Plain Meaning Decision Clarifies Standard for Effluent Limitations

Susan Weckesser

Recommended Citation
Available at: http://digitalrepository.unm.edu/nrj/vol22/iss2/12

This Note is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu.
"PLAIN MEANING" DECISION CLARIFIES STANDARD FOR EFFLUENT LIMITATIONS


INTRODUCTION

The Clean Water Act\(^1\) authorizes the Administrator of the Environmental Protection Agency (EPA) to promulgate effluent limitations for private industrial sources.\(^2\) Conventional pollutants,\(^3\) one of three categories of pollutants\(^4\) named in the Act, are subject to the best conventional pollutant control technology standard (BCT).\(^5\) The EPA Administrator published results of its review of effluent limitations for numerous industries in August, 1979.\(^6\)

---

4. The three categories are conventional pollutants, toxic pollutants, and nonconventional pollutants (a category composed of all pollutants not specifically identified as conventional or toxic). 33 U.S.C. § 1311 (1977).
5. Factors to be taken into account in determining best conventional pollutant control technology measures and practices include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and a comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and a taking into account of the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and other factors as the Administrator deems appropriate. 33 U.S.C. § 1314(b)(4)(B) (1977). The BCT standard for conventional pollutants resulted from industry contentions, during congressional considerations in 1977, that the application of standards requiring best available technology economically achievable (BAT) would entail enormous costs without comparable benefits. The response of Congress was to lessen requirements for conventional pollutants to the BCT standard. J. QUARLES, IMPACT OF THE 1977 CLEAN WATER ACT AMENDMENTS ON INDUSTRIAL DISCHARGERS 5 (BNA ENVIR. REP. Monograph No. 25, 1978).
Thirty-four paper and chemical manufacturers, food processing companies, and trade associations sought judicial review of the Administrator's actions in *American Paper Institute v. EPA*. The petitioners challenged the BCT regulations on several grounds. They contended that Congress in Section 304(b)(4)(B) of the 1977 Clean Water Act required EPA to consider two factors in its determination of BCT: an industry-wide cost-effectiveness test and a cost-comparison test. The petitioners asserted that EPA had considered only the latter of these two tests in setting BCT standards and that EPA's benchmark for the cost-comparison test was arbitrary and capricious. The petitioners further alleged that EPA used statistically unreliable and internally inconsistent data as a basis for the cost-comparison test, and that the agency deprived them of their right to comment.

The Fourth Circuit analyzed the language of the section at issue and held that its plain meaning required that cost-effectiveness be considered in determining BCT measures and practices. The court ruled that EPA must develop an industry-wide cost-effectiveness test, employ that test in its determination of BCT regulations, and re-examine all existing BCT regulations for inconsistency with the cost-effectiveness test. The court agreed with the petitioners that the data on which EPA relied in formulating its reference point for publicly owned treatment works (POTWs) for the cost-comparison test was statistically unreliable, but ruled that EPA's formulation of the test was not arbitrary or capricious. The court further held that the petitioners had not been deprived of their right to comment on the regulations.

---

9. The cost-comparison test compares the cost for private industry to reduce its effluent levels to that incurred by publicly owned treatment works (POTWs), more commonly known as municipal sewer plants.
10. The benchmark is the POTW cost figure used as the basic reference point for determining the reasonableness of the cost figure for industry to meet BCT standards. EPA determined the benchmark for the POTW cost-comparison figure by calculating the cost per pound of conventional pollutant removed based on the incremental step from secondary to advanced secondary treatment. 44 Fed. Reg. 50735 (1979).
11. The petitioners specifically challenged the EPA Administrator's final regulations for the corn wet milling industry. After the parties filed their briefs, EPA suspended the BCT effluent limitations for this industry sub-category. 45 Fed. Reg. 45582 (1980). Therefore, the court did not address the petitioners' position on this issue.
12. The court interpreted the statutory language which requires a "consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived" as calling for a cost-effectiveness test.
13. A cost-effectiveness test balances the incremental costs of removing a pound of pollutant with the incremental benefits derived from the removal. AIR & WATER POLLUTION CONTROL LAW: 1980 (G. Wetstone ed. 1980). This type of test is more commonly known as a cost-benefit test.
14. Prior to the court's decision, EPA confessed to error in the two documents on which it relied in formulating its POTW benchmark and moved the court for voluntary remand.
STATUTORY BACKGROUND

