UIC Law Review

Volume 11 | Issue 1 Article 6

Fall 1977

Judicial Review under the FWPCA: When and Where, 11 J. Marshall J. Prac. & Proc. 188 (1977)

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JUDICIAL REVIEW UNDER THE FWPCA: WHEN AND WHERE?

From the moment the Environmental Protection Agency (EPA) began issuing regulations under the Federal Water Pollution Control Act of 1972,[1] (FWPCA), the determination of the proper forum for judicial review has presented a surprising degree of difficulty. Equally troublsome has been the task of deciding which regulations and actions of the EPA are in fact reviewable.

Although recently the United States Supreme Court has provided guidance in this muddled area[2] many important questions concerning regulation under the FWPCA, such as reviewability and the propriety of a particular review forum, remain either unanswered or in dispute among the various federal courts. An overview of the FWPCA, therefore, is important for a proper examination of these continuing problems.[3]

Although federal water pollution control legislation has been in existence since 1948,[4] a complete restructuring of the federal government's participation in water pollution control occurred with the enactment of the 1972 amendments to the FWPCA.[5] The heart of the pre-1972 program was "water quality standards." These standards were a measure of the amount of pollutants a given body of water could sustain without substantial harm to its ecosystems or without making the water a health hazard. Under the pre-1972 program, enforcement could be

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1. 33 U.S.C. §§ 1251-1376 (Supp. V 1975).
2. E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112 (1977).
3. For an extensive explanation of prior forms of the FWPCA and a section by section analysis *see generally* Davis & Glasser, *The Discharge Permit Program Under the Federal Water Pollution Control Act of 1972—Improvement of Water Quality Through the Regulation of Discharges from Industrial Facilities*, 2 FORDHAM URB. L.J. 179 (1974); Mcthenia, *An Examination of the Federal Water Pollution Control Act of 1972*, 30 WASH. & LEE L. REV. 195 (1973); Comment, *The Federal Water Pollution Control Act Amendments of 1972*, 14 B.C. IND. & COM. L. REV. 672 (1973); Comment, *The Federal Water Pollution Control Act Amendments of 1972*, 1973 WIS. L. REV. 893 (1973).
4. Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948).
5. The 1972 amendments to the FWPCA not only amended the 1948 Act but also reorganized and expanded the Act. For a discussion of the legislative history of the 1972 amendments see S. REP. No. 92-414, 92d CONG., 1st SESS. 5 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, *reported in* CONGRESSIONAL RESEARCH SERVICE, A LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 1423 (Comm. Print 1973) [hereinafter, citations to the legislative history of the FWPCA will be to the CONGRESSIONAL RESEARCH SERVICE publication and referred to as LEG. HIST.].

commenced against the discharger if the discharge of wastes reduced the quality of water below the permissible water quality standard. To establish a violation, the plaintiff had to demonstrate that the cause of the unacceptable water quality was the effluent being discharged by the defendant. The demanding burden on the plaintiff, especially when dealing with large bodies of water, to show a causal link between discharge by a single defendant and the unacceptable water quality, when coupled with the unwieldy procedural requirements of the statute[6] proved fatal to any attempts at effective enforcement.[7]

The 1972 amendments were passed in order to bring about a shift in emphasis of the FWPCA's policy from regulating water quality to limiting the discharge of effluents into bodies of water, and to make clear that the primary enforcement responsibilities would lie with the states.[8] To achieve these fundamental goals, the 1972 amendments sought to implement three basic strategies. First, a broad matching grant program was developed for the construction of municipal waste treatment facilities.[9] Second, implementation and adoption, at the state and regional levels, of three interrelated water quality planning processes was established.[10] Third, and most important, was the use of federal regu-

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6. The 1948 FWPCA and its subsequent amendments required that prior to the commencement of enforcement, a public hearing before a hearing board would be held to recommend whether or not federal officials should bring a federal abatement suit. *See* Water Pollution Control Act of 1948, Pub. L. No. 80-845, § 2(d), 62 Stat. 1155; Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498; Water Pollution Control Act Amendments of 1965, Pub. L. No. 89-234, 79 Stat. 903; Federal Water Pollution Control Act Amendments of 1970, Pub. L. No. 91-224, 84 Stat. 91. According to one author, these public hearings usually took more than a year to complete. 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, 1121 (1970).

7. Such ineffective enforcement is evidenced by the fact that only one case reached the courts in twenty years. LEG. HIST., *supra* note 5, at 1423.

8. 33 U.S.C. § 1251 (Supp. V 1975).

9. The operation of the waste treatment facility grant program is primarily governed by sections 201-207 of the FWPCA. 33 U.S.C. §§ 1281-1287 (Supp. V 1975).

10. These three planning schemes were enacted to provide a basis for development of the waste treatment construction program and the National Pollutant Discharge Elimination System program. *See* note 11 and accompanying text *infra*. The first of the planning processes is a facility funding program set up by the EPA to guide the development of sewage treatment plants and to provide a channel for federal funds to *individual* treatment facilities. 33 U.S.C. § 1281 (Supp. V 1975). The next level of planning is on a regional basis. Areawide agencies are to be designated and will plan for and regulate future disposal of municipal and industrial wastes in those areas which have special problems. *Id.* § 1288. Finally, statewide basin planning is to be carried out by the state environmental protection agencies. Statewide basin planning is intended to provide an overall plan for all navigable waters within state boundaries. *Id.* § 1313. For the most in-depth and thorough analysis

lations to limit the amount that any single point source of pollution[11] may discharge into the nation's navigable waters.[12]

These regulations, national in scope, are divided into three types according to either the character of the sources or the components of the effluent. The regulations proscribing discharge of pollutants from existing sources are called "effluent limitations."[13] The regulations for new sources[14] are called "standards of performance"[15] and when effluent discharges involve toxic pollutants[16] (regardless of the character of the source), the level of discharge must not exceed the limits set in regulations entitled "effluent standards."[17]

Implementation of these regulations is to be on an individual basis through a permit system called the National Pollutant Discharge Elimination System (NPDES).[18] The FWPCA flatly declares that all discharge of pollutants is unlawful until a NPDES permit is obtained and the discharges are in accordance with the conditions prescribed in the permit.[19] In order to obtain a permit it is necessary for the applicant to demonstrate that the effluent discharges do not exceed the effluent limitations established in the federal regulations.[20]

Each of these federal regulations proscribing the discharge

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of these planning processes to date, see Phillips, *Developments in Water Quality and Land Use Planning: Problems in Application of the Federal Water Pollution Control Amendments of 1972*, 10 URB. L. ANN. 43 (1975).

11. Section 502(14) of the FWPCA, 33 U.S.C. § 1362(14) (Supp. V 1975), defines "point source" as a "discernible, confined, and discrete conveyance." The FWPCA is intended to regulate only those types of contributing points of pollution which are capable of regulation. The drainage pipe from a steel mill carrying spent sulfuric acid can be rerouted through recycling systems which remove most of the acid. The run-off of ammonia nitrates from recently fertilized farmland is not capable of treatment, short of halting fertilization.

12. Federal regulations, issued on a nationwide basis according to categories of pollutors, limit the amount of permissible effluent discharge and are promulgated under the authority of sections 301 for existing sources, 306 for new sources, and 307 for toxic substances. *Id.* §§ 1311, 1316, 1317.

13. *Id.* § 1311.

14. "New source" means any building, structure, facility, or installation whose construction began after publication of proposed regulations prescribing a standard of performance which will be applicable to that source if the regulation is issued in that form. *Id.* § 1316(a)(2).

15. *Id.* § 1316(a)(1).

16. Toxic pollutants are those substances which after discharge and upon exposure, ingestion, inhalation, or assimilation into any organism will cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions, or physical deformation in such organisms or their offspring. *Id.* § 1362(13).

