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## Federal Water Pollution Control Act Amendments of 1972

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# CASE NOTES

## FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

ENVIRONMENTAL LAW—Under § 301 of the Federal Water Pollution Control Act Amendments of 1972 EPA has authority to establish by regulation uniform effluent limitations for 1977 and 1983; section 306, which requires EPA to establish by regulation standards for new point sources constituting no discharge of pollutants, precludes EPA from providing variance procedure for plants unable to comply; under § 509(b)(1)(E) review of EPA regulations lies in courts of appeals. *E. I. duPont DeNemours & Co. v. Train*, 97 S. Ct. 965 (1977).

Because *DuPont v. Train* involves major portions of the Federal Water Pollution Control Act Amendments of 1972 (the Act), it is a landmark case in environmental law. The Supreme Court determined, by a process of statutory construction, that: 1) EPA has authority to issue regulations setting forth uniform effluent limitations for classes and categories of plants, for both 1977 and 1983, provided some allowance is made for variations in individual plants; 2) § 509(b)(1)(E)<sup>1</sup> clearly authorizes only courts of appeals to review EPA action promulgating effluent limitations for existing point sources under § 301; 3) variances for new point sources unable to comply with the new source standards issued under § 306 are not authorized, and the use of the word “standard” precludes any variation.

### SUMMARY OF THE ACT

In order to understand the history of the case and the court’s decision, it will be necessary to consider the Act briefly. It authorized a series of steps aimed at eliminating all discharges of pollutants into the nation’s waterways by 1985.<sup>2</sup>

Section 304, the information and guidelines section, directs the Administrator of the EPA (the Administrator) to develop and publish certain data. These data were to provide guidance in carrying out responsibilities imposed by other sections of the Act. Within certain

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1. All citations in text are to the section numbers of the session law, Federal Water Pollution Control Act Amendments of 1972. Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. § 1251 *et seq.* (Supp. II 1972)).

2. *Id.* at § 101(a)(1).

intervals after the date of enactment, the Administrator was to promulgate guidelines to assist the States in carrying out permit programs pursuant to § 402.<sup>3</sup> Within a subsequent interval, he was to have ready information used in formulating new plant standards pursuant to § 306.<sup>4</sup> Within one year he was to publish regulations providing guidance for effluent limitations on existing point sources.<sup>5</sup> Within the same time limit the Administrator was also to develop and publish criteria for the most up to date water quality, as well as technical information on factors necessary to restore and maintain that quality.<sup>6</sup>

Section 301 is the effluent limitation section. It makes discharge of any pollutant unlawful unless the discharge complies with certain sections of the Act, among them §§ 301, 306, and 402.

Section 402 authorizes the Administrator to issue permits to individual point sources and to review and approve plans of States that want to administer their own permit programs.

Section 306 requires the Administrator to publish, within ninety days, a list of categories of sources discharging pollutants and to publish, within one year thereafter, regulations establishing national standards of performance for new sources within each category. There is no provision in this section for exceptions from the standards for individual plants.

Section 301 defines the effluent limitations to be achieved by existing point sources in two stages. By July 1, 1977, the best "practicable" control technology currently available is required; by July 1, 1983, the best "available" technology economically achievable is specified. The 1983 limitations are expressly applicable to "categories and classes of point sources"; the 1977 limitations do not contain those words. The person or agency responsible for setting the § 301 effluent limitations and their relationship to § 304 guidelines and § 402 permits are not specified.

The Administrator found he was unable to meet the various deadlines imposed. He thus failed to adopt § 304 guidelines before defining the effluent limitations for existing sources described in § 301(b) or the national standards for new sources described in § 306.<sup>7</sup> The regulations divided the industry into twenty-two subcategories and set, within each subcategory, precise numerical limits for various

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3. *Id.* at §§ 304(h), (f), and (g).

4. *Id.* at § 304(c).

5. *Id.* at § 304(b).

6. *Id.* at § 304(a).

7. Failure to meet the deadlines brought a judicially imposed timetable for the Administrator. *National Resources Defense Council, Inc. v. Train*, \_\_\_\_ U.S. App. \_\_\_\_, 510 F.2d 694 (1975).

pollutants. Each subcategory contains a variance clause, applicable to the 1977 limitations only.

#### LOWER COURT DECISIONS CONSTRUING THE ACT

The circuit court cases construing the relevant portions of the Act have come to various inconsistent conclusions. The case most inconsistent with the Supreme Court's decision is *CPC International, Inc. v. Train*.<sup>8</sup> In that case, the Eighth Circuit found, *inter alia*, that limitation guidelines promulgated by the Administrator are reviewable by federal district courts and not courts of appeals, that the Administrator does not have the power to promulgate effluent limitation regulations under § 301, and that individual permit issuers are to establish effluent limitations based on § 304(b) guidelines.