Congress established a timetable for achieving certain water pollution control objectives in the 1972 amendments to the Federal Water Pollution Control Act.\(^{15}\) Congress declared the goal of the Act to be the elimination of discharge of pollutants into the nation’s navigable waters by 1985.\(^ {16}\) Congress set two stages towards achieving that goal utilizing two separate standards for private industrial sources: “best practicable control technology currently available” (BPT), to be achieved by July 1, 1977,\(^ {17}\) and “best available technology economically available” (BAT), to be achieved by July 1, 1983.\(^ {18}\)

In 1977, Congress re-examined these standards and amended the Federal Water Pollution Control Act, now known as the Clean Water Act.\(^ {19}\) The legislation established various standards and compliance schedules for three classifications of pollutants: conventional pollutants, toxic pollutants, and non-conventional pollutants not otherwise classified.\(^ {20}\) The 1977 BPT standards remained unchanged. The amendments applied BAT standards to both toxic pollutants and non-conventional pollutants but extended the compliance date to July 1, 1984.\(^ {21}\)

For conventional pollutants, Congress abandoned the BAT standard and developed a new standard of best conventional pollutant control technology (BCT). The Act set July 1, 1984, as the date for achievement of BCT standards.\(^ {22}\) BCT standards may not be more stringent than BAT standards,\(^ {23}\) and in no case may BCT limitations be less stringent than...
The 1977 amendments provided that the EPA Administrator, in providing guidelines for effluent limitations, should specify factors to be taken into account in determining BCT measures and practices applicable to any point source within various industrial categories and classes. These factors should include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources and shall take into account the age of the equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water-quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

Unlike limitations on toxic pollutants and unconventional pollutants, the Clean Water Act permits no variances for BCT limitations on water quality grounds or modification of the BCT timetable requirements on innovative technology grounds. Read in conjunction, these statutes imply that final BCT standards will be binding on all industrial discharge of conventional pollutants.

On August 23, 1978, EPA published proposed BCT regulations for numerous industries. Seventy-nine parties, including industrial groups, the Council on Wage and Price Stability, and several state governments expressed concern with EPA’s approach to development of BCT regulations. The comments fell into two general categories: those objecting to the overall methodology used by the Administrator and those objecting to the individual industry data used. As a result of these comments, EPA announced that it had changed its approach and additional documents

24. Id.
26. Id.
28. 33 U.S.C. § 1311(c) (1977). Innovative technology is that which has a substantial likelihood for enabling a facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation. 33 U.S.C. § 1311(k) (1972).
would be used in computing costs and levels of pollutants from POTWs. EPA published its final BCT determinations on August 29, 1979, and on May 9, 1980, petitioners asked the court to review EPA's final BCT regulations.

ARGUMENTS REGARDING DETERMINATION OF BCT REGULATIONS

The petitioners argued that the statute required EPA's proposed BCT guidelines to pass two reasonableness tests. EPA responded that the statute did not require a cost-effectiveness test, but rather only a POTW cost-comparison standard to arrive at BCT regulations for industry. EPA contended that the second clause in the relevant portion of the statute set forth the benchmark of reasonableness required by the first clause. Thus, the statute merely required consideration of the reasonableness of the relationship between costs and benefits as based on figures comparing costs for POTWs and private industry. This interpretation is consistent with statutory interpretations of language setting forth factors for determining BPT standards. The BPT statute specifically calls for "consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved." This language, which clearly calls for a cost-benefit test in setting BPT standards, points up the ambiguity of the BCT language.