17. *Id.* § 1316.

18. *Id.* § 1342.

19. Section 301(a) provides that "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." *Id.* § 1311(a).

20. *Id.* § 1342(a)(1), (b)(1).

of pollutants, in conjunction with other procedural requirements such at data recordation and monitoring of daily discharges,[21] must be complied with in order to obtain a NPDES permit. Initially, the permits are to be issued by the EPA, but the FWPCA contemplates that the entire NPDES permit program, including enforcement, will eventually be taken over by the states.[22] Section 402, the heart of the NPDES program, specifies strict requirements that must be met prior to the states being allowed to administer the permit issuing process.[23] The EPA, however, retains veto power over each permit[24] and over the entire permit issuing process.[25]

According to section 509 of the FWPCA[26] the initial issuance of permits by the EPA, the decision to allow or deny state assumption to the permit program, and the promulgation of the national regulations limiting effluent discharges are all reviewable within ninety days in the court of appeals for the circuit in which the plaintiff does business or resides.[27] The exercise of this right of review has engendered jurisdictional problems for each type of regulation issued. Often the issue of jurisdiction has arisen only as a secondary consideration to a substantive challenge, yet the court decisions show considerable differences in how to interpret limited statutory grants of subject matter jurisdiction. The issue of the court's subject matter jurisdiction has been further clouded by attempts to obtain review under the Administrative Procedure Act[28] and federal question jurisdiction.

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21. *Id.* §§ 1318, 1342(a)(1), (b)(1).
22. *Id.* § 1342(b).
23. *Id.* § 1342(b).
24. *Id.* § 1342(d). The EPA, however, is empowered to waive its veto power over each permit issued by the state-run program. *Id.* § 1342(e).
25. *Id.* § 1342(c)(3).
26. *Id.* § 1369(c).
27. Section 509(b)(1) of the FWPCA provides:

> 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), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b), (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.

Id. § 1369(b)(1).
28. 5 U.S.C. §§ 701-706 (1970).

In order to provide a coherent presentation, this comment will be divided into three sections. The first area of consideration will be the problems arising from the choice of a forum for the review of EPA actions. The second section will examine those decisions which have dealt with the problem of whether or not certain actions not mentioned in the special review provisions of the FWPCA are in fact reviewable and, if so, when. The third division of this comment will confront the growing debate among the federal circuits concerning whether other jurisdictional statutes, such as the Administrative Procedure Act, can provide the basis for judicial review of acts under the FWPCA and whether such statutes can be utilized to circumvent the notice of suit requirement of the FWPCA.

Effluent Limitations— District Court or Court of Appeals Review?

The ultimate goal of the FWPCA is clean water through absolute prohibition of effluent discharge by 1985.[29] This is to be achieved by the utilization of a two-step process for existing sources.[30] The first step is to limit effluent discharges to a level achievable through use of currently existing technology.[31] The second step is to set levels of discharge that will be equal to the expected achievable level if the present rate of development of abatement technology continues.[32] According to section 304 of the FWPCA, the EPA was to issue, within various deadlines not to exceed one year, guidelines and information that were to be used in constructing the permit programs,[33] and in establishing

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29. *Id.* § 1251(a)(1).

30. Section 301 of the FWPCA declares the discharge of any pollutant unlawful unless in accordance with the FWPCA. For existing sources section 301 "allows" discharge up to a maximum of two increasingly stringent levels whose exact numerical standard is a function of the sophistication of the effluent reduction equipment. *Id.* § 1311(a), (b). *See* notes 31 and 32 *supra.*

31. Section 301(b)(1)(A), *id.* § 1311(b)(1)(A), states that by July 1, 1977, point sources shall achieve the degree of effluent limitation obtainable through the use of the "best practical control technology currently available." One court has interpreted this phrase, based on the remarks of Senator Muskie, the FWPCA's principal author, to mean the average performance of the best existing plant's effluent reduction systems. American Meat Inst. v. Train, 526 F.2d 442, 453 (7th Cir. 1975).

32. Section 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A) (Supp. V 1975), states that by July 1, 1983, categories and classes of point sources shall achieve the degree of effluent limitation obtainable through the use of the "best available technology economically achievable." The Seventh Circuit defined this as technology which already exists in the very best of plants or which has been shown operational and could be made generally applicable through public or private research. American Meat Inst. v. Train, 526 F.2d 442, 462-63 (7th Cir. 1975).

33. 33 U.S.C. § 1314(f), (g), (h) (Supp. V 1975).

standards of performance[34] and effluent limitations.[35] Section 304, was in part a mandate to the EPA to investigate and study the currently available technology and to make predictions as to its future potential. The degree of effluent reduction attainable at these two levels of technology were to form the basis for the existing source effluent limitations so that what could not be removed by present effluent reduction equipment would be the permissible level of discharge. These section 304 guidelines were then to be used in the development of single number effluent limitations enforceable against all point sources.[36] Due to the enormity of the task under such short deadlines, the EPA issued guidelines and the actual numerical limits in one combined form in early 1974.[37]

While it was clear from section 304 that the guidelines were to be issued as regulations,[38] the legal significance of the numerical effluent limitations was ambiguous. Section 301 of the FWPCA merely states that there "shall be achieved" effluent limitation for all point sources equal to the amount obtainable by the current technology described in the section 304 guidelines, however, nowhere in section 301 is it stated that this achievement is to be accomplished through the imposition of national regulations.[39] The EPA, in issuing the "combined" regulations, as-

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34. *Id.* § 1314(c).
35. *Id.* § 1314(b).
36. While a literal reading of section 301(b), 33 U.S.C. § 1311(b) (Supp. V 1975), establishes that exact limitations are to be set based upon the section 304 guidelines, it is not made clear who is to set those limits. This omission led to a controversy that ultimately consumed sixteen court of appeals decisions, before the United States Supreme Court was able to end the controversy in its decision in E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112 (1977).
37. The Administrator did not act within the one year requirements of § 304. Compliance was not within the realm of reality. There are some 28,000 industrial dischargers and 27,000 others. About 30,000 applications for permits were filed. EPA characterizes the Act as 'incredibly complex and demanding.' A private suit was brought to compel compliance. The result was a court imposed timetable. Natural Resources Defense Council, Inc. v. Train, D.C. Cir., 510 F.2d 692, 710-14.
E.I. duPont de Nemours & Co. v. Train, 541 F.2d 1018, 1025 (4th Cir. 1976).
38. 33 U.S.C. § 1314(b) states: "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 and, at least annually thereafter, revise, if appropriate, such regulations."
39. Interestingly, there are numerous references to national regulations in other sections of the FWPCA, for example, section 509, 33 U.S.C. § 1369(b)(1) (Supp. V 1975), provides for judicial review "of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 1311. . . ." Section 505, 33 U.S.C. § 1365 (Supp. V 1975), which provides for citizen enforcement suits, states in subsection (a)(1) that suits are permitted against any person "who is alleged to be in violation of (A) an effluent standard or limitation under this chapter. . . ." Section 505(f) defines effluent standard

sumed that section 301 was a grant of implied power and promulgated the regulations on the authority of both 301 and 304.

The regulations were immediately challenged as being arbitrary and capricious, with claims that under the current applicable technology the numerical limits could not be supported as attainable.[40] Because of the ambiguity of the EPA's authority under section 301, the challengers filed suits in both the district court and the court of appeals.[41] Jurisdiction in the court of appeals was premised on the special review provision of the FWPCA, section 509. In the district court, the Administrative Procedure Act, the Declaratory Judgment Act,[42] and a federal controversy[43] were all alleged as the basis for the court's jurisdiction.

