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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

OUR CHILDREN'S EARTH FOUNDATION and ECOLOGICAL RIGHTS FOUNDATION,

Plaintiff,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL LEAVITT, as Administrator of the United States Environmental Protection Agency,

Defendant.

Case No. C 04-2132 PJH

INTERVENOR AMSA'S REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Date: May 11, 2005
Time: 9:00 a.m.
Judge: Honorable Phyllis J. Hamilton
Courtroom 3, 17th Floor

CLEAN WATER ACT CASE

[E-FILING]

INTRODUCTION

Intervenor the Association of Metropolitan Sewerage Agencies (AMSA) files this Memorandum in Reply to the Plaintiffs' Opposition to Defendants' Motion for Judgment on the Pleadings. In order to avoid repetition of facts or legal arguments, AMSA's own Motion for Judgment on the Pleadings expressed AMSA's concurrence with the grounds provided Defendants' motion, without restating the arguments set forth in the Defendants' Memorandum in Support. AMSA is filing this separate Reply in order to address certain misstatements in the Plaintiffs' Memorandum in Opposition regarding the applicable case law, and to provide additional legislative history that AMSA believes will furnish the Court with a more complete and accurate picture of Congressional intent regarding the proper forum for judicial review of the actions that are the subject of Plaintiffs' Complaint.

ARGUMENT

A. PLAINTIFFS MISREPRESENT THE SUPREME COURT'S HOLDING IN *du PONT* AND IGNORE SUBSEQUENT CASE LAW ESTABLISHING THAT ALL EPA ACTIONS RELATING TO THE PROMULGATIONS OF EFFLUENT LIMITATION GUIDELINES ARE REVIEWABLE ONLY IN THE COURT OF APPEALS

Plaintiffs suggest in their Memorandum in Opposition that Supreme Court's decision in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) "supports that court of appeals jurisdiction extends *only* over those EPA actions expressly enumerated in CWA § 509(b)(1), and not to any other actions, no matter how closely related" to those listed. Plaintiffs' Memorandum in Opposition at 12. This argument turns the holding of *du Pont* on its head and misrepresents the Supreme Court's analysis of the both the ELG program and the jurisdictional provisions of the Clean Water Act (CWA).

Plaintiffs begin with the misapprehension that the Supreme Court held that EPA regulations had to be effluent limitations under CWA § 301 rather than effluent guidelines under CWA § 304 to be reviewable in the courts of appeals. Plaintiffs' Memorandum in Opposition at 12. While the Supreme Court suggested that, "if" the regulations at issue were merely § 304 guidelines, review could "probably" be brought in the District Court (if one followed the Eighth Circuit's approach in *CPC Int'l, Inc. v. Train*, 515 F.2d 1032, 1038 (8th Cir. 1975)), it also noted

that the Courts of Appeals might still have ancillary jurisdiction to review the regulations because of their "close relationship" with § 301 effluent limitations. 430 U.S. at 125. In the end, the Supreme Court found it unnecessary to choose between these theories, because it recognized that the regulations at issue (like all of those subsequently promulgated by EPA) were actually a hybrid derived from both § 301 and § 304, which EPA referred to as "effluent limitation guidelines" (ELGs), and that they were unquestionably reserved for appellate court review. *Id.* at 122.[1]

This hybrid approach to ELG rulemaking stemmed from EPA's recognition that the "ambitious" deadlines imposed by Congress could not be met if it attempted to adopt § 304 effluent guidelines and § 301 effluent limitations in separate proceedings. *Id.* "Because the process proved more time consuming than Congress assumed when it established this two-stage process, EPA condensed the two stages into a single regulation." *Id.* at 124. Furthermore, because these hybrid regulations are typically promulgated in the same proceeding as new-source standards under § 306 (which are expressly reserved for appellate court review in § 509), the Supreme Court held that that they should be reviewed in the Court of Appeals. *Id.* at 136-7 (noting that "we have no doubt that Congress intended review of the two sets of regulations to be had in the same forum").

