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JURISDICTION TO REVIEW WATER POLLUTION CONTROL REGULATIONS: *CPC INTERNATIONAL INC. v. TRAIN*

The Federal Water Pollution Control Act Amendments of 1972¹ (FWPCA) were passed against a background of increasing national concern over water pollution² and the quality of the environment in general.³ FWPCA establishes a complex scheme⁴ designed to achieve its stated "national goal that the discharge of pollutants . . . into the navigable waters be eliminated by 1985."⁵ To attain this goal, the new amendments allow the Environmental Protection Agency (EPA) to regulate the amount of effluents emitted by any source.⁶ By broadening the enforcement powers of the EPA,⁷ Congress has sought to make pollution the exception rather than the rule and place the burden of justifying pollution on the polluter.⁸

1. FWPCA §§ 101-518, 33 U.S.C. §§ 1251-1376 (Supp. II, 1972).

2. See, e.g., the Water Pollution Control Act of 1948, Act of June 30, 1948, Pub. L. No. 845, ch. 758, 62 Stat. 1155. Federal water pollution legislation dates from the 1899 River and Harbors Act, 33 U.S.C. §§ 407-14 (1970), but expanded rapidly after the Water Pollution Control Act of 1948. The primary responsibility for enforcement is on the states, only half of which had fully approved water quality standards by 1971. The federal government has had little success in trying to coordinate and enforce those standards. SENATE COMM. ON PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93d Cong., 1st Sess. 1422-23, 1426 [hereinafter cited as LEGISLATIVE HISTORY].

3. See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970), as amended, 42 U.S.C. § 4332 (Supp. V, 1975); Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857-58a (1970), as amended, 42 U.S.C. §§ 1857b-1, 1857c-5, c-8 to -10, 1857d-1, 1857f-1, f-6e to -7, 1857h-5, 1857i (Supp. IV, 1974).

4. For a section-by-section analysis of the Act see F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03, at 3-80 to -176 (1973); R. Zener, *The Federal Law of Water Pollution Control*, in FEDERAL ENVIRONMENTAL LAW 682-791 (1974).

5. Federal Water Pollution Control Act Amendments of 1972 (FWPCA) § 101(a)(1), 33 U.S.C. § 1251(a)(1) (Supp. II, 1972).

6. *Id.* §§ 301-07, 33 U.S.C. §§ 1311-17.

7. The Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903, provided only for development and promulgation of water quality standards. For the history of prior water pollution control legislation see F. GRAD, *supra* note 4, § 3.03; Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103 (1970).

8. See FWPCA § 301(a), 33 U.S.C. § 1311(a) (Supp. II, 1972). "The most noteworthy aspect of the legislation . . . is what has been referred to as a 'clean water's' approach." F. GRAD, *supra* note 4, § 3.03, at 3-81.

An initial step in the statutory scheme guiding issuance of water pollution control regulations by the EPA is the promulgation of effluent limitation regulations. In *CPC International Inc. v. Train*,⁹ a group of corn processing companies brought suit before the United States Court of Appeals for the Eighth Circuit challenging guidelines and performance standards promulgated to cover the grain processing industry.¹⁰ The principal issue before the court was whether it had jurisdiction to review effluent limitation regulations for existing plants.¹¹ The court held that the EPA did not have the authority under FWPCA to promulgate such regulations and thus jurisdiction in the court of appeals was improper.¹²

Under section 301(b)¹³ of FWPCA existing sources of pollution must be brought into compliance with the following standards and timetable. By July 1, 1977, sources must meet effluent limitations achievable through application of the "best practicable control technology currently available as defined by the Administrator pursuant to section

Section 301(c) of the FWPCA, 33 U.S.C. § 1311(c) (Supp. II, 1972), allows the Agency Administrator to modify effluent limitations only "upon a showing by the owner or operator of such point source . . . that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward elimination of the discharge of pollutants."

9. 515 F.2d 1032 (8th Cir. 1975).

