



10-1976

## E.I. du Pont de Nemours Co. v. Train

Lewis F. Powell Jr.

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*dey*

May 6, 1976

No. 75-978 E.I. duPont v. Train

Dear Chief:

I "passed" when we considered the cert petition in the above case, as I thought there was a possibility of a Hunton & Williams client being involved.

It now appears that Hunton & Williams has some participation in the case. Accordingly, I should be marked "out" from now on.

Sincerely,

The Chief Justice

lfp/ss

cc: Mr. Michael Rodak, Jr.

MEMORANDUM TO FILESNo. 75-978 E.I. duPONT de NEMOURS v. TRAIN

also No. 75-1473 DuPont v. Train  
75-1705 Train v. DuPont  
75-1602 DuPont v. EPA  
75-1612 Ethyl v. EPA  
75-1613 Nalco Chemical Co. v. EPA  
75-1614 National Petroleum Refiners v. EPA

I talked with Joe Carter about the above cases, and he informs me that Hunton & Williams is not implicated in any way so far as he knows. He did agree to check with George Freeman who has been doing some "water pollution" work. Unless he advises to the contrary, however, he knows of no interest of my former law firm.

The one possibly complication is the presence in these cases, as a party, of Allied Chemical Company. At the time I left Hunton, Williams, Allied was not a regular client and Joe Carter tells me that even today it is not a retained client. But Hunton, Williams has done work for Allied on a case by case basis over a long period of time, and presently represents Allied in the Kepone extensive litigation.

I may stay out of these cases for the time-being and decide later whether to participate when they come on for argument next Fall.

L.F.P., Jr.

*George  
called on  
6/10/76*

Holds in full  
with Gov. Truman  
6/10

CA4 agreed with  
H-W - allowed  
flexibility.

If we get over  
prior. issue,  
one of substantial  
issues in a  
generic issue  
pending before  
CA 4 & (H-W)  
is involved )  
Issue arose since  
I left firm (1972)

Document #  
1st Case

Dupont  
Add  
substantive  
- 9 etc  
Grantor  
must of  
specific  
SG  
& subs  
as issue  
H-W  
brief in  
not in 2

Supreme Court of the United States

Memorandum

....., 19.....

Notes on talk  
with Gen. Trueman  
6/10

Document #1

1st case - no  
involvement

Document #2

Adviser

substantive issue

- effect the

Grantor of Permit

must give to

specifications of EPA

SG viewed generic

& substantive issue

as inseparably issued

H-W pled Amicus

brief in CA 4 - but

not in this Ct

CA 4 agreed with  
H-W - allowed  
flexibility.

If we get over  
generic issue,  
one of substantial  
issues in a  
generic issue

pending before

CA 4 & (H-W)

is involved

issues are

Deport #1

1<sup>st</sup> Case - no  
involvement

Deport #2

Address

substantive issue

- Q effect Her

Grantor of Permit

must give to

specifications of EPA.

SG viewed permit

& substantive issue

as inseparably issued

H-W filed Amicus

brief in CA 4 - but

not in this Ct

CA4 agreed with  
H-W - allowed  
flexibility.

If we get over  
prev. issue,  
one of substantial  
issues in a  
generic issue  
pending before  
CA 4 & (H-W)  
(involved)  
Issues arise since  
I left firm (1972)



Phil - I like the  
paper & also the  
Cert ~~to~~ memo in  
75-978

Probably  
Grant both  
cases &  
consolidate

Presented Qs under the  
Water Pollution Control Act, including  
whether EPA has authority to issue  
regulations or merely guidelines.

Preliminary Memo

June 10, 1976 Conference  
List 1, Sheet 3

No. 75-1473

E.I. duPONT  
de NEMOURS  
& CO.

Timely

v.

Cert to CA 4  
(Rives [CA 5],  
Breitenstein  
[CA 10] & Widener)  
Federal/Civil

TRAIN [EPA  
Administrator]

No. 75-1705

TRAIN [EPA  
Administrator]

Timely

v.

