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Supreme Court Clarifies Water Act Requirement

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SUPREME COURT CLARIFIES WATER ACT REQUIREMENT

ENVIRONMENTAL LAW—FEDERAL WATER POLLUTION CONTROL ACT: The United States Supreme Court held that the EPA was not required to consider the economic capability of individual plants in granting a variance from first-phase effluent limitations standards. *EPA v. National Crushed Stone Ass'n*, 101 S.Ct. 295 (1980).

*EPA v. National Crushed Stone Association*¹ arose in the Fourth Circuit Court of Appeals² as a challenge to effluent limitations set by the Environmental Protection Agency (EPA) pursuant to the Federal Water Pollution Control Act (Act).³ Crushed stone manufacturers and a coal mining and processing industry association brought suit in the fourth circuit, attacking both the substantive regulations limiting the discharge of pollutants, and the factors that the EPA allowed to be considered in granting a variance from the limitations.⁴ The industry was concerned specifically with the effluent limitations standards they were to comply with by July 1, 1977,⁵ and the factors which the EPA would consider in allowing them to avoid compliance. The fourth circuit vacated and remanded to the EPA for reconsideration both the substantive regulations and the variance clause.⁶ The U.S. Supreme Court granted certiorari to the EPA to consider only the question of what factors could be considered in granting a variance from the 1977 standards.

The Supreme Court upheld the EPA's interpretation as to what factors are relevant in granting a variance from the 1977 limitations, thereby resolving a conflict between two circuit courts, and clarifying the role of economic factors in granting such a variance.

1. 101 S. Ct. 295 (1980).

2. 601 F.2d 111 (4th Cir. 1979). The Federal Water Pollution Control Act grants jurisdiction to the federal circuit courts of appeals to review the actions of the EPA. 33 U.S.C. § 1369(b)(1) (1976).

3. 33 U.S.C. §§ 1251-1376 (1976), *as amended by* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

4. The regulations are contained in 40 C.F.R. §§ 436.22, .32 (1980).

5. *See* note 14, *infra*.

6. 601 F.2d 111 (4th Cir. 1979).

STATUTORY BACKGROUND

Passage of the 1972 amendments to the Act signaled a major change in the focus of water pollution regulation in several important respects. Prior to 1972, federal regulatory efforts were aimed at aiding the states to provide for enforcement of specific water quality standards.⁷ The amendments, however, adopted effluent limitations standards, with technology as the basis for the control and proposed reduction of water pollution at the source.⁸ Moreover, the limitations were to be set at the federal level and applied nationwide and uniformly.⁹ This change in regulatory philosophy was due to the failure of the pre-1972 laws to significantly reduce water pollution.¹⁰

Under the Act, the EPA¹¹ is to promulgate the effluent limitations for all categories of existing industrial "point sources"¹² in two phases, aimed at the goal of eliminating discharge of pollutants into the nation's waterways by 1987.¹³ The first-phase standards are based on application of the best practicable control technology currently available (BPT),¹⁴ and the second-phase standards are based on application of the best available technology economically achievable (BAT).¹⁵

The purpose of the first-phase BPT effluent limitations standards is to set minimum levels of compliance to be met by all industrial

7. 1 F. GRAD, *TREATISE ON ENVIRONMENTAL LAW* 3-80 (1973).

8. *Id.* at 3-83.

9. *Id.*

10. See Barry, *The Evolution of the Enforcement Provision of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103, 1122 (1970).

11. The Act designates the EPA to implement the statutory goals. 33 U.S.C. § 1251(d) (1976).

12. "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (Supp. III 1979).

13. This goal, set out in 33 U.S.C. § 1251(a)(1) (1976), was originally to be achieved by 1985, but under the Federal Water Pollution Act Amendments of 1977, deadlines for meeting effluent limitations timetables were extended, with July 1, 1987, being the latest date by which the second-phase limitations could be met. 33 U.S.C. § 1311(b)(2)(F) (Supp. III 1979). The extension of time for compliance with second-phase limitations is not relevant to the Court's decision here.

14. The first-phase regulations require all existing point sources to meet effluent limitations standards based on "application of the best practicable control technology currently available" by July 1, 1977. 33 U.S.C. § 1311(b)(1) (1976).