10. *Id.* at 1034.

11. *Id.* The court also considered challenges to regulations covering standards of performance for new plants (§ 306(b)) and pretreatment standards for new plants which discharge wastes into publicly-owned treatment plants (§ 307(c)). *Id.* The court held that these regulations were not adequately supported by EPA findings. Employing the standards for a limited scope of judicial review established in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the court held that § 306(d) regulations were not formulated in terms of "the best available demonstrated control technology" as required by § 306(a)(1). 515 F.2d at 1050. EPA had contended that simultaneous use of all technology presently available in the industry (but not all used in one plant), in addition to deep bed filtration, would allow new plants to meet the standards. The court held, however, that the technology was not demonstrated to be available within the industry and that EPA findings were inadequate to justify their assessment that deep bed filtration could be applied to this industry and handle the unique "shockload" problems in processing corn. The court remanded the regulations for Agency action within 120 days, with the additional directive to consider technology costs as required by the Act. *Id.* at 1047-50.

The § 307(c) regulations covering pretreatment standards for new plants that emit wastes into a municipal system were held too vague to provide adequate notice to plant operators of potential violations. The regulations were remanded for a more precise Agency definition of what constituted an "excessive" discharge that would produce a "treatment process upset and subsequent loss of treatment efficacy." *Id.* at 1052.

12. *Id.* at 1037.

13. FWPCA § 301(b), 33 U.S.C. § 1311(b) (Supp. II, 1972).

[304(b)]. . . .” By July 1, 1983, limitations achievable through application of the “best available technology economically achievable . . . as determined in accordance with regulations issued by the Administrator pursuant to section [304(b)] . . . ” must be met. Section 304(b)¹⁴ requires the EPA to promulgate *guidelines* to aid adoption or revision of effluent limitations. Although section 509(b) provides for review of selected EPA actions in a circuit court of appeals, including “approving or promulgating any effluent limitation . . . under section [301] . . . ,”¹⁵ no provision is made for review of section 304(b) guidelines.¹⁶

Prior to *CPC* two federal district courts had considered whether original jurisdiction for review of EPA promulgated guidelines and effluent limitations is in the district or circuit courts. In *American Paper Institute v. Train*,¹⁷ a district court denied jurisdiction declaring that the promulgation of guidelines is not reviewable and establishment of effluent limitations is reviewable only in the court of appeals.¹⁸ *E.I.*

14. FWPCA § 304(b), 33 U.S.C. § 1314(b) (Supp. II, 1972), provides in pertinent part:

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall . . . publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations. . . . Such regulations shall—

(1)(A) identify . . . the degree of effluent reduction attainable through the application of the best practicable control technology currently available . . . ; and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources. . . . Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application . . . and such other factors as the Administrator deems appropriate. . . .

15. FWPCA § 509(b), 33 U.S.C. § 1369(b) (Supp. II, 1972).

16. (1) Review of the Administrator’s action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or treatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in *approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title*, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any 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. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

FWPCA § 509(b), 33 U.S.C. § 1369(b) (Supp. II, 1972) (emphasis added). Note that in this provision of the Act, the statute refers specifically to §§ 1311, 1312 and 1316 (FWPCA §§ 301, 302, 306) but omits any reference to § 1314 (FWPCA § 304).

17. 381 F. Supp. 553 (D.D.C. 1974).

18. *Id.* at 554.

