The Effluent Limitations Controversy: Will Careless Draftsmanship Foil the Objectives of the Federal Water Pollution Control Act Amendments of 1972?

Patrick A. Parenteau* and Nancy Tauman**

"The failure to provide a clear procedural structure on so basic a matter in the administration of the Act is disquieting. . . . Such controversy postpones the achievement of the Act's lofty objectives, and imposes a burden on the Courts of Appeals and the Supreme Court which they might have been spared by careful drafting."1

INTRODUCTION: THE CONTROVERSY

In 1972, the Congress of the United States unveiled a revolutionary scheme for federal control of water pollution in amendments to the Federal Water Pollution Control Act.2 Hailed by some as a universal model for pollution control legislation, and by others as a costly legislative experiment, the 1972 Amendments boldly state that their objective is the restoration and maintenance of the chemical, physical, and bio-

* Counsel, National Wildlife Federation; formerly Institute Fellow, Natural Resources Law Institute, Lewis and Clark College, Northwestern School of Law. B.S. 1969, Regis College; J.D. 1972, Creighton University; LL.M. 1975, George Washington University.


logical integrity of the nation's waters. In even bolder language, the Act declares that its ultimate goal is the total elimination of polluting discharges in navigable waters by 1985.

This complex statute differs in several respects from earlier congressional efforts to clean up the nation's waters. The major difference, however, and the one which is the subject of this article, involves the creation of a pollution abatement device called an effluent limitation. In general terms, an effluent limitation is a technology-based standard requiring designated point sources to employ certain pollution control devices, operational methods, or manufacturing processes to reduce or eliminate the discharge of pollutants into the nation's navigable waters. By the application of progressively stricter effluent limitations designed to track technological improvements in pollution con-

notes, the terms "Federal Water Pollution Control Act Amendments" and the "Act" refer to the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., as amended through 1972. Throughout the text and notes of this article, references to sections of the Federal Water Pollution Control Act Amendments will be to sections of Pub. L. No. 92-500, 86 Stat. 816. Readers who want or need the corresponding United States Code citation are referred to the table of parallel citations, Appendix B.

5. The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance. Federal Water Pollution Control Act Amendments, § 502(11), 33 U.S.C. § 1362(11) (Supp. V, 1975).
6. The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. Federal Water Pollution Control Act Amendments, § 502(14), 33 U.S.C. § 1362(14) (Supp. V, 1975). Throughout this article, "point source" will be deemed to mean industrial rather than municipal point sources.
trol, the Act seeks to achieve its ultimate goal: the total elimination of pollutant discharges by 1985.9

Recently, however, the effluent limitation scheme created by the Act has been seriously challenged on a variety of fronts by various industries which find the regulatory device an unwarranted burden on legitimate business enterprises. Industry-initiated litigation already has resulted in reported cases from seven courts of appeals.10 Moreover, these seven circuit courts have adopted numerous, often conflicting, interpretations of those sections of the Act dealing with effluent limitations. The United States Supreme Court has granted certiorari in two of the cases11 in order to resolve the disputes.


In duPont I the questions presented are:
(1) Do courts of appeals or district courts have initial jurisdiction to review regulations issued by EPA Administrator under Federal Water Pollution Control Act governing wastewater effluent discharges from existing plants? (2) Does Federal Water Pollution Control Act provide that regulations governing wastewater effluent discharges from existing plants be issued in form of "effluent limitations" based upon authorization implied from Section 301(b) of Act, or "guidelines for effluent limitations" in compliance with express command of Section 304(b) of Act?


In duPont II the question presented is:
Are standards of performance promulgated under Section 306 of Federal Water Pollution Control Act, as added in 1972, to control effluent discharges from sources constructed after effective date of standards only "presumptively applicable," and must they provide "escape mechanism" enabling individual new sources to obtain variances from standards?

44 U.S.L.W. 3734 (June 22, 1976).
The present effluent limitations controversy involves two basic issues. The first, which can be called the jurisdictional issue, presents two questions. The first question is whether § 301(b) of the Act confers upon the Administrator of the Environmental Protection Agency (EPA) the authority to promulgate regulations setting national effluent standards for categories of point sources. A subsidiary question is whether the courts of appeals have jurisdiction under § 509 of the Act to review the regulations of the Administrator promulgated pursuant to authority claimed under §§ 301(b) and 304(b). The two questions are related because § 509 confers jurisdiction on the courts of appeals to review regulations only if they are promulgated under § 301(b).

According to the industry view, § 301(b) does not expressly grant the Administrator the authority to promulgate regulations thereunder. Industry argues that Congress, by not setting forth such express authority, intended effluent limitations to be set by the agencies with authority to issue discharge permits under § 402. Under that section, the permit issuer could be the EPA itself, or, more frequently, a state agency with an approved NPDES permit program. Furthermore, industry contends that the Administrator's regulations must be considered "guidelines" issued pursuant to § 304(b), and, since the review procedure of § 509(b)(1)(E) does not apply to regulations promulgated under § 304(b), the circuit courts lack jurisdiction to review the Administrator's regulations. Instead, reasons industry, review lies in the district courts under the Administrative Procedure Act.

13. The terms "effluent limitations" and "effluent standards" frequently are used interchangeably, even in the statute. As used in this article, the term "effluent limitations" refers to precise limitations as applied to individual point sources, while the term "effluent standards" refers to EPA's designation of uniform national effluent standards for categories of point sources. National effluent standards are to be translated into specific limitations by means of the permit process. See R. Zener, The Federal Law of Water Pollution Control, in FEDERAL ENVIRONMENTAL LAW 682, 728 (E. Dolgin & T. Guilbert eds. 1974) [hereinafter cited as Zener].

16. The "industry view" refers to the position generally taken by industry in the cases cited in note 10 supra.

§ 301(b) does not identify who is to set the effluent limitations it requires. The language is passive; i.e., effluent limitations "shall be achieved." 33 U.S.C. § 1311(b) (Supp. V, 1975).

18. NPDES stands for National Pollutant Discharge Elimination System. Pursuant to § 402(b) of the Federal Water Pollution Control Act Amendments, states are given the opportunity to administer the NPDES permit program upon EPA approval. 33 U.S.C. § 1342(b) (Supp. V, 1975).
EPA, on the other hand, maintains that Congress, although it did not expressly so indicate, intended uniform national effluent limitations to be set by the Administrator under § 301(b) independent of the permit issuing process under § 402. In the EPA view, the congressional failure to expressly empower the Administrator to promulgate § 301(b) regulations setting effluent limitations for categories of point sources was merely an oversight, correctible by reference to the legislative history of the section. EPA concludes that review of the Administrator's regulations, which combine the § 301(b) effluent limitations with § 304(b) guidelines, lies exclusively in the circuit courts, as provided by § 509(b)(1)(E).

