reveals a threat to the discipline, health, welfare, or morals of the Armed Forces.

Dated: September 11, 1980.

M. S. Healy,

OSD Federal Register Liaison Officer, Washington Headquarters Services, Department of Defense.

[FR Doc. 80-28648 Filed 9-16-80; 8:45 am]

BILLING CODE 3810-70-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 117

[FRL 1606-8]

Water Programs; Determination of Reportable Quantities for Hazardous Substances

AGENCY: Environmental Protection Agency.

ACTION: Notice of effective date.

SUMMARY: This notice establishes the date on which the determination of reportable quantity regulation, 40 CFR Part 117, will be applicable to common carriers. When published on August 29, 1980, 40 CFR Part 117 deferred its applicability to discharges of hazardous substances from common carriers. Beginning November 20, 1980, common carriers will be required to report discharges of hazardous substances as provided for under Subpart C of 40 CFR Part 117.

EFFECTIVE DATE: November 20, 1980.

FOR FURTHER INFORMATION CONTACT: Joseph Krivak, Director, Criteria and Standards Division (WH-585), Office of Water Planning and Standards, 401 M Street, S.W., Washington, D.C. 20460 (202) 755-0100.

SUPPLEMENTARY INFORMATION: On August 29, 1979, the Environmental Protection Agency ("EPA") published a regulation in the Federal Register (44 FR 50766) establishing a new Part 117 in the Code of Federal Regulations entitled "Determination of Reportable Quantities for Hazardous Substances." The regulation established reportable quantities for those substances designated as hazardous in 40 CFR Part 116, and provided that discharges of such amounts be reported to the Federal Government (§ 117.21). Discharges of reportable quantities also give rise to civil penalties (§ 117.22) and liability for clean-up costs (§ 117.23).

The regulation became effective on September 28, 1979, except for discharges of hazardous substances which have been offered to common carriers who are required to accept such substances for shipment in compliance with applicable tariffs. EPA recognized that under regulations and practices then in existence, not all hazardous substances would be identified as such in applicable shipping papers. Thus, common carriers may not have known if their cargoes contained hazardous substances, and would have had great difficulty in complying with the requirement to report discharges of designated hazardous substances.

On May 22, 1980, the Department of Transportation ("DOT") promulgated regulations (45 FR 34560) requiring identification of hazardous substances shipped in quantities greater than or equal to a reportable quantity, 49 CFR Parts 171 and 172. Certain packages containing low concentrations of hazardous substances were excluded from DOT's identification requirements. See § 171.18 and preamble discussion, 45 FR 34568-70. DOT's regulations become effective on November 20, 1980.

Accordingly, appropriate identification of shipments containing hazardous substances will soon be in place and EPA's regulations will be made applicable to all discharges, including those from common carriers on the same date (November 20, 1980) on which DOT's regulations pertaining to hazardous substances become effective. The discussion regarding possible changes in existing tariffs which appeared in the preamble to EPA's August 29, 1979 regulations, (44 FR 50775-76) is of course no longer applicable.

It should be noted that both DOT's regulations (49 CFR 117.17) and EPA's regulations (40 CFR 117.21, referencing 33 CFR 153.203) provide for immediate notification to the Federal Government of discharges in reportable quantities. The toll-free notification number (800-424-8802) is identical under both regulations. Notification made pursuant to DOT regualtions will be considered notification pursuant to EPA regulations.

Dated: September 11, 1980.

Douglas M. Costle,

Administrator.

[FR Doc. 80-28651 Filed 9-16-80; 8:45 am]

BILLING CODE 6560-01-M

40 CFR Part 125

[FRL 1607-3]

Ocean Discharge Criteria

AGENCY: Environmental Protection Agency ("EPA").

ACTION: Notice of availability of final regulation.

SUMMARY: Copies of EPA's forthcoming ocean discharge criteria implementing Section 403(c) of the Clean Water Act will be available to the public on September 30, 1980

ADDRESS: Copies of the regulation will be available at EPA, Room 741, East Tower, 401 M St., S.W., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Kenneth Farber, Office of Water Planning and Standards (WH-586), EPA, 401 M St., S.W., Washington, D.C. 20460, 202-472-5746.

SUPPLEMENTARY INFORMATION: EPA is under a court order to promulgate regulations establishing ocean discharge criteria under Section 403(c) of the Clean Water Act, 33 U.S.C. § 1343(c). The order originally required EPA to deliver the final regulation to the office of the Federal Register by July 30, 1980. Recently, the court amended its order, so that EPA is now required to deliver the regulation to the Federal Register by September 30, 1980. The court has also ordered the Agency, by that date, to make a copy of the final regulation available to any interested person. In accordance with the court's order, this is to give notice that copies of the final regulation will be available at EPA on September 30, 1980, after 3:00 pm, at the address and room noted above.

Dated: September 11, 1980

Steven Schatzow,

Deputy Assistant Administrator for Water Regulations and Standards.

[FR Doc. 80-28672 Filed 9-16-80; 8:45 am]

BILLING CODE 6560-01-M

40 CFR Part 423

[FRL 1606-3]

Steam Electric Power Generating Point Source Category; Amendment to BPT Variance Clause

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Because a recent Court decision may create confusion about EPA's position on an issue of fundamental importance under the Clean Water Act, EPA is amending a regulation to emphasize its position. The regulation applies to the steam electric power industry. The amendment specifies that a plant's impact on receiving water quality is not relevant to the issue of whether the plant may receive a "variance" from national "best practicable technology" limitations.

EFFECTIVE DATE: October 31, 1980.

FOR FURTHER INFORMATION CONTACT: Richard G. Stoll, Jr. (A-131), Assistant

General Counsel, EPA, 401 M Street, S.W., Washington, D.C. 20460, (202) 755–0960.

SUPPLEMENTARY INFORMATION:

I. Introduction

A basic requirement of the Clean Water Act [1] is that all industrial plants must at a minimum limit their pollution discharges to the Nation's waters to a level representative of the "best practicable technology currently available" ("BPT") as defined by EPA for that type of plant §§ 301(b)(1)(A), 304(b)(1)(B). EPA has issued regulations specifying BPT limits on a national basis for numerous industrial categories and subcategories.

Because of time and resource constraints, EPA generally bases its national BPT limits on data from plants which EPA has judged to be representative in terms of the relevant technical, engineering, and cost characteristics. Because EPA does not base its national limits on data from every plant in a category or subcategory, EPA includes a "variance clause" in each BPT regulation. This clause provides an opportunity for an individual plant to show that it is "fundamentally different" from the plants EPA examined in setting the national limits. In such a case, a new BPT limit may be set at such level as is legally appropriate for that plant.

One important issue relating to the BPT variance clause is whether a plant's impact on receiving water quality may be a relevant factor. EPA has long maintained that the Clean Water Act precludes consideration of this factor. As discussed below, two court decisions have affirmed EPA's position. A recent court decision, however (*"Applachian II"*), expressed doubt as to whether EPA has actually adopted the foregoing position. The decision also indicated disagreement with such a position in some respects.

II. Background to "Appalachian II" Decision

On October 8, 1974, EPA published national BPT limits and a variance clause for the steam electric power industry. 40 CFR Part 423, 39 FR 3686 *et seq.* The variance clause did not specify whether economic factors could be considered. On August 12 and 20, 1974, however, EPA had ruled they could not. 39 FR 28926 and 30073. On July 16, 1976, the U.S. Court of Appeals for the Fourth Circuit rejected the steam electric variance clause because EPA excluded economic factors. *Appalachian Power Co.* v. *Train,* 545 F.2d 1351, 1358–60 (*"Appalachian I."*)

On September 29, 1978, EPA amended the steam electric variance clause to comply with the *Appalachian I* decision. 43 FR 44846–48. The amended clause, however, did not explicitly address the receiving water quality issue discussed above. Essentially the same group of power companies which sued in *Appalachian I* sued again in the Fourth Circuit. This time, they argued that EPA's variance clause was defective because it failed to account for variations in receiving water quality. EPA's attorneys responded in their brief that receiving water quality cannot legally be considerd as a relevant factor.

In its opinion of April 28, 1980, the Court refused the power companies' request to vacate the variance clause. *Appalachian Power Co., et al.* v. *EPA,* 620 F.2d 1040 (*"Appalachian II"*). A copy is reprinted below as Exhibit A. The Court based its decision on the assumption that EPA would allow consideration of water quality, and dismissed statements to the contrary in EPA's brief as the "mere assertion of an attorney." The Court indicated its belief that the Clean Water Act required EPA to allow consideration of water quality.

Because the Court refused to ascribe EPA's attorneys' argument to EPA, its rejection of that argument may be regarded as undefinitive, or *dicta,* in lawyers' parlance. Nevertheless, EPA petitioned the Court for a rehearing because of the potential for confusion. A copy is reprinted below as Exhibit B. EPA pointed out that EPA has indeed adopted the position stated in its brief, and that this position had been upheld in another Fourth Circuit decision (*Consolidation Coal Co.* v. *Costle,* 604 F.2d 239, 244–245 (1979)) and by another Court of Appeals (*Weyerhaeuser Co.* v. *Costle,* 590 F.2d 1011, 1041–1044 (D.C. Cir. 1978)). On May 27, 1980, the Court denied EPA's petition for rehearing. A copy of the denial is reprinted below as Exhibit C.

III. Need for Amendment to Power Plant Variance Clause

The *Appalachian II* Court premised its opinion on the assumption that EPA's brief did not represent EPA's position. EPA has, however, formally adopted and consistently adhered to the position in its brief. I accordingly believe it is necessary to amend the clause to resolve any possible ambiguities regarding EPA's intent. The amendment should provide an opportunity for a definitive judicial resolution of this issue.

IV. Explanation of EPA's Position

On June 7, 1979, EPA published a BPT variance clause for all industries other than power plants.[2] 40 CFR 125.30–32, 44 FR 32950–1.[3] This clause provides that "the impact of a discharge on local receiving water quality" may not be a ground on which to grant a variance. 40 CFR 125.31(3)(4). As explained in the preamble to this regulation:

> [S]pecific receiving water quality is not a relevant factor in the fundamentally different factors variance context. To allow relaxation from technology-based limits because of case-by-case variations in receiving water quality would be grossly violative of the Act and contrary to its fundamental principles.
>
> 44 FR 32893–4.

I have already thoroughly explained the basis for this position. *In Re Louisiana-Pacific Corp,* 10 ERC 1841 (1977).[4] A copy of this decision is attached as Exhibit D. As my decision shows, Congress concluded in 1972 that earlier water pollution legislation had been ineffective because of the complexities of relating water quality effects to discharge levels. Congress accordingly made a basic policy judgment in the 1972 statute: dischargers were to meet technology-based control requirements at a minimum and and variations in receiving water quality were not to be relevant in setting these requirements.

My decision shows that Congress recognized that its basic policy judgment might in some cases require controls where no direct, site-specific water quality benefit could be shown. Congress deliberately chose this approach, however, as preferable to one in which control efforts could be bogged down interminably by highly technical scientific and legal disputes. Moreover, by requireing each plant—regardless of its location—to reduce its discharges in this fashion, Congress assured general

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[1] Pub. L. 92–500 (1972) as amended by Pub. L. 95–217 (1977).

[2] EPA has placed the BPT variance clause for power plants on a different "track" than the BPT variance clause for all other industries because EPA disagrees with the *Appalachian I* ruling to the extent it requires consideration of § 301(c) factors (including affordability) in the BPT variance context. EPA recently secured a writ of *certiorari* for Supreme Court review of this issue. *EPA* v. *National Crushed Stone Association, et al.,* No. 79–770.

[3] EPA published minor technical amendments to this clause at 45 FR 33512, May 19, 1980.