EPA cited legislative history to support its position and relied on comments by Senator Muskie that the BCT legislation provided for comparison of the costs for industry with the costs for municipalities in setting BCT standards. In presenting a report to the Senate, Senator Muskie had stated, "[c]learly, if the cost of achieving a certain level of reduction of conventional pollutants for industry is less than the cost of achieving a similar level of reduction for a community, it would be reasonable." 33

33. 44 Fed. Reg. 19214 (1979). The petitioning industries objected to EPA's use of these documents on the ground that they were not given sufficient time to comment. The court evaluated the charges and found that EPA had complied with Section 4 of the Administrative Procedures Act, 5 U.S.C. § 553(b)(3), in regard to notice. In light of the general availability of the documents and extensiveness of the comments, the facts did not support the petitioners' contention that they were denied adequate notice. American Paper Institute v. EPA, 16 E.R.C. 1252 (4th Cir. 1981).


36. Id.


39. Id.

The petitioners argued that the statute clearly required EPA's proposed BCT guidelines to pass two tests for reasonableness: a cost-effectiveness test and a cost-comparison test. The petitioners countered EPA's legislative history argument by quoting Representative Roberts' apparent reference to an industry cost-effectiveness test in his statement explaining BCT. Representative Roberts stated that in assessing the need for BCT, the EPA Administrator is required to consider the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived. Although Representative Roberts did not specifically refer to a cost-effectiveness test, he implied that BCT regulations should not impose effluent limitations resulting in incremental costs which exceed incremental benefits.\(^4\)

The Fourth Circuit used the plain meaning rule in determining that the statute unambiguously required both a cost-effectiveness test and a cost-comparison test in setting BCT standards. The plain meaning rule, as set out in *Appalachian Power Co. v. Train*, holds that "EPA must be held to a standard of at least literal compliance with the language of a statute which it is authorized to implement."\(^4\)

Determining that EPA's construction of the statute was contrary to the plain meaning of the language, the court held that the section specifically charged EPA to consider a cost-effectiveness test as well as a POTW cost-comparison test in formulating standards for BCT. The court stated that EPA ignored the mandatory "shall" in the statute, disregarded the conjunctive "and" and completely eliminated the first factor, which calls for "consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived." Holding that the language was unambiguous, the court remanded the regulations to EPA for reconsideration.

In his dissenting opinion, Judge Phillips disagreed with the majority's conclusion that Congress unambiguously required the EPA Administrator to use a two-part test in formulating BCT regulations. He stated that the statute was so ambiguous that legislative history must provide guidance for its interpretation. Because he found the legislative history in this case to be inconclusive, Judge Phillips would have deferred to EPA's interpretation. He concluded that the court had mistakenly determined that a plain meaning existed for the statute in question.

Petitioners also challenged EPA's formation and application of the POTW cost-comparison test on three grounds. First, they argued that EPA erred in using an incremental approach to arrive at a POTW bench-

\(^{41}\) 123 CONG. REC. H12928 (1977).
\(^{42}\) 545 F.2d 1351, 1357 (4th Cir. 1976).
mark. Second, they contended that, even if EPA were permitted to use an incremental POTW comparison, EPA had acted arbitrarily and capriciously in setting the benchmark for the POTW-private industry comparison test. Third, the petitioners objected to the POTW cost data as being inadequate and statistically unreliable.

The court found nothing on the face of the statute or in its legislative history to suggest that Congress intended for EPA to structure or administer the test in any particular way. The EPA considered various proposals before selecting the cost-comparison test. Therefore, the selection of the benchmark was neither arbitrary nor capricious.

The court discarded the petitioners' argument that EPA should have used a narrower increment. Quoting from Ethyl Corp. v. EPA, the court stated that it "must look at the decision not as the chemist, biologist or statistician . . . but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality." EPA provided evidence that it had considered recommendations from both the Corn Refiners Association, Inc., and the Council on Wage and Price Stability in deciding to use a particular incremental POTW benchmark. The court concluded that it was "unwilling to place a straitjacket on EPA to so limit its decision."

EPA admitted to errors in the documents on which the agency based the POTW benchmark. Petitioners had challenged the documents as inadequate, statistically unreliable and internally inconsistent. In response to EPA's admission, the court remanded the POTW benchmark to EPA for correction of data errors and consequent revision of BCT regulations.

