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JUDICIAL REVIEW UNDER THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972: WHICH FEDERAL COURT?

The Federal Water Pollution Control Act Amendments of 1972 (the Act)[1] seek to eradicate water pollution through the cooperative interaction of the state and federal governments.[2] Under the program instituted by the Act, Congress changed the focus of pollution abatement from regulating the quality of water to controlling the amount and character of effluents discharged into water.[3] The demarcation, however, between state control and federal authority is vague.[4] Clearly, under § 304(b)[5] of the Act, the Administrator of the Environ-

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[1] 33 U.S.C. §§ 1251 *et seq.* (Supp. IV, 1974), *amending* 33 U.S.C. §§ 1251 *et seq.* (Supp. II, 1972)[hereinafter cited as the Act]. The statutory references will be those found in the Act as set out in the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 *et seq. See generally,* Linn, *Deficiencies in the Regulatory Scheme of the Federal Water Pollution Control Act Amendments of 1972,* 19 St. Louis U.L.J. 208 (1974); Comment, *The Federal Water Pollution Control Act Amendments of 1972,* 14 B.C. Ind. & Com. L. Rev. 672 (1973); Comment, *The Federal Water Pollution Control Act Amendments of 1972: Effective Controls At Last?,* 39 Brook. L. Rev. 403 (1972).

[2] To what extent the Act promotes federalism is unclear. One of the policies of the Act is the recognition of "the primary responsibilities and rights" of the states to combat pollution, § 101(b), 33 U.S.C. § 2151(b)(Supp. IV, 1974), but the precise roles of the states and the federal government in sharing the duties of enforcement are but vaguely indicated. The Act, however, has been viewed as an attempt to establish federal control over the abatement of water pollution because of dissatisfaction with the efforts of the states. Smith, *Highlights of the Federal Water Pollution Control Act of 1972,* 77 Dick. L. Rev. 459, 462 n.7 (1973); *see* Library of Congress, Environmental Policy Division, *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong. 1st Sess. at 1422 (Comm. Print 1973)[hereinafter cited as *Leg. Hist.*]; 1 F. Grad, Treatise on Environmental Law § 3.03 at 3-58 to 3-59 (1975). Conversely, the policies have been described as perhaps promising a "creative federalism." McThenia, *An Examination of the Federal Water Pollution Control Act of 1972,* 30 Wash. & Lee L. Rev. 195, 219 (1973).

[3] *See, e.g., Leg. Hist., supra* note 2 at 1425; Ipsen & Raisch, *Enforcement under the Federal Water Pollution Control Act Amendments of 1972,* 9 Land & Water L. Rev. 369, 375 (1975). "Effluents," it can be inferred from the definition of effluent limitations, *see* note 6 *infra,* are chemical, physical, biological, and other constitutents which are discharged from point sources into water.

[4] *See* note 2 *supra.*

[5] Section 304(b) provides in pertinent part:

> For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines

mental Protection Agency (EPA) may issue guidelines[6] which serve as suggestions for the subsequent promulgation of binding limitations on the effluent discharge from existing plants.[7] But is is unclear whether the state or the federal government is to undertake the next step of enacting the specific limitations for which § 304(b) provides advisory guidelines. Section 301[8] of the Act authorizes these specific

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> for effluent limitations, and at least annually thereafter, revise, if appropriate, such regulations.

§ 304(b), 33 U.S.C. § 1314(b)(Supp. IV, 1974).

[6] "Guidelines" are not expressly defined in the Act but are normally considered to be more advisory in nature than concrete effluent limitations, which are restrictions, including compliance schedules, established by the EPA Administrator or by a state on the amounts, rates, and concentrations of chemical, physical, or biological constitutents discharged from point sources, *see* notes 7 and 8, *infra,* into water, § 502(11), 33 U.S.C. § 1362(11)(Supp. IV, 1974). *See* Davis & Glasser, *The Discharge Permit Program Under the Federal Water Pollution Control Act of 1972—Improvement of Water Quality Through the Regulations of Discharges from Industrial Facilities,* 2 FORDHAM URBAN L.J. 179, 211 & n.196 (1974), *reprinted in* 6 ENVIRONMENT L. REV. 211 (1975). *See also* Brief for Appellant at 32 n.1, E.I. du Pont de Nemours & Co. v. Train, 528 F.2d 136 (4th Cir. 1975), *cert. granted,* 44 U.S.L.W. 3585 (U.S. Apr. 20, 1976)(No. 75-978), in which appellant du Pont suggested that guidelines in other areas of law identify limits of possible action rather than "hard and fast rules," noting, for example, HEW guidelines for school desegregation plans.

[7] Existing plants, more particularly designated as "point sources" which are existing, specific conveyances such as pipes, ditches, or vessels from which effluents are discharged, § 502(14), 33 U.S.C. § 1362(14)(Supp. IV, 1974), are distinguished in the Act from new plants or sources. *Compare* § 301, 33 U.S.C. § 1311 (Supp. IV, 1974), *with* § 306, 33 U.S.C. § 1316 (Supp. IV, 1974).