Within a year cases involving a challenge to the existing source effluent limitations had been filed in seven of the eleven circuits.[44] In each case either the parties or amicus curiae challenged the jurisdiction of the court of appeals to hear the case in an original proceeding. The essence of the challenges was that the ambiguity of section 301 concerning who was to set the exact numerical limits indicated that Congress intended the states to issue the numerical limitations through the permit process.[45] The EPA, as required by section 304, was to issue broad guidelines which contained the technological and biological information necessary to establish the effluent reduction that any individual facility would be expected to meet,[46] with these guidelines then being used by the permit issuers to draw up exact discharge limits on a permit by permit basis. Thus, the industrial challengers felt that section 301 did not provide the EPA with the

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or limitation as "(2) an effluent limitation or other limitation under section 1311. . . ." In addition, section 401(a)(1), 33 U.S.C. § 1341(a)(1) (Supp. V 1975), requires a permit applicant to obtain a certification from the state "that any such discharge will comply with the applicable provisions of section 1311, 1312, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title . . . the state shall so certify. . . ."

40. *See, e.g.*, CPC Int'l, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975).

41. *Id.* at 1034, n.4.

42. 28 U.S.C. §§ 2201-2202 (1970).

43. 28 U.S.C. § 1331 (1970).

44. American Frozen Food Inst. v. Train, 539 F.2d 107 (D.C. Cir. 1976); Hooker Chemicals & Plastics Corp. v. Train, 537 F.2d 620 (2d Cir. 1976); E.I. duPont de Nemours & Co. v. Train, 528 F.2d 1136 (4th Cir. 1975); American Petroleum Inst. v. Train, 526 F.2d 1343 (10th Cir. 1975); American Meat Inst. v. EPA, 526 F.2d 442 (7th Cir. 1975); American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975); CPC Int'l, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975).

45. *See, e.g.*, American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1035-36 (3d Cir. 1975).

46. *Id. See also* Hooker Chemicals & Plastics Corp. v. Train, 537 F.2d 620, 624-25 (2d Cir. 1976); American Meat Inst. v. EPA, 526 F.2d 442, 448-49 (7th Cir. 1975).

authority to issue national regulations containing numerical limits applicable across broad categories of industrial sources. Having concluded that the EPA could not act under section 301 the plaintiffs had to address the question of the status of those regulations already issued by the EPA and which court had jurisdiction to review them.

Section 509 of the FWPCA states that the review of the EPA's issuance of effluent limitations under section 301 is to be in the court of appeals,[47] however, there is no mention in section 509, or in any other section of the FWPCA, about review of *guidelines* issued under section 304. It was argued that the court of appeals lacked subject matter jurisdiction since the EPA had no explicit authority under section 301 to issue regulations, and that what, in essence, the EPA had issued was at most section 304 guidelines which were not within the purview of section 509.[48]

Judicial Review of Effluent Limitations

Faced with this challenge, the various courts of appeals divided along two lines of analysis. The majority of the courts held that by first determniing the EPA's authority they would resolve the question of their own jurisdiction.[49] If EPA power to issue regulations did exist under section 301, then, the courts reasoned, review would undoubtedly be in the court of appeals. This approach was to be unanimously adopted by the United States Supreme Court.[50]

The second line of opinions took the approach that while a decision on the EPA's authority would have the effect of ending the dispute over the proper forum, it in fact begged the jurisdictional question.[51] It was the opinion of the Tenth and Fourth Circuits that proper adherence to legal principles required a court to first determine whether it had the power to hear a particular case before the court made a substantive determination in that proceeding. These courts felt that to decide the question

47. *See* note 27 *supra*.
48. *See, e.g.*, CPC Int'l, Inc. v. Train, 515 F.2d 1032, 1037 (8th Cir. 1975).
49. *See* American Frozen Food Inst. v. Train, 539 F.2d 107 (D.C. Cir. 1976); Hooker Chemicals & Plastics Corp. v. Train, 537 F.2d 620 (2d Cir. 1976); American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975); American Meat Inst. v. EPA, 526 F.2d 442 (7th Cir. 1975); CPC Int'l, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975). These cases resolved the issue of jurisdiction by first deciding the EPA's authority.
50. E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112 (1977).
51. E.I. duPont de Nemours & Co. v. Train, 528 F.2d 1136 (4th Cir. 1975) (the dismissal for lack of jurisdiction in the district court in this decision and its companion case on the merits of the EPA's claim of section 301 authority was affirmed by the Supreme Court, *see* note 50 *supra*); American Petroleum Inst. v. Train, 526 F.2d 1343 (10th Cir. 1975).

of the existence of the EPA's authority, a clearly substantive question of law, before determining if the court could properly hear the case under the review provisions of the FWPCA, was to put the cart before the horse.[52] An understanding of the differences in the analytical approaches demonstrated by these cases will continue to be important in the future since Congress has shown a decided trend toward incorporating into major regulatory acts a special statutory review provision which establishes judicial review in particular courts[53] according to the function being performed by the agency.

CPC International, Inc. v. Train[54] is representative of the decisions which dealt with the existence of the EPA's authority in order to answer the question of which court should decide if the EPA's regulations were arbitrary and capricious. In concluding that the EPA *did not* possess regulatory authority under section 301, the Court of Appeals for the Eighth Circuit went through an analysis of both the statute and its legislative history and concluded that Congress intended that exact numerical standards were to be set by the permit issuers on an individual basis and that the EPA's authority was limited to the issuance of section 304 guidelines. As a result, it remanded the case to the district court to consider the arguments of the parties as to the substantive propriety of the guidelines.[55]

In *American Meat Institute v. EPA*,[56] the Seventh Circuit concluded that the EPA *did* possess section 301 authority to establish regulations and therefore, the regulations were originally reviewable in the court of appeals. Interestingly, the Seventh Circuit began its consideration of the jurisdictional question by stating that its analysis must be guided by the principle of *Train v. Natural Resources Defense Council*.[57] In that case, the Supreme Court had held that if a statute lends itself to several

52. *See, e.g.*, E.I. duPont de Nemours & Co. v. Train, 528 F.2d 1136, 1141 (4th Cir. 1975).

53. For discussions of this trend and some of the problems special review provisions have created, see D. Currie and F. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975); Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980 (1975).

54. 515 F.2d 1032 (8th Cir. 1975).

55. While the Eighth Circuit merely stated that the guidelines were reviewable in the district court, the D.C. district court found that their lack of authority deprived the plaintiffs of standing. American Paper Inst. v. Train, 381 F. Supp. 553 (D.D.C. 1974). The court found that since the guidelines were only an aid in establishing the effluent limitations and since the limitations are the binding force behind the permits the plaintiff could not claim it was "adversely affected or aggrieved" under the APA, 5 U.S.C. § 702 (1970).

56. 526 F.2d 442 (7th Cir. 1975).

57. 421 U.S. 60 (1975).

reasonable interpretations, the courts were not to reject the interpretation chosen by the agency charged with its enforcement.[58] Using this perspective, the Seventh Circuit sought only to determine if the EPA's construction of section 301 was reasonable. While the court did find the agency's interpretation reasonable, it is important to note that this conclusion was made in the context of a challenge to the court's jurisdiction. The court found that its jurisdiction was based on the existence of the EPA's authority to issue section 301 effluent limitations and that the question of the existence of that power was to be left to the EPA itself unless it was shown that the EPA's conclusion was clearly unreasonable.[59] Since the principle in *Train* was expressed in an entirely different context the court's determination of its own jurisdiction based upon such deference to an administrative agency seems questionable.

