

Spring 3-1-1978

## Vii. Environmental Law

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Environmental Law Commons](#)

---

### Recommended Citation

*Vii. Environmental Law*, 35 Wash. & Lee L. Rev. 536 (1978),  
<https://scholarlycommons.law.wlu.edu/wlulr/vol35/iss2/12>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact [lawref@wlu.edu](mailto:lawref@wlu.edu).

## VII. ENVIRONMENTAL LAW

The Federal Water Pollution Control Act Amendments of 1972 (FWPCA),<sup>1</sup> amended by the Clean Water Act of 1977 (CWA),<sup>2</sup> provide a plan to eliminate the discharge of pollutants into navigable waters by 1985.<sup>3</sup> The program sets forth compliance standards at interim and final stages and is directed to all publicly and privately owned pollutant dischargers.<sup>4</sup>

In *State Water Control Board v. Train*,<sup>5</sup> the Fourth Circuit examined the interim compliance deadline established in the FWPCA for effluent reduction by publicly owned sewage treatment plants<sup>6</sup> to determine whether receipt of federal funding<sup>7</sup> was a condition precedent to the duty to comply with the standards and deadlines. Appellant, Virginia Water Control Board, brought an action seeking a blanket exemption from the compliance deadline for public sewage treatment plants that had not received federal funds.<sup>8</sup> The district court held that receipt of such funds was not a condition precedent to the duty to comply, and that the deadline was binding upon the treatment plants.<sup>9</sup> The Fourth Circuit affirmed.<sup>10</sup>

The Fourth Circuit based its holding on an analysis of section 301(b)(1)(B) of the Act,<sup>11</sup> which establishes the generally applicable timetable for pollution reduction. Section 301(b)(1)(B) sets July 1, 1977 as the deadline for interim compliance. This deadline originally was unconditional on its face.<sup>12</sup> The legislative history of the 1972 amendments supported the "plain meaning"<sup>13</sup> of the statutory language, indicating that the amendments provided no exceptions to the deadline.<sup>14</sup> The history noted

<sup>1</sup> 33 U.S.C. §§ 1251-1376 (Supp. V 1975). See generally McThenia, *An Examination of the Federal Water Pollution Control Act Amendments of 1972*, 30 WASH. & LEE L. REV. 195 (1973.)

<sup>2</sup> Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).

<sup>3</sup> FWPCA § 101(a)(1), 33 U.S.C. § 1251 (a)(1)(Supp. V 1975).

<sup>4</sup> FWPCA § 301, 33 U.S.C. § 1311 (Supp. V 1975).

<sup>5</sup> 559 F.2d 921 (4th Cir. 1977).

<sup>6</sup> 33 U.S.C. § 1311(b)(1)(B)(Supp. V 1975).

<sup>7</sup> Title II of the FWPCA, 33 U.S.C. §§ 1281-1292 (Supp. V 1975), authorizes grants of federal money for construction of treatment works.

<sup>8</sup> See *State Water Control Bd. v. Train*, 424 F. Supp. 146 (E.D. Va. 1976). The State Water Control Board requested a declaratory judgment establishing that receipt of Title II grants was a condition precedent to compliance with the effluent reduction deadline. *Id.* at 149.

<sup>9</sup> *Id.* at 154.

<sup>10</sup> 559 F.2d at 924.

<sup>11</sup> 33 U.S.C. § 1311(b)(1)(B) (Supp. V 1975).

<sup>12</sup> Section 301(b)(1)(B) states that compliance by publicly owned sewage treatment works with EPA-defined effluent limitations is to be achieved "not later than July 1, 1977." 33 U.S.C. § 1311(b)(1)(A), (B) (Supp. V 1975).

<sup>13</sup> 559 F.2d at 924.

<sup>14</sup> H.R. REP. No. 911, 92d Cong., 2d Sess. (1972), reprinted in S. COMM. ON PUBLIC WORKS, 93d Cong., 1st Sess., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 788 (1973) [hereinafter WPCA LEGIS. HIST.]. The report stated that "[i]t is the intention of the Committee that the requirements of section 301(b)(1)(A) and (B) [33 U.S.C.

that recommendations were made to limit applicability of compliance deadlines to projects receiving funds and to provide statutory deadline extensions where, despite good faith efforts, compliance would not be possible.<sup>15</sup> These recommendations were excluded from the 1972 FWPCA Amendments as enacted.<sup>16</sup>

The Fourth Circuit emphasized both the absolute nature of the statutory language and the Act's history<sup>17</sup> in its refusal to allow the requested exemption.<sup>18</sup> Other circuits also have found the deadlines established by the 1972 amendments to be inflexible. The Third Circuit held that the Environmental Protection Agency has no authority to grant an extension of the interim deadline,<sup>19</sup> and the Sixth Circuit expressly supported the Fourth Circuit's construction of section 301(b)(1)(B), despite finding other circumstances permitting noncompliance by a discharger.<sup>20</sup> The statutory text and the legislative history allowed no other conclusion.<sup>21</sup> The Fourth Circuit's holding was therefore proper in light of the provisions of the FWPCA then in effect.

