heavily on *Train v. Natural Resources Defense Council*,³⁷ where the Supreme Court stated that the interpretation of an ambiguous statute by the administrative agency charged with its enforcement should be accorded significant weight in judicial resolution of the issues in dispute.³⁸ The Supreme Court announced its confidence in the ability of the EPA to formulate a construction of the Clean Air Act which was "sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency."³⁹ While the Court did not suggest that EPA's construction of the Clean Air Act was the only one that could be arrived at, it did hold that the interpretation was reasonable enough "that it should have been accepted by the reviewing courts."⁴⁰

*American Meat Institute v. EPA*⁴¹ contains the most persuasive analysis of the legislative history of the Act. The Seventh Circuit noted that comments of Senator Bentsen, a member of the Senate Public Works Committee which reported out the original version of

35. *Id.* at 1045.

36. *Id.* at 1041.

37. 421 U.S. 60 (1975).

38. *Id.* at 87.

39. *Id.*

40. *Id.* at 75.

41. 526 F.2d 442 (7th Cir. 1975).

the Act,⁴² clearly indicated that the Administrator was intended to promulgate regulations under section 301.⁴³ Similar intent was found in the Senate Report on the Act.⁴⁴ The court also pointed to Senator Muskie's written explanation of the Act to the Senate during debate on the conference report, in which he made clear that broad discretion to fix permissible effluent levels was not to rest with the states.⁴⁵ The factors to be considered in determining the level of effluent discharge were for the discretion of the Administrator and were not to be considered on a plant by plant basis at the time of application for a permit. Muskie also stated that nationally uniform effluent limitations would be promulgated as a result of the Act.⁴⁶

In accounting for the disparity in various interpretations which have flowed from analyses of the legislative history and in deference to the Eighth Circuit's analysis in *CPC*, the *American Meat* court noted that "[m]uch of the remaining legislative history . . . is ambiguous," due largely to the unclear definition of "effluent limitation" offered by section 502(11).⁴⁷ Since the court took the position that the question before it was "not whether the agency's interpretation of § 301 [was] the only permissible one, but rather [was it] sufficiently reasonable to preclude [the court] from substituting [its] judgment for that of the agency,"⁴⁸ it deemed the multiplication of examples from the legislative history to be unnecessary.

The only significant difference in analysis among the courts reviewing the regulations has been the *DuPont* court's conclusion that it did not have to decide whether section 301 alone authorized the promulgation of effluent limitations in order to determine that juris-

42. S. REP. NO. 414, 92d Cong., 2d Sess., (1972), reprinted in LEGISLATIVE HISTORY 1283.

43. 526 F.2d at 451.

44. *Id.*

45. *Id.*

46. LEGISLATIVE HISTORY 172.

47. 526 F.2d at 452.

Section 502(11) provides:

The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11) (Supp. IV, 1974) (emphasis added).

48. 526 F.2d at 449-50 (footnote omitted).

diction to review the regulations was in the court of appeals under section 509.⁴⁹ It viewed EPA actions taken under section 304(b) as the starting point of the Administrator's authority to promulgate effluent limitations and held that "any action taken by the Administrator under § 304(b) should properly be considered to be pursuant to the provisions of § 301 and, therefore, reviewable by this court under § 509."⁵⁰

When the Supreme Court reviews *DuPont*, resolution of the jurisdiction issue will probably require an analysis of the Administrator's authority to issue effluent limitations regulations under section 301. On this score, the summary manner in which the *DuPont* court decided that it made no difference whether the Administrator had such authority⁵¹ seems somewhat cavalier in light of the other decisions which have considered the question. In this respect, the district court's opinion is much stronger.⁵²

There is a tension in the policy of the Act which makes determination of whether the Administrator has authority to promulgate effluent limitations pursuant to section 301 difficult to resolve. On one hand, it was the intention of Congress to draw the states into active administration of the Act. The primary vehicle for this participation is the section 402 permit program. At the same time, the scheme created by the Act is pervasive and requires vast federal input. It is unlikely that Congress intended that fifty sovereigns