[8] Section 301(b) provides in pertinent part:

> In order to carry out the objective of this chapter there shall be achieved—
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> (1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b)[§ 304(b)] of this title . . . .
>
> . . . .
>
> (2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class . . . as determined in accordance with regulations issued by the Administrator or pursuant to section 1314(b)(2) [§ 304(b)] . . . .

§ 301(b), 33 U.S.C. § 1311(b)(Supp. IV, 1974). For a discussion of the differences between the 1977 and 1983 standards, *see* Note, *The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device,* 10 HARV. J. LEGIS. 565, 577-87 (1973). *See also* Tanner's Council, Inc. v. Train, No. 74-1740 at 13-14 (4th Cir. Mar. 10, 1976).

effluent limitations, with which industrial dischargers must comply, but the section is written in passive language, and does not indicate to which government it gives authority. Therefore, the EPA may be empowered both to suggest § 304(b) guidelines and to promulgate § 301 binding effluent limitations. Alternatively, the EPA may be restricted to issuing § 304(b) guidelines while the states, under the power of the § 402 permit program,[9] have the authority to use the guidelines to enact § 301 limitations. Under this latter scheme, the EPA would be relegated to reviewing § 301 limitations only as part of its duty to supervise the § 402 state permit program.[10]

Besides being essential to a determination of the scope of federal authority, the question of the Administrator's capacity under § 301 may have to be answered to decide which federal forum, a district court or a court of appeals, has jurisdiction to review the Administrator's actions. Section 509(b)(1)[11] provides that direct judicial review

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[9] Section 302, 33 U.S.C. § 1342 (Supp. IV, 1974), establishes a permit program by which permits for effluent discharge may be issued by the Administration, § 402 (a)(1), 33 U.S.C. § 1342(a)(1) (Supp. IV, 1974), or by a state which has adopted a program approved by the Administrator. § 402(b), 33 U.S.C. § 1342(b) (Supp. IV, 1974). The Administrator retains veto power over objectionable state-issued permits, § 402(d)(2), 33 U.S.C. § 1342(d)(2) (Supp. IV, 1974). *See generally* Bernbom, *The National Permit Program: A Polluter's Bridge Over Troubled Water?* 7 Loy. (Chi.) U. L.J. 1 (1976).

[10] *See* note 9 *supra*.

[11] Section 509(b)(1) provides in pertinent part:

> Review of the Administrator's action . . . , (E) in approving or promulgating any effluent limitation or other limitation under section 1311 [§ 301], 1312 [§ 302], or 1316 [§ 306] of this title, . . . may be had by an 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.

§ 509(b)(1), 33 U.S.C. § 1369(b)(1)(Supp. IV, 1974). The fervor with which challengers of EPA regulations have sought to circumvent this appellate court jurisdiction arises from several practical reasons. First, review at the trial court level is usually protracted. Letter from Ray E. McDevitt, Associate General Counsel, Water Quality Division, EPA, Mar. 4, 1976. Such delay postpones the establishment of binding legal obligations, and even if the district court proceeding is concluded rapidly, review in an appellate court remains available. *Id. See* Brief for Appellee at 40, E.I. du Pont de Nemours & Co. v. Train, 528 F.2d 1136 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3585 (U.S. Apr. 20, 1976)(No. 75-978). Ongoing litigation may not only defer the Act's mandates, but it also allows the challengers to make equitable arguments that time extensions for compliance with the regulations be granted to offset the time spent litigating the legality of the regulations. Letter from Ray E. McDevitt, Associate General Counsel, Water Quality Division, EPA, Mar. 4, 1976. Finally, at the district court level there are many more forums from which a challenger may choose. There are 89 district courts as opposed to 11 circuit courts. C. Wright, Law of Federal Courts §§ 2, 3 at 6, 8 (1970). This increased number also allows a more precise

of the Administrator's approval or promulgation of effluent limitations under § 301 may be had in the court of appeals for the circuit in which the interested party lives or transacts business. Section 304 which, unlike § 301, expressly grants authority to the Administrator, is not included in § 509's provision for judicial review. The § 509 jurisdictional issue thus becomes intertwined with the issue of the Administrator's authority, if any, to promulgate effluent limitations under § 301. If the Administrator publishes regulations and if the regulations are deemed binding effluent limitations promulgated under § 301, they are reviewable in courts of appeals under § 509. If, however, the Administrator's regulations are deemed mere guidelines for state action issued pursuant to the express authority of § 304, they are reviewable only in district courts under general jurisdiction statutes.[12] The Fourth Circuit Court of Appeals, in *E.I. du Pont de Nemours & Co. v. Train,*[13] held that the courts of appeals have exclusive jurisdiction to review EPA regulations under § 509.[14] The court, however, found it unnecessary to its disposition of the jurisdictional issue to ascertain the Administrator's authority under § 301.[15]

In *du Pont,* the Fourth Circuit upheld a district court dismissal[16] for lack of subject matter jurisdiction of a suit by eight chemical

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selection of judges. Letter from Ray E. McDevitt, Associate General Counsel, Water Quality Divison, EPA, Mar. 4, 1976.

