



Winter 1977

Federal Water Pollution Control Act - Technological and Economic Feasibility

Susan Wayland

Recommended Citation

Susan Wayland, *Federal Water Pollution Control Act - Technological and Economic Feasibility*, 17 Nat. Resources J. 145 (1977).

Available at: <https://digitalrepository.unm.edu/nrj/vol17/iss1/10>

This Recent Developments 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, lsloane@salud.unm.edu, sarahrk@unm.edu.

FEDERAL WATER POLLUTION CONTROL ACT— TECHNOLOGICAL AND ECONOMIC FEASIBILITY

1977 effluent limitations set by EPA must be based on evidence that the particular industry can achieve the levels of reduction so required by use of the designated technology whereas 1983 effluent limitations need not be based on a presently demonstrated technology. *Tanners' Council v. Train*, 8 ERC 1881 (4th Cir. 1976).

The Tanners' Council of America, a trade association for the leather tanning and finishing industry, brought an action to set aside regulations establishing "effluent limitations guidelines" and "Standards of performance" for the Leather Tanning and Finishing Industry Point Source Category. The regulations were issued by the Administrator of the Environmental Protection Agency (hereafter "EPA") on April 9, 1974¹ under authority of the Federal Water Pollution Control Act, as amended² (hereafter "the Act").

The regulations set discharge limitations for both new³ and existing sources. The amount of pollution discharge permitted by existing plants is divided into 1977 limitations and 1983 limitations. The 1977 and new source regulations set a single-number effluent limitation for 5 pollution parameters:

- (a) 5 day biological oxygen demand: (BOD₅)⁴
- (b) total suspended solids: (TSS)⁵
- (c) chrome
- (d) oil and grease
- (e) pH⁶

For existing sources, 1983 limitations were set for those same 5 pollution parameters and also for sulfide: total kjeldahl nitrogen

1. 39 Fed. Reg. 12958, *et seq.*, 40 C.F.R. Part 425. 33 U.S.C. § 1251, *et. seq.* (Supp. 1975), § § 301, 304, 306, 307, 316, and 402.

2. 33 U.S.C. § 1251, *et. seq.* (Supp. 1975).

3. New sources are those plants on which construction is commenced after publication of the proposed regulations.

4. A measure of the oxygen-consuming capabilities of the organic matter in the waste water measured over a 5-day period.

5. Particles of organic and inorganic matter suspended in the waste water.

6. An expression of the concentration of hydrogen ions. At a pH of 7, the water is neutral. If the pH value is below 7, the water would be acid; if it is above 7, it would be alkaline.

(TKN),⁷ and fecal coliform.⁸

The Act specifies that in establishing 1977 effluent limitations for existing sources, one must apply "the best practical control technology currently available" (BPCT-CA),⁹ and that the Administrator must consider:

- (1) The total cost of applying the technology balanced against the effluent benefits which would be achieved by that application;
- (2) the age of equipment and facilities involved;
- (3) the processes used;
- (4) the engineering aspects of the control techniques;
- (5) process changes;
- (6) non-water quality environmental impact (including energy requirements).¹⁰

BPCT-CA standards should be established on the basis of the best average performance of the best existing plants in the subcategory, but the results achieved by plants in other industries may be used if the level of achievement in a subcategory is uniformly inadequate.¹¹ Looking outside an industry for BPCT-CA standards is permissible only if the Administrator determines the technology to achieve the higher levels can be applied to that industry.¹² Before the EPA can make such a determination, it must 1) show the transfer technology is available outside the industry; 2) determine the technique can be transferred; 3) make a reasonable prediction that the technology will allow the industry to meet the new standards.¹³

EPA found there were no exemplary plants in the tannery industry. Because of this, technology and performance data from the meat packing industries were used as the standard. However, the EPA recognized the waste loads in the two industries are sufficiently dissimilar to necessitate modifying the 1977 standards to permit a higher level of effluent concentration in the tanning industry.