JUDICIAL BACKGROUND

The Plain Meaning Rule

Judicial interpretation of statutory construction generally follows three doctrines. Courts tend to rely on legislative history, defer to agency construction of the statute, or make a decision based on independent consideration of the merits. The Fourth Circuit's use of the plain meaning

---

43. EPA's test compared the cost of upgrading POTWs from secondary treatment levels (the level required for achievement by July 1, 1977) to a level beyond secondary treatment. This increment roughly parallels the industrial increment from BPT to BAT.
44. The POTW incremental cost is the cost of upgrading an existing POTW from one treatment level to a higher level.
46. EPA used Advanced Secondary Treatment as the increment beyond secondary treatment for the POTW benchmark.
rule in *American Paper Institute* is contrary to other judicial interpretations which have deferred to EPA's construction of a statute in cases of conflicts in legislative history. Despite the court's insistence that the statute in question is unambiguous, the court noted the inconclusiveness of legislative history. When such conflicts exist, the statute is inherently unclear. Thus, the court misapplied the plain meaning rule in *American Paper Institute*.

The United States Supreme Court has upheld EPA's statutory interpretation in several cases by appropriately evoking the plain meaning rule. In *E.I. du Pont de Nemours & Co. v. Train*, the statute in question involved the authority of the EPA Administrator to promulgate effluent limitations. In *Train v. Natural Resources Defense Council*, the statute related to the EPA Administrator's review of state implementation plans under the Clean Air Act amendments. The *du Pont* decision relied upon the following language from *Train* to support the theory that the court should defer to agency interpretation in questions of statutory construction:

>We therefore conclude that the Agency's interpretation... was "correct," to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the "correct" one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency.50

Although courts have generally used the plain meaning rule to support EPA's interpretation of a statute, the Fourth Circuit's decision in *American Paper Institute* uses the plain meaning rule to support industry's position. When the Fourth Circuit ruled against EPA's statutory interpretation in *EPA v. National Crushed Stone Ass'n*, EPA appealed to the United States Supreme Court, which overturned the decision. Yet in *American Paper Institute*, EPA's counsel has expressed satisfaction with the Fourth Circuit's decision. Apparently, EPA has no plans to appeal the decision to the Supreme Court.

49. 421 U.S. 60 (1975).
50. *Id.* at 87.
51. The U.S. Supreme Court's ruling in *EPA v. Crushed Stone Ass'n*, 449 U.S. 64 (1980), overruled the fourth circuit's decision by using the plain meaning rule. The Supreme Court upheld EPA's interpretation of the statute, rather than the fourth circuit's, and cited legislative history in support of its decision.
52. 449 U.S. 64 (1980).
The Cost of Meeting Effluent Limitations

The requirement of meeting effluent limitations for discharge of pollutants places great costs on industry. Accordingly, various industries have sought to minimize the burdensome costs through challenges to all three standards: BPT, BAT, and BCT.

One of industry’s major contentions has been that cost-benefit analyses are required for the determination of both BPT and BAT standards. The American Paper Institute’s challenge to BCT standards is founded on a similar premise, with the goal of reducing the cost of compliance. When a statute or court requires EPA to carry out a cost-benefit analysis in setting effluent limitations, EPA may encounter difficulties in demonstrating that benefits are equal to or exceed costs of meeting the limitations. Because of its necessarily subjective nature, any such judgment is subject to the scrutiny of industry and the courts. Additionally, although a statute may require EPA merely to consider costs, rather than perform a cost-benefit analysis, EPA still bears a heavy burden in justifying a decision that costs bear a reasonable relation to benefits.

BPT and BAT effluent limitations require different analyses. In setting BPT standards, EPA must perform cost-benefit analyses. The statute requires “consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such reduction.” These cost-benefit tests are performed on an industry-wide basis, not for individual plants within an industrial category. Variances from BPT standards are available only upon a showing of a fundamental difference in factors in existence at an individual plant from factors considered by EPA in promulgating standards for the particular industry.