The *Train* decision dealt with the propriety of the procedures adopted by the EPA in its administration of the Clean Air Act. The challenge was to the EPA's interpretation of its *own* authority to grant variances under the Act. Generally, when dealing with the issue of judicial jurisdiction, it is incumbent upon the court to perform a completely independent analysis without granting deference to either parties' arguments. While an agency may have expertise in interpreting a portion of a statute which deals with a question of technical fact or administrative procedure, it clearly has no special insight into the purely legal determination of whether Congress had conferred upon a particular court the power to hear certain types of cases. Thus, while the Seventh Circuit apparently was under the impression that it was merely construing the existence or absence of the EPA's section 301 authority the court was, in fact, avoiding not only the proper analytical framework but was also deferring to an agency the determination of the court's own subject matter jurisdiction.

In all, five circuits[60] followed the approach of first determin-

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58. We therefore conclude that the Agency's interpretation . . . was "correct," to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as [the Clean Air Act] is the "correct" one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtably been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency.

Id. at 87.

59. American Meat Inst. v. EPA, 526 F.2d 442, 449-50 (7th Cir. 1975).

60. The Second Circuit (Hooker Chemical & Plastics Corp. v. Train, 537 F.2d 620 (2d Cir. 1976)), Third Circuit (American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975)), Seventh, Eighth and District of

ing the existence of the EPA's authority before deciding the question of the court's power to review the regulations. Refusing to follow the lead of the other courts the Tenth Circuit delivered a strongly worded contrasting opinion when in *American Petroleum Institute v. Train*[61] Judge Breitenstein, speaking for a unanimous court, began his opinion with a broad brushing aside of the rationale of the previous decisions.

> API [American Petroleum Institute] says that the court of appeals does not have jurisdiction because the Act does not authorize the Administrator to promulgate § 301 regulations imposing effluent limitations on existing sources. The argument is beside the point because the Administrator has not only claimed the power but also has acted to promulgate regulations under § 301. Our present concern is with the jurisdiction of the court of appeals — not with the statutory authority of the Administrator.
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> Existence of jurisdiction must not be confused with the exercise of that jurisdiction. . . . In the instant case, jurisdiction is incident to a federal statute granting the right of an interested person from within the circuit to file a petition in the court of appeals to review agency action. . . . *The validity or invalidity of that action has no bearing on jurisdiction. In the exercise of its statutory jurisdiction, the court determines whether the Administrator acted within his statutory authority.*[62]

American Petroleum Institute involved an appeal from a district court decision dismissing the case for lack of subject matter jurisdiction. The Fourth Circuit also adopted Judge Breitenstein's analysis in *E.I. duPont de Nemours & Co. v. Train*[63] (hereinafter *duPont*). The court confined its analysis to section 509, its legislative history, and the general intent of Congress in creating a special review provision. Judge Widner, writing for the Fourth Circuit, also felt "it unnecessary to decide the substantive question of [EPA] authority . . . under § 301 alone in order to decide the question of which federal court has jurisdiction . . . ."[64]

When the *duPont* cases reached the Supreme Court both the jurisdictional arguments and the arguments concerning section 301 authority were heard together. In an 8-0 decision[65] the Court concluded that the EPA did have section 301 authority and, *therefore*, the court of appeals had jurisdiction to hear the case.[66]

Columbia Circuits (American Frozen Food Inst. v. Train, 539 F.2d 107 (D.C. Cir. 1976)) followed this approach.

61. 526 F.2d 1343 (10th Cir. 1975).
62. *Id.* at 1345 (emphasis added).
63. 528 F.2d 1136 (4th Cir. 1975) (one of three consolidated cases to reach the Supreme Court).
64. *Id.* at 1141.
65. Justice Powell did not participate in the decision.
66. E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112 (1977).

Just as the majority of circuits had concluded, the Supreme Court similarly felt that "[t]he jurisdictional issue is subsidiary to the critical question whether EPA has the power to issue effluent limitations by regulations."[67]

Purpose of a Special Review Provision

Recalling that section 509, the special review provision of the FWPCA, delineates jurisdiction through a description of particular EPA action, it can be seen that all the courts were faced with the task of interpreting section 509's call for review of EPA action in "promulgating any effluent limitation . . . under section 301" in light of the failure of section 301 to explicitly grant EPA regulatory authority. Only in *American Petroleum Institute* and *duPont* was the task performed by recognizing that the proper focus of interpretation must be limited by the intention of Congress in creating a special review provision.

It was the express conclusion of the *duPont* court that because Congress recognized the courts would find most EPA actions reviewable under the Administrative Procedure Act, Congress intended through the enactment of section 509 to strictly control the right of review. Only through such strict control did Congress feel it would be able to maintain the integrity of its very short deadlines. Therefore, Congress limited review to a forum which would be the most expeditious.[68] It was this in-

67. *Id.* at 973.

68. The Senate Report on the version of the FWPCA drafted by the Senate, authors of section 509, contains the following language:

> One of the uncertainties in the existing Federal Water Pollution Control Act is the availability or opportunity for judicial review of administratively developed and promulgated requirements, standards and regulations. Moreover, the effect on the general program of a review itself is not clear.
>
> Any person has standing in court to challenge administratively developed standards, rules and regulations under the Act. The courts are increasingly adapting this test to what administrative actions are reviewable. In several recent cases [*Environmental Defense Fund, Inc. v. Hardin* (C.A. No. 23,813, May 28, 1970); *Barlow v. Collins* (397 U.S. 159, 167 (1970)); *Abbott Laboratories v. Gardiner* (387 U.S. 136, 140-41 (1967))] the Courts have held that even in matters committed by statute to administrative discretion, preclusion of judicial review "is not lightly to be inferred . . . it requires a showing of clear evidence of legislative intent." (*E.D.F. v. Hardin*, supra, p. 7). The Courts have granted this review to those being regulated and to those who seek "to protect the public interest in the proper administration of a regulatory system enacted for their benefit." (*E.D.F. v. Hardin*, supra, p. 6). Since precluding review does not appear to be warranted or desirable, the bill would specifically provide for such review within controlled time periods. Of course, the person regulated would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applies to him alone.
>
> Because many of these administrative actions are national in scope and require even and consistent national application, including

tention of Congress that the Fourth Circuit felt would be violated if existing source regulations, whether issued by the EPA or the states, were to be reviewed in the district court while new source and toxic regulations were reviewed in the court of appeals. "We do not conclude that Congress intended for review to be bifurcated in this manner."[69]

Congress, in providing for special review made no distinction between proper and improper agency action, or actions which exceeded the bounds of delegated authority. Section 509 merely states that review of the approval or promulgation of any effluent or other limitation under sections 301, 302 or 306 would be in the court of appeals. Whether or not the EPA even has the authority to issue effluent limitations is irrelevant to the question of where review shall take place. The sole purpose of section 509 is to make certain that when the EPA performs a function under the authority of the FWPCA, however ultra vires, capricious, or arbitrary, and the agency states that the action is taken pursuant to section 301, then review of that action can only be in the court of appeals. In short, section 509 takes the decision as to where review is to be had out of the hands of the plaintiff and squarely places it within the EPA.[70]

Bifurcated Review

A final consideration which the Fourth Circuit was especially careful to note was the argument that if the EPA did not possess section 301 authority, then the section 304 guidelines would have to be reviewed initially in the district court[71] and the other national regulations whose issuance is unquestionably within the province of the EPA,[72] would be reviewed initially in the court

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the approval of State programs under Section 402. This section specifies that any review of such actions shall be in the United States Court of Appeals for the District of Columbia. For review of permits issued under section 402 and other actions which run only to one region, the section places jurisdiction in the U.S. Court of Appeals for the Circuit in which the affected State or region, or portion thereof, is located.

In order to maintain the integrity of the time sequences provided throughout the Act, the section would provide that any review sought must be filed within 30 days of the date of the challenged promulgation or other action.

