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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

SUBJECT: American Petroleum Institute v. EPA --
Effluent Guidelines for Petroleum Refining --
INFORMATION MEMORANDUM

FROM: General Counsel (A-130)

TO: The Administrator (A-100)

THRU: AX

On August 11, the United States Court of Appeals for the Tenth Circuit handed down its decision in American Petroleum v. EPA, No. 74-1465 and related cases. The court upheld the New Source Performance Standards and most of the 1977 effluent limitations for the petroleum refining industry. The 1983 limitations were remanded.

The 1977 limitations were upheld except for a minor provision dealing with treatment of storm runoff. In reaching its decision, the court upheld EPA on most of its legal contentions concerning its authority and methodology. Thus, the court found that EPA has power to promulgate effluent limitations, although, following the Fourth Circuit (in DuPont v. Train, 8 ERC 1718, cert. granted, June 21, 1976), it labeled them "presumptively applicable. Unlike the Fourth Circuit, it refused to remand the variance clause, holding that it was lawful on its face, and its application in practice could be contested in permit issuance proceedings. The court rejected industry's argument that the regulations must establish a "range" of limitations.

With regard to industry's argument that EPA must perform a balancing of costs against environmental and societal benefits, the court said that the value of environmental benefits "is not capable of present-day determination," and that societal benefits are for Congress to assess. The court approved EPA's more limited cost-effectiveness analysis as satisfying the FWPCA. An interesting aspect of this decision is that it was written by Judge Breitenstein who also sat on the panel hearing the cases in the Fourth Circuit; on several important issues, he has now disagreed with his earlier opinion.

On technical issues, the court's opinion approved EPA's statistical methodology for arriving at daily and monthly limitations and refused to order (as did the Fourth Circuit in FMC Corp. v. Train, 8 ERC 1731, 1740-41) that EPA revise the regulations to allow so-called "excursions," or days of excused violations of effluent limitations. EPA's net/gross regulations, 40 CFR §125.28, were upheld as providing adequate credit for uncontrollable pollutants in intake water. And EPA was found to have authority to require, by 1977, in-plant process changes that are normal practice within an industry.

The 1983 regulations were remanded because the court could not understand their basis from EPA's rulemaking documents.

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Prepared by:AWEckert:bla:8/23/76

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