[12] Besides the Administrative Procedure Act, *see* note 30 *infra,* the following statutes provide bases of jurisdiction in federal district courts: 28 U.S.C. § 1331 (1970)(federal question and amount in controversy of $10,000); 28 U.S.C. § 1332 (1970) (diversity of citizenship and amount in controversy of $10,000); 28 U.S.C. § 1651 (1970)(jurisdiction to issue writs); and 28 U.S.C. §§ 2201-02 (1970)(the Declaratory Judgment Act). These statutes were suggested by du Pont as jurisdictional bases in the district court. E. I. du Pont de Nemours & Co. v. Train, 383 F. Supp. 1244, 1249 n.1 (W.D. Va. 1974). *See* J. MACDONALD & J. CONWAY, ENVIRONMENTAL LITIGATION §§ 8.29-8.31 (1972) wherein the authors discuss the possible utilization of these jurisdictional bases for environmental actions generally.

[13] 538 F.2d 1136 (4th Cir. 1975), *cert. granted,* 44 U.S.L.W. 3585 (U.S. Apr. 20, 1976)(No. 75-978). Besides the jurisdictional attack, du Pont also filed protective petitions for review. The regulations, therefore, were reviewed in E.I. du Pont de Nemours & Co. v. Train, No. 73-1261 (4th Cir. Mar. 10, 1976).

[14] 528 F.2d at 1137.

[15] *Id.* at 1141, *accord,* American Petroleum Inst. v. Train, 526 F.2d 1343 (10th Cir. 1975). *Cf.* American Paper Inst. v. Train, 381 F. Supp. 553 (D.D.C. 1974). The *American Paper* court, choosing between plaintiff's argument that the challenged regulations were § 304 guidelines and defendant EPA's contention that they were § 301 limitations, determined that they were limitations and therefore dismissed the suit for lack of subject matter jurisdiction. *Id.* at 554.

[16] E. I. du Pont de Nemours & Co. v. Train, 383 F. Supp. 1244 (W.D. Va. 1974).

manufacturers[17] who challenged regulations[18] intended to establish effluent limitations for existing inorganic chemical plants.[19] The regulations stated that they had been promulgated pursuant to both § 301 and § 304(b).[20] The court of appeals declared that the only question to be decided was whether federal district courts could review the regulations concerning existing plants or whether the courts of appeals had exclusive subject matter jurisdiction.[21]

The EPA's argument for jurisdiction in the courts of appeals, as summarized by the Fourth Circuit, was a simple one. Congress had intended that the Administrator rather than the states promulgate actual effluent limitations under § 301.[22] The Administrator, the EPA argued, had combined his guideline-issuing authority under § 304 and his limitation-promulgating authority under § 301 to produce the regulations challenged by du Pont.[23] Because § 301 actions are directly reviewable in courts of appeals under § 509, and these regulations were promulgated thereunder, the EPA concluded that the district court properly dismissed du Pont's complaint.[24]

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[17] In addition to du Pont, the plaintiffs included: Allied Chemical Corporation; American Cyanamid Company; the Dow Chemical Company; FMC Corporation; Hercules, Inc.; Monsanto Company; and Olin Corporation.

[18] 39 Fed. Reg. 9612, 40 C.F.R. 415 (1975). The regulations addressed standards of performance for new plants, pretreatment standards for new plants discharging wastes into municipal treatment plants, and effluent limitations for existing plants. 528 F.2d at 1137. Du Pont challenged only the last of these because the Administrator's actions relating to new plants, under § 306, 33 U.S.C. § 1316 (Supp. IV, 1974), are clearly within the ambit of § 509, 33 U.S.C. § 1369 (Supp. IV, 1974). *See* note 11 *supra*.

[19] "Inorganic chemicals manufacturing" was included on the original list of source categories for which the Administrator was mandated to publish regulations in § 306(b)(1)(A), 33 U.S.C. § 1316(b)(1)(A) (Supp. IV, 1974). "Source" indicates any building or installation from which pollutants may be discharged. § 306(a)(3), 33 U.S.C. § 1316(a)(3) (Supp. IV, 1974).

[20] The regulations, characterized as "final rulemaking" were also promulgated pursuant to § 307(c), 33 U.S.C. § 1317(c)(Supp. IV, 1974), which deals with pretreatment standards for new sources. 39 Fed. Reg. 9612, 40 C.F.R. 415 (1975).

[21] 528 F.2d at 1137. For the notion that appellate court jurisdiction, if found, would have to be exclusive, the Fourth Circuit relied on the Supreme Court's statement in National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974), that when legislation expressly provides a specific remedy, courts should not expand the statute to embrace other remedies. Although the Fourth Circuit then compared § 505(a) of the Act, which invests district courts with jurisdiction to hear citizen suits, with § 509, the use of the *Passenger Corp.* edict begged the question of the statute's grant of jurisdiction, for the jurisdictional controversy itself arises from the ambiguity of the statute. *See* American Iron and Steel Inst. v. EPA, 526 F.2d 1027, 1073 (3d Cir. 1975) (Adams, J., concurring).

[22] 528 F.2d at 1138.

[23] *Id.* at 1139. *See* note 20 *supra*.

[24] 528 F.2d at 1139. *See* 383 F. Supp. 1244, 1256.