[4] The *Appalachian II* Court expressed agreement with the result in *Louisiana-Pacific,* in which I denied variances for two pulp mills. The Court interpreted my position to be that a variance cannot be granted where water quality is the *only* fundamental difference. My position is much broader: water quality is not a relevant factor to be considered, whether alone or with other factors. Moreover, I see no point in considering a factor if it could not, when all other factors are equal, tip the scale.

improvement in the quality of the nation's waters.

In the 1977 Amendments to the Clean Water Act, Congress changed this approach in some respect for certain types of dischargers, for certain types of limitations, and for certain types of pollutants.[5] Significantly, Congress made no such change with respect to BPT limitations for industrial dischargers such as power plants. In fact, as the Fourth Circuit noted in *Consolidated Coal* (604 F.2d at 245) and as the D.C. Circuit noted in *Weyerhaeuser* (590 F.2d at 1043), Congress refused to amend the Act in this regard despite pleas from industrial interests to do so. As Senator Muskie stated in explaining the new amendments:

> Although numerous changes have been made to sections 301 and 304, effluent limitations and guidelines developed pursuant to these sections remain technology-based standards. *Except to the extent expressly provided in the statute, such limitations cannot be varied or modified due to the nature or quality of receiving waters.*

Cong. Rec. daily edition, S. 19646, December 15, 1977, emphasis added.

V. Conclusion

Congress chose in 1972, and reaffirmed in 1977, a policy under which receiving water quality impact is irrelevant in determining BPT for any industrial plant. Because the *Appalachian II* Opinion was premised on the assumption that this was not EPA's official position, I feel it is incumbent upon me to amend the power plant variance clause to make the position totally clear. Because the amendment imposes no new duties or obligations and reflects EPA's long-standing position, I find for good cause that it would be unnecessary to propose this amendment for public comment.

Consistent with 40 CFR 100.01 (45 FR 26048, April 17, 1980) this amendment shall be considered issued for purposes of judicial review at 1:00 p.m. eastern time on October 1, 1980, and effective on October 31, 1980.

(Secs. 301, 304, and 501, Clean Water Act, 33 U.S.C. 1311, 1314, and 1361)

Dated: September 10, 1980.

Douglas M. Costle,
Administrator.

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

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

* * * * *

* * * In no event may a discharger's impact on receiving water quality be considered as a factor under this paragraph.

Exhibit A—U.S. Court of Appeals for the Fourth Circuit

[Nos. 74-2096, 74-2188, 74-2196, 74-2236, 74-2263, 74-2264, 74-2265, 74-2268, 74-2269, 74-2270, 74-2286, 74-2298, 74-2312, 74-2313, 74-2315, 74-2339, 74-2340, 74-2341, 74-2343, 74-2365, 74-2366, 74-2396, 75-1014, 75-1020, 75-1021, 75-1022, 75-1047, 75-1074, 75-1078, 75-1091, 75-1094, 75-1095, 75-1196, 75-1199, 75-1200, 75-1201, 75-1202, 75-1203, 75-1223, 75-1255, 75-1345, 75-1346, 75-1347, 78-1701, 78-1878, 78-1902]

Appalachian Power Co., Baltimore Gas and Electric Co., Carolina Power & Light Co., Duke Power Co., Monongahela Power Co., Ohio Power Co., Potomac Edison Co., Potomac Electric Power Co., South Carolina Electric & Gas Co., Virginia Electric and Power Co., West Penn Power Co. (Petitioners) v. Russell E. Train, as Administrator, Environmental Protection Agency (Respondent) Alabama Power Co., Et Al, Jersey Central Power & Light Co., Metropolitan Edison Co. and Pennsylvania Electric Co. (Intervenors).

On Petitions for Review of Actions of the Administrator of the Environmental Protection Agency*

Argued: April 4, 1979.
Decided: April 28, 1980.

Before Breitenstein,** Senior Circuit Judge, Widener and Phillips, Circuit Judges

*The following Petitions for Review, all naming Train as Respondent, were consolidated:

74-2188—National Rural Electric Cooperative Association
74-2196—Georgia Power Company
74-2236—Tampa Electric Company
74-2263—Indiana & Michigan Electric Company
74-2264—Indiana-Kentucky Electric Corporation
74-2265—Illinois Power Company
74-2268—Pacific Gas and Electric Company
74-2269—San Diego Gas & Electric Company
74-2270—Southern California Edison Company, a California Corporation
74-2286—Mississippi Power Company
74-2298—Arkansas Power & Light Company and Arkansas-Missouri Power Company
74-2312—Gulf Power Company
74-2313—Alabama Power Company
74-2315—Boston Edison Company, Holyoke Water Power Company, Nontaup Electric Company, New England Power Company, Public Service Company of New Hampshire, Western Massachusetts Electric Company
74-2339—Consolidated Edison Company of New York, Inc.
74-2340—Pennsylvania Power & Light Company
74-2341—Philadelphia Electric Company
74-2343—Florida Power & Light Company
74-2365—Dairyland Power Cooperative
74-2366—Commonwealth Edison Company
74-2396—Mississippi Power & Light Company, Louisiana Power & Light Company, and New Orleans Public Service, Inc.
75-1014—Western Farmers Electric Cooperative, a corporation
75-1020—Alabama Electric Cooperative, Inc.
75-1021—Buckeye Power, Inc., Indiana and Michigan Power Company, Kentucky Power Company, Ohio Electric Company, Ohio Power Company, Ohio Valley Electric Corporation
75-1022—Brazos Electric Power Cooperative, Inc.
75-1047—Connecticut Light & Power Company, The Hartford Electric Light Company, Western Massachusetts Electric Company, Long Island Lighting Company, New York State Electric & Gas Corporation [Intervenors]
75-1074—Corn Belt Power Cooperative
75-1078—Texas Utilities Generating Company, Dallas Power & Light Company, Texas Electric Service Company, Texas Power & Light Company
75-1091—Public Service Electric & Gas Company
75-1094—Union Electric Company
75-1095—Central Iowa Power Cooperative
75-1196—South Texas Electric Cooperative, Inc.
75-1199—Central Power & Light Company and West Texas Utilities Company
75-1200—State of Texas
75-1201—Houston Lighting & Power Company
75-1202—Tennessee Valley Authority
75-1203—Brazos River Authority
75-1223—Cincinnati Gas & Electric Company, Cleveland Electric Illuminating Company, Columbus & Southern Ohio Electric Company, Dayton Power & Light Company, Ohio Edison Company, Toledo Edison Company
75-1255—Union Electric Company, a Missouri Corporation
75-1345—Platte River Power Authority
75-1346—City of Lamar, a municipal corporation of the State of Colorado, and The Lamar Utilities Board
75-1347—Tri-State Generation and Transmission Association, Inc.
78-1701—Appalachian Power Company, et al.
78-1878—Natural Resources Defense Council, Inc.
78-1902—Natural Resources Defense Council, Inc.

**Honorable Jean S. Breitenstein, United States Circuit Judge for the Tenth Circuit, sitting by designation.

[5] Section 301(g) now authorizes relaxations from "BAT" (1984-1987) limitations on water quality grounds for industrial dischargers for non-toxic, non-conventional pollutants. Section 301(h) now authorizes relaxation from "secondary treatment" limitations on water quality grounds for municipal ("POTW") discharges into marine waters.

George C. Freeman, Jr. (Turner T. Smith, Jr., William A. Anderson, II, E. Gabriel Smith, Hunton & Williams on brief) for Petitioners Appalachian Power Company, et al.; James Taylor Banks (Stephen H. Schroeder, Ronald J. Wilson on brief) for Petitioner NRDC; Richard G. Stoll, Deputy Associate General Counsel, EPA (Joan Z. Bernstein, General Counsel, James A. Rogers, Associate General Counsel, EPA; James W. Moorman, Assistant Attorney General, Land and Natural Resources Division, Bradford F. Whitman, Assistant Chief, Pollution Control Section, Barry J. Trilling, Department of Justice on brief) for Respondents

WIDENER, Circuit Judge:

These actions arise because of EPA amending its regulations to comply with our mandate in *Appalachian Power Co. v. Train*, 545 F2d 1351 (1976). In *Appalachian Power*, approximately seventy power companies sought review of the Environmental Protection Agency's (EPA) regulations promulgated under authority of the Federal Water Pollution Control Act (Act).[1] The power companies now challenge EPA's amendments to parts of 40 CFR Part 423 [2] on grounds that they do not fully comply with *Appalachian Power*. Part 423 sets out the best practicable technology (BPT) limitation standards for the steam electric power industry. National Resources Defense Council (NRDC), through its petitions, also seeks a review of certain EPA BPT regulations, not on the ground that *Appalachian Power* has not been complied with but on the ground that § 301(1), 33 USC § 1311(1), a 1977 amendment to the Act, prohibits EPA from modifying any of § 301, 33 USC § 1311, including BPT limitations, for toxic pollutants. It also challenges the EPA variance amendments on the ground that they did comply with *Appalachian Power* so far as the factors in § 301(c) are referred to in the amended regulations.

In 1972, Congress passed the Federal Water Pollution Control Act (Act) with an ultimate goal of no pollutant discharges into our nation's waters. Toward that ultimate goal, Congress established increasingly stringent standards of pollution control. Phase-I of the Act sets best practicable technology (BPT) limitations to go into effect in 1977.[3] In 1983, best available technology (BAT) limitation standards are to go into effect.[4] Several parts of the Act were amended in 1977 but the basic goals and strategies of the Act remain intact. EPA is given broad power under the Act so that it may insure that the phases of improvement can be achieved. In order to carry out its obligation, EPA promulgated regulations setting single number effluent limitations for various industries in order to commence the achievement of the goal of the statute. In *duPont*, we held that EPA had the authority to promulgate such effluent limitations which are to be considered presumptively applicable. *E. I. duPont de Nemours & Co. v. Train*, 541 F2d 1018, 1028 (4th Cir. 1976), aff'd on this point 430 U.S. 112 (1977). Through the regulations applicable unless rebutted, EPA hopes to achieve national uniformity as the goal of no discharge of pollutants is sought. Id at 1028.

Appalachian Power involved a review of many of EPA's regulations promulgated to aid in the application and enforcement of the Act. Only our holding dealing with BPT variance regulations is pertinent to our decision here. Among other provisions under attack in *Appalachian Power* was EPA's variance clause providing that a variance from the 1977 standards set out in the regulations would be granted when "the factors relating to equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from those factors considered in establishing the guidelines."[5] Costs were excluded from consideration by EPA's interpretation of its own regulation. We struck down the clause because EPA's refusal to consider costs resulted in too restrictive a view of the minimum content of the variance. Under the 1983 standards set out in the Act, for example, costs were to be a relevant factor. Following our decision in *duPont*, we reasoned that the Act contemplated progressively more stringent standards as the country moved closer to the goal of elimination of pollutant discharge. Therefore, the 1977 standards were not intended to be any less flexible than the 1983 standards. As a result, we remanded the regulation to EPA for the agency to come forward with a meaningful variance clause taking into consideration at least the statutory factors set out in §§ 301(c), 33 USC § 1311(c); 304(b)(1)(B), 33 USC § 1314(b)(1)(B); and 306(b)(1)(B), 33 USC § 1316 (b)(1)(B).[6] *Appalachian Power* at 1359–60.

After the Supreme Court's decision in *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), we modified our decision in *Appalachian Power* to exclude the requirement of a variance for new sources, but declined to modify the opinion further.[7] In March 1978, EPA proposed its amendment to the BPT variance provision. 43 FR 8812–13 (1978). After a comment period, this rule was made final on September 22, 1978. EPA amended 40 CFR 423.12(a), 423.22(a), 423.32(a) and 423.42 by adding the following paragraph:

> In accordance with the decision in *Appalachian Power*, 545 F2d 1351, 1358–60 (4th Cir. 1976), EPA's legal interpretation appearing at 30 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.