LEG. HIST., *supra* note 5, at 1502-03 (footnotes omitted).

69. E.I. duPont de Nemours & Co. v. Train, 528 F.2d 1136, 1141 (4th Cir. 1975).

70. Section 309, 33 U.S.C. § 1319 (Supp. V 1975), provides that the EPA may bring civil and criminal actions in the district court for the district in which the defendant resides or does business. Thus, if the EPA claims it is performing a § 301 function, review will be in the Court of Appeals but review will be in the district court if the EPA states that it is performing an enforcement function.

71. E.I. duPont de Nemours & Co. v. Train, 528 F.2d 1136, 1141 (4th Cir. 1975).

72. Section 306(b)(1)(B), 33 U.S.C. § 1316(b)(1)(B) (Supp. V

of appeals. The FWPCA recognized that there are a variety of effluents from a variety of sources with each having its own distinct problems and often requiring different considerations. On the other hand, separation of the development of effluent restrictions for new sources from existing sources is mainly a recognition that it is possible to demand a higher level of control technology for new sources because they are not faced with the problem of retrofitting modern effluent reduction equipment to old machinery and manufacturing processes. The waste products, however, do remain the same so the studies of the harm to the water environment are as useful for the new sources as for existing sources. This similarity led the EPA to issue the effluent limitations and the standards of performance simultaneously.[73]

It seems appropriate that those courts confronted with an ambiguous statute whose implementation depends in great part upon an interpretation of congressional intent[74] be required to consider the impact of a decision in light of the intended goal of Congress. A finding of no section 301 authority would have resulted in a bifurcated review for regulations based upon the same biological and engineering studies, with review for the existing source regulations in the district court and the review for new source regulations in the court of appeals. In addition to the obvious waste of judicial resources caused by two different courts reviewing similar regulations based upon the same information, there is also the obvious potential for conflicting precedent. Since those who challenge the regulations are usually large industrial companies or trade associations it is extremely

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1975), unequivocally states that it shall be the duty of the EPA to publish "regulations to establish Federal standards of performance for new sources . . . ." Section 307(a)(2), 33 U.S.C. § 1317(a)(2) (Supp. V 1975), also is clear in its mandate to the EPA to publish effluent standards for any toxic pollutant found to have a dangerous effect upon man or animal. Both of these promulgation activities are listed in section 509(1)(A), (C), 33 U.S.C. § 1369(b)(1)(A), (C) (Supp. V 1975), as reviewable in the court of appeals.

73. The general procedure employed by the EPA has been to contract with private research companies to study particular industries and report on the state of the art of the effluent reduction equipment available to that industry. Proposed standards were then developed and, along with the report of the private research companies, were distributed to industry representatives in the form of a Draft Development Document. The proposed standards were also issued as proposed regulations in the Federal Register. After a period of time in which comment was received on both the Development Document and the proposed regulations, adjustments were made and then the regulations were issued in final form. For a description of how one set of regulations was issued see American Meat Inst. v. Train, 526 F.2d 442, 446-47 (7th Cir. 1975).

74. The ambiguity of implementation referred to deals with existing sources and the controversy surrounding the question of who is to set the effluent limitations referred to in section 301.

unlikely that either they or the EPA will settle for any detrimental decision at the district court level. Thus, in the long run the court of appeals will almost invariably hear both types of cases.

Review of Regulations Omitted from Section 509

Toxic Pollutants

Section 307 of the FWPCA deals with federal regulation of those pollutants which Congress felt, based on scientific research, were so harmful that their release into the nation's waters presented a high danger of disease or harm to humans or animals.[75] The regulation of these effluents is a two step process. The EPA is to first compile a list of toxic substances for which it intends to limit or prohibit discharge with an explanation of the factors used in deciding which substances were to be listed.[76] After appropriate notice and comment procedures the EPA is then to issue "effluent standards" either limiting or prohibiting the discharge of those toxic pollutants so listed.[77] Section 509(b)(1)(C) provides that review of any effluent standard, prohibition, or pretreatment standard shall be in the court of appeals.[78]

Review of Toxic Effluent Standards

The EPA issued an initial list of toxic substances, within the statutory deadlines, and began the notice and comment period for the promulgation of effluent standards. Before the regulations could be issued, however, suit was brought to compel the EPA to expand this list of substances. The complaint in *Natural Resources Defense Council v. Train*,[79] (hereinafter *NRDC-toxic pollutants*), was filed in the district court with jurisdiction premised on section 505 of the FWPCA, the Administrative Procedure Act[80] and general federal question jurisdiction.[81] Citizen suits, without regard to citizenship or the amount in controversy, are authorized by section 505 to be filed against the EPA to enforce nondiscretionary duties of the agency.[82]

The district court dismissed the case after a discussion of the merits of the plaintiff's claim. At the appellate level the EPA pressed the lack of jurisdiction of the district court as a proper

75. *See* 33 U.S.C. § 1317 (Supp. V 1975).
76. *Id.* § 1317(a)(1).
77. *Id.* § 1317(a)(2).
78. *Id.* § 1369(b)(1)(C).
79. 519 F.2d 287 (D.C. Cir. 1975).
80. 5 U.S.C. §§ 701-706 (1970).
81. 28 U.S.C. § 1331 (1970).
82. 33 U.S.C. § 1365 (Supp. V 1975).

ground for dismissal. It was the contention of the EPA that the listing of the toxic substances and the promulgation of regulations controlling their discharge was one continuous process and therefore, review of that process could only be had in the court of appeals according to section 509. The court upheld the EPA's contention as to those substances which had been listed and for which standards were already issued. For those substances, however, which the EPA chose not to list, the court concluded that section 509 did not apply since section 509 is concerned solely with agency activities that culminated in the issuance of a regulation. While holding that the listing stage was totally discretionary and, therefore, non-reviewable under section 505, the court concluded that the APA was an independent grant of jurisdiction. The court, therefore, found that the district court did have the proper authority to hear the case.[83] Thus, where the EPA chooses to list a toxic pollutant, and thereafter issues a regulation controlling its discharge, those regulations will be reviewed in the court of appeals. However, if the decision is not to list a substance[84] the review will be in the district court with jurisdiction based on the APA.[85]

The analogous provisions and structure between the FWPCA and the Clean Air Act[86] has often led the courts to rely upon decisions rendered under one act to support the interpretation of a similar provision of the other act. A similar case arising under the Clean Air Act supplies an interesting contrast. In *Lubrizol Corp. v. Train*[87] the Sixth Circuit Court of Appeals concluded that the registration of fuels and fuel additives under section 211 of the Clean Air Act,[88] the prerequisite step to control or proscription of their use, was to be reviewed according to the special statutory review provisions of that act. In dealing with a scheme strikingly similar to section 307 of the FWPCA, which was aimed at the control of particularly troublesome air pollutants through the use of listing and information gathering pro-

83. The court relied upon a decision involving the notice requirements of section 505(b)(1)(A) which requires a 60-day notice to the EPA before the filing of a suit. Natural Resource Defense Council v. Train, 510 F.2d 692 (D.C. Cir. 1974). *See* note 111 *infra*.

84. The consent decree which was the final result of this litigation in fact involved a decision on the part of the parties to allow EPA regulation through sections 301, 304 and 306 rather than 307. The reasons given were that the other sections allow compliance within three years rather than one and because it was possible through sections 301 and 306 to regulate on an industry-wide basis rather than on a pollutant-by-pollutant basis. Natural Resources Defense Council v. Train, 8 ERC 2120, 2120-21 (D.D.C. June 8, 1976).

85. 5 U.S.C. § 706(2)(A) (1970).