The second issue, which will be referred to as the uniformity issue, presents a more important question: what is the legal effect of the effluent limitations once they have been set by the Administrator under § 301(b)? This question involves many elements—the form and content of the Administrator's regulations, the procedure by which they are established, and their ultimate effect on permit issuers. A related and crucial issue is the availability of, and the grounds for allowing, a variance from the established standard in individual cases. The success or failure of the entire regulatory scheme may rest on the disposition of this complicated issue.

Industry's position on this issue is that the Administrator lacks any authority to set uniform national effluent standards—that his only authority is to establish "guidelines" for the permit issuers to consider, but not necessarily follow, in setting effluent limitations for individual dischargers. Even if the Administrator does have the broader power, industry argues that his regulations must set forth "ranges" of effluent limitations, rather than across-the-board limitations by categories of point sources. Moreover, industry contends that the Administrator must specify "factors," such as costs of technology, plant age and processes, and energy requirements, to be considered by the permit issuers in setting specific effluent limitations for individual point sources. These "ranges" and "factors" would supply the permit issuer with the discretion, which industry feels is essential, to tailor effluent limitations to meet the individual requirements of disparate point sources. In industry's view, national standards, promulgated on a categorical basis,

20. The "EPA view" is taken from the cases cited in note 10 supra.
21. § 509(b) provides in part:
Review of the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under section 301, . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business upon application by such person.
cannot account for the myriad variations in plant design and environment; therefore, the permit issuers must be free to fashion appropriate effluent limitations on a case-by-case basis.

EPA, however, asserts that the Administrator not only has the authority to set uniform national effluent standards, but that such standards are the very essence of the pollution control methodology adopted by Congress in the 1972 Amendments. Moreover, the congressional goal of uniformity, which EPA claims the legislative history of the Act manifests, could not be realized unless standards were to be set on a categorical, rather than individual, point source basis. According to EPA, needed flexibility is built into the standard setting and enforcement procedures by subcategorization and variance clauses, respectively. Subcategorization attempts to group point sources with similar designs and processes together, whereas variance clauses, which are built into the regulations for each category and subcategory of point source, are designed to except point sources which are "fundamentally different" from other sources within the same category or subcategory. EPA argues that acceptance of industry’s view would return standard setting to the exclusive control of the various states and perpetuate the problem of "forum shopping" that Congress sought to cure in the 1972 Amendments.22

The significance of the forthcoming Supreme Court decisions in the duPont cases23 lies in the impact those decisions will have upon the enforcement provisions of the Federal Water Pollution Control Act Amendments. Should the Court find in favor of the industry position—that the Administrator lacks the authority to set uniform national effluent standards, and that the courts of appeals lack jurisdiction to review such standards directly—the EPA would be forced to withdraw regulations already promulgated for some forty categories of industrial point sources.24 EPA then would have to re-promulgate effluent limitation guidelines for these categories, as well as draft new guidelines

22. Ohio’s Mahoning Valley furnishes a graphic illustration of the adverse effects of industrial forum shopping. Ohio’s historically lax pollution laws allowed over-development, particularly in the heavy industrial category, in the Valley. As a consequence, the state cannot now meet minimum federal air and water standards without putting large numbers of industrial plants out of business. The Mahoning Valley situation has been the subject of much current debate, with EPA proposing a special exemption for the Valley and Senator Edmund Muskie, the principal author of the Federal Water Pollution Control Act Amendments, charging that any such exemption would be unlawful. See 6 ENV. RPTR.—CURR. DEV. 1937-38, 2110-11 (1976).


for additional categories. This would in turn disrupt the permit-issuing mechanisms of the Act, casting serious doubt upon the validity of permits already issued under the existing EPA regulations and creating additional difficulties for permit issuers by forcing them to set effluent limitations on an ad hoc basis without EPA regulations to guide them, at least until EPA could comply with the Court's interpretation of the Act. Moreover, denying the courts of appeals review jurisdiction over effluent limitations would lead to a confusing pattern of judicial review: the finality of EPA-promulgated guidelines under § 301 would lie in the courts of appeals, while the validity of individual effluent limitations would have to be determined separately by the district courts. This pattern of review would result in further delay of the enforcement procedures. Ultimately, such a decision would jeopardize achievement of the 1977, and perhaps even the 1983, effluent reduction goals for industrial point sources.

A Supreme Court decision upholding the EPA position, on the other hand, would allow EPA to complete the standard-setting phase of the Act and move on to the enforcement monitoring phase. Additionally, acceptance of the EPA interpretation would vest the courts of appeals with jurisdiction to review the Administrator's regulations under §§ 301 and 304, thereby finalizing the categorical effluent limitations at the time they are established, rather than at the time they are incorporated into permits. This interpretation would eliminate the administrative burden upon the EPA and the permit-issuers which the industry interpretation would create by requiring a two-tiered rule-making procedure. Consequently, an additional burden on the federal courts created by an increased case load could be avoided. Whereas the industry position necessitates two separate judicial review functions—one for the EPA's effluent guidelines and one for the permit issuer's effluent limitations—the EPA position entails only one review procedure.

The Supreme Court's forthcoming decisions assume even greater importance in light of Congress' unwillingness to amend or clarify the sections at issue. Amendments to the Act considered by Congress during its 1976 session did not contain any provision for resolution of the present effluent limitations controversy. Bills introduced in both the House and the Senate dealt mainly with extensions of the 1977 and 1983 deadlines, changes in the § 404 dredge and fill program, and revision of the sewage treatment construction grant program. Only

a single amendment to the Act, a measure involving bonds issued to
fund sewage treatment construction grant projects, was passed before
Congress adjourned. In view of Congress' failure to act, the timely
implementation of the NPDES system will not be possible without a
definitive Supreme Court interpretation of the Act.

This article will analyze the two major issues set forth above, dis-
cuss the circuit court cases dealing with these issues, and suggest how
the issues ought ultimately to be resolved. Though treated separately
in the discussion, the two issues are closely related. Resolution of the
jurisdictional issue, for example, depends upon whether one believes
the Administrator has the authority to promulgate uniform standards.
If the Administrator does have such authority, jurisdiction to review his
actions lies in the circuit courts, as provided in § 509.

The first part of this article briefly outlines the historical develop-
nment of federal water pollution legislation, highlighting the factors
which led Congress to adopt the effluent limitation approach. In the
second part of the article, the litigation spawned by the effluent limita-
tions controversy is analyzed in depth. Conclusions regarding the va-
lidity of the various court holdings are presented. A matrix is pre-
sented in Appendix A displaying each court's holding with respect to
each of the issues litigated.

The authors' premise is that uniform national effluent standards,
promulgated by the Administrator of the EPA and enforced by the
states with approved permit programs, were intended to be the keys
to accomplishing the remedial goals of the Federal Water Pollution
Control Act Amendments. In general, the authors conclude that in-
dustry's position on each of the enumerated issues is not supported by
the Act, its legislative history, or logic, and that EPA's approach to
these issues represents a reasonable interpretation of its statutory duties
which ought to be adopted by the Supreme Court.