15. The second-phase regulations to be met no later than July 1, 1987, require compliance with standards based on "application of the best available technology economically achievable." 33 U.S.C. § 1311(b)(2) (Supp. III 1979).

point sources by July 1, 1977, and BPT limitations are to be set on the basis of various factors set out in the statute.¹⁶ BPT is defined as the establishment of a range of best practicable levels, to be based on "the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category."¹⁷ Furthermore, if the present practices are uniformly inadequate in a given industrial category, the EPA is to interpret "best practicable" to require higher levels of control than any currently in use as long as it determines that the technology to achieve such higher levels can be practicably achieved.¹⁸

One factor to be considered in assessing the BPT limitations involves a balancing of the total cost of application of the technology necessary to comply with the effluent limitations standards, with the effluent reduction benefits to be achieved from such applications of technology.¹⁹ This balancing "is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such . . . reduction for any class or category of [point] sources."²⁰ This limited cost-benefit analysis is allowed primarily to maintain uniformity within a class or category of point sources, and to avoid requiring the EPA to determine the economic impact of BPT limitations on any individual point source.²¹

By contrast, the second-phase BAT standards are intended to upgrade the level of controls established by the BPT limitations, and are to be promulgated where complete elimination of the discharge of pollutants is not obtainable at a reasonable cost.²² The EPA is to determine the BAT standards by again considering various factors set

16. Factors included in assessing BPT are "total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, . . . age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate." 33 U.S.C. § 1314(b)(1)(B) (1976).

17. I SEN. COMM. ON PUB. WORKS, 93d CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 169 (1973) [hereinafter cited as LEGISLATIVE HISTORY]. Cf. 39 Fed. Reg. 6580 (1974), where the EPA defines BAT as "the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category or subcategory. The average is not based upon a broad range of plants within an industrial category or subcategory, but is based upon performance levels achieved by exemplary plants."

18. LEGISLATIVE HISTORY, *supra* note 17, at 169.

19. See 33 U.S.C. § 1314(b)(1)(B) (1976).

20. LEGISLATIVE HISTORY, *supra* note 17, at 170.

21. *Id.*

22. *Id.* at 788-89.

out in the statute,²³ and the cost of achieving the required effluent reduction is one of the factors to be considered.²⁴ However, no cost-benefit analysis is to be done at this stage. The EPA is to be bound by a test of reasonableness in determining what needs to be done in moving toward the elimination of the discharge of pollutants, and what is achievable through the application of the best available technology, without regard to cost.²⁵ Also, BAT limitations are to be applied to those processes or control techniques which are the best for a specific point source,²⁶ as opposed to BPT limitations which are to be set for entire classes or categories of point sources. The justification for this difference is apparent in light of the higher level of compliance required by the second-phase regulations.²⁷

Congress expressly authorized variances from BAT standards where the variances represent the maximum use of technology within the economic capability of the owner or operator, and will result in reasonable further progress toward the elimination of the discharge of pollutants.²⁸ The Act does not expressly authorize a variance from BPT limitations, but the EPA has provided BPT variance provisions for every category and subcategory of industrial point sources for which it has promulgated regulations. All BPT variance provisions are similar to each other in form, allowing a variance from BPT standards through a showing that factors in existence at the individual point source are "fundamentally different" from those considered by the EPA in promulgating the nationally uniform regulations for an entire category or subcategory of industry.²⁹ However, the EPA has stated that only fundamentally different technological and engineering factors will be considered in granting a BPT variance, and that consideration of economic factors would violate the Act.³⁰

JUDICIAL INTERPRETATION OF THE BPT VARIANCE PROVISION

Industry has challenged EPA's authority to promulgate BPT variance provisions, and whether the EPA may exclude consideration of economic factors in granting BPT variances.

23. Factors included in assessing BAT are "age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate." 33 U.S.C. § 1314(b)(2)(B) (Supp. III 1979).

24. *Id.*

25. LEGISLATIVE HISTORY, *supra* note 17, at 170.

26. *Id.* at 789.

27. *Id.* at 169-70.

28. 33 U.S.C. § 1311(c) (1976).

29. *See, e.g.*, the variance provision for the crushed stone subcategory. 40 C.F.R. §§ 436.22, .32 (1980).

30. *See* 39 Fed. Reg. 30,073 (1974) (memorandum of Assistant Administrator for Enforcement and General Counsel).

