Dated: September 21, 1978.

BARBARA BLUM,
Acting Administrator.

Subpart A, part 455 of chapter I, title 40, of the Code of Federal Regulations is amended to read as follows:

Subpart A—Organic Pesticide Chemicals Manufacturing Subcategory

§ 455.20 Applicability; description of the organic pesticide chemicals manufacturing subcategory.

(a) For the purpose of calculating effluent limitations for COD, BOD5, and TSS, the provisions of this subpart are applicable to discharges resulting from the manufacture of organic active ingredients, excluding the following: Allethrin, Benzyl Benzoate, Biphenyl, Bisethylxanthogen, Chlorophacinone, Coumafuryl, Dimethyl Phthalate, Diphacinone, Endothall Acid, EXD (Herbisan), Gibberellic Acid, Glyphosate, Methoprene, Naphthalene Acetic Acid, Phenylphenol, Piperonyl Butoxide, Propargite, 1,8 Naphthalic Anhydride, Quinomethionate, Resmethrin, Rotenone, Sulfoxide, Sodium Phenylphenate, Triazine compounds (both symmetrical and asymmetrical), and Warfarin and similar anticoagulants.

(b) For the purpose of calculating effluent limitations for organic pesticide chemicals, the provisions of this subpart are applicable to discharges resulting from the manufacture of the following organic active ingredients: Aldrin, BHC, Captan, Chlordane, DDD, DDE, DDT, Dichloran, Dieldrin, Endosulfan, Endrin, Heptachlor, Lindane, Methoxychlor, Mirex, PCNB, Toxaphene, Trifluralin, Azinphos Methyl, Demeton-O, Demeton-S, Diazinon, Disulfoton, Malathion, Parathion Methyl, Parathion Ethyl, Aminocarb, Carbaryl, Methiocarb, Mexacarbate, Propoxur, Barban, Chlorpropham, Diuron, Fenuron, Fenuron-TCA, Linuron, Monuron, Monuron-TCA, Neburon, Propham, Swep, 2,4-D, Dicamba, Silvex, 2,4,5-T, Siduron, Perthane, and Dicofol.

(c) The intermediates used to manufacture the active ingredients and active ingredients used solely in experimental pesticides are excluded from coverage in this subpart. Insecticidal pathogenic organisms such as Bacillus thuringiensis, insect growth hormones, plant extracts such as pyrethrins; sex attractants and botanicals such as Rotenone are also excluded from coverage in this subpart.

§ 455.21 Specialized definitions.

(a) "Organic active ingredients" means carbon-containing active ingredients used in pesticides, excluding metalloorganic active ingredients.

(b) "Total organic active ingredients" means the sum of all organic active ingredients covered by § 455.20(a) which are manufactured at a facility subject to this subpart.

(c) "Organic pesticide chemicals" means the sum of all organic active ingredients listed in § 455.20(b) which are manufactured at a facility subject to this subpart.

§ 455.22 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitation set forth in this section, EPA took into account all information it was able to collect, develop, and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements, and costs) which can affect the industry subcategorization and effluent levels established. It is possible, however, that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations.

The following limitations establish the quantity or quality of pollutants or pollutant properties controlled by this paragraph which may be discharged from the manufacture of organic active ingredient by a point source subject to the provisions of this paragraph after application of the best practicable control technology currently available.

Effluent characteristics	Effluent limitations: Maximum for any 1 day	Effluent limitations: Average of daily values for 30 consecutive days shall not exceed—
COD	13.000	9.0000
BOD	7.400	1.6000
TSS	6.100	1.8000
Organic pesticide chemicals	.010	.0018
pH	(1)	(1)

(1) Within the range of 6.0 to 9.0.

NOTE.—For COD, BOD5, and TSS, metric units: Kilogram/1,000 kg of total organic active ingredients. English units: Pound/1,000 lb of total organic active ingredients. For organic pesticide chemicals—metric units: Kilogram/1,000 kg of organic pesticide chemicals. English units: Pound/1,000 lb of organic pesticide chemicals.