I

THE EVOLUTION OF THE EFFLUENT LIMITATION
AS A POLLUTION CONTROL DEVICE

A. Early Federal Efforts

From its earliest (1948) version to its present form, the Federal
Water Pollution Control Act has undergone a series of transforma-
tions, suffering a great deal of congressional tinkering. As each reg-

27. 7 ENV. RPTR.—CURR. DEV. 836-37 (1976).
28. For an excellent history of federal water pollution control legislation, see
Barry, The Evolution of the Enforcement Provisions of the Federal Water Pollution
Control Act: A Study of the Difficulty in Developing Effective Legislation, 68 MICH.
ulatory scheme failed to accomplish its remedial tasks, and as the quality of the nation's waters steadily deteriorated, Congress found itself advancing the federal government ever further into a matter which traditionally has been looked upon as primarily local in nature.

The brief historical discussion which follows is meant to place the present controversy over the latest congressional effort in perspective. Three key points will emerge from this discussion. First, the failure of the individual states to exercise their own water pollution control authority eventually led to the recognition by Congress that a national program spearheaded by the federal government was essential to future efforts in this field. Second, the absence of uniform national standards to provide a minimum level of protection was a primary cause of the excessive deterioration of certain water bodies in the country. Third, the use of water quality standards as a regulatory device proved unworkable, thereby necessitating a switch to the effluent limitation as the basic control device. As will be seen, these observations play an extremely important role in the resolution of the present controversy.

For nearly a quarter of a century, federal water pollution control legislation followed the traditional principle that the states, being closest to the problem, must lead the fight against water pollution. During this time, the federal government supplied limited technical and financial assistance, and practically no national guidance, to aid the states. The Water Pollution Control Act of 1948, for example, assigned enforcement powers in water pollution control to the governors of the states. The federal agencies were authorized only to support research in water pollution and projects to develop new technology, and to make limited loans to assist the financing of treatment plants. In 1956, Congress increased the level of financial assistance for the construction of local treatment works and for local pollution control planning. Additional provisions were added to deal with pollution of interstate waters. Though the 1956 legislation added little in the way of substantive protection, it did recognize as a matter of policy that a broader national effort, with better federal-state cooperation, was needed to combat the increasing pressures of population and economic growth upon the nation's natural resources.

Substantive provisions were enacted, however, in the Water Quality Act of 1965. That Act created a new federal agency, the Federal

Water Pollution Control Administration (FWPCA), located in the Department of Health, Education and Welfare, to administer the federal portion of a new water pollution abatement program. Under that program, states were required to develop water quality standards for all interstate waters within their borders along with plans to implement and enforce the standards. Upon approval by the Administrator of the FWPCA, these state-promulgated criteria became federal standards. Federal support of state efforts in water pollution control intensified a year later when Congress appropriated $3.4 billion to assist the construction of treatment works.

The Water Quality Improvement Act of 1970 created several new water pollution control programs. Oil and hazardous substances became the subject of federal regulation for the first time. Federal activities affecting water quality were made subject to state enforcement measures. Demonstration projects were authorized to aid in the cleanup of the Great Lakes. In 1970, the Environmental Protection Agency was created, and it assumed the responsibilities of the FWPCA.

Throughout all of these amendments, the basic enforcement mechanism of the 1948 Act, the conference procedure, consisting of a three phase administrative proceeding, remained unaltered. In the first phase, a conference was called by the appropriate federal agency in which all affected state and interstate water pollution control agencies participated. Following the conference, recommendations were formulated by the appropriate federal agency. Six months were allowed for compliance with these recommendations. If the problem was not resolved during that period, a formal hearing was held before a board comprised of representatives of state and federal agencies. That board could direct that certain abatement measures be taken, allowing another six month compliance period. If both of these steps failed, the federal government could file suit. The whole process could sometimes take up to eight years.

This unwieldy enforcement mechanism proved totally ineffective. Through 1971, fifty informal conferences were held, only four con-

---

39. Over the years various federal agencies have had responsibility for pollution control programs, including the Public Health Service, the Federal Water Pollution Control Administration, and, most recently, the Environmental Protection Agency. S. Rep. No. 92-414, 92d Cong., 1st Sess. 2 (1971).
40. 1 F. Grad, Treatise on Environmental Law 3-60 (1975) [hereinafter cited as Grad].
41. Id.
continued to the hearing stage, and only a single case made it to court, where it was dismissed.\textsuperscript{42} Even the creation of a second enforcement procedure in the 1965 Act did not help matters. Under that provision, the discharge of matter by industrial polluters into interstate waters which reduced the quality of such waters below the established water quality standards was subject to abatement upon 180 days notice, without the formalities of the conference procedure.\textsuperscript{43}

The failure of these regulatory schemes can be attributed to two phenomena: the failure to require permits for discharges and the practical problems of enforcing water quality standards. Discharge permits were not required because, until the environmental renaissance of the 1970's, the use of air and water as depositories for industrial and municipal wastes was an accepted fact. The idea that air and water are public resources, to be shared and cared for by all, was yet to be embraced by Congress or the public. Perhaps this feeling, more than anything else, explains Congress' \textit{laissez faire} attitude toward the free use of the environment by polluters. At any rate, polluting activities were not subject to a general permit requirement until 1970. In that year, the President established a federal permit program under the Refuse Act, section 13 of the Rivers and Harbors Act of 1899,\textsuperscript{44} to be administered by the Army Corps of Engineers.\textsuperscript{45} This program was made possible by a series of Supreme Court decisions\textsuperscript{46} that expanded the scope of the Corps of Engineers' regulatory authority under the Refuse Act to the effect that the Corps could regulate polluting activities. This program was short-lived, though, due to a district court decision which rendered enforcement administratively impossible.\textsuperscript{47}

\textsuperscript{43} \textit{GRAD}, supra note 40, at 3-61.
\textsuperscript{45} The Refuse Act permit program was established by Exec. Order No. 11,574, 3 C.F.R. 188 (1970).
\textsuperscript{46} The two most important cases were United States v. Republic Steel Corp., 362 U.S. 482 (1960), and United States v. Standard Oil Co., 384 U.S. 224 (1966). In \textit{Republic Steel} the Court held that the discharge of industrial wastes which reduced the depth of a navigable river was an obstruction to navigable capacity and required a permit under the Rivers and Harbors Act. In \textit{Standard Oil}, the Court construed the Refuse Act to cover the discharge of commercially valuable aviation gasoline. For a further account of the use of the Rivers and Harbors Act as a pollution control statute, see \textit{GRAD}, supra note 40, at 3-69-3-74.
\textsuperscript{47} The case, \textit{Kalur v. Resor}, 335 F. Supp. 1, 3 ERC 1458 (D.D.C. 1971), involved the application of the National Environmental Policy Act (NEPA), 42 U.S.C.
The inability of administrative agencies to enforce water quality standards was due primarily to the almost impossible burden of proof allocated to them. Not only were they required to show that a particular water quality standard had been violated, but they had to pinpoint the source from among several possible sources on a given water body. To further complicate matters, a number of other variables had to be accounted for. In water pollution, the precise amount of effluent a stream can handle without deterioration of water quality depends not only on the amount of effluent emitted, but also on the temperature of the water, the speed at which the water is travelling, the general characteristics of the waterway, the time of year, and other factors. Thus, any number of supervening natural factors could break the causal chain the enforcement agency was required to establish before winning an enforcement action.