86. 42 U.S.C. §§ 1857-1857*l* (Supp. V 1975).

87. Lubrizol Corp. v. Train, 9 ERC 1478 (6th Cir. 1976).

88. 42 U.S.C. § 1857f-6C (Supp. V 1975).

cesses followed by the promulgation of regulations which control the manufacture or distribution of hazardous fuels or additives, the Sixth Circuit analyzed how these various steps were to be reviewed in terms of congressional intent. The district court had concluded that section 307 of the Clean Air Act (the counterpart to section 509 of the FWPCA)[89] allowed the court of appeals to review only those cases that dealt with prohibitory regulations and that the registration process was to be reviewed in the district court according to the provisions of the APA. The Sixth Circuit reversed and held that the district court had misunderstood the lengths to which the Clean Air Act had sought to control judicial review. In enacting both the Clean Air Act and the FWPCA Congress had an overriding concern for rapid implementation. The court's discussion of the role of this congressional concern was clear and probing. First the court focused upon the problem of delay throughout incessant litigation. Bifurcated review would result in two courts hearing the same arguments because invariably the district court opinion would be appealed. Review of the regulation by the district court would also lack the preclusive effect of judicial review within the statutory framework because the district court jurisdiction would not be under section 307 and therefore the plaintiffs would not be bound by that section's thirty-day limitation period. Finally, if the district courts were to review the regulations under section 211, there would be a grave risk of inconsistent results and the encouragement of forum shopping. By providing the D.C. Circuit with exclusive review jurisdiction over actions of the EPA under the Clean Air Act which are national in scope, Congress established a single, national forum, except for review by the Supreme Court.[90]

The *Lubrizol* decision can be distinguished from the *NRDC-toxic pollutants* decision in that *Lubrizol* involved a challenge to

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89. The Clean Air Act differs in one respect from the FWPCA. Section 307 of the Clean Air Act provides that all national regulations shall be reviewed only in the District of Columbia Circuit Court and that those actions which have only a statewide or local impact shall be reviewed in the "appropriate circuit," which is presumably the circuit for the affected state.

The Administrative Conference of the United States, established by Congress (5 U.S.C. §§ 571-576 (Supp. V 1975)) to study various administrative procedures and make suggestions for change, has recommended that section 509 of the FWPCA be amended to conform to section 307 of the Clean Air Act. 1 C.F.R. § 305.75-4 (1976). Interestingly, the Supreme Court commented favorably upon the decentralized effect of section 509 in the *duPont* case. Justice Stevens felt that the numerous decisions at the court of appeals level performed a valuable service in weeding out the more spurious arguments and thus allowed the Court to decide the cases most efficiently. E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.26 (1977).

90. Lubrizol Corp. v. Train, 9 ERC 1478, 1483-85 (6th Cir. 1976).

an affirmative act of the EPA, the requiring of registration of motor vehicle engine oil, while *NRDC-toxic pollutants* concerned the failure of the EPA to list a toxic substance, yet, the principle involved in both decisions was similar. Each court was faced with a decision as to the meaning of a special review provision which simply called for direct appellate court review of EPA action "in promulgating any control or prohibition" (under the Clean Air Act) or "any effluent standard" (under the FWPCA). In other words, the courts had to consider to what depth they were to probe the process of development of these regulations. The *Lubrizol* court recognized that a confined construction of those words would likely defeat the very purpose of the special review procedure because a separation of the review of registration from regulation would cause immeasurable delay in implementation through additional litigation. While the *NRDC-toxic pollutants* court was properly concerned with the possibility of an absence of review of an important function of the EPA it allowed this concern to overshadow a more appropriate interpretation of section 509. Such an interpretation would have been to construe section 509 as the *Lubrizol* court construed section 307 of the Clean Air Act. The failure of the *NRDC-toxic pollutants* court to recognize that section 509's call for review of EPA's "action" in issuing effluent standards includes all decisions, whether affirmative or negative, made by the EPA in the process of development and promulgation of toxic substance regulations has in fact resulted in the very bifurcated review process that *Lubrizol* sought to avoid.

State Water Quality Standards

While the FWPCA represents a major shift from water quality control to discharge control[91] the FWPCA does not totally disregard the use of water quality standards at the state level.[92] Section 303[93] calls for continued state development of water quality standards. That section recognizes that water quality standards will be potentially helpful in the enforcement of the FWPCA. In addition, water quality standards place a major emphasis on planning for better water quality in the future through the stringent use of effluent limitations.[94] While each water quality standard must be approved by the EPA,[95]

91. *See* notes 4-7 and accompanying text *supra*.
92. 33 U.S.C. § 1313 (Supp. V 1975).
93. *Id.*
94. For a more complete development of this aspect of the FWPCA, see Phillips, *Developments in Water Quality and Land Use Planning: Problems in the Application of the Federal Water Pollution Control Act Amendments of 1972*, 10 URB. L. ANN. 43, 60-66 (1975).
95. 33 U.S.C. § 1316(a), (b) (Supp. V 1975).

section 509, the special review provision, does not provide for review of the EPA's decision in the court of appeals nor is there any specification for review in any other provision of the FWPCA.

In 1975, the EPA's approval of certain water quality standards issued by New York led to an action for review in *Bethlehem Steel Corp. v. EPA*.[96] In concluding that review must begin in the district court according to the provisions of the APA, the Court of Appeals for the Second Circuit, in addition to disposing of several statutory interpretation questions,[97] was faced with the same problem of a resultant bifurcated review that had appeared in the challenges to existing source and toxic pollutant regulations.

Since section 509 does not provide for review of the EPA's action under section 303, Bethlehem Steel attempted to characterize the approval process as part of the approval of effluent limitations under section 301. As a matter of policy Bethlehem Steel argued that the court should adopt its interpretation in order to avoid the conflicting result that would arise when review of the issuance of effluent limitations would be in the court of appeals and the EPA approval of state water quality plans would be in the district courts.[98] This argument proved particularly troublesome for the court[99] since in other contexts, especially the section 301 controversy, the courts had recognized that when faced with an ambiguous provision[100] construction of the section should tend towards centralized review in order to protect the desired congressional goal of expeditious review. Although the court felt strongly that review of *all* EPA action should be in one court, the court concluded that it was constrained by the specificity of section 509, Congress' clear understanding of the difference between effluent limitations and water quality stand-

96. 538 F.2d 513 (2d Cir. 1976).

97. Briefly, Bethlehem Steel sought to have the state's water quality plans characterized as "effluent limitations" that were approved by the EPA and thus reviewed in the court of appeals according to section 509. The Second Circuit rejected this argument as erroneous in the face of massive legislative history which clearly showed that Congress intended to differentiate between the two types of control methods and to place the discharge control mainly in the hands of the federal government. *Id.* at 514-16.

98. *Id.* at 517.

99. The jurisdictional question is a difficult one. . . . Moreover, Bethlehem has presented several troubling arguments. But it seems to us that when a jurisdictional statute sets forthwith such specificity the actions of an administrative agency which may be reviewed in the court of appeals, a litigant seeking such review of an action that is not specified bears a particularly heavy burden.

Id. at 518.

100. *See* Hooker Chemical & Plastics Corp. v. Train, 537 F.2d 620 (2d Cir. 1976); E.I. duPont de Nemours & Co. v. Train, 528 F.2d 1136 (4th Cir. 1975).

ards, and the plausibility of the EPA's suggested rationale for district court review.