From the beginning, the circuit courts of appeals and the U.S. Supreme Court have viewed BPT variance provisions as a regulatory necessity, so that EPA's authority to promulgate such provisions has not been a major issue. Whether the EPA had such authority was considered in *Natural Resources Defense Council, Inc., v. EPA*.³¹ In that case, the second circuit held the establishment of the variance clause to be a valid exercise of the EPA's authority to promulgate regulations necessary to implement the Act.³² The court agreed with the EPA's rationale that Congress intended uniform treatment only for plants similarly situated, and that the variance provision was necessary as an "administrative safety valve" to account for uniquely individual plant characteristics that may have been overlooked in developing the nation-wide regulations.³³ The U.S. Supreme Court subsequently affirmed the EPA's authority to promulgate BPT variance clauses in *E. I. du Pont de Nemours & Co. v. Train*³⁴ by finding that the EPA's statutory power to set BPT effluent limitations standards was conditioned on making some allowance for variations in individual plants through promulgation of a variance clause.³⁵ Therefore, even though there is no statutory authorization, BPT variance provisions are routinely used by the EPA in implementing the statute.

A more important issue for industries has been what factors the EPA will consider in granting a BPT variance. Specifically, industries have argued that the economic capability of individual point sources ought to be considered by the EPA in granting BPT variances.³⁶

The EPA has refused to consider economic factors on a case-by-case basis except for variances from the second-phase BAT standards.³⁷ The EPA has characterized that portion of the Act allowing a variance from BAT standards as the exclusive procedure for an economic variance, and has said that even in that context, any variance

31. 537 F.2d 642 (2nd Cir. 1976).

32. *Id.* at 647.

33. *Id.* at 646.

34. 430 U.S. 112 (1977).

35. *Id.* at 128.

36. Ripeness for judicial review is an issue the courts have had to consider in adjudging the adequacy of BPT variance provisions where the industries challenging the BPT variance provisions for their class or category have neither applied for nor been denied a variance from the overall applicable BPT limitations. In finding the issue ripe, the courts have relied on EPA's published opinions wherein the EPA specifically stated which factors they would or would not consider in granting BPT variances, thus taking the subject out of the realm of conjecture. See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1032 (D.C. Cir. 1978); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1359 n.22 (4th Cir. 1976).

37. 39 Fed. Reg. 30,073 (1974). Following the decision in *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976) the EPA for a time seemed to expand the factors it would consider in granting BPT variances. See *In re Louisiana-Pacific Corp.*, 10 ERC 1841, 1852 n.27 (1977). However, in a later opinion EPA restated its belief that variances based on plant-specific economic capability applied only to BAT variances. 43 Fed. Reg. 50,042 (1978).

granted must still represent the maximum use of technology within the economic capability of the owner or operator of the point source, and must result in reasonable further progress toward the elimination of the discharge of pollutants.³⁸

The fourth circuit disagreed with the EPA's interpretation in *Appalachian Power Co. v. Train*,³⁹ and found the BPT variance provision for steam-electric generating plants should have included consideration of the economic impact on individual point sources. The court held that economic impact was a factor in granting BAT variances, and that since Congress could not have meant for BPT effluent limitations to be more stringently applied than BAT limitations, economic impact also must be considered in granting BPT variances.⁴⁰ The court also noted that cost was a factor in establishing the BPT standards and that EPA had given no reason for excluding cost as a factor in granting a BPT variance.⁴¹

In contrast, the BPT variance provision was upheld by the District of Columbia circuit. The court in *Weyerhauser Co. v. Costle*⁴² found that the same factors used to set BAT effluent limitations standards were also considered in granting BAT variances. By analogy, the court reasoned that Congress must have intended the same relationship to exist between the factors considered in setting BPT standards and those considered in granting BPT variances. The court held that because the EPA did take into account the same factors in granting BPT variances as it did in assessing BPT limitations, the BPT variance provision was valid.⁴³

Against this background, the fourth circuit reviewed the BPT variance provision promulgated by the EPA for the crushed stone and sand and construction gravel subcategories in *National Crushed Stone Association v. EPA*.⁴⁴ As in the past,⁴⁵ the EPA refused to grant BPT variances for individual plants unless the plants could show technological and engineering factors existing at their plants that were fundamentally different than those considered by the EPA in setting the effluent standards for the subcategories.⁴⁶ The fourth circuit again held that BPT variance provisions must include consideration of the

38. 39 Fed. Reg. 30,073 (1974).

39. 545 F.2d 1351 (4th Cir. 1976).

40. *Id.* at 1359.

41. *Id.*

42. *Weyerhauser Co. v. Costle*, 590 F.2d 1011, 1036 (D.C. Cir. 1978).