The Tenth Circuit, in *American Petroleum Institute v. EPA*,<sup>9</sup> and the Fourth Circuit, in *DuPont v. EPA*,<sup>10</sup> deviate from the Supreme Court's holding only in that they found the Administrator's regulations to be only presumptively valid as applied to individual point sources. The Supreme Court, in finding that the Administrator's regulatory power applies to classes and categories and that new source regulations were absolute prohibitions, impliedly overruled *American Petroleum Institute* and *DuPont II*. Apparently, individual permit applicants must do more than simply rebut the presumption that the regulations are valid. Unfortunately, the Court failed to decide expressly the question of presumptive validity. As a result, the question may arise in subsequent litigation.

The Seventh Circuit, in *American Meat Institute v. EPA*,<sup>11</sup> the Third Circuit, in *American Iron and Steel Institute v. EPA*,<sup>12</sup> and the District Court for the District of Columbia, in *American Paper Institute v. Train*,<sup>13</sup> are basically in accord with the Supreme Court's decision. The Seventh Circuit expressly found that the Administrator has the power to promulgate regulations for effluent limitations. The circuit court did indicate, however, that in reviewing those regulations the court would not rewrite them but simply determine whether they were the result of reasoned decision making. This test sounds like the presumptively valid standard but is different because the court here established a standard for determining validity.

The Third Circuit, in evaluating effluent limitations for point

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

9. 540 F.2d 1023 (10th Cir. 1976).

10. 541 F.2d 1018 (4th Cir. 1976). This case is known as *DuPont II*.

11. 526 F.2d 442 (7th Cir. 1975).

12. 526 F.2d 1027 (3rd Cir. 1975).

13. 381 F. Supp. 553 (D.D.C. 1974).

sources established for the iron and steel industry, found that sufficient flexibility was not provided where the Administrator failed to specify permissible ranges of limitations. The court remanded the regulations for reconsideration. The standard of evaluation of the court was not expressed; therefore, it is difficult to determine whether the court used the "reasoned decision making standard" used in *American Iron and Steel Institute v. EPA*. Because this issue was not decided by the Supreme Court, courts in the future will have to determine the applicable standard for evaluating effluent limitation regulations. In any event, the court did hold that the Administrator does have power to promulgate industry-wide effluent limitation regulations.

The District Court for the District of Columbia considered only the jurisdictional issue and, like the Supreme Court, found that the courts of appeals have exclusive jurisdiction for reviewing actions of the Administrator taken pursuant to the Act.

### HISTORY OF THE CASE

#### *DuPont I*

In 1974 E. I. DuPont DeNemours & Co. and seven other chemical companies brought an action in the United States District Court, Western District of Virginia, for declaratory and injunctive relief against the Administrator, Russell Train.

The court was asked to consider the following issues: 1) Did the EPA Administrator have authority, under § 301(b), to issue regulations establishing effluent limitations for sulfuric acid plants? 2) Did these regulations conform to § 304, as well as to the notice and public participation provisions of the Administrative Procedure Act (APA)? 3) Did the district court have subject matter jurisdiction over these matters?

DuPont argued that the regulations were intended to be guidelines only, not rules applicable across the board to all plans in a given category, and that these guidelines would help the agency granting the permit to determine the amount of effluent limitations that each individual plan could attain. The Administrator contended that the intent of the Act was that the Administrator promulgate actual effluent limitations, which would be uniformly valid and applied in the issuance of permits under § 402.

DuPont further argued that § 304(b) required the guidelines to be published in two parts: the 1977 requirements and the 1983 ones. In addition, the factors that were to be taken into account in determining the control measures applicable in order to obtain those goals

were to be specified. Such regulations as were promulgated for the sulfuric acid plants did not discuss the statutory factors and therefore provided no guidance to the permit granting authority. This, they argued, was contrary to the congressional intent to "recognize, preserve, and protect the primary responsibilities and rights of the States . . ." <sup>14</sup>

In addition, DuPont argued that since § 509(b) provided only for review of EPA actions under §§ 301, 302, 306, 307, and 402, review of other regulatory actions by the EPA would be under the APA and through other jurisdictional statutes, and that, therefore, the district court was the proper forum. Since the Administrator viewed the regulations as effluent limitations, jurisdiction to review them would be, under § 501(b)(1)(E), exclusively in the court of appeals.