43 FR 43025 (Sept. 22, 1978) corrected at 43 FR 44848 (Sept. 29, 1978).

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[1] 33 USC § 1251 et seq.

[2] Specifically amended were 40 CFR 423.12(a), 423.22(a), 423.32(a) and 423.42.

[3] § 301(b)(1)(A), 33 USC § 1311(b)(1)(A).

[4] § 301(b)(2)(A), 33 USC § 1311(b)(2)(A).

[5] §423.12(a) interpreted at 39 FR 28926–27 (Aug. 2, 1974), 30073 (Aug. 13, 1974).

[6] § 301(c), 33 USC § 1311(c), provides: The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

§ 304(b)(1)(B), 33 USC § 1314(b)(1)(B), provides that such regulation shall: [S]pecify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

§ 306(b)(1)(B), 33 USC § 1316(b)(1)(B), provides: As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

[7] No. 74–2096, Order of September 26, 1977.

In October 1978, EPA published a notice rescinding its no-cost interpretation of 1974. 43 FR 50042. In October 1978, the utilities filed this action.[8]

The utilities challenge the EPA amendment to the BPT variance provisions, contending that the mandate of *Appalachian Power* has not been met by the addition of "significant cost differentials and the factors listed in section 301(c) of the Act." Specifically, the utilities argue that *Appalachian Power* requires EPA to consider 304(b)(1)(B) factors including "total cost . . . in relation to effluent reduction benefit."

The utilities concede that the addition of "significant cost differentials and the factors listed in section 301(c) of the Act" to the existing variance provisions on its face could fulfill the *Appalachian* mandate. They argue, however, that EPA has made it clear that effluent reduction benefits are not a relevant factor under the regulation. The utilities urge that EPA's interpretation of effluent reduction benefit is much too narrow in that it considers only costs in relation to the degree of effluent reduction with no consideration of receiving water quality. Such an interpretation, they urge, is impermissible in light of *Appalachian.*

No variance has been applied for here. Therefore, the utilities' only authority offered to show EPA's application of its newly amended regulations is the February 6, 1979 recommendation of the Assistant Administrator for Water Enforcement of the EPA tentatively turning down Cincinnati Gas and Electric Company's application for a variance for its W. C. Beckjord Station, as well as the case of *In re Louisiana-Pacific Corp.,* 10 ERC 1841 (1977). That document; the utilities contend, shows EPA's rejection of water quality as a factor in considering effluent reduction benefits pursuant to *Appalachian.* There, Cincinnati Gas' application for a variance from ph limitations was turned down because no fundamental difference was found to justify a less stringent standard. In commenting on receiving water quality, the Office of Enforcement of the EPA included in its recommendation to the Administrator the following:

> The Administrator has determined *In the matters of Louisiana Pacific Corporation* NPDES No. CA0005894 *and Crown Simpson Pulp Company* NPDES No. CA0005882 10 ERC 1841 (September 16, 1977) ("Louisiana Pacific") that EPA is not authorized to grant a FDF variance providing relief from technology-based limitations guidelines due to the characteristics of the receiving water. The type of receiving water or the fact that the receiving water quality will not be harmed by the discharge or measurably improved by installing control equipment are not legally fundamental differences.
>
> Recommendation on Variance Ruling FDF 78–01 at pp. 7–8.

We think the utilities' reliance on the recommendation in the Cincinnati Gas and Electric variance recommendation is misplaced. First and principally, the Administrator has not yet taken any action with respect to the variance. That being so, we do not believe that, even assuming the utilities' construction of the recommendation to be correct, the recommendation of the Office of Enforcement to the Administrator is legally binding on the Agency. While it may have considerable significance, legal as well as practical, to the parties involved, it is little if anything more than an in-house memorandum from a subordinate in the Agency recommending to the Administrator the action he should take in passing on the requested variance. Second, the language we have above quoted, which is that upon which the utilities rely, we do not believe, read in context, can be taken to say that the Administrator in no instance will consider the quality of the receiving water as a part of the evidence in a case requesting a variance. Read literally, the language simply means that the quality of receiving water of itself is not a fundamental difference upon which a variance can be granted. This is entirely consistent with that part of our ruling in *Appalachian Power* in which we denied the claim of Consolidated Edison that it ought to be allowed to discharge into New York harbor not subject to effluent limitations because the harbor was already so dirty the addition of its effluent would make no difference. From an examination of the papers on hand in the Cincinnati Gas and Electric Company variance No. FDF 78–01, we believe, however, that the variance was not sought solely or even principally because of the water quality of the Ohio River into which the effluent flowed. Rather, it was based principally upon cost differentials and a claim that the addition of sulphuric acid to its settling ponds to reduce their alkalinity would do more harm to the receiving water than the effluent in question in that case.

Much the same remarks apply to EPA's decision in *In re Louisiana-Pacific Corp.,* 10 ERC 1841 (1977). In that case the claim of the industry was that a discharge of its effluent into the ocean would do no harm apparently because the ocean waters were so vast. The Administrator denied that variance, again entirely consistent with our opinion in *Appalachian Power,* concluding that he could provide no "... relief from technology-based effluent limitations guidelines due solely to the characteristics of particular receiving waters...." He stated that he could not permit exemption where the type of receiving water is the fundamental difference between the seekers of the variance and other pulp and paper mills. In his opinion, the Administrator time and again made it plain that the only thing he acted upon was a request for a variance based solely on water quality. At no place in that decision did the Administrator indicate that he did or would hold that the quality of the receiving waters was irrelevant in all instances in variance proceedings. It is true EPA does take that position in its brief in this court: "Receiving water quality simply cannot legally be considered a relevant factor in evaluating a variance request." Brief at p. 13. But as the mere recommendation of a subordinate does not bind the Agency,[9] neither does the mere assertion of an attorney in a brief except for the purposes of that case. Much as we disagree with the statement, there has been no application of it in the case before us, and no binding statement has been made to that effect by the Administrator. We will have to await a proper case to see if the Administrator in actual practice, or in the administration of the statute, takes the same extreme position his attorneys do in the brief in this case. No such extreme position can be read into the *Louisiana-*

[8] NRDC had filed its original petition on September 28, 1978, in the D.C. Circuit. The utilities and NRDC then filed petitions for review in this court. Upon motion, the D.C. Circuit transferred NRDC's first petition to this court. *NRDC* v. *EPA,* No. 78–1929 (D.C. Cir. Dec. 21, 1978).

[9] The Deputy Assistant Administrator for Water Enforcement, who made the recommendation in *Cincinnati Gas and Electric Co.,* acts only as the principal adviser to the Administrator of EPA on matters of enforcement. 40 CFR § 1.31. Thus, his decision is not binding on the Administrator. In like vein, we held that a decision of the Provider Reimbursement Review Board, and in-house board, does not bind the Secretary of HEW, who can modify or reverse that decision on his own motion. *Fairfax Hospital Ass'n, Inc.* v. *Califano,* 585 F2d 602 (4th Cir. 1978). See also, e.g., *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951) (NLRB rejected examiner's findings); *Environmental Defense Fund, Inc.* v. *EPA,* 489 F2d 1247 (D.C. Cir. 1973) (Administrator decided contrary to the conclusion of the Hearing Examiner regarding the banning of DDT); *Adolph Coors Co.* v. *FTC,* 497 F2d 1178 (10th Cir. 1974) (FTC overruled Administrative Law Judge's finding that Coors had not violated § 5 of the Federal Trade Commission Act); *Peterson* v. *Gardner,* 391 F2d 208 (2d Cir. 1968). (Appeals Council can rule contra to decision of the Hearing Examiner); *Alcoa Steamship Co.* v. *Federal Maritime Commission,* 321 F2d 756 (D.C. Cir. 1963) (Maritime Commission rejected recommendation of examiner and approved pooling agreement); *Braswell Motor Freight Lines* v. *USA,* 275 F.Supp. 98 (W.D. Texas 1967), aff'd 389 U.S. 569 (1968) (ICC rejected recommendation of its examiner).

Pacific or *Cincinnati Gas* variance cases.

Because we believe the amendment of the variance provision will admit consideration of all of the factors required in our opinion, and there has been no concrete application denying a variance request which is under review, we decline to set aside EPA's amended regulations as a non-compliance with our mandate.[10]

EPA and NRDC also ask us to reconsider our holding in *Appalachian Power* to the effect that § 301(c) factors are applicable in consideration of variances from BPT limitations. Id at 1359-60. This issue was dealt with again by this court in *National Crushed Stone Assoc. Inc.* v. *EPA*, 601 F2d 111 (4th Cir. 1979), and in *Consolidation Coal Co.* v. *Costle*, 604 F2d 239 (4th Cir. 1979), cert. granted 48 L.W. 3513 (1980). In those cases the industries successfully sought application of *Appalachian Power's* BPT variance holding outside the steam electric industry to which EPA has limited our holding in *Appalachian*. We declined to change our *Appalachian Power* variance holding in those cases, and we decline to do so here.

We should note at this point that EPA continues to argue from extreme positions which we do not believe are justified by the statute, and even are not justified by the actions of the Administrator as distinguished from the language in his brief. EPA's principal argument in this case is shown by an example it gives that a discharger of a copper compound might be granted a variance if it were on a clean river but not if it were on a dirty river. The example misses the point. If the discharger were economically unable to correct its condition of violation *and* if its efforts resulted in reasonable further progress toward meeting the standard, then there is no reason to necessarily exclude the issuance of a variance. But if the continued discharge, during the time it took the industry to comply, might kill all aquatic life in the river, it might easily be said that the progress was not reasonable, while, if the discharge did little or no actual harm during this period, it might just as easily be said that reasonable progress was being made. To determine whether or not progress is reasonable, we repeat, it may be appropriate to consider water quality as *a factor*, that is to say as an item of evidence. Its sought-for arbitrary exclusion by EPA is simply too rigid a construction of the statute, and we do not believe it is justified. To hold otherwise ultimately can only result in regulation for regulation's sake, at which point, of course, a serious question of constitutional limitations would arise. We believe this useful statute deserves better treatment.

NRDC's petitions request us to hold that variances from BPT limitations cannot be granted to a discharger of toxic pollutants because of a 1977 amendment to the Act, which states:

> The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) [33 U.S.C. § 1317(a)(1)]

§ 301(1) of the Act, 33 U.S.C. 1311(1).

It is the contention of NRDC that the amendments to the various regulations should have as required content a prohibition against issuing a variance from BPT limitations on account of toxic pollutants.

33 U.S.C. § 1317(a)(1) (§ 307(a)(1) of the Act) requires the Administrator to publish a list of toxic pollutants. Upon designation of a pollutant as toxic, § 307(a)(2) [33 U.S.C. § 1317(a)(2)] goes into effect, requiring the EPA to set BAT standards for those pollutants.

As now interpreted by EPA, the variance clause applies to all pollutants for which BPT limitations are set by regulations. The BPT limitations for the steam electric industry include pollutants which are on the toxic pollutant list in 40 CFR Part 129. As noted, because of § 301(1), NRDC contends that EPA in a repromulgation of its variance regulations must in terms exclude toxics from their coverage. EPA and the utilities contend that § 301(1) was not intended to apply to BPT, but only to the specific sections of § 301 which allow an operator to be relieved of an effluent limitation. They also argue that a BPT variance is not a true variance so as to bring § 301(1) into effect. BPT variances, the argument goes, do not excuse anyone from meeting BPT limitation standards. Instead, they enable EPA to determine an individual BPT limitation for an industry procuring a variance. As a result, an operator granted a variance is still in compliance with its BPT limitation standard. Its standard is just different from others.