43. *Id.* at 1035.

44. 601 F.2d 111 (4th Cir. 1979).

45. See *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976).

46. The variance provisions for the crushed stone and sand and gravel subcategories are set out in 40 C.F.R. § 436.22, .32 (1980). See also 43 Fed. Reg. 50,042 (1978).

economic impact on individual plants, and so remanded the variance provision to the EPA for compliance with the court's decision in *Appalachian Power Co.*⁴⁷

EPA v. NATIONAL CRUSHED STONE ASSOCIATION

The Supreme Court was concerned only with the question of whether the EPA's interpretation of its BPT variance clause was valid.⁴⁸ Justice White, writing for a unanimous Court, with Justice Powell not participating, noted that a BPT variance provision is not expressly authorized or required by the Act, but cited its own decision in *E. I. du Pont de Nemours and Company v. Train*, containing dictum indicating that a variance provision was a necessary aspect of a valid BPT standard. For the second time, and with no further rationale, the Court affirmed the EPA's authority to promulgate BPT variance provisions with no express statutory authority. This allowed the Court to frame the issue in terms of what factors the EPA could consider in granting a BPT variance, and, specifically, whether the economic capability of an individual point source to afford the costs of implementing BPT standards must be considered.

The Court found the question ripe for judicial review under the test set out in *Abbott Laboratories v. Gardner*.⁴⁹ only a question of law was involved in the statutory construction of the Act; and failure to review could result in hardship to Respondents because the thousands of point sources making up the crushed stone and coal subcategories needed to know what the BPT regulations would require of them, how much pollution controls would cost, and whether businesses would have to close.⁵⁰ Also, the Court found judicial review necessary because based on its prior decision in *du Pont* that the variance provision was an integral part of the BPT effluent limitations standards, if the variance provision for the coal industry were invalid, then essentially similar variance clauses already promulgated for other industries might be invalid.⁵¹ Both the affected industries and the EPA had immediate interests in having the question decided. Finally, the Court

47. *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111, 124 (4th Cir. 1979).

48. Respondents National Crushed Stone Association were joined in this appeal by Consolidation Coal Co. Plaintiffs in *National Crushed Stone Ass'n* were National Crushed Stone Association, Warren Brothers Co., and Arkhola Sand and Gravel Co. *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111, 112 (4th Cir. 1979). Plaintiffs in *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979), were seventeen coal producers, their trade association, five citizens' environmental associations, and the Commonwealth of Pennsylvania.

49. 387 U.S. 136, 149 (1967).

50. *EPA v. National Crushed Stone Ass'n*, 101 S.Ct. 295, 301 n.12 (1980).

51. *Id.*

needed to resolve the conflict existing between the fourth circuit^{5 2} and the District of Columbia circuit^{5 3} on the question.

The EPA's argument that judicial review of the variance provision was premature prior to application of the provision to a particular discharger's request for variance was rejected by the Court. The Court noted that the EPA had published opinion papers setting out specific factors that it would not consider in granting BPT variances, so EPA's position on the subject was not a matter of speculation.^{5 4}

The Court next examined the fourth circuit's interpretation of the Act, under which the fourth circuit required the EPA to apply BAT variance factors in granting BPT variances. The Court found no statutory language supporting such a requirement,^{5 5} nor could the Court cite statutory justification for applying the factor of affordability in granting BPT variances.^{5 6} Further, the Court could find no basis for the fourth circuit to infer from the decision in *du Pont* that BPT standards could be modified by considering the factor of economic affordability. Justice White pointed out that the holding in *du Pont* was that the EPA had the authority to set BPT standards by regulation for classes of point sources.^{5 7} It did not hold that BPT and BAT limitations had identical content or purposes, and in fact recognized in *du Pont* that the factors to be considered in granting BAT variances applied only to BAT variances.^{5 8}

The decision explored the relationship between the factors considered in granting a BAT variance and those considered in setting the BAT effluent limitations.^{5 9} A BAT variance for a particular point source will not be so much an exception to the BAT standard as it will represent the same kind of economic and technological commitment as the general BAT standard creates for the class or category; that is, BAT variances still must represent a commitment of the maximum resources economically achievable toward the goal of eliminating all discharges of pollution. Also, application of both BAT effluent limitations standards and BAT variances assumes that the point source has already complied with the first-phase BPT limitations.