DuPont de Nemours & Co. v. Train,¹⁹ however, held that EPA has the authority to promulgate effluent limitations under section 301(b) and that both guidelines and limitations must be reviewed in the court of appeals.²⁰ Based on statutory construction, the *DuPont* court found that EPA promulgation of effluent limitations was implicit in the grant of review in section 509(b).²¹ This interpretation was supported by other sections of the Act. For example the requirements of sections 301(b) and 304(b) contemplate that EPA will issue the limitations,²² and a contrary conclusion would be inconsistent with EPA's permit review authority.²³ The *DuPont* court also felt that slight variations in language of different sections of the Act should not be used to limit EPA powers²⁴ and expressed concern that allowing section 304(b) guidelines and section 301(b) limitations to be challenged in different courts "would create duplicative litigation." Moreover, appeals from district court decisions would hinder the Congressional goal of "prompt judicial review."²⁵

In *CPC*, the court dismissed the *DuPont* analysis as "unpersuasive"²⁶ in view of the interrelationships between relevant provisions of the FWPCA²⁷ and the legislative history.²⁸ Since other sections of the

19. 383 F. Supp. 1244 (W.D. Va. 1974), *aff'd*, 528 F.2d 1136 (4th Cir. 1975).

20. *Id.* at 1250.

21. *Id.* at 1252.

22. *Id.* at 1250-51.

23. *Id.* at 1252.

24. *Id.* at 1251-52. Agency action on effluent limitations and standards is variously described as "promulgating," "approving," "establishment of" and "achievement of" in FWPCA §§ 301, 302, 306, 33 U.S.C. §§ 1311, 1312, 1316 (Supp. II, 1972).

25. 383 F. Supp. at 1254.

26. 515 F.2d at 1043 n.19. EPA had argued that the same Agency findings supported the guidelines authorized by § 304(b) and the effluent limitations mentioned in § 301(b). Brief for Respondents at 12, *CPC Int'l Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975). EPA maintained that such jointly supported issuance of regulations was consonant with the language and legislative history of the Act and that judicial deference should be given to this EPA determination. *Id.* at 15-31, *citing* *Ehlert v. United States*, 402 U.S. 99, 105 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *United States v. City of Chicago*, 400 U.S. 8, 10 (1970); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). None of these cases, however, involved an administrative construction that would affect the level of original judicial review as in the *CPC* suit.

Finally, the EPA contended that such an interpretation would avoid "bifurcation of review" and would "short circuit petitioner's attempt to delay pollution abatement." Brief for Respondents, *supra*, at 23. For a discussion of judicial bifurcation see L. JAFFEE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION*, 158-59, 421-22 (1965).

27. See notes 30-32 and accompanying text *infra*.

28. 515 F.2d at 1039-42. The court also cited the Act's legislative history to demonstrate that one of the purposes for setting deadlines on EPA promulgation of regulations is to provide adequate and timely guidance for state National Pollution Elimination Discharge System (NPDES) programs. *Id.*

FWPCA actively mandate EPA promulgation of standards,²⁹ the court decided that the passive voice of section 301(b) indicated that Congress had given EPA no general power to issue regulations under that section.³⁰ The court went on to declare that “the permit provisions of the Act are inconsistent with the argument that the permit-setting authority is to be governed by regulations published under section 301.”³¹ In

Of particular significance to the *CPC* court was the understanding of the respective federal and state roles under the Act expressed by two people most concerned with the Act prior to its passage. Then EPA Administrator Ruckelshaus, testifying before a Senate subcommittee, said:

We believe that such Federal guidance is especially important in the area of effluent limitations. . . . It would be difficult and needlessly duplicative for each State to gather all the scientific, industrial, and technological information upon which effluent limitations must be based. Federal leadership must be provided here so that the States, in setting effluent limitations, have a clear idea of the task.

Id. at 1039 (emphasis added), quoting *Hearings on S. 75, S. 192, S. 280, S. 281, S. 523, S. 573, S. 601, S. 679, S. 927, S. 1011, S. 1012, S. 1013, S. 1014, S. 1015 and S. 1017 before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess., pt. 1, at 19*. The court also quoted Senator Muskie, a primary sponsor of the Act, in his summary to the Senate of the Conference draft:

The Conference agreement provides that the Administrator may review any permit issued pursuant to this Act *as to its consistency with the guidelines* and requirements of the Act. Should the Administrator find that a permit is proposed which *does not conform to the guidelines issued under section 304* and other requirements of the Act, he shall notify the State of his determination, and *the permit cannot issue* until the Administrator determines that the necessary changes have been made to assure compliance. . . .