B. The 1972 Act

The major philosophical change effected by the 1972 Amendments is articulated in the declaration that any discharge of a pollutant, except in compliance with the Act, is unlawful. The major methodological change wrought by the Act is the switch from standards based on water quality criteria to standards based on available pollution control technology (effluent limitations). Water quality standards were designed to protect designated uses of water, but not to prevent "pollutants" from entering the water per se. Enforcement was after the fact, i.e., after the quality of the water was reduced below acceptable levels.

In contrast, effluent standards are not, except in two specific instances, specifically related to water quality or water uses, although

\[\text{§ 4321 et seq. (1970), to the Refuse Act permit program created by Exec. Order 11,574. The court enjoined the program because its regulations failed to require the preparation of environmental impact statements for permits. Congress' response was to enact § 402 (a) of the Federal Water Pollution Control Act Amendments, which effectively terminated the Refuse Act permit program and substituted in its place an expanded discharge permit program. See Zener, supra note 14, at 785-86.}\]


50. A particular water body may be designated for a number of uses—domestic supply, power production, fish and wildlife habitat, recreation, agriculture, and industry—so long as the uses are all compatible. The interim goal of the 1972 Amendments is to achieve, by 1983, a standard of quality in all the nation's waters which permits water-contact recreation and a balanced, indigenous population of fish and shellfish. Federal Water pollution Control Act Amendments, § 101(a)(2), 33 U.S.C. § 1251(a) (2) (Supp. V, 1975). This is commonly referred to as the fishable/swimmable goal.

51. In two distinct situations, though, the Act does provide that effluent limitations are to be based upon water quality standards. In the first, under § 302, 33 U.S.C.
their ultimate purpose, of course, is to improve the quality of receiving waters. As one author describes it:

An effluent standard . . . is a measure of the amount of a pollutant that is allowed to be discharged in a time period (e.g., 1/10 lb. of mercury a day), or may specify a maximum permissible concentration in the effluent (e.g., no more than .01 parts per million of copper), or may specify a maximum amount that may be discharged per unit of production (e.g., no more than 5 lbs. of suspended solids per ton of paper produced).  

Whereas the purpose of water quality standards is to protect only designated uses of water, the purpose of the effluent standard is to reduce or eliminate the discharge of pollutants so that the receiving water can be used for practically any purpose. Philosophically, the two approaches are quite distinct. The former derives from the view that there is social utility in a certain level of pollution, provided important uses are not impaired. The latter takes the view that pollution is undesirable and should be eliminated to the fullest extent that technology will permit. There are different economic implications in each of these approaches as well. The effluent standard approach requires the expenditure of large sums to achieve the cleanest water technologically possible, whereas the water quality approach is said to be more cost-effective. The controversy over whether an "optimal" level of pollution should be maintained to maximize social benefits has raged for a long time, and shows no signs of diminishing.  

§ 1312 (Supp. V, 1975), the Administrator is authorized to establish more stringent effluent limitations where necessary to safeguard public water supplies, agricultural and industrial uses, fish and wildlife populations, or water-contact recreation. These are the so-called water quality related effluent limitations. Prior to promulgating this type of regulation, the Administrator must hold a public hearing and conduct a cost-benefit analysis to justify the more stringent limits.

In the second situation, under § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (Supp. V, 1975), the Administrator (by implication since he is not expressly mentioned) is empowered to set more stringent effluent limitations not later than July 1, 1977, where necessary to meet state-issued water quality standards. These are the so-called water quality derived effluent limitations. No public hearing or cost-benefit analysis is required prior to promulgation of the limitations, according to an EPA general counsel's opinion. See Goldfarb, Better Than Best: A Crosscurrent in the Federal Water Pollution Control Act Amendments of 1972, 11 LAND & WATER L. REV. 1, 18 (1976).

52. Zener, supra note 14, at 693.

53. See W. Baxter, People or Penguins: The Case for Optimal Pollution (1974). The author's basic premise is that environmental amenities are important only insofar as they serve some human purpose, even a purely aesthetic one. From that point, he argues that determining the degree of cleanliness required of air or water should be determined on the basis of net social benefits. For example, under the author's thesis, it would not be desirable to consume a large amount of resources to maintain in a pristine state a water body which doesn't need to be in such a state. Need is determined on the basis of supply and demand. In certain instances, some degree of pollution would be tolerated in exchange for a greater value in another area (e.g., employment).
ever, it is clear that Congress has opted for the elimination of pollution to the extent technologically feasible whether or not the marginal costs of doing so exceed marginal benefits in a particular case.

Even though the primary focus of federal water pollution control is now firmly fixed on effluent standards, water quality standards have not been abandoned. The standards that had been established under prior law for interstate waters were specifically continued in force, subject to EPA approval, by the 1972 Act.\(^5\) In addition, the 1972 Amendments direct the states to establish standards for intrastate waters as well.\(^6\) The functions of water quality standards, however, have changed. No longer the primary enforcement devices, they now are designed to serve as benchmarks to measure the success of effluent standards in meeting the clean water goals of the Act.\(^7\)

In making the change to a regulatory program based on effluent, rather than water quality, standards, Congress sought to simplify enforcement. The following excerpt from the Senate Report accompanying the original version of the 1972 Amendments illustrates the point:

The legislation recommended by the Committee proposes a major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits.

The Committee adopted this substantial change because of the great difficulty associated with establishing reliable and enforceable precise effluent limitations on the basis of a 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—dependable 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.\(^8\)

On the House side, the desire to adopt a new approach to pollution control was equally apparent:

America's waters are in serious trouble, thanks to years of neglect, ignorance and public indifference. Almost from its inception

---

in 1946 the Committee on Public Works has been trying to bring to reality an effective properly funded program to restore and enhance the quality of our waters and to insure their future as a lasting national asset.\textsuperscript{58}

Furthermore, to correct past abuses and stimulate a nationwide effort to clean up the waters, Congress mandated uniformity in the setting of effluent standards:

Except as provided in Section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible.\textsuperscript{59}

The uniformity concept was the subject of heated congressional debate.\textsuperscript{60} Opponents argued that it would fail to account for the different absorptive capacities of receiving waters. Proponents countered that uniformity would cure the major defect of the prior law, \textit{i.e.}, that industry would simply locate in places where water pollution control efforts were not unduly vigorous and where demands on effluent treatment were minimal.\textsuperscript{61} Furthermore, argued the proponents, uniformity of standards would avoid the consequences of economic competition in siting decisions because the attraction of inexpensive control treatment would be removed. In rebuttal, it was asserted that the cost of pollution control equipment played a very minor role in siting decisions.\textsuperscript{62}

The congressional decision to insist that national standards be "as uniform as possible"\textsuperscript{63} reflects a compromise between the absolute uniformity and absolute individuality positions advocated in the debates. Evidently, Congress realized that achievement of its ultimate goal—zero discharge by 1985—would depend upon a unified national effort to reduce the amount of pollution entering the waterways. Recognizing that the cost of achieving this goal nationwide would be considerable,\textsuperscript{64} Congress nevertheless opted for a non-degradation, rather than a "controlled degradation," standard of performance. As subsequent discussion will show, however, implementation of the "as uniform as possible" standard involves practical problems for the administrative agencies.