The thrust of the EPA's rationale was that section 509 provided review for only those actions which have a national impact. Since state water quality standards are limited to waters within that particular state there is no national impact. The EPA contended that prompt review of the former is of greater importance because of the far greater number of affected individuals. Interestingly, while this argument has a general validity, it does have an exception. Until the states assume responsibility for the NPDES permit program the EPA is to issue the permits[101] and section 509(b)(1)(F) provides for court of appeals review of the issuance or denial of any permit by the EPA.[102] It is intriguing to consider why the court did not cite this review as evidence of the lack of validity of the EPA's argument concerning the importance of only national impact reviewability in the court of appeals. This review could also buttress an equally plausible theory that all EPA action was intended to be reviewed in the court of appeals with the failure to include section 303 as merely an oversight. Congress had already made one other significant oversight in failing to specify in section 301 who was to issue existing source regulations.[103]

While the court did not address itself to the weaknesses of the

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101. 33 U.S.C. § 1342(a)(1) (Supp. V 1975).

102. When the states assume control of the permit process the role of the EPA becomes merely supervisory with the right to veto any permit issued. When the state issues a permit and the EPA fails to veto that permit, the courts have found this not to be reviewable according to section 509.

In Mianus River Preservation Comm. v. Administrator, 541 F.2d 899 (2d Cir. 1976), two theories were offered to bring the failure of the EPA to veto the permit issued by the Connecticut Department of Environmental Protection as part of the NPDES program. First, the court dismissed the idea that the state agency was an agent for the EPA. The FWPCA was intended to encourage states to set up their own independent authorities to administer the permit and enforcement provisions of the FWPCA. The states role was to be concurrent with the federal role and was to be of equal stature. Congress did not preempt the field and then grant the authority to the EPA to delegate to states the authority to administer the permit programs. The states are to play an independent and primary role in the clean-up of the nation's waters. *Id.* at 903-06.

The second theory of the plaintiffs was that the failure of the EPA to veto the permit constituted federal action sufficient for section 509 purposes. In looking to the legislative history of section 402, the court noted that Congress intended that the EPA take a passive role in supervising state programs and not conduct a permit-by-permit review. Therefore, the court concluded that to equate this passive role with action "in issuing . . . a permit" would be to thrust the EPA into a role not intended and allow review of something not reviewable under section 509. *Id.* at 906-09. *Accord,* Shell Oil Co. v. Train, 415 F. Supp. 70 (N.D. Cal. 1976).

103. While Congress did not provide for review of section 303 approval in section 509, there is some evidence that it was the result of conference compromise. The Senate version of the FWPCA did not contain a section

EPA's interpretation it must be remembered that the underlying rationale of the EPA is sound. The national regulations are the foundation of all other regulatory programs under the FWPCA. Individual application will, without question, be far more time consuming than the issuance of the broad categorical regulations based upon industry-wide studies. Congress, displaying an awareness of this problem, limited its efforts to those programs which are the *sine qua non* of the more time demanding programs such as the permit and planning phases.

The court in *Bethlehem Steel* reluctantly upheld the general purpose of section 509. The court's reluctance seems somewhat unwarranted in light of those decisions which have made a clear showing of the strong distinction Congress had intended between those actions which are designed to be national in impact and those which are local or statewide. Only the former can be said, as a general rule, to be deserving of direct court of appeals review.

The Administrative Procedure Act as a Basis for Review

Citizen Suits

Section 505 of the FWPCA[104] is patterned almost verbatim

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on water quality standards but was added by the House. Leg. Hist., *supra* note 5, at 305-07. Section 509 was part of the original Senate bill but the House bill contained no similar provision. *Id.* at 1713. The House bill adopted and partially revised section 509 and eventually became the law. Thus at the time section 509 was drafted, it could not have been intended that court of appeals review be available for state water quality plans. The conference adopted section 303 and made small changes to section 509 (mainly a change in the Senate version's placement of review in the District of Columbia Circuit Court to review in the circuit where the plaintiff resides or its place of business; this being in apparent exchange for the House Conferees dropping their request for review in the district courts) and thus their refusal to include section 303 in the list of reviewable actions under section 509 could not have been inadvertent. *Id.* at 330-31.

104. Section 505 provides in relevant part:

> (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
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> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

after section 304 of the Clean Air Act.[105] Both sections provide for citizen enforcement suits against sources polluting in violation of state or federal regulations, and suits against the EPA to enforce the performance of nondiscretionary duties. Citizen suits against the EPA can be commenced in the district court only after sixty days notice. Attorney's fees, as well as costs, are available to either party. Both sections also contain "savings clauses" which declare that any right of action created by the act is not to affect any previously existing statutory or common law cause of action. Thus these savings clauses state unequivocally that the citizen suit is not to be an exclusionary cause of action, but rather an addition to those already available.

The citizen suit provisions of both the Clean Air Act and the FWPCA have engendered considerable debate among the circuits as to whether causes of action, dependent upon violations of the FWPCA, can be asserted under general federal question jurisdiction or the review provisions of the APA in lieu of sections 505 or 509 of the FWPCA.[106] To date the attempts to assert jurisdiction other than that granted by the FWPCA or Clean Air Act have been the result of the parties' failure to meet the sixty day notice requirement[107] or a desire to obtain review of regulations palpably intended for review in the court of appeals according to the special review provisions.[108]

In *Natural Resources Defense Council v. EPA*, (hereinafter *NRDC-304 guidelines*),[109] the district court, in a citizen suit filed

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(b) No action may be commenced—
(1) under subsection (a)(1) of this section—
(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.
(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,
except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

33 U.S.C. § 1365(a), (b) (Supp. V 1975).

105. 42 U.S.C. § 1857h-2 (1970).

106. 5 U.S.C. §§ 701-706 (1970).

107. *See, e.g.*, Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2d Cir. 1975); City of Highland Park v. Train, 519 F.2d 681 (7th Cir. 1975).

108. *See, e.g.*, Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975).

109. 510 F.2d 692 (D.C. Cir. 1974),

under section 505, ordered the EPA to perform its nondiscretionary duty of issuing section 304 guidelines.[110] On appeal, the EPA contended that the NRDC had not complied with the sixty day notice requirement and, therefore, sought to have the case dismissed for lack of jurisdiction. The appellate court held that section 505 was not to be interpreted as an exclusionary grant of jurisdiction in that the savings clause of section 505 preserved the jurisdiction that was granted by other statutes. The court found that the citizen suit provision was essentially an additional vehicle for review created by the FWPCA. While the notice requirement acts as a grace period in which the EPA may take corrective action and avoid the need for litigation, the court will not erect the notice requirement as an absolute barrier to a suit.[111]

This decision is to be contrasted with those attempting to use the citizen suit to obtain review of functions of the EPA mentioned in section 509 of the FWPCA. The courts in this area have been unanimous in concluding that 509 and its analog, section 304 of the Clean Air Act, are exclusionary review provisions. While there are several decisions involving this question under the FWPCA[112] perhaps the best statement of the exclusivity of special review provisions lies in the Clean Air Act case of *Oljato Chapter of Navajo Tribe v. Train.*[113]

Exclusivity of Special Review Provisions

In *Oljato*, the plaintiffs sought to compel the EPA to revise standards of performance (new source emission regulations) for coal fired power plants by filing a citizen suit and also seeking review under the APA. Section 307[114] of the Clean Air Act provides for court of appeals review of any standard of performance within thirty days of issuance and thereafter only if based on new information. Section 307 also states that the standards may not be reviewed in an enforcement proceeding. It was

110. *See* note 36 *supra.*

111. Natural Resources Defense Council v. Train, 510 F.2d 692, 698-704 (D.C. Cir. 1974). It is important to note that the District of Columbia Circuit had previously found the APA to be an independent grant of jurisdiction which is without regard to dollar amount or citizenship. Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). It was this conclusion that environmental plaintiffs have often relied upon in suing in those circuits which have adopted it in order to avoid the necessity of showing harm to the extent of $10,000 required by general federal question jurisdiction. A recent amendment of 28 U.S.C. § 1331(a) eliminates the necessity of meeting the dollar amount when the defendant is a federal officer. Act of Oct. 19, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (1976). This amendment was the basis of a recent Supreme Court opinion which expressly held that Congress, in enacting the APA, had not intended that it be a jurisdictional statute. *See* Califano v. Sanders, 430 U.S. 99 (1977).