Prior to the Supreme Court's ruling in *du Pont*, the Eighth Circuit had been alone in holding that effluent limitation guidelines were reviewable in District Court. The Third, Fourth, Seventh, Tenth and District of Columbia Circuits had concluded that review was confined to the Courts of Appeals. *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027 (3d Cir. 1975); *E.I. du Pont de Nemours & Co. v. Train*, 528 F.2d 1136 (4th Cir. 1975); *American Meat Inst. v. EPA*,

[1] EPA's hybrid, or "shortcut," approach to the promulgation of effluent limitation guidelines was upheld by the D.C. Circuit in *American Frozen Food Inst. v. Train*, 539 F.2d 107, 131 (D.C. Cir. 1976) ("we conclude that the Administrator's decision to issue 'guidelines' under § 304 and 'effluent limitations' under § 301 through the same procedures, on the same day, and in the same document was a permissible interpretation of the statute which we are required to accept"). EPA has followed this same procedure in subsequent rulemaking for almost 30 years. All of the "Effluent Limitation Guidelines" are codified together at 40 CFR Parts 400-471.

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526 F.2d 442 (7th Cir. 1975); *American Petroleum Inst. EPA*, 526 F.2d 1343 (10th Cir. 1975); *American Frozen Food Inst. v. Train*, 539 F.2d 107 (D.C. Cir. 1976). Following *du Pont*, the Eighth Circuit reversed its position, recognizing that the Supreme Court, "contrary to our holding in *CPC*, ruled that effluent guidelines for existing sources are reviewable in the courts of appeals." *American Ass'n of Meat Processors v. Costle*, 556 F.2d 875 (8th Cir. 1977). Indeed, noting that prior to *du Pont* there had been "substantial uncertainty as to the proper forum in which to seek review of existing source effluent guidelines," the Eight Circuit even went so far as to recall its mandate in one recent case dismissing a petition for review of such guidelines. *Id.* at 877 n.2.

The Plaintiffs' characterization of the Supreme Court's decision *du Pont* is therefore directly at odds with the actual holding of that case and with its impact on all subsequent effluent guidelines litigation, which has been uniformly conducted in the Courts of Appeals. *See generally*, Annot., *Availability of Court of Appeals Review, under § 509(b)(1)(E) of Federal Water Pollution Control Act (33 U.S.C.A. § 1369(b)(1)(E)), of Action by Administrator of Environmental Protection Agency in Approving or Promulgating Effluent and Other Limitations*, 62 A.L.R. Fed. 906 (1983). A partial list of the post-*du Pont* cases involving ELG review includes: *American Petroleum Inst. v. EPA*, 858 F.2d 261 (5th Cir. 1988) (oil and gas industry); *Texas Mun. Power Agency v. EPA*, 836 F.2d 1482 (5th Cir. 1988) (electric utility industry); *American Petroleum Inst. v. EPA*, 787 F.2d 965 (5th Cir. 1986) (oil and gas industry); *Kennecott Copper Corp. v. EPA*, 780 F.2d 445 (4th Cir. 1985) (nonferrous metals manufacturing industry); *Cerro Copper Products Co. v. Ruckelshaus*, 766 F.2d 1060 (7th Cir. 1985) (copper-forming industry); *Reynolds Metals Co. v. EPA*, 760 F.2d 549 (4th Cir. 1985) (metal and brewing industries); *Nat'l Ass'n of Metal Finishers v. EPA*, 719 F.2d 624 (3d Cir. 1983) (electroplating industry); *American Petroleum Inst. v. EPA*, 661 F.2d 340 (5th Cir. 1981) (oil and gas industry); *American Paper Inst. v. EPA*, 660 F.2d 954 (4th Cir. 1981) (paper industry); *Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794 (9th Cir. 1980) (seafood processing industry); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979) (pesticide industry); *Weyerhaeuser Co. v. Costle*,

590 F.2d 1011 (D.C. Cir. 1978) (pulp and paper industry); *American Iron & Steel Inst. v. EPA*, 568 F.2d 284 (3d Cir. 1977) (iron and steel industry).