Conversely, du Pont maintained that the Administrator had no power under § 301 to promulgate effective effluent limitations.[25] Du Pont, as had previous challengers to actions of the Administrator,[26] noted the passive language of that section and interpreted it as merely expressive of statutory objectives rather than as conferring any authority upon the EPA. According to du Pont, the § 301 objectives were to be implemented by the § 402 state permit programs[27] operated pursuant to § 304 guidelines.[28] Thus, the regulations could only have been issued under § 304(b),[29] rendering § 509(b)(1) review in the appellate court unavailable, and necessitating review in the district courts pursuant to the Administrative Procedure Act.[30]

Stating that an interpretation of the Administrator's authority under § 301 should not absolutely govern the issue of which court had jurisdiction,[31] the Fourth Circuit rested its holding that the complaint had been properly dismissed by the district court on three related grounds: the express language of § 509(b)(1)(E);[32] the illogic of having § 306 effluent regulations for new point sources reviewed by courts of appeals under § 509, which explicitly lists § 306, while § 301 regulations for existing point sources would be reviewed by district courts under the Administrative Procedure Act;[33] and, the logic of linking § 301, which expresses statutory goals, with § 304, which provides means for attaining those goals.[34]

As had the district court,[35] the Fourth Circuit noted that the ex-

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[25] 528 F.2d at 1139.

[26] *See, e.g.*, American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1036 (3d Cir. 1975).

[27] *See* note 9 *supra*.

[28] 528 F.2d at 1139.

[29] *Id.*

[30] 5 U.S.C. §§ 701 *et seq.* (1970). The Administrative Procedure Act offers judicial review to any person "suffering legal wrong because of agency action" or to any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1970). "Agency action" includes all or part of "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13)(1970). The Administrative Procedure Act does not apply if there is another adequate judicial remedy. 5 U.S.C. § 704 (1970). Therefore, du Pont could allege that, because § 304 actions are not covered by § 509, there is no judicial review provided in the Federal Water Pollution Control Act Amendments of 1972, and the Administrative Procedure Act must be activated. Indeed, some commentators have advised that the Administrative Procedure Act be routinely invoked as a jurisdictional basis whenever judicial review of agency action is sought in district court. J. MACDONALD & J. CONWAY, ENVIRONMENTAL LITIGATION § 8.29 at 219 (1972).

[31] 528 F.2d at 1141.

[32] *Id.*

[33] *Id. See* note 30 *supra*.

[34] 528 F.2d at 1142.

[35] 383 F. Supp. at 1250.

plicit language of § 509(b)(1)(E) provides for review in federal courts of appeals of the Administrator's approval or promulgation of effluent or other limitations pursuant to §§ 301, 302, or 306.[36] It appears that Congress intended that § 301 effluent limitations for existing sources, § 302 water quality related effluent limitations, and § 306 effluent limitations for new sources be subject to § 509 judicial review. A strict reading of § 509, however, based upon du Pont's contention that § 304 actions are not covered by the § 509 review provision and that §§ 304 and 301 are inseparable, would dictate the challenging of new source regulations in courts of appeals while regulations for existing sources would be challenged in district courts.[37] Congress, the court concluded, did not intend this inconsistency.[38] No mention of bifurcated review could be found in the Act's legislative history.[39] Moreover, the court indicated that after some disagreement between the Senate,[40] which favored the courts of appeals, and the House,[41] which favored the district courts, the Senate's choice of forum apparently prevailed.[42]

In addition, the court stated that even if § 301 simply declares statutory goals, as du Pont had argued, the appellate courts still had original jurisdiction.[43] The goals of § 301 are mandatory and must be implemented through the mechanisms of § 304(b), which plainly delineates the guidelines-issuing powers of the Administrator.[44] Therefore, § 304 actions activate the specific policies in § 301. This analysis, the court concluded, suggests that the sections are mutually

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[36] *See* note 11 *supra*.

[37] 528 F.2d at 1141.

[38] *Id.*

[39] *Id. See Leg. Hist., supra* note 2. For an idea of the breadth of the Act's legislative history, *see also* McThenia, *An Examination of the Federal Water Pollution Control Act of 1972,* 30 WASH. & LEE L. REV. 195, 202 n.31 (1973).

[40] *Leg. Hist., supra* note 2, at 330.

[41] *Id.*

[42] *Id.* at 330-31.

[43] 528 F.2d at 1142.

[44] *Id. See* note 5 *supra*. The Fourth Circuit in E. I. du Pont de Nemours & Co. v. Train, No. 74-1261 at 13, 16 (4th Cir. Mar. 10, 1976) reinforced approval of this concept of combining § 301 and § 304 power, *accord,* Tanners' Council, Inc. v. Train, No. 74-1740 at 4 (4th Cir. Mar. 10, 1976); FMC Corp. v. Train, No. 74-1586 at 5 (4th Cir. Mar. 10, 1976), American Frozen Food Inst. v. Train, No. 74-1464 at 38-40 (D.C. Cir. May 11, 1976). Observing that the EPA was under the compulsion of a judicially ordered timetable. Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 710-14 (D.C. Cir. 1974), the *du Pont* court noted that the Act does not forbid combining the two steps and that such action by the EPA was sufficiently reasonable to be accepted by reviewing courts under the authority of Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 75 (1975).

dependent, and any final action must be reviewable under § 509.[45]