515 F.2d at 1042 (emphasis supplied by the court), quoting LEGISLATIVE HISTORY, *supra* note 2, at 176. The court suggested that the comments of Mr. Ruckelshaus and Senator Muskie would seem to be inappropriate if § 301(b) authorized EPA promulgation of limitations itself instead of having them achieved through § 304(b) guidelines. 515 F.2d at 1042.

The *American Paper Institute* court did not refer to the Act's legislative history when it discussed the interrelationship of §§ 301 and 304. 381 F. Supp. at 553. The *DuPont* court, in contrast, discussed FWPCA's legislative history extensively, quoting in support of its construction of the Act a different part of the Conference Report. “*The Conferees intend that the factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of application of an effluent limitation to an individual point source within such a category or class.*” 383 F. Supp. at 1254-55 (emphasis added by the court), quoting LEGISLATIVE HISTORY, *supra* note 2, at 172. In other words, factors relevant to establishing § 304 guidelines by EPA are not to be applied when NPDES permits are issued or denied. CONFERENCE REPORT ON S. 2770, S. REP. NO. 92-1236, 92d Cong., 2d Sess. (1972).

29. 515 F.2d at 1038. See, e.g., FWPCA §§ 306(b)(1)(B), 307(a)(2), 307(b), 307(c), 33 U.S.C. §§ 1316(b)(1)(B), 1317(a)(2), 1317(b), 1317(c) (Supp. II, 1972).

30. 515 F.2d at 1038. See FWPCA § 301(b), 33 U.S.C. § 1311(b) (Supp. II, 1972). For another example of the use of the passive voice see FWPCA § 301(e), 33 U.S.C. § 1311(e) (Supp. II, 1972).

31. 515 F.2d at 1038. The court based this construction on the important enforcement role given the states under the FWPCA § 402, 33 U.S.C. 1342 (Supp. II, 1972) (National Pollution Discharge Elimination System (NPDES)). If states had to follow § 301 regulations in issuing permits instead of § 304 guidelines, the court felt there was no logical

addition, the court found it significant that the Effluent Standards and Water Quality Information Advisory Committee (ESWQIAC) advises the EPA on development of guidelines and standards only under sections 304, 306 and 307.³² The court also disposed of *DuPont's* policy arguments saying that denial of court of appeals jurisdiction "is by no means to denigrate the importance [of the guidelines] under the Act or to diminish their clout in the permit-issuing process."³³ The *CPC* court assumed that the guidelines are reviewable in the district courts.³⁴

Under FWPCA the EPA is charged with eliminating water pollution by 1985.³⁵ There is little doubt that Congress intended the states to play a primary enforcement role under FWPCA.³⁶ The *CPC* court attempted to coordinate these responsibilities by delineating the statutory scheme whereby states issue permits according to EPA-promulgated guidelines which may be reviewed only in district courts. This allows states flexibility to meet varying local conditions which affect individual plant effluent discharges—a flexibility lacking in present EPA administration of the Act.³⁷ In addition, challengers to section 304(b) guidelines are assured that suit in a district court is proper³⁸ and that challenges need no

justification for having statutory one-year deadlines for EPA to issue those guidelines and yet not having similar deadlines in § 301. 515 F.2d at 1039; see FWPCA §§ 301, 304, 33 U.S.C. §§ 1311, 1314 (Supp. II, 1972).

32. 515 F.2d at 1039. FWPCA § 515, 33 U.S.C. § 1325 (Supp. II, 1972), requires the Administrator to advise ESWQIAC of proposed standards and guidelines. The committee may then hold public meetings on scientific and technical aspects of those proposals. Whether or not it does hold meetings, the committee is required to transmit all relevant information it has to the Administrator within 120 days after it has received notice of his proposed regulations.