The Tanners' Council contended that EPA erred in determining that waste treatment technology in all tanneries was inadequate. This position was supported by the reports of the New York State Depart-

7. Ammonia nitrogen + the organic nitrogen content in waste water. TKN indicates the major nitrogen impact on the waste treatment plant or receiving stream.

8. These are bacteria which originate in the intestines of warm-blooded animals. If they are present in waste water, then one may be sure that both pathogenic viruses and bacteria are also there. Salmonella is a well-known example of such a bacterium.

9. 33 U.S.C. § 1251, *et. seq.* (Supp. 1975), § 301(b)(1)(A).

10. 33 U.S.C. § 1251, *et. seq.* (Supp. 1975), § 304(b)(1)(B).

11. S. Rep. No. 92-414, 92d. Cong., 1st Sess. (1971), *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 1468 (Jan. 1973).

12. *Ibid.*

13. *CPC International, Inc. v. Train*, 515 F.2d 1032, 1048 (8th Cir. 1975) (7ERC 1207).

ment of Environmental Conservation and the Effluent Standards and Water Quality Information Advisory Committee, both of which contended that several tannery plants, given the wastewater from the particular processes and products, had achieved the lowest effluent levels possible.¹⁴

The court felt that any test of adequacy was a judgmental one and should be left in the hands of the agency as discretionary. However, the agency is required to establish that 1977 standards can be met by applying the BPCT-CA to the industry. Since no proof was found in the record of this, the court concluded that this lack of scientific data and other demonstrative evidence required a remand of the regulations to the EPA to establish by evidence in the record that the 1977 limitations could be achieved by use of the designated technology.

The court recommended that on remand the EPA reconsider its decision not to make allowance for temperature in light of the strong evidence in the record. Cold water slows down biodegradability of the wastes in the lagoons; in addition, there are higher waste loads in the winter, because hides contain more hair then.

The court next considered the new source standards. The court found them to be identical to the standards for existing sources for 1977, and found that they had not been independently established. Thus, since the court set aside the 1977 standards, it felt consistency required that the new source standards be set aside and remanded to the Administrator for reconsideration.

Finally, the court considered the 1983 limitations. The Act provides¹⁵ that effluent limitations for existing sources to be employed by July 1, 1983, should be "the best available technology economically available (BATEA)." The Tanners' Council contended that EPA ignored the requirement that the technology be presently available, construing the requirement of availability to mean technology demonstrated in a pilot plant. The court disagreed. It said that while the technology must be in use to serve as a standard for the 1977 and new source regulations, the lack of the words "currently" and "demonstrated" in Section 301(b)(2)(A) permits the Agency to assess technologies not yet applied if there is a reasonable basis to believe the technology will be available by 1983.

In promulgating the 1983 limitations, the Administrator is required to publish such regulations within one year of the passage of the Act¹⁶ and to revise them periodically. Though the BATEA

14. *Tanners' Council v. Train*, 8 ERC 1881, 1883 (4th Cir. 1976).

15. 33 U.S.C. § 1251, *et. seq.* (Supp. 1975), § 301(b)(2)(A).

16. *Id.*, § 304(b).

limitations are only tentative, if they are set out now, the industry has the maximum time to meet them. The court refused to set them aside but said that a showing that the designated technology is effective in abating tannery wastes, and is capable of achieving the reduction levels would be required prior to 1983.

In summary, the court set aside and remanded for reconsideration the effluent limitations guidelines for 1977 and for new source standards, because the limitations were not supported by evidence that the BCTP-CA could be successfully applied to the industry. It left in force the effluent limitations guidelines for 1983, even though not supported by a demonstrated technology, with the caveat that EPA has an obligation to revise these guidelines if the chosen technology proves to be unavailable as the 1983 deadline approaches.

This is one of the first of the cases dealing with the Federal Water Pollution Control Act in which the court got past the question of jurisdiction and into the merits of the case.¹⁷ I feel the court was eminently reasonable in setting the standards it did; it even engaged in technology forcing, albeit in the future. This case should provide useful guidelines for other courts dealing with similar problems.

SUSAN WAYLAND

17. § 509(b)(1) provides that review of the regulations lies in the United States Court of Appeals.