

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Chemical Manufacturers Association v. U.S. Environmental  
Protection Agency

29 ERC 1273 (5th Cir. 1989) · No. 87-4849, et al. · Decided March 30, 1989

SUMMARY

The Fifth Circuit reviewed consolidated petitions challenging EPA regulations governing pollutant discharges from the organic chemicals, plastics, and synthetic fibers industries under the Clean Water Act. The court upheld most of the regulations, including provisions concerning BPT, BAT, pretreatment standards, and toxic pollutants, but held that EPA violated the Administrative Procedure Act by failing to provide notice and an opportunity for comment on its BAT subcategorization. The court also held that EPA's failure to consider wastestream recycling in establishing new source performance standards was arbitrary.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States Court of Appeals for the Fifth Circuit                                                                                                                                                                                                                                                                                                                                                                                                                              |
| WRITING FOR THE COURT | Judge Rubin, with Judges Garza and King jointly participating; Judge Rubin; Judge Garza; Judge King                                                                                                                                                                                                                                                                                                                                                                               |
| JURISDICTION          | Federal                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| DECIDED               | March 30, 1989                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| DOCKET                | 87-4849, et al.                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| PROCEDURAL POSTURE    | Consolidated petitions for review of EPA final regulations establishing Clean Water Act effluent limitations guidelines, pretreatment standards, and new-source performance standards for the organic chemicals, plastics, and synthetic fibers industries.                                                                                                                                                                                                                       |
| STANDARD OF REVIEW    | Procedural validity was reviewed plenary under the Administrative Procedure Act. Statutory interpretation was reviewed plenary, with guarded deference to EPA where the statute was ambiguous and EPA's interpretation reasonable. EPA factual and technical determinations were reviewed under the arbitrary-or-capricious standard, with the court examining whether EPA considered relevant factors and articulated a rational connection between the facts and its decisions. |
| PRECEDENTIAL VALUE    | published precedential federal appellate opinion                                                                                                                                                                                                                                                                                                                                                                                                                                  |

## PARTIES

Chemical Manufacturers Association, affected OCPSF-industry companies and other petitioners v. United States Environmental Protection Agency

## TOPICS

clean water act

administrative procedure act

judicial review of agency action

rulemaking

statutory interpretation

## PRACTICE AREAS

environmental law

administrative law

Clean Water Act litigation

judicial review of agency rulemaking

## QUESTIONS PRESENTED

1. Whether EPA violated the APA's notice-and-comment requirements by relying on updated Dun & Bradstreet economic data and by adopting metal limitations and BAT subcategorization without adequate notice.
2. Whether EPA's BPT limitations satisfied the Clean Water Act's requirements concerning cost, technology, data selection, subcategorization, seasonal effects, waste-stabilization ponds, and plant-specific differences.
3. Whether EPA's BAT limitations and statistical and analytical methodologies were arbitrary or capricious or otherwise unlawful.
4. Whether EPA properly established pretreatment standards for existing sources, including pass-through determinations, small dischargers, paint/resin plants, and removal credits.
5. Whether EPA lawfully established NSPS by relying on BPT and BAT costing methods and by failing to consider wastestream recycling.
6. Whether EPA adequately considered the economic effects of the Montreal Protocol on the chlorofluorocarbon industry.
7. Whether the court had jurisdiction over NRDC's challenge to EPA's reservation of pollutants for future rulemaking.
8. Whether the OCPSF regulations applied to research as well as manufacturing discharges.

## HOLDINGS

1. EPA did not violate the APA by using updated and expanded Dun & Bradstreet data in its economic-impact analysis without reopening notice and comment.
2. The Clean Water Act does not require EPA to apply a quantitative knee-of-the-curve or equivalent stringent cost-benefit test when establishing BPT limitations; EPA must consider total costs in relation to effluent-reduction benefits, and costs need not be given primary importance.
3. The BCT cost-effectiveness test supplements, rather than replaces, the BPT requirements; EPA may promulgate BPT limitations for conventional pollutants even when facilities were previously regulated

by individual NPDES permits.

4. EPA reasonably selected its representative best performers and reasonably used SIC codes and other industrial characteristics in subcategorizing the OCPSF industry.
5. EPA was not required to resolve individualized plant-specific claims during national rulemaking because fundamentally different factor variances provide the appropriate collateral mechanism for such claims.
6. The court lacked jurisdiction under Clean Water Act section 509(b)(1) to review challenges concerning implementation of the regulations or the delayed processing of individual FDF applications; such claims belong in district court proceedings.
7. EPA violated the APA by failing to publish its BAT subcategorization for public comment before promulgating the final regulations.
8. EPA acted arbitrarily by failing to consider wastestream recycling as a model technology in establishing NSPS where the record indicated that recycling was well demonstrated and produced substantially greater pollutant removal.

#### KEY QUOTATIONS

*"The court's proper function is only to determine whether the agency has "considered the relevant factors and articulated a rational correlation between the facts found and the choice made." (at 197)*

*"The selection of the point of diminishing returns is a matter for agency determination." (at 207)*

*"The fundamentally-different-factors (FDF) variance procedure provides an entirely acceptable alternative to subcategorizing an industry to account for plant-specific characteristics." (at 221-222)*

#### FACTUAL BACKGROUND

EPA promulgated technology-based effluent limitations for conventional and toxic pollutants discharged by plants in the organic chemicals, plastics, and synthetic fibers industries. The regulations addressed direct discharges, indirect discharges through publicly owned treatment works, pretreatment standards, and new-source performance standards. Industrial petitioners challenged EPA's rulemaking procedures, cost analyses, statistical methods, subcategorization decisions, achievability determinations, and application of the standards to particular facilities; NRDC challenged the standards as too lenient.

#### PROCEDURAL HISTORY

EPA promulgated final regulations governing direct and indirect discharges by OCPSF manufacturing plants. Industrial petitioners challenged the regulations on procedural, substantive, and plant-specific grounds, while the Natural Resources Defense Council challenged them as insufficiently stringent. The Fifth Circuit reviewed the consolidated petitions under Clean Water Act section 509(b)(1).

#### DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

EPA regulations were upheld in the principal respects challenged, but the matter was remanded insofar as EPA failed to provide notice and comment on BAT subcategorization and failed to consider wastestream recycling in establishing NSPS. Individual plant-specific FDF claims were to be pursued through the statutory administrative and district-court procedures.

## CASES CITED

- Alabama Power Co. v. Costle
- NRDC v. Train
- Air Transport Association of America v. Civil Aeronautics Board
- Community Nutrition Institute v. Block