Plaintiffs' contention that *du Pont* supports the principle that Court of Appeals jurisdiction does not extend to actions "closely related" to those expressly enumerated in § 509 is, thus, directly contrary to the holding in that case. The Supreme Court's decision in *du Pont* actually upheld a decision by the Fourth Circuit Court of Appeals affirming the District Court's dismissal of an attempted challenge to certain effluent limitation guidelines for lack of subject matter jurisdiction. As the Fourth Circuit succinctly stated in its opinion,

> The only question presented in this appeal is whether the district courts have jurisdiction to review effluent limitations regulations issued by the Administrator to control effluent discharges from existing plants. A necessary corollary is whether the courts of appeals have jurisdiction under § 509 of the Act, 33 USC § 1369(b)(1), to review, on direct petition for review, regulations for existing plants, *for if we have the jurisdiction, the district courts do not*.

E.I. du Pont de Nemours & Co. v. Train, 528 F.2d 1136, 1137 (4th Cir. 1975) (emphasis added). In reaching its conclusion that jurisdiction properly resided in the Court of Appeals, the Fourth Circuit found it unnecessary to assume that the subject regulations had been promulgated under the authority of § 301:

> Even if § 301 merely sets out the technological objectives to be attained under the Act, courts of appeals may properly assume jurisdiction to review actions of the Administrator in issuing regulations to achieve these objectives. If § 301 is to be viewed in the manner advocated by the appellants, then § 304(b) must necessarily be deemed the key to the attainment of the objectives set forth in § 301. Thus, to obey the mandate of § 301, "guidelines for effluent limitations" must be promulgated under § 304(b). Construed in this light, any action taken by the Administrator under § 304(b) should properly be considered to be pursuant to the provisions of § 301 and, therefore, reviewable by this court under § 509.

Id. at 1142.

Similarly, in the present case, the Courts of Appeals have exclusive jurisdiction to review EPA's action in reviewing and deciding whether or not to revise the existing effluent limitation guidelines under CWA §§ 301 and §§ 304, as well as EPA's actions in issuing its plan for such

review under CWA § 304(m), because each of those actions is closely related to the attainment of the objectives set forth in § 301. This court should therefore dismiss the Plaintiffs' First, Second and Fourth claims for lack of subject matter jurisdiction.

B. THE LEGISLATIVE HISTORY OF CWA § 304 PROVIDES CONCLUSIVE EVIDENCE THAT CONGRESS INTENDED THE COURT OF APPEALS TO HAVE JURISDICTION OVER EPA'S ACTIONS IN REVIEWING AND REVISING EXISTING EFFLUENT LIMITATIONS AND GUIDELINES

There is very little legislative history relating to the enactment of CWA § 304(m) in 1987. What little there is (in the Conference Committee Report accompanying S. 1128), is essentially a restatement of the contents of that provision, which gives no indication of the forum contemplated for judicial review of EPA's action in publishing its biennial plan for review and revision of existing effluent guidelines. S. REP. NO. 99-1004, 99th Cong., 2d Sess. 36 (1986), *reprinted in* 2 *A Legislative History of the Water Quality Act of 1987* (Committee Print compiled for the Senate Committee on Environment and Public Works), 725 (1988).

However, Congress had previously addressed the need for EPA review and revision of existing effluent guidelines in the 1977 CWA amendments. At that time, Congress made an explicit, unequivocal legislative statement that EPA's review of existing effluent guidelines, and its determination whether or not to revise such guidelines, would be subject to judicial review in the Court of Appeals rather than in District Court. This statutory pronouncement was not codified in the CWA, but it is preserved as a "Note" at the end of CWA § 304. It was enacted as § 73 of Pub. L. 95-217, the statute which embodied all of the 1977 CWA amendments. That section states, in full:

EXISTING GUIDELINES

> SEC § 73. Within 90 days after the date of enactment of this Act, the Administrator shall review every effluent guideline promulgated prior to the date of enactment of this Act which is final or interim final (other than those applicable to industrial categories listed in table 2 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives) and which applies to those pollutants identified pursuant to section 304(a)(4) of the Federal Water Pollution Control Act. The Administrator shall review every guideline applicable to industrial categories listed in such table 2 on or before July 1, 1980. Upon completion of each such review the Administrator is authorized to make such adjustments in any such

> guidelines as may be necessary to carry out section 304(b)(4) of such Act. The Administrator shall publish the results of each such review, including, with respect to each such guideline, the determination to adjust or not to adjust such guideline. Any such determination by the Administrator shall be final except that if, ***on judicial review in accordance with section 509 of such Act***, it is determined that the Administrator either did not comply with the requirements of this section or the determination of the Administrator was based on arbitrary and capricious action in applying section 304(b)(4) of such Act to such guideline, the Administrator shall make a further review and redetermination of any such guideline.