In reaching its decision, the Fourth Circuit briefly reviewed several cases which had dealt with the interrelationship of §§ 301 and 304, and the judicial review problem under § 509. The court first discussed the Eighth Circuit's contrary holding in *CPC International, Inc. v. Train.*[46] In *CPC,* the Eighth Circuit had focused upon the fact that § 301 delegated to the Administrator no direct power to promulgate effluent limitations for existing point sources, whereas such power for new sources had been given in § 306(b)(1)(B).[47] Since the Administrator had been empowered to issue effective national limitations in § 306 and other sections of the Act, the *CPC* court reasoned that the omission of such power in § 301 was purposeful.[48] Thus, the Eighth Circuit concluded that courts of appeals had no § 509 jurisdiction to review EPA regulations for existing point sources because they could only be issued pursuant to § 304(b), a section not mentioned in § 509.[49]

The *du Pont* court rejected the Eighth Circuit's ruling by declaring that a determination of the Administrator's authority under § 301 did not alone solve the jurisdictional problem.[50] Instead, the Fourth Circuit interpreted the Act to require the reading of §§ 301 and 304 together, thus ensuring appellate court jurisdiction under § 509.[51] The *du Pont* court, however, apparently failed to consider several other reasons given by the Eighth Circuit in support of its holding.

First, the *CPC* court noted that the regulations challenged in that case had been entitled effluent limitations guidelines,[52] a term defined by the EPA to indicate regulations issued pursuant to § 304(b).[53] Thus, it appeared that even the EPA accepted the proposition that the Administrator had no § 301 authority to promulgate binding limitations. Additionally, the Eighth Circuit pointed out

[45] 528 F.2d at 1142.

[46] 515 F.2d 1032 (8th Cir. 1975).

[47] *Id.* at 1038. This is the segment of the *CPC* opinion which the *du Pont* court isolated as the chief rationale for *CPC's* contrary holding. 528 F.2d at 1139. The *CPC* court also noted that national standards could be promulgated by the Administrator under § 307(a)(2), 33 U.S.C. § 1317(a)(2)(Supp. IV, 1974), for toxic discharges and under § 307(b) and (c), 33 U.S.C. § 1317(b) and (c)(Supp. IV, 1974), for pretreatment standards. 515 F.2d at 1038.

[48] *See* note 8 and accompanying text *supra.*

[49] 515 F.2d at 1037.

[50] 528 F.2d at 1141.

[51] *Id.* at 1142.

[52] 40 C.F.R. 406.12 and 406.13 (1975). The challenged regulations in *du Pont* had been similarly labelled. 39 Fed. Reg. 6912, 40 C.F.R. 415 (1975).

[53] 515 F.2d at 1037 n.9. *See* 40 C.F.R. 401.11(j)(1975).

that § 402(d)(2)'s reference to permits "outside the guidelines"[54] made plain that the permit-granting authorities, presumably the states, were intended to consult the § 304(b) guidelines and not to follow independent regulations promulgated under § 301.[55] This meant that the Administrator had no power to fulfill the § 301 objectives because it lay with the states. The *du Pont* district court, in contrast, concluded that "guidelines" in § 402(d)(2) referred to § 304(h), which concerns "guidelines" for the administrative details of a state's permit program such as funding and personnel qualifications.[56] The *CPC* court did not consider this possibility, but noted that the term "guidelines" in § 304(h) referred to a state's permit program, and not to the administrative requirements which must be included within each permit.[57] According to the Eighth Circuit, the resulting division of powers between the EPA and the states would ensure the uniformity of action sought in the Act.[58]

The *CPC* court also noted that § 304(b) provided a one-year period within which guidelines must be published.[59] If, as apparently contended by the EPA, the guidelines were only intended for the EPA's temporary use to aid in promulgating § 301 regulations, a congressional inconsistency arose because a deadline was set for publication of the § 304 guidelines but not for promulgation of § 301 limitations.[60] Had the EPA been intended to promulgate the § 301 limitations as well as to issue the guidelines, two deadlines would have been set by Congress. In other sections of the Act where the Administrator had to follow a two-step procedure of publishing information and then publishing standards based upon that information, two different deadlines had been designated.[61] Thus, the court concluded that Congress had not empowered the EPA to promulgate the limitations under § 301, but had left this duty to the individual states by establishing the § 402 permit program.[62]

Finally, the *CPC* court noted the absence of a reference in § 301

[54] Section 402(d)(2) provides in pertinent part that if a state-proposed permit is objected to by the Administrator because it is "outside the guidelines" set by him, it will not issue. § 402(d)(2), 33 U.S.C. § 1342(d)(2)(Supp. IV, 1974). *See* note 9 *supra*.

[55] 515 F.2d at 1038-39.

[56] 383 F. Supp. at 1252.

[57] 515 F.2d at 1038-39 n.14.

[58] *Id.* at 1039. Thus uniformity would result by issuance of the EPA guidelines to be followed by the states, which would promulgate the actual limitations themselves.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 1039 n. 15.