[FR Doc. 78-27409 Filed 9-28-78; 8:45 am]

[1505-01]

[FRL 955-8]

PART 423—STEAM ELECTRIC POWER GENERATING POINT SOURCE CATEGORY

Amendment to BPT Variance Clause

NOTE.—This document originally appeared at 43 FR 43023, September 22, 1978, and is being republished today to correct several typographical errors.

AGENCY: Environmental Protection Agency.

ACTION: Final amendments to rules.

SUMMARY: EPA is issuing amended regulations under the Clean Water Act which apply to the steam electric power industry. The amendments provide, contrary to EPA's original position, that economic factors are legally relevant when considering a powerplant's request for a variance from national effluent limitations guidelines. EPA has changed its original position in order to comply with a judicial decision.

DATE: The amendments are effective on September 21, 1978.

FOR FURTHER INFORMATION CONTACT:

Edward A. Kramer (EN-336), Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, 202-755-0750.

SUPPLEMENTARY INFORMATION:

I. Background

A. EPA's Original Variance Clause

On October 8, 1974, EPA published regulations under the Clean Water Act setting forth best practicable control technology (BPT) effluent limitations guidelines for the steam electric power industry. 40 CFR Part 423, 39 FR 3686 et seq.

For each subcategory in the power industry category, there was a "variance clause." 40 CFR 423.12(a), 423.22(a), 423.32(a) and 423.42 (introductory paragraph). This clause allowed case-by-case variances from national guidelines where one could show that certain plant-specific factors—such as age or size of the plant—were "fundamentally different" from the factors EPA considered in setting the national guidelines. The variance clause did not specify whether plant-specific economic factors could be considered.

Essentially the same variance clause was included in the BPT effluent limitations guidelines for almost all industries. On August 20, 1974, EPA published a legal interpretation which ruled that economic factors could not be considered in applying this standard variance clause. 39 FR 30073.

B. The Fourth Circuit's Appalachian Order

On July 16, 1976, the U.S. Court of Appeals for the Fourth Circuit issued an opinion in response to various legal challenges to EPA's BPT (and other) regulations for the steam electric power industry. *Appalachian Power Co.* v. *Train*, 545 F.2d 1351. The court rejected EPA's exclusion of economic factors from the steam electric BPT variance clause. A request by EPA for recall of mandate as to this portion of the Court's opinion was denied (one judge dissenting) on September 26, 1977.

C. EPA's Response to the Fourth Circuit's Order

After the court's opinion was issued, EPA changed its position with regard to the steam electric power industry. On March 3, 1978 (43 FR 8812), EPA proposed clarifications to the steam electric variance clause to formalize its changed position.

As proposed, the variance clause allowed the permit issuer to consider "significant cost differentials" and other economic factors applicable to the particular source involved. The clause also specified that the August 20, 1974 legal interpretation would not be applicable to steam electric powerplants.

EPA requested that written public comments be submitted by April 3, 1978. The following parties submitted comments:

1. Consumers Power Co.
2. Richard J. Criqui, Jr.
3. Duke Power Co.
4. Natural Resources Defense Council (NRDC).
5. Synthetic Organic Chemical Manufacturers Association (SOCMA).
6. Union Carbide.
7. Utility Water Act Group (UWAG).

After considering all comments carefully, EPA has decided to issue the final variance clause amendments in the same form as they were proposed.

II. Response to Public Comments

A. Consideration of Effluent Reduction Benefits

The proposed variance clause allowed case-by-case consideration of "significant cost differentials." Several commenters criticized EPA for failing to specify that "effluent reduction benefits" were to be weighed against costs in each case.

Upon examination, these criticisms are apparently derived from the commenters' desire for variances based upon receiving water quality. Such types of variances, however, are plainly not authorized by the Act. As explained in detail in the Administrator's decision *In the Matter of Louisiana—Pacific Corp.* and *Crown Simpson Pulp Co.*, 10 ERC 1841 (September 15, 1977), the Act does not allow relaxations of BPT limitations based upon case-by-case variations in water quality impact.