It is apparent that if either argument just above stated is correct that EPA is not required to exclude toxic pollutants from BPT variances. We think that § 301(1) does not apply to BPT variances.

Toxic pollutants prior to the 1977 amendments were not treated differently from other pollutants in that BAT technology was not necessarily applied, and dischargers discharging toxic pollutants were nevertheless included in those required to comply with BPT effluent limitations. While the 1977 amendments have required BAT limitations for discharges of toxic substances, they do not indicate that they are to operate retroactively so as to possibly retract any variance previously issued to an industry which just happened to be discharging toxic substances, or to obliterate the known practice of EPA in not excluding toxic substances from those pollutants for which a variance might be granted under BPT effluent limitations. Neither does the legislative history justify such a construction. See 3 U.S. Code Congressional and Administrative News, 1977, p. 4326 et seq. The interpretation of the statute by EPA is entitled in some deference. *E. I. duPont de Nemours v. Train*, 430 U.S. 112, 135 n. 25 (1977). It is also true that retroactive application of a statute is not favored. *Union Pacific RR Co. v. Laramie Stockyards Co.*, 231 U.S. 190, 199 (1913). In our case, § 301(1) speaks to preventing the *modification* of any requirement of § 301 as it applies to any specific pollutant on the toxic pollutant list. On its face, it might thus be said to apply to such parts of the statute as § 301(c) which speaks of *modifying* requirements for BAT limitations. Indeed, in § 301(g), 33 U.S.C. § 1311(g), also a part of the 1977 amendments, it is provided that the Administrator, with the concurrence of the State, shall *modify* BAT requirements with exceptions including toxic pollutants. While this may well be an indication of Congressional intent that the statute should be read as EPA reads it, that § 301(1) applies only to those sections of § 301 which in terms permit *modification*, in all events the best that can be said for § 301(1) is that it is not clear. That being true, we give weight to the construction the administering agency has placed upon the statute, and, when we consider that retroactivity is not favored, we are of opinion that § 301(1) does not apply so as to require the exclusion of toxic substances from BPT variance provisions.

Our ruling today is limited to the holding that BPT variance regulations need not exempt toxic pollutants. We do not consider whether or not, or how, EPA will construe § 301(c) with relation to § 301(1). That question is not before us and its consideration would be premature.

[10] The utilities also rely upon EPA's comments published with its amendment of the variance provisions in 40 CFR Part 423. 43 FR 40324 (Sept. 22, 1978), typographically corrected at 43 FR 44847 (Sept. 29, 1978). The comments no more than reflect the ruling in *Louisiana-Pacific*, supra, and are not contrary to our mandate in *Appalachian Power*.

Accordingly, being of opinion that EPA's amendments to 40 CFR 423.12(a), 423.22(a), 423.32(a), and 423.42 are sufficient to permit a compliance by the agency with our opinion and mandate, the petition of the industry to require further consideration of this matter by EPA is denied. (This petition was filed in case No. 74–2096.) The petition of the industry dealing with the same subject in case No. 78–1701 is likewise denied for the same reasons.

The petitions of NRDC are also denied for the reasons stated in this opinion. (These petitions were filed in cases Nos. 78–1878 and 78–1902.)

Exhibit B—U.S. Court of Appeals for the Fourth Circuit

[No. 74–2096 et al.]

Appalachian Power Co., et al., Petitioners, V. Russell E. Train, as Administrator Environmental Protection Agency, Respondent

Petition for Rehearing

Pursuant to Rule 40, FRAP, respondent hereby petitions the Court for a rehearing, and suggests that rehearing en banc would be appropriate to resolve the conflicts outlined below.

Introductory Statement

On April 28, 1980, a panel of this Court issued judgment and opinion in the above-captioned case which declined to invalidate the repromulgated Environmental Protection Agency regulations establishing a variance clause for the steam-electric industry. This Court deferred consideration of certain of petitioners' claims on grounds of prematurity. In our judgment, however, the opinion expresses conclusions that are in square conflict with another decision of this Court which is not addressed in the opinion. Moreover, the opinion conflicts with a decision from another circuit and ignores a statement of the Administrator set forth in EPA's recent NPDES regulations.

Specifically, it is counsel's judgment that:

(1) To the extent the court's decision is based upon its assumption that the Administrator of EPA has not adopted the position, urged by EPA in its brief, that water quality could not be considered as a factor in a BPT variance request, the assumption was rendered erroneous by the promulgation, after argument, and before decision of EPA's revised NPDES permit regulations, at 44 FR 32893 (June 7, 1979);

(2) This Court's conclusion (expressed on pages 17 and 18 of the slip opinion) that water quality is a factor to be considered in determining whether or not a variance may be granted from the requirements of best practicable control technology (BPT) is in direct conflict with this circuit's holding in *Consolidation Coal Co.* v. *Costle*, 604 F.2d 239 at 244–245 (1979); and

(3) The above mentioned conclusion conflicts with the holding of *Weyerhaeuser Co., et al.* v. *Costle*, 590 F.2d 1011, at 1041–1044 (D.C. Cir. 1978).

Discussion

In dismissing the petition filed by the utility petitioners, the Court's decision was premised upon the following assumption: the Administrator of EPA has not clearly adopted the position that water quality could not be considered as a factor when considering "fundamentally different factors" variances. That assumption was in any event nullified prior to the Court's decision by a specific statement of the Administrator. Moreover, while the Court dismissed the industry's petition, it articulated the law in a way that contradicts the earlier opinion of another panel of this circuit in *Consolidation Coal Co.* v. *Costle*, 604 F.2d 239 (4th Cir. 1979), and which is also in conflict with *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011 (D.C. Cir. 1978). Neither of these other cases is discussed in the opinion in relation to the water quality issue.

The Court declined to vacate EPA's variance clause because the panel assumed that the Administrator had not expressed agreement with the position taken in EPA's Brief. (Slip op. at 14–15.) However, on June 7, 1979, the Administrator stated at 44 FR 32893, (emphasis added):

> EPA has been prompted by other comments to add a new provision . . . which makes clear that *specific receiving water quality is not a relevant factor in the fundamentally different factors variance context.* To allow relaxation from technology-based limits because of case-by-case variations in receiving water quality would be grossly violative of the Act and contrary to its fundamental principles.

Although the Administrator made these remarks in promulgating a variance clause for industries other than the steam electric industry, the legal and policy reasons for this determination are identical to those relating to the steam electric industry, as set forth by EPA in papers filed with the Court in this case.[1]

Since, at least as of June 7, 1979, the Administrator's position has been precisely what the Court had assumed that it was not, the Court's refusal to rule on the merits was grounded on an erroneous premise.

While declining to rule on the merits of the water quality issue, the Court did express its view of the law. The Court quoted and expressed strong disagreement with the following statement in EPA's Brief: "Receiving water quality simply cannot legally be considered a relevant factor in evaluating a variance request." Slip. op. at 14. The Court concluded (Slip op. at 18, Court's emphasis):

> [I]t may be appropriate to consider water quality as *a factor*, that is to say as an item of evidence. Its sought-for arbitrary exclusion by EPA is simply too rigid a construction of the statute, and we do not believe it is justified.

This conclusion is contrary to the decision of another panel of this circuit in *Consolidation Coal Co.* v. *Costle*, 604 F.2d 239 (1979). There, this Court expressed strong agreement with precisely the same EPA position. The Court framed the issue as follows (604 F.2d at 244, emphasis added):

> The precise issue, therefore, is whether the factors peculiar to a source of pollution *must include* comparison of the expected improvements in the receiving water with the cost of achieving them.

The Court in *Consolidation Coal* cited with approval another decision [2] because it had "affirmed the Administrator's refusal *to consider* receiving water quality in setting limitations." Id., emphasis added. The Court stated (604 F.2d at 245, emphasis added:

> Any possible doubt about congressional intent *to preclude consideration* of receiving water quality in industrial variance rulings was put to rest in 1977 [in the 1977 Clean Water Act Amendments].
>
> * * * * *
>
> We therefore conclude that the variance regulations as interpreted by the Administrator *properly exclude consideration* of the quality of the receiving water.

There is no way to reconcile the *Consolidation Coal* decision with that in the instant case. In the one case the Court has stated that receiving water quality may not be considered in assessing variance requests, and in the other it has said that the agency must

[1] This statement on the newly-promulgated regulations was made after argument and before the Court's decision. EPA did not file a supplemental memorandum bringing it to the Court's attention at the time it was issued simply because the government had no idea that the Court would conclude that the agency's representations made to the Court would be considered not to constitute agency policy. At the very least, the June 7, 1979, Federal Register statement is a "change in the law which occurred after the case was submitted . . ."

[2] *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

consider it.[3] As a result, any action by the agency in this regard will be vulnerable to charges that it violates one or the other of the circuit's opinions.

The Court's opinion also conflicts with, and clearly overlooks, *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011 at 1036 (D.C. Cir. 1978). The *Weyerhaeuser* court rejected complaints about EPA's "refusal to consider receiving water quality" in the BPT variance clause for the pulp and paper industry, 590 F.2d at 1036, 1041–1044. The D.C. Circuit's decision, to the same effect as *Consolidation Coal*, concluded that water quality is not relevant to BPT. The Court stated in pertinent part (590 F.2d at 1042–44, emphasis added):

> Congress made the deliberate decision to rule out arguments based on receiving water capacity.
>
> * * * * *
>
> Moreover, *by eliminating the issue of the capacity of particular bodies of receiving water*, Congress made nationwide uniformity in effluent regulation possible.
>
> * * * * *
>
> In only one limited instance, thermal pollution,[4] *is receiving water to be considered* in relaxing standards. * * * Otherwise, receiving water quality was to be *considered* only in setting "more stringent" standards than effluent limitations otherwise would prescribe.
>
> * * * * *
>
> *[W]e affirm the Agency's refusal to consider water quality in setting its limitations.*

Both of these cases are relevant to the issue before the Court in *Appalachian Power*, and this Court's failure to discuss them clearly constitutes "a material * * * law overlooked in the decision." The *Consolidation Coal* holding is clearly in conflict with this case, and hence raises "an apparent conflict of another decision of the Court which is not addressed in the opinion."

Since EPA's regulatory policy plainly disregards water quality as a factor in variance decisions, the Court should have adjudicated the issue on its merits, and thus rehearing is required. Moreover, since there is a direct conflict between the law as expressed by this panel on the merits, and the Court's holding in *Consolidation Coal*, rehearing en banc appears to be appropriate.

[3] The panel in the instant case failed to note the existence of contrary opinion in *Consolidation Coal*. The Court's sole reference to that case (Slip Opinion at 17) is in the context of a different issue that is now before the Supreme Court.

[4] The Court's reference to thermal pollution relates to Section 316 of the Act, 33 U.S.C. 1326.

Respectfully submitted,

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Dated: May 12, 1980.

By:

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Exhibit C—U.S. Court of Appeals for the Fourth Circuit

[Nos. 74–2096, et al]

Appalachian Power Co., et al, Petitioners v. Russell E. Train, as Administrator, Environmental Protection Agency, Respondent Alabama Power Company, et al, Intervenors

No judge entitled so to do has requested a poll of the court on the petition for rehearing en banc.

It is accordingly adjudged and ordered that rehearing en banc shall be, and the same hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly adjudged and ordered that the petition for rehearing shall be, and the same hereby is, denied.

With the concurrences of Judge Breitenstein and Judge Phillips.

Exhibit D—Environmental Protection Agency

In the Matters of Louisiana-Pacific Corp., NPDES No. CA0005894 and Crown Simpson Pulp Co., NPDES No. CA0005882.

Decision of the Administrator

I have been asked to consider the granting of variances from effluent limitations guidelines for two pulp, paper, and paperboard mills located on the Pacific Coast of California. The requests for variances are denied.