Cert to CA 4  
(Rives [CA 5],  
Breitenstein  
[CA 10] & Widener)  
Federal/Civil

E.I. duPONT  
de NEMOURS  
& CO.

[NOTE: This petn and cross-petn are straight-lined  
for consideration by the Conference on List 1, Sheet 3 (June 10,  
1976 Conference), with Nos. 75-1602, 75-1612, 75-1613, 75-1614.  
This designation is in error, as the Clerk's Office now confesses;  
there is absolutely no relation whatsoever between the judgments  
involved in the instant petns and those in Nos. 75-1602, et al.]

Grant both &  
consolidate w/  
No. 75-978.

Phil

Granted

1. SUMMARY: This case presents a companion issue to that in No. 75-978, du Pont v. Train, cert. granted, April 19, 1976: what are the nature and limitations on the authority of resp Administrator of the Environmental Protection Agency for promulgating regulations governing effluent discharges from new sources under the Federal Water Pollution Control Act (as amended 1972)? du Pont I, No. 75-978, raised the identical question with respect to existing sources.

2. FACTS & PROCEEDINGS BELOW: The regulatory scheme in issue is described in detail in the Preliminary Memo for No. 75-978. The petition and cross-petition here involve a companion case to No. 75-978 decided by the same panel of CA 4. The petitions here seek review of CA 4's decision to set aside the regulations promulgated by resp for both existing and new sources. In essence, the court held that the regulations for both sources are "presumptively applicable," but that any source may rebut the presumption as it applies to that particular plant.

3. CONTENTIONS:

a. Petr du Pont presents for review the same questions raised in No. 75-978: whether the District Courts or Courts of Appeals have jurisdiction under the Act to review regulations promulgated by resp governing wastewater effluent discharges from existing plants, and whether those regulations are to be "effluent limitations" or merely "guidelines for effluent limitations" under the Act. Petr rehearses the arguments made in No. 75-978.

Q → {

b. Resp and cross-petr SG challenges "only that portion of the decision which holds that new source standards to be 'presumptively applicable' and requires a variance clause for new sources." SG Memorandum, at 8. The SG urges granting of this petition and his cross-petition for consolidation with No. 75-978 so as to place before the Court both the jurisdictional questions and the merits respecting both existing and new sources; petr du Pont has also moved for consolidation with No. 75-978. SG contends that the legislative history of the 1972 additions to the FWPCA do not support CA 4's "presumptively applicable" standard, nor its holding that variances from regulations must be granted for new sources.

4. DISCUSSION: Strictly speaking, CA 4's decision in No. 75-978 reached only the question of jurisdiction. (However, as the SG pointed out in his memo in that case, the court had to decide whether the EPA administrator's authority was to issue regulations or merely guidelines.) This case squarely presents the merits, not only with respect to existing sources but also to new sources. A grant of both the petition and cross-petition here, and consolidation with No. 75-978, would give the Court a complete record on which to consider the jurisdictional question and the question of the extent of the EPA's authority for all types of sources subject to regulation under the Act.

There are responses.

6/2/76

Hutchinson

Opinion in Petn.  
No. 75-1473

ME

Preliminary Memo

June 10, 1976 Conference  
List 1, Sheet 3

No. 75-1705

TRAIN [EPA  
Administrator]

Timely

v.

E.I. duPONT  
de NEMOURS  
& CO.

Cert to CA 4  
(Rives [CA 5],  
Breitenstein  
[CA 10] & Widener)  
Federal/Civil

This petition is a cross-petition for No. 75-1473,  
to which the reader is directed.

There is a response.

6/2/76

Hutchinson

Opinion in  
petition.  
No. 75-1473

ME

*Grant &  
consolidate w/  
75-978.  
Phil*

Court .....  
 Argued ....., 19...  
 Submitted ....., 19...

Voted on ....., 19...  
 Assigned ....., 19...  
 Announced ....., 19...

No. 75-1705

*Train*

vs.

