



Winter 1979

## Deadline for Achieving BPT Upheld

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### Recommended Citation

Juan J. Baca, *Deadline for Achieving BPT Upheld*, 19 Nat. Resources J. 197 (1979).  
Available at: <https://digitalrepository.unm.edu/nrj/vol19/iss1/13>

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## DEADLINE FOR ACHIEVING BPT UPHELD

ENVIRONMENTAL LAW—CLEAN WATER ACT OF 1977: Deadline for industrial dischargers in achieving best practicable control technology cannot be waived by the courts. Section 309 of the 1977 Amendments to the Federal Water Pollution Control Act which permits the granting of an extension under certain circumstances provides the only avenue of relief from the mandatory July 1, 1977 deadline. *Republic Steel Corp. v. Costle*, 581 F.2d 1228 (1978).

In July 1972, Republic Steel Corp. (Republic) applied to the Ohio Environmental Protection Agency (EPA) for a permit which would authorize it to continue discharging effluents from its Canton, Ohio steel mill into Nimishillon Creek.<sup>1</sup> In June 1974, the Ohio EPA issued a permit to Republic. The permit, in essence, would have sanctioned Republic's discharge of effluents in excess of the federal effluents standards beyond the July 1, 1977 deadline set by the Federal Water Pollution Control Act (FWPCA).<sup>2</sup> Under § 301(b)(1)(A)(i) of the FWPCA, industrial dischargers were required to comply by July 1, 1977 with various effluent limitations for point sources<sup>3</sup> by the use of the application of the best practicable control technology (BPT) current available.

The Federal office of the EPA for Region V<sup>4</sup> objected to the granting of this permit. In response, Republic filed a petition with the Sixth Circuit Court of Appeals for judicial review of the Federal EPA's objection.<sup>5</sup> On June 23, 1977, only days before the July 1st deadline, the Sixth Circuit Court of Appeals held, in *Republic I*, that the Federal EPA had no authority to object to the permit which the Ohio EPA had issued to Republic.<sup>6</sup>

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1. Federal regulations provide for grants to the states to conduct research, demonstrations, and training to further the objectives of the EPA. This aid, in the form of federal grants, establishes state EPAs. These state EPAs are responsible to the EPA Regional Administrators for their region and to the Federal EPA. 40 C.F.R. § 30 (1977).

2. Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1311(b)(1)(A)(i) (1976).

3. Point source refers to any building, structure, facility or installation from which there is or may be the discharge of pollutants.

4. The EPA is organized into ten regional offices each consisting of three to eight states. Each regional office is headed by a Regional Administrator who is responsible directly to the Federal EPA. Regional Administrators are responsible, *inter alia*, for the furtherance of EPA objectives within their boundaries. 40 C.F.R. § 1.5, 1.41 (1977).

5. *Republic Steel Corp. v. Train*, 557 F.2d 91 (1977).

6. *Id.* at 97.

The Sixth Circuit based its ruling on the fact that the FWPCA expressly conditions adherence to the July 1, 1977 deadline upon a definition by the Administrator of the EPA (Administrator) of the BPT for the various discharging industries. Failure by the Administrator to satisfy this condition precedent by not publishing the final regulations for alloy and steel manufacturing BPT, excused Republic's noncompliance with the July 1, 1977 deadline. After this ruling, the EPA filed a petition for a writ of certiorari with the United States Supreme Court.<sup>7</sup>

Congress, in the meantime, had enacted the Clean Water Act of 1977 (1977 Amendments),<sup>8</sup> which amended and revised portions of the FWPCA. In the light of these new regulations, the Supreme Court granted the EPA's petition for certiorari, vacated the Sixth Circuit's ruling, and remanded the case for further consideration.<sup>9</sup>

In August 1978, in *Republic II*, the Sixth Circuit held that the deadline for attaining BPT by industrial dischargers cannot be waived by the courts.<sup>10</sup> In its ruling, the court stated that the provisions of the 1977 Amendments made their previous decision moot. The 1977 Amendments did not change the July 1, 1977 deadline for achieving BPT, the court found, nor did it alter the requirement that the Administrator set guidelines for BPT by October 18, 1973.