I. Procedural Background

On March 29, 1977, Mr. Bill B. Dendy, Executive Officer of the State Water Resources Control Board for the State of California, submitted extensive materials concerning the actions taken before the California Regional Water Quality Control Board, North Coast Region, and before the State Board itself, with respect to these two mills. A list of the enclosures to that March 29 letter appears in the margin.[1] Mr. Dendy noted in his March 29 letter that the "state board finds that a variance is warranted for the two dischargers . . . on the grounds that the environmental benefits (if any) to be derived from the application of the treatment required to meet the guideline limitations for BOD and pH would be far outweighed by the nonwater quality environmental costs including use of energy." Mr. Dendy went on to say that he believes "that variance based on these grounds is in accordance with the precedents established in the decisions of several U.S. Court of Appeals, particularly the Fourth Circuit's decision of the case of *Appalachian Power* v. *Train* [545 F. 2d 1351 (1976)]."

On May 26, 1977, Mr. G. William Frick, EPA General Counsel, issued a Recommended Decision of the Administrator which recommended denial the variance requests of the two companies. 42 FR 28167–72 (June 2, 1977). The preamble to the recommended decision advised that written comments on the decision could be submitted and that all such comments received by July 5, 1977, would be considered prior to issuance of a final decision of the Administrator. Comments were timely filed by Crown Simpson Pulp Company and Louisiana-Pacific Corporation (joint submission), the law firm of Hunton & Williams (on behalf of the Utilities Water Act Group and other petitioners in *Appalachian Power Co.* v. *Train*), Southern California Edison Company, East Bay Municipal Utility District and the National Wildlife Federation.

In reviewing the submissions by the State of California and the extensive

[1] A. State Board Order No. WQ 77–6 (with exhibits thereto); B. Transcript of hearing before the State Board December 22, 1976; C. Transcript of hearing before the Regional Board, July 29, 1976; D. Transcript of hearing before the Regional Board, August 26, 1976; E. "Written Comments on Tentative Orders" presented to the Regional Board July 21, 1976; F. "Request for Variance in EPA Limitations on the Basis of Fundamentally Different Factors" dated June 21, 1976; G. Written Statement of Dr. Herman R. Amberg before the California Regional Water Quality Control Board, North Coast Region, July 19, 1976; H. "Written Comments on Tentative Wastes Discharge Orders" dated December 1976; I. Interoffice Memorandum from John R. Hannum to D.C. Joseph and Gary Grimm dated December 13, 1976; J. "Non-water Quality Environmental Impacts" calculation by Dr. Amberg; presented at State Board Hearing December 22, 1976; K. Letter from Dr. C. Edward Taylor to Mr. W. Don Maughan dated January 13, 1977. The two companies have commented that this list does not include certain documents which were before the State during its proceedings. However, they do not argue that the documents are vital to this decision nor have they taken the opportunity afforded by the notice and comment procedure to make any such materials available to me. Under the circumstances, and given the purely legal nature of my decision, I see no need to amplify the record.

materials, including legal briefs, submitted by the Louisiana-Pacific Corporation and the Crown Simpson Pulp Company to the State as well as the comments on the recommended decision, I have assumed for the purpose of the opinion as factually accurate the statements by the State and the industry as to the essential nature of operations at these facilities, the water quality effects of the discharges, the energy impacts, the cost of application of the technology which would be required to meet EPA's national limitations, and other major relevant facts. The Environmental Protection Agency has conducted no independent review of the facts following the submission of the requests for variances. In other words, the record of the State Board hearing as submitted by Mr. Dendy with the addition of the Development Document for the effluent limitations guidelines applicable to these mills, constitutes the record which I have reviewed. While the Development Document was not formally forwarded to me as part of the record, I note that it is referred to repeatedly in the various materials which are part of the record, including the opinion and order of the State Board, and it is therefore properly before me.

As I discuss in more detail below, the issues which are to be resolved in these variance requests are solely legal, and do not require an independent analysis or weighing of facts. This is not to say, however, that in other variance requests it would not be appropriate to conduct factual reviews.[2]

The Crown Simpson Pulp Company and the Louisiana-Pacific Corporation each operate bleached kraft pulp mills on the Samoa Penninsula, on the west side of Humboldt Bay, near Eureka, California. Louisiana-Pacific also operates a plywood mill at this location. Each mill produces about 600 air dry tons per day of bleached kraft pulp; the Louisiana-Pacific saw mill also produces about 500,000 board feet per day of lumber. Each mill principally discharges through separate ocean outfalls about 2500 feet from shore and at a depth of approximately 30 to 40 feet. The outfalls are about one mile apart, and each has a diffuser at the end.

On December 4, 1974, the Regional Board of the California Water Resources Control Board adopted waste discharge requirements for these dischargers; at that time national effluent limitations guidelines for these sources were not available. EPA Region IX objected to the Regional Board orders on the grounds that the Regional Board failed to implement the provisions of Sections 301 and 304 of the Federal Water Pollution Control Act by not imposing effluent limitations in those orders which would require achievement of best practicable control technology currently available by July 1, 1977. The State Board reviewed the regional orders, and, after a hearing on March 7, 1975, remanded the orders to the Regional Board with directions that effluent limitations based on best practicable control technology, or "BPT", be included. These BPT limitations were to be based on promulgated national regulations if available, otherwise the Regional Board was directed to establish the numbers based on its best judgment as to what constituted BPT.

On February 19, 1976, EPA promulgated interim final effluent limitations guidelines for the bleached kraft sector of the pulp, paper and paperboard point source category. 40 CFR Part 430 Subparts F–I. EPA issued final amendments to these regulations on January 6, 1977. The validity of the national regulations is not at issue in this variance proceeding.[3] Each national limitation contains a variance clause [4] which in essence provides that a discharger may submit evidence that factors such as the age or size of plants, raw materials, manufacturing processes, treatment technology available, energy requirements or other such factors, are fundamentally different from the factors considered during the establishment of the national effluent limitations guidelines.[5]

In accordance with the instructions from the State Board, the Regional Board conducted hearings with respect to these two mills, on June 24, July 29, and August 26, 1976. The discharge restrictions for Crown Simpson and Louisiana-Pacific established by the Regional Board did not follow the EPA national effluent limitations guidelines. On September 3, 1976, EPA Region IX issued a letter of objection to the Regional Board orders, noting that the Regional Board had in effect granted variances from the national limitations without submitting the matter to the Administrator of EPA for approval. This action by EPA prompted the two mills to seek review in the United States Court of Appeals for the Ninth Circuit (Nos. 76–3161 and 76–3287). Those actions have been stayed pending decision on this matter.

On October 21, 1976, the State Water Resources Control Board adopted resolution 76–108 to review the action of the Regional Board with respect to these two mills. On December 22, 1976, the State Board held a hearing, and on March 17, 1977, the Board issued its opinion.

The Board ordered that the Regional Board Orders No. 76–133 and 76–134 be set aside and replaced by the permits established by the State Board. It granted the requested variances from the effluent limitations guidelines for BOD and pH, subject to approval by the EPA Administrator, and ordered the Executive Officer of the State Board to forward to EPA all necessary information, data and documents for a prompt decision on this matter.

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[2] Crown Simpson and Louisiana-Pacific complain of the lack of an opportunity for a hearing before me, arguing that such a hearing is required by law. But the companies were given extensive opportunity for hearings by the State and an opportunity to comment upon the General Counsel's recommended decision. I have not augmented the record compiled by the State nor have I independently evaluated the factual conclusions reached below. A hearing, particularly of the nature apparently envisioned by the two companies in which they would "respond to [my] questions concerning the voluminous record in the . . . proceedings before the State . . ." would be a useless exercise. I have carefully considered the arguments made by the companies concerning the legal issues involved in this proceeding. I am convinced that the procedures I have used have been fair and entirely adequate and that all process "due" has been provided.

[3] The regulations are being challenged in *Wyerhaeuser Company, et al.* v. *Train*, No. 76–1674, *et al.* before the United States Court of Appeals for the District of Columbia Circuit. See footnote 5, *infra*.

[4] For example, § 430.72 reads in part as follows: In establishing the limitations 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, however, possible 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 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.

[5] Crown Simpson and Louisiana-Pacific note in their comments that should I deny their variance requests they may seek judicial review of my decision and raise the question of whether the variance provision is valid.

Alternative effluent limitations for BOD and pH, to apply in the event the variances were approved or denied by the Administrator, were established in the permits. The dischargers also were granted an extension of time until July 1, 1983, to meet the effluent quality requirements for chromium contained in the California Ocean Plan.[6]

The differences between the permit conditions based on the national effluent limitations guidelines, on the one hand, and those which will result from the granting of the variances from those guidelines, on the other hand, are substantial. In NPDES Permit No. CA0005882 the limitation on BOD5 (daily maximum) is 18,450 pounds, and the limit on total solids is 36,480 pounds. The pH must be maintained within the range of 5.0 – 9.0. According to the terms of the permit, "Upon approval by the Administrator of EPA of the finding of 'fundamental difference' . . . the following limitations shall apply in lieu of the limitations [set forth above]". These are 96,000 pounds per day of BOD5 (daily maximum) and pH within the range of 3.0 to 10.0.

For the Louisiana-Pacific Mill (NPDES permit No. CA0005894) the differences are similar. In all cases the BOD figures cited pertain to the pulp operations, which are by far the major sources of BOD at these facilities.

II. The Legal Issue

The California State Water Resources Control Board found that because there would be "no expected or predictable water quality improvement as the result of imposition of the EPA guidelines [and i]n light of . . . the magnitude of the chemical and energy requirements, and the potential air and land management problems associated with sludge disposal . . . the evidence justifies the variance requested." (Board Opinion p. 17). It is clear that the Board did not find a "fundamental difference" in terms of non-water quality impact itself but instead found non-water quality impact to be a significant *because of lack of improvement of local receiving water quality.* In effect, the State granted an exemption from minimum national technology-based standards because of local water quality considerations. This was contrary to the letter and intent of the FWPCA and I have no choice but to disapprove the state action.

The heart of the Louisiana-Pacific and Crown Simpson presentations to the State Boards was the absence of a need to control BOD and pH. In essence, what the companies argue is that because they are located on the Pacific Ocean, with its vast dilution and regenerative powers, one need not be concerned with pollution requirements which assertedly are designed solely to protect the oxygen levels or pH of receiving streams. They argue that the oxygen level even in the immediate area of their discharge pipes is not a matter of concern.

BOD is not a metal or a chemical compound or a specific substance that pollutes the environment. It is a measure of the quantity of oxygen required for the biological and chemical oxidation of water-borne substances under ambient or test conditions. The BOD5 test is a procedure which provides an estimate of the oxygen consumed by micro-organisms utilizing the degradable matter present in a waste under conditions that are representative of those that are likely to occur in nature. Standard conditions of time (5 days), temperature, suggested microbial seed, and dilution water for the wastes have been defined and are incorporated in standard analytical procedures. As noted in the Development Document for the Effluent Limitation Guidelines (BPT) for the Bleached Kraft, Groundwood, Sulfite, Soda, Deink, and Non-integrated Paper Mills Segment of the Pulp, Paper, and Paperboard Point Source Category, at pages 267 and 268:

> The BOD of a waste exerts an adverse effect upon the dissolved oxygen resources of a body of water by reducing the oxygen available to fish, plant life, and other aquatic species. Conditions can be reached where all of the dissolved oxygen in the water is used resulting in anaerobic conditions and the production of undesirable gases such as hydrogen sulfide and methane. The reduction of dissolved oxygen can be detrimental to fish populations, fish growth rate, and organisms used as fish food. A total lack of oxygen due to the exertion of an excessive BOD can result in the death of all aerobic aquatic inhabitants in the affected area.
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> * * * * *
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> The BOD5 test is also an indicator of the total organic load that is being discharged to a receiving stream. Compounds contributing to this total organic waste load found in pulp and paper mill wastes include terpenes, resin acids, fatty acids, phenols, formic acid, sacharinic acids and other small organic acids. These compounds also contribute to the toxicity of a pulp and paper mill waste.