Industries have also attacked BAT standards in an effort to reduce costs of compliance. In addition to the recent challenge to BCT limitations, the American Paper Institute challenged BAT standards prior to the 1977 Clean Water Act amendments. The District of Columbia circuit court ruled that no cost-benefit balancing was required for BAT limitations nor for new source performance standards. The court held that the EPA Administrator should merely consider costs in establishing standards. The United States Supreme Court failed to grant certiorari.

Sources subject to BAT limitations may obtain variances or time extensions on several grounds. Some of these grounds include economic infeasibility and proposed innovative technology.

57. 40 C.F.R. §§ 401–460.
The BCT standard for conventional pollutants is comparable to the BAT standard for other pollutants. BCT limitations may not be more stringent than BAT limitations, and the statutes make no provisions for variances. The BCT standard was intended to replace the BAT standard for conventional pollutants. Therefore, EPA's interpretation that merely a consideration of the reasonableness of costs was required in setting BCT standards is understandable. Since BCT and BAT limitations are comparable for different categories of pollutants, the factors determining the development of each standard should also be comparable.

The fourth circuit's decision that the statute requires a cost-effectiveness test will probably lead to lower standards, allowing a greater discharge of conventional pollutants. In addition, the process of conducting this test will lead to delay in promulgation of standards, and delay means economic benefits for industry.

CONCLUSION

The decision in the present case is an economic victory for the industries represented. The American Paper Institute's counsel has said that EPA rules, had they been upheld, would have cost $2 billion for almost no clean up at all. A point always exists at which the costs of pollution control are no longer warranted by resulting incremental benefits. EPA's evaluation of the reasonableness of the costs would seem to have given adequate consideration to the incremental benefits as compared to the costs.

The statute requires compliance with BCT standards by July 1, 1984. Such a compliance date is now impossible. Before proposing new regulations, EPA must conduct further tests. The cost of these new determinations will no doubt impose a hardship on the agency, which is at present operating under severe budget constraints.

Courts have taken notice of the effects of delay in setting and meeting effluent limitations. The Fourth Circuit recognized the problems in its opinion in *FMC Corp. v. Train*, but in the present case it took no notice of its earlier warning.

While EPA must take seriously a statutory duty to consider cost, courts of review should be mindful of the many problems inherent in an undertaking of this nature and uphold a reasonable effort by

64. NAT'L J., August 17, 1981, at 3, col. 1.
66. 539 F.2d 973 (4th Cir. 1976).
the Agency. The requirement [that costs be considered] should not serve as a dilatory device, obstructing the Agency from proceeding with its primary mission of cleaning up the lakes, rivers and streams of this Nation.67

Judge Phillips echoed these sentiments in his dissent to the majority opinion in *American Paper Institute*. He noted that the 1977 amendments called for EPA to have BCT regulations in place within 90 days after enactment,68 a date "now long since passed."69

Although the result of *American Paper Institute* would appear to be a victory for private industry and a defeat for EPA, Ralph Perry, EPA's general counsel, has said that the court's decision "appears to be compatible with our philosophy."70 The philosophy to which Perry referred is the Reagan Administration's espousal of cost-effectiveness analyses in the development of environmental regulations affecting industry.

Perry has also stated that EPA expects to propose new regulations implementing the court's decision within a year. Perry conceded that the new regulations will give greater weight to costs of industry, but he insisted that the environmental impact of the discharge of conventional pollutants by private industry will not be ignored. "We are the Environmental Protection Agency and we are going to protect the environment."71

The EPA's published reaction to the decision may be a harbinger of future agency policy. Whether the decision will lead to a softening of effluent limitation standards and a consequent strain on municipal sewer treatment plants is open to speculation. A cost-effectiveness analysis is a complex measure, and its development will require time and money. EPA is in the process of changing its policies and structure to reflect the goals of the Reagan Administration. Environmentalists are waiting to see if EPA will be able to retain its goal of achieving zero discharge of pollutants into navigable waters by 1985. Economics, which to date have been merely a factor in setting limitations, may assume a pre-eminent role in determination of effluent limitations and in implementation of clean water goals.

SUSAN WECKESSER

67. *Id.* at 979.
71. *Id.*.