The court came to the following conclusions: 1) The sections of the Act, considered as a whole, authorized the Administrator to promulgate § 301(b) effluent limitations, apart from § 402 permit proceedings; the requirements, insofar as structure and content were concerned, of the regulations, under § 304(b), were satisfied; 2) The court of appeals had exclusive jurisdiction of the substance of the limitations and the procedures utilized in establishing them under § 509(b); for that reason, the court declined to decide the claim of plaintiffs that the notice and public participation requirements of the APA were not met, though the court did indicate it found the allegations somewhat dubious.

This decision was appealed to the United States Court of Appeals for the Fourth Circuit.<sup>15</sup> The only issue presented to the appellate court was whether the district court had the jurisdiction to review effluent limitations regulations issued by the Administrator.

The Administrator argued that he combined his rulemaking authority granted under § 301(b) with the authority provided under § 304(b) in order to get the regulations challenged. Since § 509 states that actions of the Administrator under § 301 are directly reviewed by courts of appeals, the district court acted correctly in dismissing the complaint for lack of jurisdiction. DuPont contended again that what the Administrator had issued were only guidelines and that therefore he had no authority to issue effluent limitation regulations under § 301. It was merely a statement of the statutory objectives to be attained, while § 304 specified how they were to be attained. Therefore, the regulations were issued under § 304(b), not

14. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 101(b), 86 Stat. 816 (1972).

15. 528 F.2d 1136 (4th Cir. 1975).

under § 301, nor under a combination of §§ 301 and 304. From this it follows that review in the courts of appeals is not provided for in § 509(b)(1). (It provides for review only of actions under §§ 301, 302, 306, 307, and 402, not § 304.)

The court considered decisions on the question of jurisdiction in the various circuits, most of which felt the decision of the jurisdictional issue were intertwined with that of EPA's authority under § 301. This court politely disagreed. It considered legislative history and congressional intent, and concluded that, if DuPont were correct, since § 509(b)(1)(E) provided for review of the Administrator's actions under §§ 301, 302, and 306, and since § 301 dealt with existing sources and § 306, with new sources, one would end up with a bifurcated review of regulations, depending on whether they were governing existing or new sources. This, the court concluded, could not have been what Congress meant to do. It therefore found it had exclusive jurisdiction to hear any actions taken pursuant to § 301. The district court's judgment that it lacked jurisdiction was affirmed.

### *DuPont II*

Several months later, DuPont and various other chemical companies filed petitions for review of various regulations promulgated by the EPA Administrator under the Act.<sup>16</sup> Suit was brought in the United States Court of Appeals for the Fourth Circuit.

After a background description of the Act, the court pointed out that under § 304 the Administrator was to publish criteria for water quality accurately reflecting the latest scientific knowledge on various subjects. This was to be done within one year of enactment of the Act.<sup>17</sup> The Administrator, faced with an unrealistic timetable, failed to act within the one-year period. He did, sometime thereafter, promulgate effluent limitation guidelines for existing sources and standards of performance for new sources in the inorganic chemicals manufacturing category of point sources, acting pursuant to §§ 301, 304(b) and (c), 306(b) and (c), and 307(c). Section 307 was not at issue. Other regulations were attacked both generally and specifically.

In an opinion filled with very strong criticism of the draftsmanship of the Act,<sup>18</sup> the court held that the Administrator had the author-

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16. 541 F.2d 1018 (4th Cir. 1976).

17. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 304(a)(1), 86 Stat. 884 (1972).

18. "The conflict among the circuits emphasizes the confusion caused by this poorly drafted and astonishingly imprecise statute." 541 F.2d 1018, 1026 (1976). "... [I]t is

ity to promulgate regulations establishing limitations for existing sources; regulations were presumptively applicable to permit applications, and unless the presumption were rebutted, such regulation would control. The court found that the EPA, in general, satisfied the procedural requirements of the statute. In addition, the court decided that review of regulations establishing 1983 limitations were to be confined to a determination of whether the record showed a reasonable basis for believing that the new technology would be both available and economically achievable. Also, certain regulations, most of them specific and technical in nature, had to be set aside and remanded for reconsideration.

### THE SUPREME COURT DECISION

The Supreme Court's decision focused on resolving the ambiguity in § 301, which was the source of the conflict between EPA and DuPont. As the Court noted, § 301 was ambiguous in three ways.

First, the section was unclear as to who would establish the effluent limitations. The statute merely states effluent limitations ". . . shall be achieved . . ." <sup>19</sup> It makes no reference as to who will set the limitations. Seizing this ambiguity created by the drafters' use of the passive voice, DuPont argued that these limitations were not to be established by the EPA. Instead, DuPont argued, the § 301 limitations were to be set by the permit issuer. The permit issuer, in determining the limitations, was to look to the § 304 guidelines.<sup>20</sup> By looking at the entire Act, the Court concluded that the power to establish effluent limitations was in the Administrator. The Court noted that § 304(b) authorized the Administrator to issue guideline regulations and that § 509(b)(1), the section providing for judicial review of the Administrator's actions, expressly mentioned the Administrator's approving or promulgating effluent limitations under § 301.