There are substantial testimony and a number of documentary materials referred to in the record indicating that the waste materials discharged by Crown Simpson and Louisiana-Pacific through their ocean outfalls are not causing a significant environmental problem with respect to oxygen reduction or pH levels in the receiving waters. I do not believe that it is necessary to consider the extent of that problem or debate such issues as the limits of the mixing zone for the dischargers.[7] For the purposes of reviewing these applications for variances, I will assume that the arguments of Crown Simpson and Louisiana-Pacific are correct in that there is not a need, based purely on water quality considerations, to control the BOD emanating from these mills beyond those levels contained in the variance-based permits. While the facts and arguments are less clear with respect to the pH requirements contained in the national effluent limitations guidelines, I will also assume for the purposes of this proceeding that there is no water quality need to limit the pH discharge other than as contained in the California permits based on the variances.[8]

In its March 17, 1977, opinion the State Board noted that the dischargers had submitted evidence regarding the chemicals required should they be forced to treat their wastes to meet EPA national guidelines, the direct and indirect power requirements associated with such treatment and the potential biological sludge disposal problems which would result from the use of EPA recommended technology (Opinion pages 15–18). Again, for the purposes of this variance proceeding I consider as

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[6] The National Wildlife Federation filed comments which fully support my denial of the BPT variances but which urge that I also disapprove the extension of time given the two companies by the State for meeting chromium effluent quality requirements derived from the California Ocean Plan. This proceeding, however, is not a general review of the State-issued permits. It concerns only the appropriateness of granting variances from EPA effluent limitations guidelines, and my decision is limited to this question. I express no opinion whatever on any other aspect of the State proceedings.

[7] I note that the State Board observed that "some of the organic compounds which contribute to the BOD may cause problems in the receiving water. . . ." Opinion p. 7. Crown Simpson and Louisiana-Pacific argue in their comments that it is improper to state that there is any relationship between effluent toxicity and BOD and pH. The quotation, however, accurately reflects the finding of the State Board and I see nothing improper in its inclusion in this opinion.

[8] Crown Simpson and Louisana-Pacific criticize the recommended decision for being too equivocal on the question of the water quality impact of their discharges. However, as noted previously, no independent review of the evidence has been undertaken, and it would therefore not be appropriate for me to endorse or concur in any conclusions reached on this subject by the State. Instead, it is accurate to say only that for the limited purposes of deciding the legal issue presented in this proceeding I assume that limitations on BOD and pH more stringent than those imposed in the variance-based permits would not improve receiving water quality. I find the attack upon the propriety of this procedure curious, since assumption of the existence of facts for limited legal purposes is a judicial technique of long standing.

true the Board findings in these respects.[9]

The issue to be resolved is straightforward: does the Federal Water Pollution Control Act, as amended ("FWPCA") allow EPA to vary technology-based water pollution regulations simply because the receiving water quality at particular sites will not be measurably improved by compliance with those regulations? Counsel for the companies stated the matter this way in a brief before the State Board:

"[Crown Simpson] and [Louisiana-Pacific] are not asking this Board to countenance a wholesale return to an ineffectual water quality approach. Rather, they submit that they have affirmatively demonstrated that there is a *fundamental* difference between the marine environment into which they discharge and *all other* receiving waters. None of the dilatory or obscurantic tactics sometimes encountered under the old system are possible when the applicant bears the burden of proving its entitlement to a variance. And while most differences in receiving waters are ones of degree, which may be burdensome administratively to distinguish, the difference between the ocean and inland waters is categorical, so that the differentness of the ocean need only be decided once." (p. 24)

Counsel for Crown Simpson reiterated this point during the December hearing (Tr. 101):

What the companies are saying is that essentially all of the requirements can be met with the exception, perhaps, of the chromium heavy metal requirement through the use of internal procedures. It can be met at a certain cost. To impose the BOD limitation is to impose on them an enormous additional cost with no environmental benefit.

When Congress enacted the Federal Water Pollution Control Act Amendments of 1972, it brought about a major change in the approach to water pollution control. Congress declared in unmistakable statutory language that certain key regulations were to be based on pollution control technology, not water quality. Localized improvement in water quality as the result of compliance with technology-based regulations was desired, but the existence of the nexus was not to be dispositive as to the application of those regulations. The Senate Committee on Public Works explained the reasons for the change in approach:

The water quality standards program is limited in its success. After five years, many States do not have approved standards. Officials are still working to establish relationships between pollutants and water uses. Time schedules for abatement are slipping away because of failure to enforce, lack of effluent controls, and disputes over Federal-State standards.

The Committee adopted this substantial change because of the great difficulty associated with establishing reliable and enforceable precise effluent limitations on the basis of given stream quality. Water quality standards, in addition to their deficiencies in relying on the assimilative capacity of receiving waters, often cannot be translated into effluent limitations—defendable in court tests, because of the imprecision of models for water quality and the effects of effluents in most waters.

Under this Act the basis of pollution prevention and elimination will be the application of effluent limitations. Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement.

The Committee recommends the change to effluent limitations as the best available mechanism to control water pollution. With effluent limits, the Administrator can require the best control technology; he need not search for a precise link between pollution and water quality.[10]

S. Rept. No. 92–414, 92d Cong. 1st Sess. at 8 (1971), Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. 1st Sess. (1973) (2 vols.) (hereafter cited as Leg. Hist.) at 1426.

Both the Act and its legislative history clearly indicate that Section 301(b)(1)(A) effluent limitations are not to be based on the nature, quality or location of receiving waters. This is demonstrated by Section 301(b) itself. Section 301(b)(1) provides that point sources other than publicly owned treatment works must meet, "(A) not later than July 1, 1977 effluent limitations . . . which shall require the application of the best practicable control technology currently available. . . . and . . . (C) . . . any *more stringent* limitation, including those necessary to meet water quality standards. . . ." (emphasis added). The basic structure of the Act is therefore clear. Technology-based limitations imposed pursuant to Section 301(b)(1)(A) are independent of local water quality considerations, but where local water quality-based requirements are *more stringent* than 301(b)(1)(A) requirements they may be imposed pursuant to Section 301(b)(1)(C). This statutory structure would be rendered meaningless if 301(b)(1)(A) limitations can be downgraded due to water quality considerations. Section 304(b) of the Act, which lists the factors which must be taken into account in developing Section 301(b)(1)(A) industrial effluent limitations—from which Crown Simpson and Louisiana-Pacific seek relief—conspicuously omits any reference to water quality.[11] Similarly, Section 304(d)(1), which requires the Administrator to publish information on "the degree of effluent reduction attainable through the application of secondary treatment" for the purpose of developing Section 301(b) effluent limitations for municipal treatment works, contains no reference to the nature or quality of the receiving waters. Clearly, Section 301(b)(1)(A) effluent limitations are not to be based on ambient water quality considerations. The Committee hearings and Congressional debates show that there was no misunderstanding of this vital point by the Congressmen voting for this major bill.[12] It perhaps is best summed up in the remarks of Representatives Clausen, a House conferee:

[9] The Board did not make independent findings of fact with respect to several of these factors; it merely stated, "the dischargers submitted evidence regarding [these factors.]" In effect, I am accepting as true the assertions of the companies before the State Boards, for the purposes of this proceeding. There was also testimony to the effect that redwood pulp produces more BOD than any other wood species, and that these two mills may be the only mills using that wood (Tr. 47), but there is no explanation in the record as to the contribution this factor would have to the much higher BOD allowed under the variance-based permits. Moreover, I note that this issue was not pressed as an important fact by the companies or relied upon by the State Board, and no mention of this factor was made in comments submitted by the companies on the recommended decision.

[10] From 1965 until the enactment of the FWPCA, the quality of interstate waters had been regulated primarily by State water quality standards, which States were required to promulgate and have approved by the Federal Government under the Water Quality Act of 1965.

[11] Crown Simpson and Louisiana-Pacific argue that the statutory phrase "effluent reduction benefits" means water quality impact. As will be shown below, this argument is entirely unfounded. See *infra* at pp. 31–32.

[12] *See e.g.:* From the Senate Report: The application of Phase I technology to industrial point sources is based upon the control technologies for those sources and to publicly owned sewage treatment works is based on secondary treatment. It is not based on ambient water quality considerations. [Leg. Hist. at 1461 (emphasis added).] The use of any river, lake, stream *or ocean* as a waste treatment system is unacceptable. [Leg. Hist. at 1425 (emphasis added).]

From the House Report: The determination of the best practicable control technology currently available under Section 301(b)(1) is not to be governed by the existing quality of the receiving waters. [Leg. Hist. at 788.]

From the Conference Report: * * * [T]he intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under [Section 304(b)], so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations. [Leg. Hist. at 309.]

From Congressional Debates: Remarks of Senator Muskie, chairman, Senate Subcommittee on Air and Water Pollution, Leg. Hist. at 170. Remarks of Representative Jones (Alabama), House Conferee, Leg. Hist. at 231. Remarks of Senator Tunney, Leg. Hist. at 209.

Now, and I emphasize this, such "best practicable control technology" will be required even if the quality of the receiving waters do [sic] not require the imposition of effluent limitations consistent with best practicable control technology. This is a technological standard. [Leg. Hist. at 378].

Water quality standards remain a vital part of the amended law, but they are not to be used as a means to avoid compliance with effluent limitations guidelines and new source standards; the discharger must comply with all applicable regulations. The following appears in the Senate Public Works Committee Report:

Section 301(b)(1)(C) provides adequate authority to apply new information to existing water quality requirements and *upgrade* effluent limits accordingly.

In other words, wherever the Administrator determines that application of the best practicable treatment requirements of Phase I will not provide for implementation of existing water quality standards for interstate or intrastate streams, *he must tighten the requirements* against a source of discharge or group of sources. Leg. Hist. at 1462.

The same is true of water quality-related effluent limitations under Section 302:

Where application of the best available control technology . . . will not attain . . . [the prescribed] standard of water quality, *more stringent effluent limitations* or alternative control strategies can be imposed [under Section 302].

* * * * *

Section 302 is intended to furnish a supplemental basis for improving water quality, and not be a cause for delay in executing the requirements of Section 301, or for requiring any less stringent effluent limitations. [Leg. Hist. at 1464, 1466 (emphasis added)].[13]

Congressman Wright, a House conferee, expressed his belief that EPA and the States would approach their regulatory duties as the Senate had outlined. He stated that the combination of technology-based and water-quality based restrictions on discharges was "a new system of cleaning up streams by a limitation upon point discharges, a dual approach [which] provides that whichever is the stronger shall apply." Leg. Hist. at 488.

The Supreme Court recently acknowledged the roles water quality and technological feasibility play under the FWPCA.

The reasons for the statutory schemes have been described as follows: "Such direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated. In addition, a discharger's performance is now measured against strict technology-based effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform." *EPA* v. *State Water Resources Control Board,* 426 U.S. 200, 204–205, 96 S. Ct. 202, 2024, 48 L. Ed. 2d 578 (footnotes omitted).

