

EPA Loses in Court Again — but Outcome Didn't Follow the Script



Richard Lazarus is the Howard J. and Katherine W. Aibel Professor of Law at Harvard University. He can be reached at lazarus@law.harvard.edu.

Both the lyrics and the tune may sound familiar, yet the Fifth Circuit's recent ruling in *Southwestern Electric Power Co. v. EPA* offers some refreshing reminders of the pitfalls of careless labeling. Yes, EPA lost again, as has been the agency's seeming recent habit during the Trump administration. And the victors were once again the environmentalists (Waterkeeper Alliance, Environmental Integrity Project, and Sierra Club) who persuaded the court that EPA had fallen far short of its statutory responsibilities under the Clean Water Act to protect public health and the environment.

At issue in the case were effluent limitation guidelines based on Best Available Technology that restrict discharges into navigable waters by steam-electric power plants. The relative stringency of these particular guidelines is exceedingly important because power plants discharge enormous volumes.

In *Southwestern Electric Power Co.*, the appeals court struck down EPA's BAT effluent limitation guidelines for two important categories of pollutants. One is *legacy wastewater*, a neologism which refers to discharges no later than December 31, 2023. The second is *leachate* from power plants, which includes liquid that after passing through landfills of coal ash is eventually discharged directly into navigable waters. Both categories are responsible for massive amounts of water pollution. As described by the Fifth Circuit, power plant leachate "accounts for more equivalent pollution than the entire coal industry."

Nor did the three-judge panel mince words in harshly criticizing the agency for promulgating unjustifiably weak rules. In concluding it had acted arbitrarily and capriciously by setting a weak standard for legacy wastewater,

the court faulted the agency for basing its BAT guidelines on a technology — surface impoundments — that it elsewhere in the same rulemaking "condemned as anachronistic and ineffective at eliminating pollution discharge." In parsing the agency's explanations for its "paradoxical" reasoning, the court sharply denounced it for relying on assertions either unsupported or contradicted by its own administrative record.

EPA's BAT effluent limitation guideline for leachate fared no better. Here too the court was similarly unpersuaded that surface impoundments are a sufficiently protective technological basis upon which to base effluent limitations applicable to leachate discharges. In particular, the court faulted the agency for failing to recognize that

although surface impoundment technology might have served as a valid basis for an effluent limitation guideline based on Best Practicable Control Technology when

EPA promulgated its BPT limitation in 1982, Congress had deliberately designed the BAT standard to be more stringent than BPT. According to the court, the agency's "proffered justifications for the leachate rule are not supported — indeed are likely incompatible with — the factors set forth under the act for determining BAT."

One aspect of the court's reasoning, moreover, is likely to have precedential significance far beyond this specific rulemaking. The appellate court easily dismissed EPA's argument, which repeated a claim industry has frequently made, that the act's language that EPA may base BAT on "other factors that the administrator deems appropriate" provides the agency with wide-ranging discretion to promulgate weaker environmental protection standards for one source of pollution because it can in-

stead control other sources. The court found that reading unpersuasive because "accepting the agency's expansive view of the 'other factors' clause" would effectively allow EPA to adopt a less stringent BAT standard "in every case."

Of course, skeptics might be quick to characterize the federal appellate court's ruling as yet another example of the Trump EPA run amok, abdicating its responsibilities to protect public health and the environment in order to line the coffers of its corporate donors. And supporters of the administration might be no less quick to respond that the "Obama judges" are once again engaging in rampant judicial activism.

Both would be wrong.

The Trump EPA did not promulgate the rules that the Fifth Circuit overturned. The portions of the BAT rule struck down as insufficiently protective were issued in 2015. Yep, that's right. During the Obama administration. And those crazy Obama environmental judges who faulted EPA for shirking their responsibilities? Think again. The unanimous three-judge appellate panel included two new judges appointed by none other than President Trump — James Ho (a former clerk for Justice Clarence Thomas) and Stuart Kyle Duncan. And the third judge, Catharina Haynes, was appointed by President George W. Bush. Still in his rookie year, Judge Duncan authored the hard-hitting opinion for the Fifth Circuit in favor of the environmentalist challengers.

Kind of refreshing.

The unanimous three-judge panel includes some surprises