While the 1972 Amendments set forth new goals for water quality, they also created new methods to achieve them. To achieve the

\textsuperscript{58} H.R. REP. No. 92-911, 92d Cong., 2d Sess. 66 (1972).
\textsuperscript{59} S. REP. No. 92-1236, 92d Cong., 2d Sess. 126 (1972).
\textsuperscript{60} GRAD, supra note 40, at 3-107.
\textsuperscript{61} Id. at 3-107-3-108.
\textsuperscript{62} Id. at 3-108.
\textsuperscript{63} S. REP. No. 92-1236, 92d Cong., 2d Sess. 126 (1972).
\textsuperscript{64} S. REP. No. 92-414, 92d Cong., 1st Sess. 42-47 (1971).
overall goal of zero discharge by 1985, Congress required that existing industrial dischargers gradually reduce the pollutant-content of their effluents within a two-phase period. In the first phase, industrial point sources are required to employ the "best practicable control technology currently available" (BPCTCA) by July 1, 1977. In the second phase, industries will be required to adopt the "best available technology economically achievable" (BATEA) by July 1, 1983. These two standards, coupled with the new source standards required by § 306, constitute the effluent standards strategy of the Act.

In the final analysis, it is the two standards applicable to existing sources which are the cause of all the furor among the regulated industries. As is invariably the case with legislative standards, these are vague, general, and in need of administrative, even litigative, clarification. Unfortunately, Congress was less clear than it could have been in designating the administrative official responsible for giving content to the 1977 and 1983 standards by means of effluent limitations. Rather than expressly directing the Administrator, the logical choice, to perform this task, the statute merely states that the prescribed effluent limitations "shall be achieved." It is this ambiguity that industry has seized upon in its quest to escape the burden of compliance with uniform effluent standards. The following section discusses the success industry has had in pressing its argument upon the courts.

II

JUDICIAL ATTEMPTS TO RESOLVE THE CONTROVERSY

In this section, the decisions of each of the seven circuits respecting the issues involved in the effluent limitations controversy are discussed in chronological sequence. For convenience, a matrix displaying all of the courts' holdings is presented in Appendix A.

In confronting these issues the courts have employed the traditional tools of statutory construction: the language of the statute itself, the legislative history, and the interpretation of the agency charged with its enforcement (EPA). Resort to the legislative history of the Federal Water Pollution Control Act Amendments is warranted in these cases for at least three reasons. First, certain provisions of the Act are being interpreted for the first time and, as has been shown, they are con-

ceptually novel in relation to earlier laws. Second, the language of § 301, the pivotal provision, is ambiguous, thereby leaving the courts to search for congressional intent in extrinsic materials. Third, as the Supreme Court recently stated:

[W]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."69

A. The Eighth Circuit

CPC International Inc. v. Train (CPC I)70 was the first case to raise the issue whether the Administrator possesses the authority to promulgate effluent limitation regulations under § 301. The Eighth Circuit was the first and, to date, the only court to answer that question in the negative:

We conclude that the statute does not grant to the Administrator a separate power under § 301 to promulgate by regulation effluent limitations for existing sources.71

In reaching this conclusion, the court relied on language from several related sections of the Act. First, the court was impressed by the fact that in § 306,72 dealing with effluent standards for new sources, and in § 307,73 dealing with toxic and pretreatment effluent standards, Congress specifically directed the Administrator to promulgate national effluent standards, and to do so within a prescribed time limit.74 In § 301, on the other hand, Congress merely directed that effluent limitations for existing sources should be achieved within a prescribed time without actually stating that the Administrator was to promulgate effluent standards.

Turning to § 402 of the Act, the CPC I court found what it considered additional evidence that the permit grantor, not the Administrator, was to issue effluent limitations. Section 402(d)(2) provides:

---

70. 515 F.2d 1032, 7 ERC 1887 (8th Cir. 1975).
71. Id. at 1037, 7 ERC at 1890. Recently the Eighth Circuit reaffirmed this holding. CPC Int'l Inc. v. Train (CPC II), No. 74-1448 (8th Cir., filed Aug. 18, 1976). The CPC II opinion is discussed in the text accompanying notes 243-47 infra.
No permit shall issue . . . if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.\textsuperscript{75}

This reference to "guidelines," reasoned the court, was a reference to the guidelines to be issued by the Administrator under § 304(b). To the court this indicated that the permit-issuing authority (EPA or a state with an approved NPDES program) was required to follow the Administrator's guidelines but was to set conforming effluent limitations at the time a permit was issued.\textsuperscript{76}

The Eighth Circuit also relied on four portions of legislative history for its conclusion. First, in testimony before a Senate subcommittee, former EPA Administrator William Ruckelshaus stated:

We believe that such Federal guidance is especially important in the area of effluent limitations. . . . Federal leadership must be provided here so that the States, in setting effluent limitations, have a clear idea of the task.\textsuperscript{77}

Moreover, in a subsequent letter to the House Committee on Public Works, Ruckelshaus stated his understanding that § 301 effluent limitations would be established by means of the permit procedure.\textsuperscript{78}

A second piece of evidence was found in statements made by Congressman Terry in the Report on the House bill to amend the Act.\textsuperscript{79} Representative Terry was concerned about the absence of a provision for judicial review of the § 304(b) guidelines.\textsuperscript{80} The court felt this concern was justified only if the guidelines were intended to be the only federal action defining limitations for existing sources. If the Administrator could issue § 301 regulations, reasoned the court, there would be no reason for Congressman Terry's concern since § 509 already provided for judicial review of actions under § 301.\textsuperscript{81}

\textsuperscript{75} CPC Int'l Inc. v. Train (CPC I), 515 F.2d 1032, 1038, 7 ERC 1887, 1891 (8th Cir. 1975), quoting 33 U.S.C. § 1342(d)(2) (Supp. V, 1975) (emphasis added by the court).

\textsuperscript{76} Id. at 1038-39, 7 ERC at 1891. The court also noted that Congress set a one-year deadline for the promulgation of § 304(b) guidelines, but did not set a deadline for § 301 regulations, indicating that no such regulations were contemplated. Id. at 1039, 7 ERC at 1891.

\textsuperscript{77} Id. at 1039, 7 ERC at 1892, quoting Hearings on Water Pollution Control Legislation Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess., ser. 92-H9, pt. 1, at 19 (1971) (emphasis added by the court).