33. 515 F.2d at 1037. The court pointed to other sections of the Act that EPA could use to enforce compliance with the guidelines other than through judicial review. *Id.* at 1037 n.11.

34. *Id.* at 1038.

35. FWPCA § 101(d), 33 U.S.C. § 1251(d) (Supp. II, 1972).

36. *Id.* § 101(b), 33 U.S.C. § 1251(b) (Supp. II, 1972) provides: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution. . . ." See also *id.* § 402, 33 U.S.C. § 1342.

37. See generally *Hearings on Implementation of the Federal Water Pollution Control Act before the Subcomm. on Investigations and Review of the House Comm. on Public Works*, 93d Cong., 2d Sess., at 27, 35, 54-63, 486-95 (1974) (particularly the testimony of Walter A. Lyon, director of the Bureau of Water Quality Management, Pa. Dep't of Environmental Resources and the discussion among John R. Quarles, Jr., Deputy Administrator, EPA, and Representatives Wright and Cleveland). See also 6 ENVIRONMENT REP. 412-13 (1975).

38. The *CPC* court noted that petitioners had to file a protective petition in the court of appeals while denying it had jurisdiction over guideline regulations. 515 F.2d at 1034 n.4. A contrary decision by the *CPC* court would have eliminated uncertainty as to the proper

longer be brought within ninety days.³⁹

These very considerations, however, discredit the *CPC* court's reading of congressional intent. Congress clearly intended that water pollution be tackled with immediacy by establishing time schedules for pollution abatement⁴⁰ and mandatory deadlines for EPA promulgations.⁴¹ As a necessary adjunct of these strict deadlines, Congress provided for swift and final review of EPA actions similar to that adopted in the Clean Air Act.⁴² Because appeals through several judicial levels may delay enforcement of challenged guidelines by over a year,⁴³

court of review with the added benefit of enhancing national uniformity of effluent limitations—another goal of the Act. See note 44 *infra*.

39. Only § 509(b) sets a 90-day limit on review. It has been suggested that this limited time for federal court review may be unconstitutional under the fifth amendment because of the possible lack of notice provided to potential plaintiffs, including citizen groups as well as industrial challengers. Note, *Reviewability: Statutory Limitations on the Availability of Judicial Review*, 1973 DUKE L.J. 253.

40. FWPCA § 301(b), 33 U.S.C. § 1311(b) (Supp. II, 1972). See note 13 and accompanying text *supra*.

41. EPA was under a court-ordered deadline of December 1, 1975, to belatedly comply with the § 304(b) requirement that guideline regulations be issued by October 18, 1973. *Natural Resources Defense Council, Inc. v. Train*, 6 E.R.C. 1033 (D.D.C. 1973).

42. FWPCA § 509(b), 33 U.S.C. § 1369(b) (Supp. II, 1972). The Clean Air Act's judicial review section places all original jurisdiction of challenges to EPA-promulgated national standards and regulations in the Court of Appeals for the District of Columbia. Challenges to Agency regulations having only local application are left to the appropriate circuit. 42 U.S.C. § 1857h-5 (Supp. II, 1972). The *DuPont* court noted the lack of legislative history on the FWPCA's review provisions. 383 F. Supp. 1253-54 n.7 (W.D. Va. 1974). For a discussion of relevant sections of both Acts see Note, *Reviewability: Statutory Limitations on the Availability of Judicial Review*, *supra* note 39.