E. I. duPont de Nemours and Co. v. *Train,* 430 U.S. 112, 97 S. Ct. 965, 972, n. 3 (1977).[14]

When Congress intended there to be deviation from technology standards due to water quality considerations, it provided definite indication of that intent. Thus, Section 316(a) provides for relaxation of technology-based limitations for thermal discharges, when the discharger can demonstrate that the environment will be protected adequately.[15]

It is in light of this strong Congressional sentiment against water-quality based exceptions from national technology standards that the Crown Simpson and Louisiana-Pacific appeals must be considered, and against which the decisions of the California Water Resources Control Board must be viewed. To the extent that the Board Opinion assumes regulatory authority to relax implementation of technology-based standards for reasons related to water quality, that Opinion is wrong. Efforts by commenters (particularly Hunton & Williams) to argue otherwise are unpersuasive. There is nothing inconsistent between the ultimate congressional goal of cleaner water and the technology-based approach required by Section 301(b)(1)(A) of the Act. As explained by Senator Cooper, a Senate Conferee:

This is a very direct approach. It is a pragmatic approach. I think we all acknowledge that, in the short run, it may often require larger expenditures than permitting discharges to the point where the water can be shown to be degraded for some use. But I think it is fair to say that after the most thorough examination, the committee concluded that the approach adopted in the bill promised to be a far more effective means of attacking the problems of water pollution control than the 1965 act. Leg. Hist. at 1304.

While Hunton & Williams quote Representative Jones' statement that Congress did not wish "to credit one environmental account and debit another" so as to "negate the overall benefit of the achievement of higher water quality", Leg. Hist. at 232, they ignore the same congressman's statement that "With the exception of modifications of section 301 requirements for the discharges of heat which may be made pursuant to section 316(a), the determination of the *'best practicable control technology currently available' is not to be based upon the existing quality of the receiving waters."* Leg. Hist. at 231. (emphasis added). Congress consciously adopted the Section 301 approach of uniform minimum levels of controls based on technological achievability rather than receiving water quality as its chosen means to attain the goals set out in Section 101 of the Act.[16] I have no

[13] See also Leg. Hist. at 791 (House Report characterizes Section 302 as providing authority to "supplement any effluent limitations set pursuant to [Section 301(b)(2)]" and notes that proposed effluent limitations under Section 302 "shall in no case operate to delay the application of any effluent limitation established under Section 301"); 209 (Senator Tunney observes that effluent limitations are only "a minimum measure of compliance"); 246 (Representatives Harsha, a House conferee, notes that "The water quality requirements are not intended to be in lieu of the technological requirements for 1977 but are required to be the basis for water quality control if they are more stringent than the effluent limitations determined by 'best practicable control technology currently available' " and that "section 303 . . . is intended to be a supplement to the 1977 and 1983 requirements."), 1281, 1283, 1285 (Senator Bentsen, a Senate Committee member, notes that "[w]here a State or the Administrator finds [Section 301(b)(2) limitations] are insufficient under the criteria of section 302, tougher effluent limitations and alternative control strategies must be established.").

[14] Similarly, the U.S. District Court for the Central District of California recently observed that "Section 301 deals with the technological control of pollutants at their source, *without regard to their effect on the immediate environment* * * *." *Pacific Legal Foundation* v. *Quarles,* Civil No. 77–521–HP (July 20, 1977), slip op. at 8 (emphasis added).

[15] That section states: With respect to any point source otherwise subject to the provisions of section 301 or section 306 of this Act, whenever the owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection [sic] and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections for such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component of such discharge with other pollutants) that will assure the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife in and on that body of water.

[16] Moreover, I think that it should be remembered that the *first* enumerated goal set out in Section 101(a) is "that the discharge of pollutants into navigable waters be eliminated by 1985." As thoughtfully explained by Senator Buckley this goal indicates a congressional belief that ultimately *no level* of discharge of pollutants should be tolerable. "Of course, the bill itself has abandoned the attempt, as an ultimate goal, of drawing a causal connection between the discharge of pollutants and the degradation of our streams. In effect, we are saying we know so little about the ultimate consequences of injecting new matter into water

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authority to defy that statutory mandate.[17]

Crown Simpson and Louisiana-Pacific argue that this proceeding presents a situation in which the practical problems normally associated with a water quality related approach to pollution control do not apply, and that therefore an exception to the technology-based approach of Section 301(b)(1)(A) is warranted. They contend that Congress adopted the technology-based approach largely out of concern with the difficulty of calculating and defending water-quality based requirements, but that this concern does not apply here because the burden of proof in a variance proceeding is on the discharger rather than EPA and because the discharger must show a "fundamental" difference in water quality impact. Similarly, the fact that this is a variance proceeding is said to mean that the congressional desire for uniformity of requirements will not be compromised and that the administrative burden upon EPA will not be excessive.

I do not share the companies' confidence that merely by casting matters in the form of a variance that all problems associated with a water-quality based approach evaporate. At best, problems of correlating effluent discharge levels to water quality and of maintaining a measure of national uniformity may be reduced. But these problems will certainly remain severe. More important, regardless of whether or not a water-quality based variance would be meritorious, it would not be consistent with the statute. Congress was well aware of the possibility of such a variance and adopted just such a provision for thermal discharges in Section 316(a). The limitation of Section 316(a) to heat was, in effect, a deliberate rejection by Congress of the kind of scheme proposed by the two companies here.[18]

The question presented is one of fundamental importance under the Act. Congress deliberately chose a technology-based approach and fully appreciated the fact that under certain circumstances it would result in treatment beyond that needed to attain or maintain water quality. To retreat from this basic congressional scheme in this proceeding would, despite Crown Simpson's and Louisiana-Pacific's bland assurances to the contrary, set a precedent which would threaten the integrity of the Act.[19]

The March 17, 1977, Order and Opinion of the California Water Resources Control Board does not directly dispute the interpretation of the FWPCA which I have presented. Instead, the Board appears to rely heavily on recent judicial discussion of EPA's variance clause to support its approval of variances for Crown Simpson and Louisiana-Pacific. However, I cannot agree with the Board's determination. One reason is that I do not believe the cases support the legal position adopted by the Board. Second, I believe the Board's action in effect is the granting of water quality-based variances, which is prohibited.

Essential to a careful review of the Board's determination are the following findings by the Board:

1. "There do not appear to be any environmental benefits which will be derived by requiring these discharges to meet either the [California State] Ocean Plan or Guideline limitations for BOD or pH." (Board Opinion p. 9)

2. "In appraising the evidence related to non-water quality environmental effects and energy requirements the Board must at least in part appraise the significance in terms of the potential environmental benefits to be gained as a result of the imposition of the EPA Guidelines. In this case we have unrefuted evidence presented by the dischargers and concurred with by the Regional Board Executive Officer that the existing discharges result in no water quality problems. Secondly, there is no expected or predictable water quality improvement to be achieved as the result of imposition of the EPA Guidelines. In light of these facts (the magnitude of the chemical and energy requirements, and the potential air and land management problems associated with sludge disposal) we can only conclude the evidence justifies the variance requested." (Board Opinion pp. 16–17).

The variances were granted not because the non-water quality environmental impacts of BPT were of themselves fundamentally different from the impacts considered in the development of the effluent limitations guidelines, but instead because this factor *in relation to* the absence of water quality problems was deemed to be fundamentally different. I cannot find any statement by the State Board that the non-water quality environmental impacts (i.e. sludge, energy etc.) of BPT for the two mills are fundamentally different in and of themselves.[20]

The only aspect of the Crown Simpson and Louisiana-Pacific situation which was found different from most other mills is, in effect, that they discharge directly into the ocean. The companies candidly admitted that this is the "fundamental" difference in the State proceedings.[21]

The issue resolves into asking whether water quality considerations are valid grounds for variances from effluent limitations based upon best practicable technology. The answer to this, as the California Board itself stated, is that it is not a valid basis:

> The argument advanced by the dischargers (variance based on type of the receiving water) is, in our opinion, the essence of what Congress intended to avoid with the Federal Water Pollution Control Act Amendments of

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that it involves a presumption of pollution, and the way to insure ourselves against pollution is through the control and ultimate elimination of pollutants." Leg. Hist. 1332.

[17] Hunton & Williams also argue that my decision in *In Re Public Service Company of New Hampshire* (No. 76–7, June 17, 1977) ("Seabrook") is inconsistent with the legal analysis in this decision. In *Seabrook* at page 13 I found that Section 316(b), which concerns cooling water intake structures, does not require use of technology whose cost is wholly disproportionate to the environmental benefit to be gained. I see no inconsistency. Sections 301(b)(1)(A) and 316(b) are quite different. Section 316(b) is explicitly site-specific while Section 301(b)(1)(A), as discussed above, concerns uniform national standards. Moreover, Section 316(b) concerns the environmental impact of entrapment and entrainment while Section 301(b)(1)(A) concerns reduction in the amount of pollutants discharged by industrial point sources. In establishing effluent limitations guidelines for the paper industry the Agency considered cost in relation to effluent reduction benefits. But the fact that this analysis did not involve consideration of local receiving water quality is inconsistent with neither my decision in *Seabrook* or the language and history of Section 301(b)(1)(A).

[18] Congress is now considering amendments to the Act which would provide relief to publicly owned treatment works discharging to marine waters. *See* H.R. 3199, S. 1952. These amendments would not apply to industrial dischargers.

[19] While the companies assured the State that their arguments applied only to marine discharges, *see supra* at p. 14, the fact is that their arguments logically apply to discharges into any body of water with high dispersion characteristics, and therefore these arguments represent an assault upon one of the basic elements of the 1972 amendments.

[20] The problems associated with sludge disposal on the Samoa penisula was mentioned by the Board as if this were possibly a fundamentally different factor. But the record is ambiguous on the point. The companies did not rely on this difference in their requests for variances to the State. And the State never explicitly found sludge disposal problems at the two mills to be fundamentally different from those problems considered by EPA in developing the regulations.

[21] See *supra* at p. 14. Witnesses for the companies, and counsel in their behalf, have stated that these mills were never considered by EPA in drafting national regulations. The State Board opinion also states this (p. 5). According to a key to the identificaion of plants used in the preparation of the Development Document, which key has been made available to all who have requested access—including Crown Simpson and Louisiana-Pacific, both mills were evaluated by EPA. For example on page 186 of the Development Document, plant 185 (Crown Simpson) and plant 186 (Louisiana-Pacific) are listed. Data for production, flow, BOD5, and TSS for the Crown Simpson mill were used in calculating national limitations. There were insufficient data for Louisiana-Pacific's mill to be used this way.

1972. The legislative history of the Amendments reflects a conclusion that regulation of pollution based on a plant by plant basis was unworkable from a practical regulatory standpoint. Congress based the Amendments on predefined minimum levels of treatment technology which were to be applied regardless of the type of receiving water. (Opinion, p. 6).

My authority to provide for variances from BPT flows from, and is inherent in, my authority to promulgate effluent limitations guidelines under Sections 301(b)(1)(A) and 304(b)(1).[22] Thus, in considering variances from effluent limitations I am as constrained by the language and legislative history of the Act with regard to this issue as I am in promulgating the national limitations. Variances can only be based on fundamental differences in factors which are appropriate to technology-based regulations and limitations derived through the variance process must still meet the congressional definition of best practicable control technology currently available.

I therefore reject as unsound the argument by Crown Simpson and Louisiana-Pacific that because variances from BPT are not explicitly mentioned in the Act or its legislative history that I may completely ignore the statute and the intentions of its drafters in administering the variance provision. But in so doing I do not agree that I have rendered the variance provision meaningless. I find only that the variance provision cannot be used to do what Congress clearly forbade. This does not mean that where a fundamental difference can be shown with respect to a factor other than water quality that a variance may not be appropriate.[23]

The State Board also recognized that water quality considerations cannot be utilized to grant a variance through a weighing of costs and benefits with regard to an individual mill. The Board properly rejected the companies' contention that while their costs of compliance are not substantially different [24] from the costs EPA found would be sustained on an industry-wide basis, their costs *weighed against the local water quality benefits* justify a variance.