\textsuperscript{78} Id. at 1039, 7 ERC at 1892, quoting H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 157 (1972).


\textsuperscript{80} Id. at 424.

\textsuperscript{81} 515 F.2d at 1040, 7 ERC at 1892-93.
The court next considered a third piece of legislative history—the debate over whether the Administrator should have the authority to veto state-issued permits. The House version of the bill to amend the Act did not contain a veto provision, which prompted Representatives Abzug and Rangel to register strong objections. In the court's view, part of the reason for their perceived need of a veto power must have been the absence of a provision calling for nationally promulgated effluent standards in the House bill. This, the court found, was strongly indicative of an intent not to provide for federally promulgated effluent limitations.

As a final bit of evidence the court cited the Report of the House-Senate Conference Committee, a portion of which states:

The Administrator is expected to be precise in his guidelines under subsection (b) of this section [304], 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 effluent limitations.

Once again the court interpreted this reference to "guidelines" as being inconsistent with an intent to make § 301 regulations the vehicle for establishing effluent limitations, but consistent with an intent to leave permit grantors the task of setting effluent limitations with the guidelines serving as mandatory regulations.

Having concluded that the Administrator lacked the power to issue § 301 effluent limitations, the Eighth Circuit was forced to conclude that it had no jurisdiction to review what the Administrator had purported to promulgate under that section:

In sum, the Act and the legislative history demonstrate that the EPA does not have power to promulgate effluent limitations for existing plants by regulation under § 301, and we see nothing in any other provision of the Act which is inconsistent with this conclusion. Accordingly, we do not have jurisdiction to directly review the regulations pertaining to existing sources.

In essence, the Eighth Circuit did not believe the congressional failure to direct the Administrator to promulgate effluent limitations in § 301 to be a mere oversight. Rather, the court felt that Congress intended the Administrator to issue guidelines for the states to follow, while reserving to the Administrator the power to veto those permits

83. 515 F. 2d at 1041, 7 ERC at 1893.
84. Id.
85. Id. at 1042, 7 ERC at 1894, quoting S. Rep. No. 92-1236, 92d Cong., 2d Sess. 126 (1972) (emphasis added by the court).
86. Id. at 1042, 7 ERC at 1894.
87. Id. at 1043, 7 ERC at 1895.
which do not comply with the guidelines. The CPC I court acknowledged that uniformity was a fundamental goal of the Act, but decided that uniformity could be achieved as well through the issuance of guidelines as by the promulgation of the effluent limitations themselves. In so holding, the court may in the final analysis have simply taken a different path to arrive at the same conclusion as EPA. By making the guidelines mandatory and recognizing the use of EPA's veto power as a means to enforce the guidelines, the court in effect substituted § 304 (b) guidelines for § 301 effluent limitations. In other words, under the court's reasoning, the action of the permit grantor in setting the effluent limitations by individual permit would, subject to some exceptions, merely be mechanical since the Administrator's guidelines, required to be precise, must be followed in any case.

The Eighth Circuit could have avoided this circuitous reasoning by adopting the interpretation offered by the EPA. Under current principles of statutory construction, courts generally are required to accept an agency's interpretation of its statutory authority where the statute itself is ambiguous and the agency's interpretation is reasonable.

88. Id. at 1039, 7 ERC at 1892.
89. The court noted:
Second, our conclusion that the existing source regulations were published solely under § 304(b) is by no means to denigrate their importance under the Act or to diminish their clout in the permit-issuing process. Id. at 1037, 7 ERC at 1890. In a footnote, the court elaborated by stating: "The guidelines are to be as precise as possible to assure uniformity of performance for industry categories." Id. at 1037 n.11, 7 ERC at 1890 n.11.
90. In its subsequent opinion in CPC II, the Eighth Circuit seemed to recognize the similarity between its own and EPA's interpretation. See text accompanying notes 243-47 infra.
91. The factors specified in §§ 304(b)(1)(B) & (b)(2)(B) which must be considered in arriving at the 1977 and 1983 standards, respectively, could dictate different limitations for subcategories of point sources, or for individual point sources, depending upon one's interpretation of the statute. This question is taken up with the discussion of the uniformity issue infra.
92. In discussing an EPA interpretation of the Clean Air Act, 42 U.S.C. § 1857 et seq. (1970), a statute very similar in concept and procedure to the Federal Water Pollution Control Act Amendments, the Supreme Court set the following standards for reviewing courts:

We therefore conclude that the Agency's interpretation of §§ 110(a)(3) and 110(f) was "correct," to the extent that it can be said with complete assurance that any particular interpretation of a complex statute is the "correct" one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency.

Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 87, 7 ERC 1735, 1744 (1975) (emphasis added). See also Udall v. Tallman, 380 U.S. 1, 16-18 (1965) (Secretary of the Interior's interpretation binding if it is one reasonable, though not only, interpretation); McLaren v. Fleischer, 256 U.S. 477, 480-81 (1921) (agency interpretation
principle does not require courts to rubber-stamp every agency interpretation, but certainly where, as here, neither the statute nor its legislative history provide certain evidence of congressional intent, an agency interpretation which is compatible with the general purposes and concept of the statute should be followed. In the present controversy, neither the language of §§ 301 and 509 nor their legislative history provide absolute proof regarding the jurisdictional question. In the absence of any controlling evidence either way the EPA interpretation must be deemed as reasonable as the industry interpretation. More importantly, the EPA interpretation is compatible with the general scheme of the 1972 Amendments, which call for greater federal involvement in standard setting, whereas the industry interpretation seeks to place the states in the role as principal standard-setters.

Moreover, if the Eighth Circuit found the EPA interpretation unreasonable it should have expressly said so and presented cogent reasons for that conclusion. Instead, the court failed to cite any persuasive evidence for rejecting the EPA construction, and created several anomalies with its own interpretation.

For example, by finding that the Administrator lacked the power to set effluent limitations under § 301, but did have the power to issue mandatory guidelines under § 304(b), the court effectively emasculated the judicial review procedure established under § 509(b). Under that provision Congress stated that the courts of appeals, not the district courts, were to have exclusive jurisdiction to review the Administrator's, but not the permit grantor's, action in "approving or promulgating any effluent or other limitation under section 301,..." The court's explanation that the reference to § 301 in § 509(b) really refers to § 301(c) (which empowers the Administrator to modify effluent limitations) is not persuasive. First, if Congress wished to limit the application of § 509(b) to § 301(c), it could easily have done so expressly. That it chose not to is at least some evidence that a broader application of § 509(b) was intended. More importantly, the operative verb in the pertinent language of § 509 is "promulgate," a statutory term of art which refers to the broadest type of rule-making activity, certainly broader in meaning than "modify." Thus, the plain language of the statute argues against the conclusion reached by the court.

The result reached by the CPC I court also contains another anomaly. Under the CPC I interpretation, individual permits based on which is at least "admissible" will not be disturbed by reviewing court except for "cogent reasons").