[62] *Id.* at 1038.

to the Effluent Standards and Water Quality Information Advisory Committee (ESWQIAC).[63] Under §§ 304(b), 306(b), and 307(a), ESWQIAC is to be notified of all proposed regulations so that it can hold scientific hearings[64] and convey to the EPA any relevant technical information it possesses.[65] Because a reference to the Committee was included in those sections, the Eighth Circuit concluded that there would have been one in § 301 if the Administrator was intended to promulgate effective effluent limitations thereunder.[66] This further disparity between §§ 304 and 306, which explicitly delineate the powers of the Administrator, and § 301, which may not, evinces the sections' separability, and therefore provides additional proof that the Administrator has no § 301 power.

The *CPC* court derived support for its holding that the Administrator had no authority to promulgate actual effluent limitations, and consequently that circuit courts did not have jurisdiction to review such EPA actions under § 509, from the Act's legislative history. The court recognized that the Act was intended to establish uniformity of conditions among plants of the same industry.[67] However, the court concluded that this result flowed more properly from the EPA's power to issue permits and to veto state-issued permits which did not comport with § 304(b) guidelines, rather than from any EPA power to promulgate § 301 limitations themselves.[68] The Act's legislative history had emphasized the importance of the precision of the § 304 guidelines,[69] on the apparent theory that the more specific the guidelines, the easier the sought after uniformity could be attained. This concern with the precision of the EPA-issued guidelines made little sense if the EPA was itself empowered to promulgate the limitations.[70] Furthermore, the Administrator's veto power over objectionable state-issued permits would be superfluous if the EPA was actually sanctioned to promulgate § 301 regulations.[71] Impliedly, the final scheme for uniformity included a more flexible sharing of power be-

[63] *Id.* at 1039. *See* § 515, 33 U.S.C. § 1374 (Supp. IV, 1974). The regulations challenged in *du Pont* noted that the current state of ESWQIAC's development did not justify delaying the issuance of the standards to await that committee's opinion. 39 Fed. Reg. 9612, 9612-13, 40 C.F.R. 415 (1975).

[64] § 515(b)(1), 33 U.S.C. § 1374(b)(1)(Supp. IV, 1974).

[65] § 515(b)(2), 33 U.S.C. § 1374(b)(2)(Supp. IV, 1974).

[66] 515 F.2d at 1039.

[67] *Id.*

[68] *Id.* at 1038-39.

[69] *See, e.g., Leg. Hist., supra* note 2, at 309.

[70] 515 F.2d at 1042.

[71] *Id.* at 1040-41.

tween the federal government, which would provide leadership through guidelines, and the state governments, which would in fact establish the limitations through permit decisions. These policies aligned with the *CPC* court's narrow reading of § 301, which the court held did not grant the Administrator power to promulgate limitations.[72] Because the Administrator had no § 301 power, but only the § 304 authority to issue guidelines, the court held that § 509's lack of reference to § 304 required review of the Administrator's actions in a district court rather than a court of appeals.[73]

Although the Fourth Circuit in *du Pont* did not specifically treat many of the issues raised in *CPC* because of its refusal to examine § 301 authority alone, the *du Pont* court did discuss the Third Circuit's decision in *American Iron & Steel Institute v. EPA*,[74] which countered some of the arguments raised in *CPC*. Unfortunately, the *American Iron* court did not consider the § 509 jurisdictional question. It did hold, however, contrary to *CPC*, that the Administrator was empowered to promulgate nationwide effluent limitations for existing point sources[75] under § 301. By so holding, the Third Circuit implicitly presumed appellate court jurisdiction under § 509.[76] Thus, with regard to the jurisdictional issue, the Third Circuit in *American Iron* reached the same result as the Fourth Circuit in *du Pont*, though *American Iron* did not discuss the issue explicitly and *du Pont* discussed it exclusively.

In examining the Administrator's § 301 authority, the *American Iron* court, like the Eighth Circuit in *CPC*,[77] began its analysis by stating that the answer to the problem lay at the "very heart of the administration of the Act,"[78] the interrelationship of §§ 301 and 304 and their relation to § 402. The Third Circuit reconciled § 301 and § 304 in an original fashion. Concentrating first on § 304, the court noted that the Administrator's duty in issuing guidelines is to specify factors[79] to be taken into account when setting control measures ap-

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[72] *Id.* at 1037.

[73] *Id.*

[74] 526 F.2d 1027 (3d Cir. 1975).

[75] *Id.* at 1037.

[76] American Petroleum Inst. v. Train, 526 F.2d 1343, 1346 (10th Cir. 1975). The *American Petroleum* court, like the *du Pont* and *American Meat* courts, held that courts of appeals have jurisdiction to review EPA regulations under the Act. *Id.*

[77] 515 F.2d at 1036.

[78] American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1035 (3d Cir. 1975).

[79] These factors include cost, the age of the facilities and the equipment involved, engineering aspects of the various kinds of control techniques, and non-water quality environmental impact. § 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B) (Supp. IV, 1974); § 304(b)(2)(B), 33 U.S.C. § 1314(b)(2)(B) (Supp. IV, 1974).

plicable to point sources within industry categories.[80] This, stated the court, means that the Administrator's § 304 guidelines, issued on the basis of broad classes of industries, are to guide the state permit grantors when they ascertain the precise degree of effluent control required of any individual point source within a broad class.[81] Thus, the Administrator's initial factor considerations indicate to the permit grantors how variations in the standards should be made, and allow some, albeit circumscribed, discretion to the permit-granting states.[82] The uniformity desired is achieved through effluent standards within a given category which are similar but not necessarily identical.[83] According to the court, this system requires that the § 301 effluent limitations complement the § 304 procedure by indicating the minimum degree of technological effluent control permissible as well as the maximum amount of effluent discharge allowable within a given industrial category.[84] Once the Administrator determines this range of acceptable effluent control and discharge pursuant to § 301, he must issue the § 304 guidelines which aid the states in deciding what limitations should be applied to each individual point source.[85] The *American Iron* court's version of the interplay between § 301 and § 304 thus places § 301 power as well as § 304 power with the EPA, and therefore insures § 509 judicial review in the circuit courts.

