10-1976

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

Lewis F. Powell Jr.

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May 6, 1976

No. 75-976  E.L. 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

ifp/ss

cc: Mr. Michael Rodak, Jr.
MEMORANDUM TO FILES
No. 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.
CA 4th agreed with. H-W - allowed.

If we get over. never. issue.

one of substantial issues in a generic issue.

CA 4 E. (H-W) involved.

Issue same issue.

9 left Fein (1972)
Memorandum

Supreme Court of the United States

[Handwritten note: filed with S. F. Heenan 6/10]
Defendant #1
1st Case - no involvement

Defendant #2

Addressee

Substantive issue

9 reflect Her

Grant of Permit

must give to

specifications of EP

5G reused generic

of substantive issue

as re-invented issue

H-W filed document

brief in CA 4 - back

not in CA 4

CA 4 agreed with

H-W -- assessed

flexibility

If we get over

generic issue

one of substantive

issue in a

generic issue

reading before

CA 4 & H-W

is involved
Deposit #1
1st Case - no involvement

Deposit #2
Adverse
substantive issue

9th Circuit's decision
Grant of Permit must go to
specificity of EPA.

SG revered; generic
of substantive issue
as misapprehend issued
HW filed Amicus
Brief in CA 4 - but
not in this ET
CA 4 agreed with
H-W - allowed
flexibility.

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

ending before
CA 4 E (H-W)

is involved

some areas sim.

J. Left, Stein (1992)
Present Gs under Water Pollution Control Act, including whether EPA has authority to issue regulations in merely guideline.

Preliminary Memo

June 10, 1976 Conference
List 1, Sheet 3
No. 75-1473
E.I. duPONT
de NEMOURS
& CO. v.
TRAIN [EPA
Administrator]
Cert to CA 4
(Rives [CA 5],
Breitenstein
[CA 10] & Widener)
Federal/Civil

No. 75-1705
TRAIN [EPA
Administrator] v.
E.I. duPONT
de NEMOURS
& CO. Cert to CA 4
(Rives [CA 5],
Breitenstein
[CA 10] & Widener)
Federal/Civil

[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.]
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. **Petitioner 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. **Petitioner rehearse**s the arguments made in No. 75-978.
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
Preliminary Memo

June 10, 1976 Conference
List 1, Sheet 3

No. 75-1705

TRAIN [EPA Administrator]

v.

E.I. duPONT de NEMOURS & CO.

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

Federal/Civil

Timely

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

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**MERITS MOTION HOLD CERT. JURISDICTIONAL STATEMENT**

**STADMT ABSENT**

**E.T. duPont de Nemours & Co**
E. I. duPONT de NEMOURS & COMPANY, ET AL., Petitioners

vs.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

4/13/76 - Cert.

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G. E. duPONT de NEMOURS & COMPANY, ET AL., Petitioners, are granted and set with 75-978.

Panel 19. Explained that 75-978 was up for emulation.
Train

vs.

E. I. DuPont de Nemours & Co.

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**E. I. duPont de Nemours v. Train**

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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
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 SC 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 "where 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-
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.

1/10/76

Ginty

No ops.

PJN
Joint motion to consolidate all three cases for oral argument.

Mr. Justice Powell - You are out of these duPONT cases.
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

1fp/ss

cc: The Conference