112. *See, e.g.*, Natural Resources Defense Council v. Train, 524 F.2d 79 (2d Cir. 1975).

113. 515 F.2d 654 (D.C. Cir. 1975).

114. 42 U.S.C. § 1857h-5 (Supp. V 1975).

the contention of the plaintiffs in *Oljato* that the refusal of the EPA to revise its standards was a failure to perform a nondiscretionary duty and that it was the purpose of their suit to compel the performance of that duty.

The court recognized that there is a difference between a challenge to a standard and the failure of the EPA to change a standard. The court, however, reasoned that Congress, through the limitations on review contained in section 307, had made certain that any challenge to a standard, whatever its form, must be in the court of appeals. To protect the Clean Air Act's timetable Congress had limited the initial review to thirty days, precluded review in enforcement actions, and limited review after thirty days to actions based upon information arising after promulgation. If the court had accepted the plaintiffs construction, whenever the standards were challenged directly in court without first giving the EPA the opportunity to revise the standards, the review would lie in the court of appeals, while district court review would exist when the EPA was given the opportunity to act and refused. Underlying the court's opinion is its obvious loyalty to the congressional intention to have section 307 bar any review of national standards other than according to section 307's own terms.[115] The court refused to accept any construction of the Clean Air Act which would defeat the uniform system of review of section 307 or which would allow a citizen suit to be used to circumvent section 307's thirty day statute of limitations.

The plaintiffs had also categorized the Administrator's refusal to revise the standards as an abuse of discretion and asserted that such an abuse was a failure to perform a nondiscretionary duty and therefore suable under the citizen suit provisions of the Act. The plaintiffs contended that even though the EPA's decision to revise was discretionary, when the evidence of new methods of abatement became exceedingly strong the EPA came under a duty to revise and, in such a situation, the citizen suit provisions could be used to compel the performance of that duty. Again while acknowledging the ingenuity of the approach, the court looked to the legislative history of section 304 (the citizen suit provision) and concluded that Congress intended to limit its use to review of actions made mandatory by the language of the Act.[116] It was the express desire of Congress to eliminate actions concerning abuse of discretion from citizen suit review. What the plaintiffs were seeking in *Oljato* was to break down the distinction between abuse of discretion and nondiscretionary

115. Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 660-65 (D.C. Cir. 1975).
116. *Id.* at 663.

duty by characterizing an abuse of discretion as the creation of a duty to act. Congress, recognizing that an efficient running EPA must have freedom from constant review of those functions committed to its discretion, refused to allow the citizen suit to be used to review alleged abuses of that discretion. The court in *Oljato* merely followed that congressional mandate.[117]

Finally, the court rejected an attempt to find district court jurisdiction under the review provisions of the APA. Since the APA permits review only when no other adequate remedy is available the *Oljato* court found the existence of an action for review under section 307 preclusive of APA jurisdiction.

Clearly what the court was doing was protecting the integrity of the exclusivity of the special statutory review provisions. The all encompassing nature of section 307 of the Clean Air Act and section 509 of the FWPCA, coupled with the absence of a savings clause similar to that in the citizen suit provisions, indicate a clear intent to limit review of those specified actions of the EPA. In contrast, the citizen suit provisions, because of the existence of the savings clause, have generally been found to provide concurrent jurisdiction with other statutes. The distinction seems reasonable if it is remembered that the basic purpose of the special review sections is to provide quick and definitive review of national regulations which are the cornerstones of the subsequent steps towards enforcement and the ultimate goal of no pollution by 1985. The purpose of the citizen suit provisions was mainly to spur the EPA to perform duties it was obliged to perform but had failed to do and to permit private enforcement actions against individual polluters.[118]

Conclusion

The FWPCA has been criticized as a vague and surprisingly imprecise regulatory statute[119] which, through its own inept drafting, has created the very delay in implementation through incessant litigation that the review provisions sought to avoid.[120] This criticism is no doubt valid, especially in two areas. First, the failure of Congress to specify existing source regulatory au-

117. *Id.*

118. While the *Oljato* case was a Clean Air Act decision, the overriding similarity between it and the FWPCA and the interchangeability of precedent between the two acts exercised by the courts make clear that the principle of this case would control in a similar situation involving section 509 of the FWPCA. Lubrizol Corp. v. Train, 9 ERC 1478, 1483-85 (6th Cir. 1976).

119. American Petroleum Inst. v. Train, 526 F.2d 1343, 1345 (10th Cir. 1975).

120. American Iron & Steel Inst. v. Train, 526 F.2d 1027, 1074 (3d Cir. 1975).

thority; and second, the granting of review in the circuit where the plaintiff resides rather than allowing review solely in the D.C. Circuit Court as required by the Clean Air Act.

Interestingly, the judge who subjected the FWPCA to its most severe criticism probably understood it the best. Judge Breitenstein, of the Tenth Circuit, followed the better view of continuing the separation of the functions of a reviewing court and those of the agency being reviewed. When the courts were faced with a challenge to their jurisdiction based on an interpretation of the interdependence of the EPA's jurisdiction and judicial jurisdiction only the Fourth and Tenth Circuits adhered to the purpose of a special review provision. Unfortunately, the Supreme Court's decision in the *duPont* case followed the path of least resistance and chose not to make the distinction between the existence of jurisdiction and its exercise.

Equally troublesome has been the area of bifurcated review of concomitant portions of EPA action. While all but one court resisted the attempts to split review of existing and new source regulations between the district and appellate courts, the D.C. Circuit lost sight of the very principles it espoused during the section 301 controversy. That court, in *NRDC-toxic pollutants*, refused to view the review provision from a perspective which encompassed not only the literal meaning of the statute's language but also from the overall ambition of Congress in creating a special review provision. When review is provided for EPA action in issuing a particular type of regulation it should be understood that review is to be more than just a review of those words that appear in the Federal Register. Instead, the judicial review should encompass the entire decisional process of the EPA in ultimately releasing a pronouncement to the Federal Register.

The enigma of the FWPCA is section 509's failure to provide for review of the EPA's approval of state water quality standards. It alone, of major EPA action which could be reviewed on the basis of an agency compiled record, is left to the district courts. Although *Bethlehem Steel* offered the reasonable rationale that only national regulations were intended to be reviewed by the court of appeals, it remains only an after-the-fact rationalization since Congress left no explanation in the FWPCA's legislative history as to why review of a section 303 action was not included in section 509. Given the fact that the courts have recognized that the ambivalence of several sections of the FWPCA has forced the courts to write law to fill in the gaps,[121]

121. *Id.*

it is equally plausible that the courts could properly act as a legislature to fill in one more gap created by the failure of section 509 to provide for review of the EPA's role in water quality standards.

The courts have been most persuasive when faced with attempts to circumvent the exclusivity of the statutory review provisions. This is in great part due to the fact that Congress made known its purpose most clearly in this portion of the legislative history. The time limitations on review in section 509 have been protected against the most ingenious arguments because, at least in this area, the courts have properly followed Judge Breitenstein's incisive admonition to those who must resolve the ambiguities of legislative history into practicalities. "In the discussion which follows, the guiding star is the intent of Congress to improve and preserve the quality of the Nation's water. All issues must be viewed in the light of that intent."[122]

Jeff Justice

122. American Petroleum Inst. v. Train, 540 F.2d 1023, 1028 (10th Cir. 1976).