EPA believes that the wording of the proposed regulation is fully consistent with the *Appalachian* decision. In fact, EPA's wording was taken *verbatim* from the court's opinion:

> In requiring that EPA give weight to the relevant statutory factors in developing a subsequent variance provision, we in no way intend to imply that EPA's regulations must provide for a detailed cost-benefit analysis at the permit granting stage. As we indicated in *duPont*, * * * an overall cost-benefit analysis for each category or subcategory satisfies the mandate of § 304 in this regard. *The variance provision should, however, allow the permit issuer to consider significant cost differentials of the particular point source involved.* 545 F.2d at 1360, n. 23 [emphasis added].

B. Limitation to "Fundamentally Different Factors"

UWAG argues that the proposed variance clause improperly fails to distinguish between "facts" and "factors." UWAG states in concluding its argument that "the variance clause must turn on consideration of plant-specific variables, on *facts* which are fundamentally different from those used in establishing the limitations." [UWAG's emphasis.]

It is not clear to EPA what difference of opinion exists between EPA and UWAG. If UWAG fears that plant-specific variables may not be considered, then it has misinterpreted the clause. As EPA stated in proposing the amendment:

> This clause allows case-by-case variances from national guidelines where one can show that certain *plant-specific* factors—such as age or size of the plant—are "fundamentally different" from the factors considered in setting the national guidelines. 43 FR at 8812.

Alternatively, if UWAG fears that by the use of the word "factors," EPA intended to foreclose consideration of plant-specific "facts," UWAG is mistaken. Site-specific *facts* which are fundamentally different from the facts considered by EPA in applying the relevant statutory factors (i.e., raw materials, energy requirements, size of plant), may qualify a facility for a variance. In this sense, "facts" and "factors" mean the same thing.

If, however, UWAG is arguing that any plant-specific fact—even one which does not relate to the statutory factors EPA considered in formulating the regulations—should qualify a facility for a variance, then EPA disagrees with UWAG. Such an interpretation would be incompatible with the "goal of uniformity" in industrywide BPT limitations, *duPont* v. *Train*, 97 S.Ct. 965, 975 (1977), for there are unique site-specific facts at every steam electric plant in the United States.

The *Appalachian* opinion, in fact, directs that EPA's new variance clause take into consideration the "statutory *factors*" in sections 301(c) and 304. 545 F.2d at 1360 [emphasis added]. And in another case discussing national BPT limitations, the Fourth Circuit said that "the specified *factors* [in section 304] shall be applied by the permit issuer in determining whether the presumptively valid effluent limitations should apply to a particular source of discharge." *DuPont* v. *Train*, 541 F.2d 1018, 1030 [4th Cir. 1976, emphasis added].

C. Illegality of Proposal

NRDC argued that the proposed variance clause is illegal because section 301(c), which provides the exclusive means for case-by-case economic hardship modifications, is limited by its terms to 1983-84 "best available technology" (BAT) limitations as distinguished from BPT. EPA cannot dispute this argument. As stated in the March 3 proposal at 43 FR 8813:

> EPA continues to believe that with respect to variances from national effluent limitations guidelines, economic factors may be considered only in § 301(c) proceedings to modify [BAT] requirements.

Nevertheless, EPA is compelled by the court's order in *Appalachian* to include section 301(c) factors into the BPT variance clause for steam electric powerplants. The court's order relates only to the power industry, however, so EPA has rejected the arguments of SOCMA and Union Carbide that this revision be made applicable to all industries.

D. APPLICATION TO BEST AVAILABLE TECHNOLOGY ("BAT") AND NEW SOURCE PERFORMANCE STANDARDS ("NSPS")

Consumers Power Co. stated that the proposal was "deficient" because it did not apply to BAT or NSPS. (BAT and NSPS limitations are generally more stringent than BPT limitations.) The *Appalachian* Court, however, specifically rejected such an argument as to BAT. 545 F2d. at 1380. As to NSPS, the Supreme Court ruled in *duPont* v. *Train*, 97 S.Ct. 965 (1977) that variances were improper. 97 S.Ct. at 980. On September 26, 1977, the *Appalachian* Court recalled its mandate as to NSPS variances in response to the Supreme Court's decision.

E. STATES' RIGHTS

Duke Power Co. argued that EPA should require States which have a permit-issuing authority to consider economic factors when evaluating variance requests. Such a requirement would in EPA's view be inconsistent with the Act.