Despite the propriety of the holding in *State Water Control Board*, the decision is no longer binding as a result of the recent amendments to the

§ 1311 (b)(1)(A), (B) (Supp. V 1975)] be met by phased compliance . . . so that all point sources will be in full compliance no later than January 1, 1976 [later changed to July 1, 1977] . . . " *Id.*

<sup>15</sup> Appellee, Russell Train, recommended that the Act provide for extension of the interim deadline where compliance would be unattainable despite good faith efforts by the polluter. WPCA LEGIS. HIST., *supra* note 14, at 1115 (statement of Russell E. Train). The administrator of the EPA, William Ruckelshaus, not only supported this recommendation, but additionally urged that "the secondary treatment requirement [of 33 U.S.C. § 1311(b)(1)(B)] should only apply to projects for which new Federal grants are provided." Letter from William D. Ruckelshaus, Administrator, EPA, to John A. Blatnik, Chairman, Committee on Public Works, House of Representatives (Dec. 13, 1971), WPCA LEGIS. HIST., *supra* note 14, at 1197.

<sup>16</sup> See 33 U.S.C. § 1311(b)(1)(B) (Supp. V 1975). The House of Representatives initially passed a bill which included Train's recommendation, *supra* note 15, that extensions be provided for good faith noncompliers. H.R. 11896, 92d Cong., 2d Sess. § 301(b)(3) (1972), reprinted in WPCA LEGIS. HIST., *supra* note 14, 893, 964-65. Ruckelshaus' recommendation that the application of the secondary treatment requirement be limited, *supra* note 15, was not included in the House bill. The extension provision was deleted before passage of the bill through Congress. 559 F.2d at 926. The consideration and exclusion of these exceptions to an otherwise unconditional compliance deadline indicated the inflexibility of that statutory requirement.

<sup>17</sup> See notes 14-16 *supra*.

<sup>18</sup> 559 F.2d at 924. In finding the § 301(b)(1)(B) deadline to be mandatory, the Fourth Circuit followed the Third Circuit's decision in *Bethlehem Steel Corp. v. Train*, 544 F.2d 657 (3d Cir. 1976), *cert. denied sub nom.*, *Bethlehem Steel Corp. v. Quarles*, 97 S. Ct. 1666 (1977). See note 19 *infra*.

<sup>19</sup> *Bethlehem Steel Corp. v. Train*, 544 F.2d 657 (3d Cir. 1976). The Third Circuit held that the EPA could not issue a permit allowing industrial dischargers to comply with effluent limitations at a time subsequent to July 1, 1977. *Id.* at 663. The court examined the statutory text and the legislative history, and concluded that Congress viewed July 1, 1977 as an "inflexible target." *Id.* at 661.

<sup>20</sup> *Republic Steel Corp. v. Train*, 557 F.2d 91, 96 n.15 (6th Cir. 1977), *appeal pending*.

<sup>21</sup> See text accompanying notes 12-16 *supra*.

Water Pollution Control Act. Section 45 of the CWA,<sup>22</sup> amending section 301 of the 1972 Act, provides that the issuer of permits authorizing limited discharges may grant extensions beyond the section 301(b)(1)(B) deadline for effluent reduction. Extensions may be granted in cases where construction of a facility cannot be completed within the required time or where the United States has not made financial assistance<sup>23</sup> available in time to enable municipal dischargers to achieve applicable effluent limitations.<sup>24</sup>

The legislative history of the CWA<sup>25</sup> clearly indicates the case-by-case nature of municipal extensions under the amendment to section 301. Extensions will not be granted to all noncomplying municipal dischargers, but only to those that have made "all possible good faith efforts" to meet the July 1, 1977 compliance deadline and whose failure to do so "is primarily the fault of the Federal Government."<sup>26</sup> The amendment was inspired in part by recognition of the impact of the impoundment of funds which were intended for use in municipal sewage treatment construction programs.<sup>27</sup>

Section 45 of the Clean Water Act establishes July 1, 1983 as the absolute deadline for compliance by municipal dischargers.<sup>28</sup> The standard with which dischargers receiving extensions under section 45 must comply is that of "best practicable waste treatment technology."<sup>29</sup> This is the same standard with which municipal dischargers are to comply under section 301(b)(2)(B) of the 1972 amendments and it represents the final stage of the effluent reduction program for publicly owned sewage treatment

<sup>22</sup> Clean Water Act of 1977 § 45.

<sup>23</sup> See note 7 *supra*.

<sup>24</sup> Section 45 of CWA adds the following subsection to § 301 of FWPCA:

(i)(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) . . . of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this Act available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act or to modify a permit issued pursuant to that section to extend such time for compliance . . . . The Administrator . . . may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which . . . construction can be completed, but in no event later than July 1, 1983 . . . .

Clean Water Act of 1977, Pub. L. No. 95-217, § 45, 91 Stat. 1566, 1584-85 (1977). The Fourth Circuit was aware of this legislation when it was pending before Congress, but as it was not then in effect, the court was not bound by it. 559 F.2d at 927 n.33.

<sup>25</sup> 123 CONG. REC. H12,916, 12,956 (daily ed. Dec. 15, 1977) (remarks of Rep. Anderson); 123 CONG. REC. S19,636, 19,646 (daily ed. Dec. 15, 1977)(remarks of Sen. Muskie).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, cf. *State Water Control Bd. v. Train*, 559 F.2d at 924 n.18 (Presidential impoundment responsible for delay in disbursement of authorized funds finally allotted in fiscal year 1976).

<sup>28</sup> Clean Water Act of 1977 § 45. See text of statute at note 24 *supra*.

<sup>29</sup> FWPCA § 201(g)(2)(A), 33 U.S.C. § 1281(g)(2)(A) (Supp. V 1975).