Act Dec. 27, 1977, P.L. 95-217, § 73, 91 Stat. 1609, *reprinted in* 3 *A Legislative History of the Clean Water Act of 1977* (Committee Print for the Senate Committee on Environment and Public Works), 47 (1978) (emphasis added). It is clear from this provision that Congress expected not just the guidelines themselves, but EPA's "review" and "determination" whether or not to revise such guidelines, to be reviewed by the Courts of Appeals. CWA § 509 authorizes review of EPA actions only in the Courts of Appeals; judicial review of EPA's failure to perform a nondiscretionary duty by the District Courts is authorized in CWA § 505.

At the time that the 1977 CWA amendments were passed, Congress was fully aware that the Supreme Court's recent decision in the *du Pont* case (issued on February 23, 1977) had established Court of Appeals jurisdiction over the promulgation of effluent guidelines under § 304. Section 18 of the House Bill, H.R. 3199 (as introduced on February 7, 1977), would have added a new item (G) to CWA § 509(b)(1) to expressly provide for review of EPA's actions "in promulgating *or revising* guidelines for effluent limitations under section 304(b)." *1977 Legis. Hist.* vol. 4, p. 1162 (emphasis added). According to the House Report, H. Rep. No. 95-139, 95th Cong., 1st Sess. (1977), *reprinted in 1977 Legis. Hist.* vol. 4, p. 1221:

> The sole purpose of this amendment is to clarify the intent of Congress that regulations and guidelines issued under section 304(b) of Public Law 92-500 would be reviewed in the U.S. Courts of Appeals pursuant to section 509(b)(1) since issuance of such regulations is an action which leads directly to effluent limitations under section 301 of Public Law 92-500.

However, by the time the Conference Report was issued (on December 6, 1977), the Supreme Court had issued its decision in *du Pont* and, according to the Conference Committee, such a

clarification had become "unnecessary." H. REP. NO. 95-830, 95th Cong., 1st Sess. 112, *reprinted in 1977 Legis. Hist.* vol. 4, p. 296.

CONCLUSION

Although it found the proposed revision to the judicial review provisions in CWA § 509 to be unnecessary in the wake of *du Pont*, the intent of Congress that any action relating to the promulgation of ELGs – including their subsequent review and any determination whether or not to revise them – should be reviewed in the Court of Appeals. Because the grant of jurisdiction to the Court of Appeals is exclusive, *American Petroleum Inst. v. Train*, 526 F.2d 1343, 1344 (10th Cir. 1975), this Court lacks subject matter jurisdiction to entertain the claims raised by the Plaintiffs in this case. Defendants' and AMSA's Motion for Judgment on the Pleadings should therefore be granted and the Plaintiffs' claims should be dismissed.

Dated: April 1, 2005

Respectfully submitted,

/s/David W. Burchmore

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I, JOHNNY R. AGUILAR, am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is One Maritime Plaza, Third Floor, San Francisco, California 94111-3492.

On April 1, 2005, I caused to be served the following documents described as:

INTERVENOR AMSA'S REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

on the interested parties in this action as set forth below:

Served On:	***Represented Party:***
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Service was accomplished as follows:

☒ **By U.S. Mail, According to Normal Business Practices.** On the above date, at my place of business at the above address, I sealed the above document(s) in an envelope addressed to the above, and I placed that sealed envelope for collection and mailing following ordinary business practices, for deposit with the U.S. Postal Service. I am readily familiar with the business practice at my place of business for the collection and processing of correspondence for mailing with the U.S. Postal Service. Correspondence so collected and processed is deposited the U.S. Postal Service the same day in the ordinary course of business, postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 1, 2005, at San Francisco, California.

/s/John R. Aguilar
JOHN R. AGUILAR