Next, § 301 was ambiguous concerning the form of the effluent limitations. For 1977, § 301(b)(1)(A) mentioned only effluent limitations for point sources. For 1983, § 301(b)(2)(A) spoke of

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enough to say that the Act is vague, uncertain, and inconsistent. . . Legislative history is of little help. In it, statements can be found to uphold almost any position one cares to take." *Id.* at 1027.

19. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 301(b), 86 Stat. 844 (1972).

20. Under § 402(a)(5), the Administrator has the power to authorize individual states to administer their own permit programs. Because of this section, DuPont was arguing that the permit issuer, not EPA, was to establish § 301 effluent limitations. In addition, § 402(a)(1) allowed for a public hearing before the permit was issued. The Court found that the holding of the public hearing was discretionary and not mandatory.



limitations for categories and classes of point sources. Because of the seeming difference in the language of the provision, DuPont argued that at least for 1977 limitations effluent permits were supposed to be issued on an individualized basis and that limitations were, therefore, to be based on the characteristics of the individual point sources. This argument bolstered DuPont's contention that permit issuers were to determine the limitations and not EPA. In response to DuPont's construction of the statute, the Court looked to the legislative history and found that the Conference Report presented by Senator Muskie made it clear that the Administrator was not required to take this individualized approach.

Lastly, § 301 was unclear whether effluent limitations were to take the form of regulations promulgated by the Administrator. Because § 301 was silent, DuPont again argued that the individual permit issuers were to determine effluent limitations. Under this interpretation the Administrator would be precluded from promulgating general regulations for classes and categories. The Court, however, looked to the practical necessities of the Act and determined that because, as it had already found, limitations were to be based on classes and categories, such class-wide determinations would necessarily be governed by regulations. In addition, § 501(a) empowered the Administrator to make such regulations as necessary to carry out the purposes of the Act.

By resolving, through sensible statutory construction, the apparent conflict between § 301 and other provisions of the Act, the Court successfully disposed of the other issues raised by DuPont. The Court found that § 304(b), which directs the Administrator to establish general guidelines for effluent limitations, was to serve as a springboard from which the Administrator was to establish regulatory limitations under § 301. DuPont had contended that § 304(b) was the sole source of the Administrator's power for ascertaining effluent limitations. And since § 304(b) expressly authorized the Administrator to establish guidelines only, DuPont contended that the Administrator's power was limited to establishing guidelines. The Court, however, concluded that § 304(b) was to serve the salutary function of providing the Administrator with a forum in which to ascertain sensible guidelines that were later to aid him in promulgating § 301 regulations.

This construction of § 304(b) also resolves the jurisdictional issue raised by DuPont. DuPont had argued that § 509(b)(1), the section that gives the federal courts of appeals exclusive jurisdiction to review the Administrator's actions, because it did not mention EPA

actions taken under § 304(b), required it to seek review in the federal district court under the APA. The Supreme Court found, however, that the actions challenged by DuPont arose out of § 304(b) only through § 301, the section intended to reflect the § 304(b) guidelines. In support of its conclusion, the Court noted that bifurcated review would produce the anomalous result of allowing the court of appeals to review individual cases arising out of § 402 permit issuing, but not review of the general guidelines that directly determined the granting or denial of those permits.

The last issue determined by the Court dealt with the question of whether § 306(b)(1)(B), the section dealing with regulations for new point sources, required a variance procedure. The court of appeals, in *DuPont II*, determined that a variance procedure, although not mentioned in the provision, was appropriate to the regulatory process. The Supreme Court found that holding to be judicial legislation. The Court determined that Congress intended the Administrator's new source regulations to be absolute prohibitions. The Court also noted that § 301(c) allowed no variance procedure for existing point sources after 1983. The Court concluded that such a variance procedure was not part of the Congressional intent of the Act.

#### CONCLUSION

Generally, then, the Supreme Court's decision settles the principal areas of dispute, i.e., whether the Administrator has the power to promulgate effluent limitation regulations and whether the courts of appeals have exclusive jurisdiction for review of such regulations.

The clarity of the Court's decision will certainly aid the Administrator in enforcing the provisions of the Act. Unfortunately, the Court failed to decide the question of presumptive validity and the standard of review. The question of presumptive validity, when it arises in subsequent litigation, can be handled by applying the Court's holding that new source regulations are absolute prohibitions. However, the question of the standard of review remains open.

In general, the Court's conclusions and lucid construction of the Act should provide the Administrator with the power necessary to establish effective water pollution regulations.

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