The fact that Congress included a provision calling on the Attorney General to assess the feasibility of establishing an environmental court, Act of Oct. 18, 1972, Pub. L. 92-500, § 9, 86 Stat. 899, further supports the interpretation that swift review of EPA regulations under FWPCA was intended. Advocates claim this new court would not only develop judicial expertise on the complex technical problems involved in such litigation but would also provide swift review of cases where the alleged harm to the environment is imminent and potentially irreversible. See Whitney, *The Case for Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973); Whitney, *The Case for Creating a Special Environmental Court System—A Further Comment*, 15 WM. & MARY L. REV. 33 (1973). The Attorney General recommended that such a court not be established. DEPT OF JUSTICE, REPORT OF THE PRESIDENT, ACTING THROUGH THE ATTORNEY GENERAL, ON THE FEASIBILITY OF ESTABLISHING AN ENVIRONMENTAL COURT SYSTEM VII-1 (1973). See generally Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 517-18 (1974); Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A.J. 425 (1951).

43. 6 ENVIRONMENT REP. 196 (1975) (comments of Charles F. Lettow, attorney for industry representatives). See letter from Russell E. Train, EPA Administrator, to Carl H. Albert, Speaker of the House of Representatives, Oct. 6, 1975, on file with the *Urban Law Annual*, submitting proposed changes in FWPCA:

the *CPC* decision provides a means to thwart compliance with the water quality time schedules and thus delay FWPCA's overall goal.

Congress also intended that effluent limitations should have a uniform impact on similar classes or categories of pollution sources.⁴⁴ As a result of the *CPC* decision, EPA will have to enforce section 304 guidelines in at least 92 district courts instead of eleven courts of appeals. Courts of appeals, however, retain original jurisdiction over

By interposing the district court in the judicial review process, at least a one year delay in the final resolution of a particular effluent guideline will occur because a decision could be appealed to the court of appeals from a district court decision. Further, since several challenges are pending in the courts, the validity of the regulations involved might not be finally resolved until the middle of 1976 or later, only one year preceding the deadline contained in the Act.

Potential delay was also recognized by the *DuPont* court:

It is reasonable to assume that by providing original judicial review in the Courts of Appeals of effluent limitations under section 509(b) along with strict time limitations and prohibitions on review by way of criminal or other civil proceedings, Congress sought to establish expeditious and consistent application of limitations. . . . [A]ny successful challenge to guidelines in the district court would affect the limitations which could only be challenged in the Courts of Appeals and would thus hinder the goal of prompt judicial review.

E.I. dePont de Nemours & Co. v. Train, 383 F. Supp. 1244, 1253-54 (W.D. Va. 1974). See also Letter from Frank P. Grad to Anne K. Stich, Oct. 25, 1975, on file with the *Urban Law Annual*: "The whole scheme of the law to my mind clearly indicates the congressional intent that the Administrator be empowered to issue uniform effluent limitations [T]he reading the court has given [the Act] . . . results in disastrous delays in getting on with the business of water pollution control."

44. FWPCA § 301, 33 U.S.C. § 1311 (Supp. II, 1972). The Conference Report on § 304(b) guidelines in LEGISLATIVE HISTORY, *supra* note 2, at 172 states: "the intent is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible," cited in *E.I. duPont de Nemours & Co. v. Train*, 383 F. Supp. at 1255.

The *DuPont* court noted the difficulty with jurisdiction over § 304(b) guidelines in district courts rather than courts of appeals: "[B]y plaintiff's construction of the Act, actual effluent limitations would always be *individualized* for dischargers in NPDES permits, thus limiting the broad precedential effect of any judicial decision approving or rejecting any such limitation." 383 F. Supp. at 1253-54 (emphasis added). Administrator Train also noted the lack of national uniformity in effluent limitation guidelines flowing from the *CPC* decision:

It can also be expected that, unless the proposed bill is enacted, proliferation of jurisdictions where review could be undertaken will increase the likelihood of conflicting judicial orders with respect to the same regulation. Further, in the Courts of Appeals, transfer to one court and consolidation of original challenges to a single industry regulated [sic] are contemplated by 28 U.S.C. § 2112(a). On the other hand, comparable consolidation in the district court could be accomplished only by establishing a multidistrict court Taking into consideration the number of district courts that could be involved, such a procedure is unlikely to be implemented. Furthermore, appeals from various district courts could be consolidated in one Court of Appeals only if those district courts were located within the same circuit.