Section 309 of the 1977 Amendments<sup>11</sup> provides that the Administrator cannot grant an extension to a discharger who has not complied with the requirements of the FWPCA. But before doing so the Administrator must find: 1) that the discharger is making a good faith effort to comply with the FWPCA requirements and 2) that the discharger has made a commitment of the necessary resources to achieve compliance by the earliest possible date after July 1, 1977—although this compliance cannot occur later than April 1, 1979. This section further requires that any such extension not result in any imposition of additional controls on any other point or nonpoint source, that an application for the permit be filed prior to Dec. 31, 1974, and that the facilities necessary for compliance are under construction.

The Sixth Circuit stated, in *Republic II*, that Congress intended the procedure outlined in section 309, to be the only relief possible from

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7. *Republic Steel Corp. v. Train*, 557 F.2d 91 (6th Cir. 1977), *vacated*, 98 S.Ct. 761 (1978).

8. Federal Water Pollution Control Act Amendments of 1977, Pub. L. No. 95-217, § 1319, 91 Stat. 1566 (amending 33 U.S.C.A. 1251 (1977 Supp. 1978)).

9. *Republic Steel Corp. v. Train*, 557 F.2d at 97.

10. *Republic Steel v. Costle*, 581 F.2d 1228, 1232 (1978).

11. Federal Water Pollution Control Act Amendments of 1977, Pub. L. No. 95-217, § 1319(a)(5)(B), 91 Stat. 1566 (amending 33 U.S.C.A. § 1251 (1977 Supp. 1978)).

the mandatory July 1, 1977 deadline.<sup>12</sup> This deadline cannot be waived by the courts. After citing the Senate Report which dealt with the purpose of the 1977 Amendments,<sup>13</sup> the court stated that section 309 responds to the legitimate concerns of the dischargers who, despite good faith efforts, have not been able to comply with the 1977 requirements.

The Senate Committee that issued this report had also considered the alternative of providing a case by case extension of the deadline. In rejecting this method, the Senate Committee had stated that this procedure would not only burden the EPA administration, but that it would provide further opportunity for delay for those who are otherwise unable to make a legitimate case for additional time.<sup>14</sup>

In *Republic II*, Republic argued that the 1977 Amendments to the FWPCA did not change the operation of the FWPCA as it was construed in *Republic I*. In other words, Republic requested the court to affirm its decision in *Republic I* despite the addition of section 309 to the FWPCA. To this the court answered that it was bound to read section 309 of the 1977 Amendments together with the original provisions of the FPWCA "as part of an integrated whole."<sup>15</sup> To adhere to its earlier decision, would not only render the 1977 Amendments meaningless, but would also defeat congressional intent. Although the Administrator can "extend the deadline where noncompliance is caused solely by the lack of BPT guidelines,"<sup>16</sup> an extension apparently cannot be granted unless the applicant also meets the requirements of section 309.

Given that the 1977 Amendments were, in effect, a realization on the part of Congress that its program for improving the quality of the nation's waters as expressed in the Federal Water Pollution Control Act of 1972 was overly optimistic, the Sixth Circuit's decision in this case can only be applauded. Section 309 of the 1977 Amendments is a compromise between the goal of eliminating water pollution and not unduly punishing those dischargers who are in good faith attempting to meet this goal. The court's strict construction of this section is clearly an indication that those dischargers who are attempting to avoid their responsibilities by creating further delays will not be indulged.

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12. *Republic Steel v. Costle*, 581 F.2d at 1231.

13. S. Rep. No. 95-370 95th Cong. 1st Sess. reprinted in (1977) U.S. Code Cong. & Ad. News 4326, 4385, 4387.

14. S. Rep. No. 95-370, 95th Cong. 1st Sess. reprinted in (1977) U.S. Code Cong. & Ad. News 4326, 4385, 4387.

15. *Republic Steel v. Costle*, 581 F.2d at 1232.

16. *Id.* at 1232.