49. 528 F.2d at 1139. On March 10, 1976 the Fourth Circuit handed down three decisions in which it addressed the technical adequacy of particular effluent limitation regulations. *E.I. DuPont de Nemours & Co. v. Train*, No. 74-1261 (4th Cir. March 10, 1976) was the resolution of the merits in the consolidated proceedings involved in the jurisdictional dispute decided by the subject case. The court found that the Administrator had the authority to promulgate regulations prescribing effluent limitations pursuant to section 301. No. 74-1261, at 16. The court therefore resolved the issue of whether the EPA or the state permit issuers are to issue effluent limitations under the scheme contemplated by the Act in favor of federal authority. This was the issue that the court considered unnecessary to decide in considering the jurisdictional question. 528 F.2d at 1138.

The other two decisions were *FMC Corp. v. Train*, No. 74-1386 (4th Cir. March 10, 1976) and *Tanners' Council of America, Inc. v. Train*, No. 74-1740 (4th Cir. March 10, 1976) in which the court disposed of petitions to review for the Plastics and Synthetics Point Source Category and the Leather Tanning and Finishing Industry Point Source Category, respectively. In each case the court noted that the Administrator had authority to promulgate effluent limitation regulations pursuant to section 301 of the Act, and cited its decision in No. 74-1261 as authority for that proposition.

50. 528 F.2d at 1142.

51. See text accompanying note 48 *supra*.

52. 383 F. Supp. 1244 (W.D. Va. 1974).

create their own standards for the control of industrial water pollution;⁵³ the objectives of the Act are more efficiently and economically attainable through federal action.

As a matter of bare statutory construction, the silence of section 301 as to *who* is to achieve effluent limitations appears to be legislative oversight. Still, the interpretation offered by the *DuPont* court is feasible. It is unlikely that the authority to issue "guidelines," conferred by section 304(b) of the Act, would be separated from the authority to issue section 301 effluent limitations. As to the jurisdictional issue, the *DuPont* court was wise in rejecting a view that would result in judicial review in the scattered manner suggested by the plaintiffs.

The result of the confusion surrounding the question of authority to issue effluent limitations has been uncertainty and delay in the implementation of a scheme to cope with a serious national problem. During the pendency of the appeal in *DuPont*, the EPA suggested that the actions of the chemical companies amounted to nothing more than an attempt to undermine the Congressional plan set up by the Act for coping with industrial water pollution.⁵⁴

In their petition for certiorari, plaintiff chemical companies suggested that the reason for the conflict among the circuits is the manner in which the effluent limitations regulations have been attacked in each case.⁵⁵ They further suggest that the jurisdictional question has not been raised squarely and uniformly by plaintiffs in each of the cases, and that in two of them it was not raised by the plaintiffs at all.⁵⁶ But it does seem clear that the Supreme Court will

53. See LEGISLATIVE HISTORY 871.

54. Brief for Respondent at 31, *E.I. DuPont de Nemours & Co. v. Train*, No. 74-1261 (4th Cir. March 10, 1976).

55. Petitioners' Brief for Certiorari at 16, *E.I. DuPont de Nemours & Co. v. Train*, 44 U.S.L.W. 3441 (U.S. Jan. 12, 1976) (No. 75-978). Another court of appeals which has considered the jurisdictional issue is the Tenth Circuit. In *American Petroleum Institute v. Train*, 526 F.2d 1343 (10th Cir. 1975) the court held that it had exclusive jurisdiction to review effluent limitation regulations. The court said that the authority of the EPA Administrator to issue the regulations under section 301 was not in issue, and that since the Administrator purported to act under the section, the regulations were clearly drawn into the jurisdictional grant of section 509. The court declined to consider the statutory power of the Administrator and found that for the purpose of the proceeding before it (which considered only the jurisdictional issue), the Administrator's claim that the regulations were promulgated under § 301 of the Act was dispositive. *Id.* at 1345-46.

56. *American Iron & Steel Institute v. EPA*, 526 F.2d 1027 (3d Cir. 1975); *American Meat Institute v. EPA*, 526 F.2d 442 (7th Cir. 1975).

have to decide the question of the Administrator's authority to issue effluent limitations pursuant to section 301 of the Act before the collateral issues of technical adequacy of the regulations, the function of state permit issuing agencies, and the jurisdictional question can be resolved.

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