Letter from Russell E. Train, *supra* note 43. See also Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980, 983-85, 992-1000 (1975); 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, 789-99, 808-09 (1973).

similar effluent limitation regulations for *new* plants.⁴⁵ This “bifurcation of review”⁴⁶ can only lead to duplicative litigation for EPA and industrial challengers and destroy the uniformity of regulation contemplated under the Act.

Ultimate resolution of the jurisdictional issue rests with Congress. Only Congress can make the policy decision to hasten and unify judicial review of federal water pollution control activities by providing original jurisdiction in federal courts of appeal.⁴⁷ The urgency expressed by the statutory deadlines sharply conflicts with an enforcement procedure that can be delayed by multitudinous and lengthy court battles. If Congress expects the deadlines to be met, it may have to amend either FWPCA deadlines or the provisions for judicial review.⁴⁸ Although the *CPC* decision may clarify the interrelation between several key provisions of FWPCA, it does so at the expense of FWPCA’s explicit goal of clean water by 1985.

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45. FWPCA § 509(b), 33 U.S.C. § 1369(b) (Supp. II, 1972).

46. “Bifurcation of judicial review” was the phrase used in *Foti v. Immigration & Naturalization Serv.*, 375 U.S. 217, 226 (1963). The major issue in *Foti* was whether a “final order of deportation” included a refusal to suspend deportation under the Immigration and Nationality Act of 1952, ch. 5, § 244, 66 Stat. 214. Final orders of deportation were directly reviewable in the court of appeals. The Supreme Court held that review of the administrative denial is ancillary to the deportability issue, and both determinations should therefore be made by the same court at the same time. The case is discussed, along with the subject of judicial bifurcation, in L. JAFFE, *supra* note 26, at 158-59, 421-22.

47. It should be noted that the *CPC* court declared that Congress has already made that policy decision. 515 F.2d at 1037. *But see* *American Iron & Steel Institute v. EPA*, 8 E.R.C. 1321, 1347-48 (3d Cir. 1975) (Adams, J., concurring) which criticizes the vague and ambiguous statutory language in the FWPCA and concludes:

The definition of the roles of the state and national governments in areas where they share concurrent powers is essentially a matter for Congress, not for the courts. The failure to create clear boundaries for the authority of the states and the EPA has thrust upon the courts a responsibility to infer legislative intent from the disparate provisions of this complex legislation. The courts have not evaded their responsibility, but our disagreement with the Eighth Circuit underlines the extent to which the courts can write law, even in areas of Congressional authority, when there has been a failure to manifest legislative intent by clear statutory commands.

(Footnotes omitted). The reference to the Eighth Circuit is specifically to its *CPC* decision. For additional cases joining the Third Circuit in rejecting the *CPC* holding see *American Frozen Food Institute v. Train*, 8 E.R.C. 1993 (D.C. Cir. 1976); *American Petroleum Institute v. EPA*, 526 F.2d 1343 (10th Cir. 1975); *E.I. duPont de Nemours & Co. v. Train*, 528 F.2d 1136 (4th Cir. 1975); *American Meat Institute v. EPA*, 526 F.2d 42 (7th Cir. 1975); *American Iron & Steel Institute v. EPA*, 526 F.2d 1027 (3d Cir. 1975); *E.I. duPont de Nemours & Co. v. Train*, 8 E.R.C. 1718 (4th Cir.), *cert. granted*, 96 S.Ct. 1365 (1976); *Shell Oil Co. v. Train*, 415 F. Supp. 70 (N.D. Cal. 1976).

48. On Oct. 6, 1975, EPA submitted to the House for consideration a proposal to amend the Act’s judicial review section in order to make explicit court of appeals original jurisdiction over the guidelines of § 304(b), 33 U.S.C. § 1314(b) (Supp. II, 1972). Letter from Russell E. Train, *supra* note 43.