The Court found no similar relationship between factors con-

52. *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111 (4th Cir. 1979); *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976).

53. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

54. 101 S.Ct. at 301 n.12.

55. *Id.* at 302.

56. *Id.*

57. *Id.* at 302 n.13.

58. *Id.*

59. *Id.* at 302-03.

sidered in granting BAT variances and the policies underlying BPT standards.⁶⁰ First, one of the BAT variance requirements is that the variance "will result in reasonable further progress toward the elimination of the discharge of pollutants."⁶¹ This requirement obviously refers to a prior standard, and for BAT limitations the prior standard is the BPT limitations. If the language is applied to BPT limitations, there is no prior standard, so the requirement is inappropriate in the context of BPT limitations. Second, the goal of eliminating pollutant discharges found in the BAT variance factors is *not* the goal of the BPT effluent limitations. The purpose of the first-phase standards is only to establish a first step toward that eventual goal. Third, where the BAT variance factors require the "maximum use of technology within the economic capability of the owner or operator," BPT limitations do not require an industrial category to commit the maximum economic resources possible even if the point source could afford to do so. A point source may have to do no more if it is already using pollution control technology found acceptable under the BPT limitations.

The Court reasoned that the incongruity in applying BAT variance factors to BPT limitations was grounded in the different purposes of the two regulatory phases.⁶² BPT is defined as the average of the *best* existing performance in a given category or class, so the statute contemplated that there would be point sources that would have to raise their level of performance to comply with the baseline BPT effluent limitations. To allow a BPT variance based on the economic capability of an individual point source would allow point sources never to meet the minimum control levels represented by BPT limitations. Moreover, the Court said that every set of BPT limitations embodied a determination by the EPA that the cost to the industry in complying with the BPT limitations would be worth the benefits in pollution reduction to be gained by meeting the limitations.⁶³ However, this limited cost-benefit analysis was to be done for categories and subcategories, not for every point source. If a point source could show that its entire situation, including cost of compliance, was not within the range of factors considered by the EPA in arriving at the BPT limitations, then the point source would be eligible for a variance whether or not it could afford to comply with the BPT standards. This was because a BPT variance represents a decision that the BPT limitations were set without taking into account all the current

60. *Id.* at 302.

61. 33 U.S.C. § 1311(c) (1976).

62. 101 S.Ct. at 303.

63. *Id.*

industry practices that were to be considered. But a BPT variance based on economic capability of an individual point source only indicates that one source is unable to comply, not that the limitations set for a category are incomplete. Therefore, the Court held that requiring the EPA to take into account economic factors in granting BPT variances would undercut the statutory goal of the BPT limitations.⁶⁴

The Court was aware that its holding meant that point sources unable to comply with BPT limitations, and denied variances, might be forced out of business.⁶⁵ However, Justice White found support for the Court's decision in the legislative history of the 1972 Amendments to the Act. Congress was aware of the possibility of plant closings caused by compliance with BPT limitations,⁶⁶ but nevertheless did not provide for variances based on economic factors. Rather, Congress added provisions for low-cost loans to small businesses to enable them to meet the cost of the required technological improvements, and also empowered the EPA to investigate any plant's claim that it would have to cut back on production or close down because of the cost of meeting BPT limitations.⁶⁷

The Court therefore determined, based on the statutory language and legislative history of the Act, that the EPA had adopted a reasonable construction of the statute, and was not required to consider economic capability of an individual point source in granting a BPT variance.

CONCLUSION

By affirming the EPA's interpretation of its BPT variance provision, the Court upheld the congressional conclusion that the need to clean up the nation's waterways is so acute that it must be done even if plant closings occur. The decision should do much to allay fears that the EPA's promulgation of a BPT variance provision allows industries to avoid compliance with the first-phase requirements of the Act.⁶⁸ The Court clearly narrows the possibilities for obtaining BPT variances, while leaving sufficient leeway for industries when circumstances place them outside the situations surveyed by the EPA in drawing up the first-phase regulations.

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64. *Id.* at 304.

65. *Id.*

66. See LEGISLATIVE HISTORY, *supra* note 17, at 156, 253.

67. 33 U.S.C. § 1367(e) (1976).

68. See Kalur, *Will Judicial Error Allow Industrial Point Sources to Avoid BPT and Perhaps BAT Later? A Story of Good Intentions, Bad Dictum, and Ugly Consequence*, 7 *ECOLOGY L.Q.* 955 (1979).