The legislative History of the Act firmly rejects any individualized cost/benefit analysis, and no court has ever required it.[25]

Crown Simpson and Louisiana-Pacific also contend that the phrase "effluent reduction benefits" in Section 304(b)(1)(B) means "receiving water quality improvement" and, further, that EPA conceded as much in its brief filed in *Weyerhaeuser Co.v. Costle* (No. 76–1674) now pending in the U.S. Court of Appeals for the D.C. Circuit. But, as explained by Senator Muskie:

> The modification of subsection 304(b)(1) is intended to clarify what is meant by the term "practicable." The balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such marginal level of reduction for any class or category of sources.
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> The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, *and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls,* or to determine the eonomic impact of controls on any individual plant in a single community.

Leg. Hist. at 170 (emphasis added). See also Leg. Hist. at 304, 309 (Conf. Rept.).

Thus, it is clear that consideration of effluent reduction benefits does not entail consideration of local receiving water quality improvement. Nothing in EPA's brief in *Weyerhaeuser* is to the contrary.[26]

Moreover, the Development Document, at page 566, shows that EPA analyzed "Costs of BPCTCA vs. Effluent Reduction Benefits" not in terms of receiving water quality improvement but in terms of the amount of pollution removed from discharges.

Where the State Board erred was in finding grounds for variances on the basis of non-water quality environmental impacts. As I have already observed, the Board did not find these impacts, of themselves, to be fundamentally different from the impacts considered on a national basis. Instead, the Board found these impacts to be the basis for variances when weighed against, or considered in light of, the lack of environmental improvement. Crown Simpson and Louisiana-Pacific argue in their comments that the State did not rely upon local water quality considerations in its decision and that it did in fact find a fundamental difference in terms of non-water quality impact alone. But the companies cite only to State observations that there would be non-water quality environmental impacts as a result of compliance with EPA effluent limitations guidelines, not to any finding of *fundamental difference* on this point.[27]

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[22] For this reason it is entirely appropriate that variances from BPT be subject to my approval.

[23] The two companies charge that by rejecting their requests I have established that "it is never appropriate to grant a variance from the requirement of installing a secondary treatment facility." If a fundamental difference can be shown in a factor (other than water quality) and a degree of treatment less than "secondary" would be appropriate under the Act, then such a reduced requirement may be established. But whatever requirement is established for a discharger, whether or not by variance and whether or not it represents "secondary" treatment, it must, for the July 1, 1977 phase of the statutory program, represent "best practicable control technology currently available".

[24] Opinion p. 14.

[25] *See* Leg. Hist. at 170 (statement of Senator Muskie). *See also* Leg. Hist. at 304, 309 (Conf. Rept.). The Fourth Circuit in *Appalachian Power Co.* v. *Train,* 545 F. 2d 1351 (4th Cir. 1976), although it found the variance clause too narrow, noted that: "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* v. *Train,* 541 F. 2d 1018 (4th Cir., 1976)], 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. In arguing that *Appalachian Power* stands for the proposition that water quality benefits must be considered in variance decisions Crown Simpson and Louisiana-Pacific ignore this (and other) pertinent language of that case.

[26] On pages 50–51 of that brief any notion to the contrary was explicitly repudiated: "Petitioner's suggestion that the method by which the pollutant parameters for the pulp and paper industry were selected is inconsistent with EPA's argument that it may not base effluent limitations on receiving water quality is also without merit. As discussed at length in Section VI of the Final Development Document, EPA based its selection of pollutant parameters on its consideration of a number of factors. Petitioners correctly note that one of those factors was the environmental harm caused by the particular pollutant. But it must be emphasized that the Agency's evaluation of that factor was limited to a consideration of harmfulness in a generic sense. That analysis is far different from the site-specific water quality assessment which petitioners would require of the Agency. EPA has never required, nor has any Court, that the pollutants it regulates have an equally harmful effect in all water bodies. That BOD and pH are generally harmful is not disputed by petitioners and is documented in the record.

"Moreover, harmfulness was only one element in EPA's selection of BOD and pH for the paper industry. At least as important a factor was the historic measurement of those two parameters by the industry itself—including mills with marine discharges. BOD was selected for the additional reasons that the BOD5 test provides an indirect measure of other pollutants in mill waste streams and that systems for the removal of BOD also remove these other, indirectly measured pollutants, including long term BOD, oil and grease, foam, and a number of compounds which contribute to toxicity. There is nothing inconsistent between this analysis and the general legislative history forbidding the establishment of effluent limitations based on the assimilative capacities of receiving waters." (Footnotes and citations omitted.)

[27] Extensive analyses of the non-water quality environmental impacts of the effluent limitations guidelines for the pulp and paper industry, including sludge landfilling and incineration, air pollution, noise effects, and energy impacts, were performed by EPA and are reflected in the Development Document. See, e.g., pages 349–354, 433–440, 480–483, 490–494, 504–506, 512, 524–538. Perhaps one reason why no finding of fundamental difference in

Footnotes continued on next page

I find the State's conclusion as to the propriety of granting the variances to be based on non-water quality environmental impacts only in light of water quality considerations, and not independently.[28]

First of all, the Act does not require that non-water quality environmental impact (or energy requirements) be weighed against environmental benefit. This factor is only to be given "consideration". Section 304(b)(1)(B).[29] Moreover, it should be obvious that where this factor is deemed fundamentally different, not in its own right but only because water quality effects are different, then the distinction between a variance granted on this basis and one granted directly for water quality reasons is only a form of words.

A water quality based variance cannot be granted merely because it is in the guise of a non-water quality environmental impact based variance. *Appalachian Power Co.* v. *Train, supra,* does not support the State's Opinion on this point. Nothing in that court's opinion authorizes any balancing of non-water quality benefits with water quality benefits, or any localized consideration of water quality improvement. In fact, the court rejected a request by Consolidated Edison Company that it be relieved from meeting the effluent limitations for its plant because of the high cost of non-water quality environmental impacts of the regulations as applied to it as weighed against an asserted lack of water quality improvement in New York Harbor. The court responded:

"[S]o far as [Con Ed's] petition may be read as a request for leniency because of the already polluted condition of the harbor, it must be rejected. The 1972 amendments to the statute changed the system from that of control of the quality of the body of water to effluent limitations as we have before noted. 545 F. 2d at 1378.

Moreover, as noted previously, the Fourth Circuit specifically noted that "we in no way intend to imply that EPA's regulations must provide for a detailed cost-benefit analysis at the permit granting stage." See note 27 *supra.* I do not understand how the opinion in the *Appalachian Power* case can be held to stand for a principle specifically disavowed by the Court.[30] In fact, the Second Circuit squarely faced this issue and held that:

The EPA . . . need not document specifically the benefits to society from the curtailment of pollutants from a particular point source. Congress has established as a national goal the complete elimination of pollutant discharges by 1985. . . . The EPA must lead industry toward that goal through the 1977 and 1983 standards, and the agency's discretion is necessarily broad.

California & Hawaiian Sugar Company v. *Environmental Protection Agency,* 553 F. 2d 280, 289 (C.A. 2, April 14, 1977).[31]

Conclusion

Providing relief from technology-based effluent limitations guidelines due solely to the characteristics of particular receiving waters is not within my authority. I am convinced that the law does not permit exemption of Crown Simpson and Louisiana-Pacific from effluent limitations guidelines on the record before me, in which I discern the type of receiving water as being the "fundamental difference" between Crown Simpson's and Louisiana-Pacific's Samoa Peninsula mills on the one hand, and other pulp and paper mills, on the other.

Accordingly, I deny the variance requests and disapprove the effluent restrictions contained in NPDES Permit No. CA0005882, paragraph B4, and NPDES Permit No. CA 0005894, paragraph B5.

Dated: September 15, 1977.

Douglas Costle,

Administrator.

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non-water quality environmental impact alone was found by the State was the testimony of Dr. Herman R. Amberg, Director of Environmental Sciences for Crown Zellerbach Corporation (part owner of the Crown Simpson Company), a witness on behalf of Louisiana-Pacific and Crown Simpson. In response to questions posed by Mr. Sam Johnson, a staff engineer for the State, at the December 22, 1976, hearing he said: (Tr. 79, 80, 82):

Mr. JOHNSON: Q. With regard to the issue of variance fundamental differences, is there any difference in your plant and the plants that were examined by EPA with regard to age of the facilities that would support a variance?

A. No, sir.

Q. The process employed?

A. It's essentially the same process.

Q. The engineering aspects of the control technology?

A. I don't think so. I'm not that familiar with the 25 mills that they used.

Q. The process changes required by the guidelines?

A. I'm not sure.

Q. Is the installation of the technology specified by EPA in the development document as BPCTCA within the economic capacity of your company?

A. Yes.

Q. How does your plant compare in the area of non-water quality environmental impacts with the plants that EPA utilized in developing the guidelines?

A. I don't think there's that much difference. However, I should point out, too, that those plants that EPA considered, there was a need for secondary treatment in that they did improve water quality. There was a bona fide need for improvement of the water quality while here there will be no benefit as far as water quality is concerned.

Dr. Amberg's comments apply equally to the two mills. His counsel asked him: "And just to clarify for the entire part of your testimony, are the Louisiana-Pacific and Crown Simpson Mills sufficiently similar so that what you have testified to with respect to Crown Simpson would equally apply to Louisiana-Pacific?" His response was "Yes." (Tr. 67, 68.)

[28] However, I do find well taken the companies' admonition that I should not make a finding that the State *could not* had it properly interpreted the Act, have found fundamental difference with regard to non-water quality environmental impact. I have not independently reviewed the factual record. I therefore express no opinion as to whether the two mills could be found fundamentally different in terms solely of non-water quality environmental impact. This is a matter properly addressed in the first instance by the State. Further, this decision does not stand for the proposition that fundamental difference in this factor cannot justify a variance. Concerns along this line expressed by Southern California Edison Company and others are based on a misunderstanding of the legal analysis which is the basis for my denial of the variance requests at issue here. There is no reason why, in a proper case, a fundamental difference in non-water quality environmental impact could not justify a variance.

[29] Crown Simpson and Louisiana-Pacific argue that non-water quality environmental impact can only be considered by means of a balancing with water quality improvement and that my interpretation of Section 304(b)(1)(B) is strained. On the contrary, I read Section 304(b)(1)(B) quite faithfully. Where Congress intended one factor to be considered in relation to another, such as cost and effluent reduction benefits, it so specified. Where it did not do so I take the omission to be deliberate.

[30] In any event, the continuing vitality of the criticism of the variance clause in *Appalachian Power* is now in doubt in light of the recent decision of the Supreme Court in *E. I. duPont de Nemours and Co.* v. *Train,* 430 U.S. 112, 97 S. Ct. 965 (1977). In that case the Supreme Court reviewed an earlier decision of the Fourth Circuit concerning EPA effluent limitations and noted that "consideration of whether EPA's variance provision has the proper scope would be premature." 97 S. Ct. at 975, n. 19. *See also; Natural Resources Defense Council* v. *EPA,* 537 F. 2d 642, 647 (2d Cir. 1976); *American Petroleum Institute* v. *EPA,* 540 F. 2d 1023 (10th Cir., 1976).

[31] *See also FMC Corp.* v. *Train,* 539 F. 2d 973, 983 (4th Cir. 1976) in which the court rejected the argument that EPA can only regulate pollutants which it finds to be harmful to receiving waters.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 68

Connection of Terminal Equipment to the Telephone Network; Correction

AGENCY: Federal Communications Commission.

ACTION: Correction to final rule.

SUMMARY: The FCC is correcting typographical errors that appeared in its First Report and Order regarding connection of telephone equipment, systems, and protective apparatus to certain private line services. Correction is being made to § 68.306, § 68.310, and § 68.312.

EFFECTIVE DATE: April 30, 1980.