*E.I. duPont de Nemours & Co*

*Relect  
for  
White*

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....													
Stevens, J. ....													
Rehnquist, J. ....													
Powell, J. ....													
Blackmun, J. ....													
Marshall, J. ....													
White, J. ....													
Stewart, J. ....													
Brennan, J. ....													
Burger, Ch. J. ....													

*Passed*

CONFERENCE 6-10-76

Court CA - 4  
Argued ..... 19...  
Submitted ..... 19...

Voted on....., 19...  
Assigned ..... 19...  
Announced ..... 19...

No. 75-1473

75-1705

E. I. duPONT de NEMOURS & COMPANY, ET AL., Petitioners

vs.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

4/13/76 - Cert.

9 ee Pass

Grant  
&  
Set with  
75-978

(Reinstated  
for White)

HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
	G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....												
Stevens, J. ....												
Rehnquist, J. ....												
Powell, J. ....												
Blackmun, J. ....												
Marshall, J. ....												
White, J. ....												
Stewart, J. ....												
Brennan, J. ....												
Burger, Ch. J. ....												

Pass (9)

explained that H.W. may be implicated

Grant + set with 75-978







Out

GRANT

King

November 12, 1976 Conference  
List 3, Sheet 3

No. 75-978

E. I. duPONT de NEMOURS  
AND CO.

v.

TRAIN

No. 75-1473

E. I. duPONT de NEMOURS  
AND CO.

v.

TRAIN

No. 75-1705

TRAIN

v.

E. I. duPONT de NEMOURS  
AND CO.

Joint Motion to Consolidate  
for Oral Argument

You  
are  
out  
gem

The Court granted cert to CA 4 in these cases to consider the authority of EPA to issue regulations governing affluent discharges under the Federal Water Pollution Control Act and whether primary jurisdiction to review the regulations as they apply to existing sources lies in the USDC or in the CA. The petition and cross-petition, 75-1473 and 75-1705, were granted June 21 and ordered consolidated and set in tandem with 75-978 which was granted April 19. No. 75-978 raises the primary jurisdiction question.

The SG and counsel for duPont explain that the judgment under review in 75-978 resulted from the filing by some of the companies for review of existing source regulations in the USDC and simply affirmed the USDC's dismissal of the complaint on the primary jurisdiction question. They correctly advise that the same jurisdictional question was considered by the CA along with the substantive issues in 75-1473 and 75-1705 which petition and cross-petition bring up for review CA 4's judgment on primary review of the validity of EPA's regulations of both existing and new sources. The parties urge that Federal Water Pollution Control Act is a lengthy, complex and highly technical statute and that based upon their experience in preparing the briefs, the questions involved can be most effectively and understandably argued, and considered by the Court, in a consolidated presentation. They also ask one hour per side for oral argument of the consolidated proceedings.

DISCUSSION: Consolidation is usually ordered only where the separate petitions involve the same judgment. But, that would not appear to be an inflexible rule and I know of no technical or substantive reasons why exceptions cannot be granted. [For example, Rule 23(5) permits counsel to file a single cert petition "[w]here several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions." This is, in effect, a con-

solidation.] On the merits, the parties' reasons appear persuasive.

Since the "cases" are already scheduled for a total of two hours of argument, allowing one hour per side for argument if they are consolidated does not involve any additional time.

This is a joint motion.

11/10/76

Ginty

No ops.

PJN



February 10, 1977

No. 75-987 DuPont v. Train

Dear John:

Please show at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice Stevens

lfp/ss

cc: The Conference

THE C. J.

W. J. B.

P. S.

B. R. W.

T. M.

H. A. B.

L. E. P.

W. H. R.

J. P. S.

join JBS  
2/10/77

~~2/11/76~~  
agree  
2/14/77

join JBS  
2/11/77

join JBS  
2/14/77

join JBS  
2/14/77

join JBS  
2/14/77

out  
letter  
2/10/77

join  
JBS  
2/10/77

12/31/76  
1st draft

75-978 DuPont v. Train