The *American Iron* scheme for reconciling § 301 and § 304 also answers several of the *CPC* court's statements. *CPC* had declared, for example, that the Act's emphasis upon the precision of the § 304 guidelines would be unnecessary if the permit grantors must look not to those guidelines but to EPA-created § 301 limitations.[86] This argument fails if the permit grantors, as *American Iron* held, are bound to follow § 301 limitations and § 304 guidelines,[87] both of which originate with the EPA. The *American Iron* interpretation of the connection between § 301 and § 304 is more logically satisfying than the means and ends blending rationale propounded in *du Pont*,[88] and it

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[80] American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1042 (3d Cir. 1975).

[81] *Id.*

[82] *Id.* at 1044.

[83] *Id.* The uniformity is achieved through congressional establishment of a uniform "ceiling" which no polluter could exceed.

[84] *Id.* at 1045. The determinations to be made are whether the limitations are more demanding in terms of the effective technology the source must employ, and whether they are more demanding in terms of requiring a lower amount of effluent discharge than is permitted under the ceiling.

[85] *Id.*

[86] 515 F.2d at 1042.

[87] American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1044 n.38 (3d Cir. 1975).

[88] *See* text accompanying notes 43-45 *supra*. Another effect of the *American Iron*

makes examination of the jurisdictional issue superfluous. If the Administrator has both § 301 and § 304 powers, which are separate but complementary, there can be no challenge that appellate court jurisdiction is improper, because § 301 is covered by § 509. Once the court has determined that the Administrator has § 301 and § 304 authority, the regulations which he publishes can be deemed to stem from the exercise of both these powers, thereby enabling direct review in the courts of appeals. *Du Pont's* holding, although virtually identical in effect, was reached through the more facile method of finding § 301 and § 304 to be inextricable because of the necessity to link the means of § 304 with the ends of § 301. This analysis ignores the fact that § 301, despite its passive language, is also descriptive of a means: the effluent limitations themselves.

The disparate analyses in *American Iron* and *du Pont* account for the decisions' complementary results. *Du Pont* declared that an examination of § 301 authority alone was not needed to resolve the § 509 jurisdictional problem.[89] But the Fourth Circuit reconciled § 301 with § 304 by holding that, to be effective at all, both sections must be read together. Consequently, together, they were held to fall within the purview of § 509.[90] The *American Iron* court, rather than trying to determine which federal court had jurisdiction to review EPA regulations, focused upon the issue of § 301 authority.[91] By noting that the Administrator possessed § 304 authority and by holding that he must necessarily have § 301 authority to effect § 304, the court implied that appellate court jurisdiction under § 509 was pro-

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court's construction of the Act is that it simultaneously promotes active federalism by retaining some division of power between the federal and state governments and, by placing most of the responsibility with the federal agency, renders uniformity more likely.

Regarding uniformity, one commentator has suggested that the EPA has the discretion to determine the extent to which the congressional policy goals of the Act will be achieved, thus implying that the impetus behind the Act's effectiveness is not state action. Comment, *Judicial Review and the 1972 Amendments to the Federal Water Pollution Control Act: And Who Shall Guard the Guards?*, 68 Nw. U.L. Rev. 770, 785-86 (1973). Further, as the EPA argued in *CPC* with regard to the Administrator's power to veto objectionable permits, if too much power is left with the states, there is imminent political and economic danger because industrial polluters may threaten to move their plants out of any state that tries to enforce its environmental policy laws through the imposition of effective effluent limitations. 515 F.2d at 1041 n.16. Such dangers are reduced if the EPA bears most of the responsibility. *See Leg. Hist., supra* note 2, at 577.

[89] 528 F.2d at 1141.

[90] *Id.* at 1142.

[91] American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1036-42 (3d Cir. 1975).

per. Thus, both cases reconciled § 301 and § 304 authority and gave the EPA more power than that given by the *CPC* court which, because it found that the EPA had no § 301 authority,[92] determined that jurisdiction was in the district court.[93]

Another case discussed by *du Pont* but dismissed as irrelevant, illumines *du Pont's* unique handling of the jurisdictional issue. The Seventh Circuit in *American Meat Institute v. EPA*[94] held that the EPA had § 301 authority to promulgate effluent limitations and that the courts of appeals had § 509 jurisdiction to review such regulations.[95] In so holding, the court determined that the relevant standard by which to measure the parties' arguments was not whether the EPA's construction of the Act was unassailable, but whether it was sufficiently reasonable to preclude the court from substituting its judgment for that of the agency.[96] Thus, under the *American Meat* standard of review, there appears a rebuttable presumption of the correctness of the EPA's interpretation of the Act.