94. CPC Intl Inc. v. Train (CPC I), 515 F.2d 1032, 1043, 7 ERC 1887. 1895 (8th Cir. 1975).
uniform national guidelines would be reviewed in the courts of appeals under § 509(b); but since the nationwide guidelines themselves are excluded from the purview of that section, they would be reviewed in the first instance by the district courts.95 Nothing in the legislative history supports this bifurcated review procedure. Logically, review of effluent standards for both new and existing sources should lie in the same court since the data used by the EPA to arrive at both standards is virtually identical.96 Under the CPC I view the initial review of the Administrator's effluent limitation guidelines by the district courts would be subject to further review by the courts of appeals. This two-tiered procedure would waste judicial resources by requiring review at the district and appellate court levels,97 and would result in further delaying implementation of national standards until all appeal procedures had been exhausted. Furthermore, review of individual permit decisions by the circuit courts would be complicated in cases where no final decision had yet been reached on the underlying guidelines. The validity of the specific effluent limitations selected by permit issuers could not be determined where the validity of the national guidelines upon which they were based had not been finally determined.

B. The Third Circuit

While recognizing that Congress had drafted the FWPCA with considerably less clarity than a reviewing court might desire, the Third Circuit in American Iron and Steel Institute v. EPA98 nevertheless was able to find an implied congressional intent to empower the Administrator to promulgate effluent limitations under § 301:

While we admit that Congress did not express its intent on this point with particular clarity, we conclude, after examining the entire statutory scheme and the legislative history, that the Administrator's power to promulgate effluent limitations under section 301 can be inferred.99

The text of the American Iron opinion reads like a systematic refutation of each of the arguments advanced by the CPC I court to reach the opposite conclusion. First, the Third Circuit disagreed with the Eighth Circuit's reading of § 509(b), i.e., that it establishes judicial

95. See Am. Meat Institute v. EPA, 526 F.2d 442, 452, 8 ERC 1369, 1376 (7th Cir. 1975), discussed in text accompanying notes 114-23 infra.
96. The Eighth Circuit itself acknowledged the anomaly in its second CPC opinion. CPC Int'l Inc. v. Train (CPC II), No. 74-1448, at 2 n.1 (8th Cir., filed Aug. 18, 1976).
97. The Eighth Circuit also acknowledged this adverse effect of its interpretation, but claimed that the statute required review by district and appellate courts. Id.
98. 526 F.2d 1027, 8 ERC 1321 (3d Cir. 1975).
99. Id. at 1036-37, 8 ERC at 1323.
review only of the Administrator's § 301(c) authority to modify effluent limitations, and not of a general § 301 authority to issue effluent limitations. By way of explanation, the Third Circuit noted that § 509 (b) could not be referring to § 301(c) at all because the latter did not even exist at the time the former was drafted. In fact, the Third Circuit found the language of § 509(b) (for example, the section's reference to Circuit Court “[r]eview of the Administrator's action . . . in approving or promulgating any effluent limitation . . .” to be the most persuasive evidence that the Administrator has the power to set § 301 standards.

The American Iron court also found support for its conclusion in several other statutory provisions. Section 505 (the citizen suits provision), for example, defines effluent limitation as “. . . (2) an effluent limitation or other limitation under section 301 . . . or (6) a permit or condition thereof issued under section 402 of this Act; . . . .” If, as the CPC I court found, effluent limitations could not exist independent of the permit process, then subsections (2) and (6) of § 505(f) would be redundant. Since Congress did include separate references, the American Iron court inferred, Congress must have intended their independent significance.

The Third Circuit felt that the statute’s repeated references to effluent limitations “under” or “pursuant” to § 301, when coupled with the complete absence of any qualification that such limitations were to be established through the permit process, made it clear that Congress intended the § 301(b) limitations to have an independent existence. Citing language from § 401 (a) (1), which provides, in the certification process, for the case where “there is not an applicable effluent limitation or other limitation under sections 301(b) and 302,” the Third Circuit observed that Congress must have intended effluent limitations to have independent significance and existence prior to the permit process. Otherwise § 401(a) (1) would have referred only to the contingency of the absence of § 304(b) guidelines. Reasoning further, the court thought that if § 301(b) does require regulations separate from those required by § 304(b), the Administrator, with his general

100. Id. at 1037, 8 ERC at 1323-24.
103. The Third Circuit dismissed the CPC I explanation for this redundancy—that a reference to § 301 in § 505(f) was necessary to encompass § 301(f)—as implausible because § 301(f) is not an effluent limitation; the court viewed § 301(f) as a flat prohibition on certain discharges (e.g., radiological warfare agents). Am. Iron and Steel Institute v. EPA, 526 F.2d 1027, 1038, 8 ERC 1321, 1324-25 (3d Cir. 1975).
104. Id. at 1039, 8 ERC at 1325.
106. 526 F.2d at 1039, 8 ERC at 1325.
rule-making power under § 501(a),107 should be the one to issue them.108

Regarding the Eighth Circuit's reliance on § 402(d)(2), the section authorizing the Administrator to disapprove permits found to be outside the § 304(b) guidelines, the Third Circuit noted that § 402(b) (1)(A) requires that permits must apply and insure compliance with any applicable requirement of § 301.109 Hence, in the Third Circuit's view, § 402, read as a whole, requires permit issuers to comply both with § 301(b) effluent limitations and with § 304(b) guidelines.110

The American Iron court also considered the legislative history of §§ 301 and 304. It discounted the statements of former EPA Administrator Ruckelshaus, which the Eighth Circuit found so persuasive, in favor of statements by Senators Muskie and Bentsen supporting the Administrator's power to issue § 301 effluent limitations.111 The reason given by the court was the fact that these Senators had far more responsibility for drafting the Act than did Ruckelshaus.

The Third Circuit also rejected the Eighth Circuit's conclusion that the concern of Representatives Rangel and Abzug over the absence of an EPA veto power in the House bill indicated a lack of EPA authority to issue § 301 limitations:

We believe that a veto power could have been considered just as necessary to ensure compliance by the permit grantors with section 301 limitations as with section 304 guidelines.112

As a final factor, the Third Circuit noted the importance of the EPA's interpretation of its own statutory authority. Citing a host of Supreme

107. Federal Water Pollution Control Act Amendments, § 501(a), 33 U.S.C. § 1361(a) (Supp. V, 1975), provides: "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act."
108. 526 F.2d at 1039, 8 ERC at 1325.
109. Id. at 1040, 8 ERC at 1326.
110. Id.
111. Id. at 1039-40, 8 ERC at 1326. Senator Bentsen's remarks are particularly pertinent to the validity of the Administrator's interpretation:
In phase I, for point sources of pollutants, effluent limits shall be established not later than January 1, 1977 [now July 1, 1977], which comply with specifically defined levels of effluent controls and treatment. As defined in section 301(b)(1) of the bill, and as elaborated in the regulations which we anticipate the Administrator shall issue pursuant to section 301 and section 304, these 1976 [now 1977] goals shall be at least ... the "best practicable control technology currently available" for [industrial] point sources. ...
Id. at 1040, 8 ERC at 1326, quoting ENVIRONMENTAL POLICY DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 162 (Comm. Print 1973) [hereinafter cited as LEGISLATIVE HISTORY] (emphasis added by the court).
112. Id. at 1041, 8 ERC at 1327,
Court cases upholding other reasonable interpretations by administrative agencies in similar circumstances, the *American Iron* court decided that the Administrator's reasonable interpretation "should be given appropriate deference."\(^{113}\)

Having thus given its own reading to the Act and its legislative history, and having found that reading to be compatible with the EPA's interpretation, the court concluded that it had jurisdiction, under § 509 (b), to review the Administrator's regulations.