As noted in the March 3 proposal at 43 FR 8813, section 510 of the Act preserves the States' rights to impose more stringent limitations than required by Federal law. While one State may in its discretion refuse to relax nationally-applicable BPT regulations on the basis of site-specific economic factors, another State may allow relaxations to the fullest extent permissible under the Act. Section 510 insures that States have this freedom of choice.

Because States are free to ignore site-specific economic factors if they choose, it would be meaningless for EPA to require States to consider such factors.

III. EFFECTIVENESS

A. TRANSITIONAL PROVISIONS

Because there has been some confusion with respect to BPT variances for steam electric plants since the *Appalachian* remand, EPA agrees with UWAG that a new 60-day application period should be provided. Until November 21, 1978, any steam electric plant may apply to the appropriate permitting authority for a variance under today's amended clause. (As provided in 40 CFR 423.12(a), 423.22(a), 423.32(a), and 423.42, variances recommended by States must be approved by EPA before they become effective.)

Such an application will not automatically stay any enforcement proceeding which EPA has initiated or may initiate against the applicant. EPA will consider in each case whether a variance request is merely a procedural after-thought designed for delay. In this regard, EPA will consider whether a variance request is likely to succeed on the merits, whether the applicant was aware that EPA has been processing steam electric BPT variance requests for some time, and whether the applicant has made any effort to work out its problems with the appropriate enforcement authorities. It should be noted that any facility which is now in compliance with a BPT limitation may not rely upon a variance application as an excuse for falling out of compliance.

B. IMMEDIATE EFFECTIVENESS

In order to provide an immediate opportunity for applications under the amended regulations and to expedite final resolution of such applications, I hereby find good cause to make these amendments effective immediately.

(Sec. 501(a), Clean Water Act, 33 U.S.C. 1361(a).)

Dated: September 15, 1978.

DOUGLAS M. COSTLE,
Administrator.

§§ 423.12, 423.22, 423.32, and 423.42 [Amended]

40 CFR Part 423 is amended by adding the following two sentences to the end of §§ 423.12(a), 423.22(a), 423.32(a), and 423.42 (introductory paragraph):

* * * * *

* * * In accordance with the decision in *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1358-60 (4th Cir. 1976), EPA's legal interpretation appearing at 39 FR 30073 (1974) shall not apply to this paragraph. The phrase "other such factors" appearing above may include significant cost differentials and the factors listed in section 301(c) of the Act.

[FR Doc. 78-26582 Filed 9-21-78; 8:45 am]

[4110-35]

Title 42—Public Health

CHAPTER IV—HEALTH CARE FINANCING ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 462—GRANTS TO PROFESSIONAL STANDARDS REVIEW ORGANIZATIONS

Designation of Alternate PSRO's

AGENCY: Health Care Financing Administration (HCFA), HEW.

ACTION: Final rule.

SUMMARY: This rule sets forth selection criteria and other conditions for the designation of alternate professional standards review organizations (PSRO's) where physician groups that qualify for designation as priority PSRO's are not available in a PSRO area. It implements section 1152(b)(1)(B) of the Social Security Act. The purpose of the criteria is to assure that the designated organization will be professionally competent to carry out PSRO responsibilities and to facilitate designation of PSRO's in every PSRO area.

DATES: Effective on September 29, 1978.

FOR FURTHER INFORMATION, CONTACT:

Beth Giebelhaus, 202-245-2196.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 1152 of the Social Security Act requires the Secretary to designate qualified organizations as PSRO's. The Act specified two categories of qualified organizations. These two categories are referred to in these regulations as: (1) Priority organizations; and (2) alternate organizations.

Priority organizations are groups that are composed exclusively of physicians ("physician groups") and that meet the requirements of section 1152(b)(1)(A). Alternate organizations are public, nonprofit private, or other agencies or organizations that are not necessarily composed of physicians and that meet the less stringent organizational requirements of these regulations. Priority organizations are preferred for designation as PSRO's. Prior to January 1, 1978, the law authorized us to designate only priority organizations, except in a few PSRO areas as provided by section 108 of Pub. L. 94-182. Even now, we may not renew a grant to an alternate PSRO if a qualified priority organization (that has not been previously designated) applies and we determine that designating the priority organization will