The Fourth Circuit decided that this presumption was irrelevant when a court seeks to ascertain its own jurisdiction, which was the sole issue in *du Pont*.[97] In support of its decision, the court noted that federal court jurisdiction is conferred by Congress and not by the determination of a governmental agency.[98] Implicit in the acceptance of the EPA's construction of the Act, however, is the acceptance of the EPA's § 509 argument for jurisdiction in the appellate courts.

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[92] 515 F.2d at 1037.

[93] *Id.* at 1038.

[94] 526 F.2d 442 (7th Cir. 1975).

[95] *Id.* at 452.

[96] *Id.* at 449-50. As had *American Iron, American Meat* relied upon Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975). In that case, which involved the interpretation of the Clean Air Amendments of 1970, 42 U.S.C. §§ 1857 *et seq.* (Supp. IV, 1974), *amending* 42 U.S.C. §§ 1857 *et seq.* (1970), the Supreme Court held that the EPA's construction of that complex statute was sufficiently reasonable to block its substitution by a court of appeals' interpretation. 421 U.S. at 87. *See* Udall v. Tallman, 380 U.S. 1, 16-18 (1965). In Hardy, Train v. Natural Resources Defense Council: *The Genesis of a New Era of Federal-State Relationships in Air Pollution Control*, 24 CLEVE. ST. L. REV. 397, 408 (1975), the writer observed that the Court did not disapprove, as a matter of law, the constructions of the Clean Air Act forwarded by the courts, but merely noted their error in substituting their interpretations for the EPA's. Such an approach will likely be considered, if not precisely used by the Court, when the Court considers the *du Pont* case. *See also* Comment, *Environmental Law—Clean Air Act Amendments—State Implementation Plans—Postponements—Revisions*—Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975), 14 DUQ. L. REV. 111, 117 (1975), 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.10 (1958).

[97] 528 F.2d at 1140.

[98] *Id. See, e.g.,* Lockerty v. Phillips, 319 U.S. 182, 187 (1943).

Thus, if the EPA's interpretation of the Act was presumed proper, the *du Pont* court could have found further support for its holding on the jurisdictional issue by presuming the correctness of the EPA's construction of § 509, which represents an explicit delegation of jurisdiction to the courts of appeals by Congress.[99]

The *du Pont* court, however, found appellate court jurisdiction without utilizing the *American Meat* presumption. Despite its refusal to examine § 301 authority,[100] the court necessarily discussed the relationship of § 301 and § 304 to hold that the Administrator's actions came within the purview of § 509 jurisdiction.[101] Thus, the *du Pont* decision diverged only slightly from earlier cases which had examined § 301 authority alone. Even though the Third Circuit in *American Iron* ignored the § 509 jurisdictional problem, the court impliedly assumed jurisdiction by finding that the Administrator had § 301 authority to promulgate limitations, and that this responsibility augmented his explicit § 304 guideline-issuing duties.[102] Also examining § 301 power, the Eighth Circuit in *CPC* decided that that section gave the Administrator no power to promulgate limitations and that therefore the court of appeals had no jurisdiction to review the challenged regulations.[103] Thus, each case which has confronted the jurisdictional issue, either primarily or secondarily, has had to deal with the power-distributing provisions of § 301 and § 304.

As several of these courts declared,[104] congressional oversight regarding these key sections of the Federal Water Pollution Control Act Amendments of 1972 is surprising and regrettable. The cure, however, may be a relatively simple one.[105] Had Congress included § 304 among the sections within the ambit of § 509's judicial review, the determination of the Administrator's authority under § 301 would be unnecessary. Further, the use of active language in § 301, placing

[99] Such a notion has its limits; obviously an agency should not be able to obtain jurisdiction in a particular forum merely because it interprets a statute to so mandate. But this deference for the agency's interpretation would not be far from the one given to the Administrator's construction of his §§ 301 and 304 power in E. I. du Pont de Nemours & Co. v. Train, No. 74-1261 at 16 (4th Cir. Mar. 10, 1976). *See* note 45 *supra*.

[100] 528 F.2d at 1141.

[101] *Id.* at 1142.

[102] 526 F.2d at 1045.

[103] 515 F.2d at 1037.

[104] *See, e.g.*, American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1037 n.14a (3d Cir. 1975), in which the court expressed concern over the confusion surrounding § 301 and urged Congress "to draft its legislation with greater clarity."

[105] The *du Pont* court remarked that the "knotty question" of the application of § 509 could have been easily solved by a simple sentence or even a word. 528 F.2d at 1141 n.5.

responsibility for promulgating regulations upon the Administrator and thereby assuring the uniformity[106] vital to the Act's success, would have clarified the jurisdictional problem. Certiorari for *du Pont* has been granted,[107] and perhaps with Supreme Court impetus Congress will amend "the very heart of the administration of the Act"[108] so that it may operate more efficiently, and the enunciated aims of the Act can be sought with greater energy.

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[106] *See* note 88 *supra*.

[107] E. I. du Pont de Nemours & Co. v. Train, 528 F.2d 1136 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3585 (U.S. Apr. 20, 1976)(No. 75-978).

[108] American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1035 (3d Cir. 1975).