**C. The Seventh Circuit**

In *American Meat Institute v. EPA*,\(^ {114}\) the jurisdictional issue was raised, not by the parties to the action, but by *amici curiae* CPC International Inc. and the American Petroleum Institute.\(^ {115}\) Nevertheless, it being a jurisdictional challenge, the court felt obliged to consider *amici*’s jurisdictional arguments.

The Seventh Circuit took a slightly different approach to the problem than either the Eighth or Third Circuits. Instead of completely ignoring the EPA’s interpretation of its statutory authority, as the Eighth Circuit did, or first reviewing pertinent sections of the Act and the legislative history to ascertain for itself the meaning of the crucial provisions and then using the administrative interpretation as additional support, as the Third Circuit did, the Seventh Circuit started with the premise that EPA’s interpretation, if found to be reasonable, would be accepted. Consequently, when it searched the statute and the legislative history, the *American Meat* court was looking only for enough evidence to sustain the EPA view, and was not seeking to remove all shadow of doubt concerning that view:

Our inquiry then is not whether the agency’s interpretation of § 301 is the only permissible one, but rather whether is it sufficiently reasonable to preclude us from substituting our judgment for that of the agency?\(^ {116}\)

Basically, the Seventh Circuit followed the counsel of the Third Circuit and rejected that of the Eighth Circuit. The *American Meat* court cited the redundancy argument involving subsections (2) and (6) of § 505(f) with approval.\(^ {117}\) It agreed with the Third Circuit’s reading of § 401(a)(1), holding that the section’s assertion that "there is not an applicable effluent limitation or other limitation under sections 301(b) and 302"\(^ {118}\) indicated the independent significance of § 301

\(^{113}\) *Id.* at 1042, 8 ERC at 1327.

\(^{114}\) 526 F.2d 442, 8 ERC 1369 (7th Cir. 1975).

\(^{115}\) *Id.* at 448 n.12, 8 ERC at 1373 n.12.

\(^{116}\) *Id.* at 450, 8 ERC at 1374.

\(^{117}\) *Id.* at 451, 8 ERC at 1375.

limitations. And it rejected the legislative history cited by CPC I in favor of those passages, particularly by Senators Muskie and Bentsen, relied upon by American Iron. 119 On its own, the Seventh Circuit cited the language of § 301(b)(2)(A), requiring that there be achieved "not later than July 1, 1983, effluent limitations for categories and classes of point sources, . . . .", 120 to illustrate that individual effluent limitations were not to be set when each permit was issued. 121

On the whole, the Seventh Circuit found EPA's position reasonable because (1) it preserved the congressional goal of uniformity so important to the Act, and (2) it maintained the equally important right of the states to administer the permit system, to incorporate stricter effluent limitations, and to determine, in certain cases, whether a variance was needed. 122 The court was thus able to conclude:

We therefore sustain EPA's interpretation of the statute, and find that it had the authority to issue effluent limitations under § 301, and that we have the authority to review the regulations under § 509 (b)(1). 123

D. The Tenth Circuit

In American Petroleum Institute v. Train (American Petroleum I), 124 the Tenth Circuit initially concluded that § 509(b)(1)(E) of the Act confers exclusive jurisdiction upon the courts of appeals to determine whether § 301(b) authorizes the Administrator to establish categorical effluent limitations, irrespective of whatever conclusion might be reached on the substantive question of the Administrator's authority. 125 In other words, the Tenth Circuit did not believe that its jurisdiction was contingent upon a prior determination of EPA's § 301(b) authority: "Our concern is solely with jurisdiction and in this opinion we do not reach the question of the statutory power of the Administrator." 126 The court did reach the substantive question of the Administrator's authority in American Petroleum Institute v. Train (American Petroleum II). 127 That decision is analyzed later in this article in the discussion of the uniformity issue. 128

121. 526 F.2d at 450, 8 ERC at 1374.
122. Id. at 452, 8 ERC at 1376.
123. Id.
124. 526 F.2d 1343, 8 ERC 1529 (10th Cir. 1975).
125. Id. at 1345-46, 8 ERC at 1530-31.
126. Id. at 1346, 8 ERC at 1530.
127. — F.2d —, 9 ERC 1252 (10th Cir. 1976).
128. See text accompanying notes 217-22 infra.
A procedural posture similar to that in American Petroleum I was presented to the Fourth Circuit in E. I. duPont de Nemours and Co. v. Train (duPont I). The case was on appeal from an order of the district court for the Western District of Virginia dismissing, for lack of jurisdiction, a petition for review of the Administrator's regulations pursuant to §§ 301(b), 304(b), 306, and 307. Like the American Petroleum I court, the Fourth Circuit saw only one issue:

The only question presented in this appeal is whether the district courts have jurisdiction to review effluent limitations regulations issued by the Administrator to control effluent discharges from existing plants.

Also like the Tenth Circuit, the Fourth Circuit saw no need to decide the substantive issue in order to resolve the jurisdictional question. Unlike the Tenth Circuit, though, the duPont I court undertook a more searching inquiry into the statute and the legislative history to make certain it had jurisdiction. It first noted that if jurisdiction over regulations promulgated for existing sources lay in the district courts, as appellants contended, then jurisdiction to review regulations for new sources would lie in the circuit courts by the express language of § 509(b)(1)(E), and an anomaly would exist.

Turning to the legislative history of § 509, the Fourth Circuit found evidence of a congressional intent not to divide jurisdiction between different court tiers. The following language from the Report accompanying the House bill was particularly persuasive to the court:

The Committee believes with the number and complexity of administrative determinations that the legislation requires there is a need to establish a clear and orderly process for judicial review.

The Fourth Circuit gave a new twist to the controversy when it found that, even if § 301 does not provide the Administrator separate regulatory authority, regulations issued under § 304(b) nevertheless are tied into § 301 so that review of his action under one section automatically constitutes review of his action under both sections:

Construed in this light, any action taken by the Administrator under § 304(b) should properly be considered to be pursuant to the provisions of § 301 and, therefore, reviewable by this court under § 509.

129. 528 F.2d 1136, 8 ERC 1506 (4th Cir. 1975), cert. granted, 96 S. Ct. 1662 (1976).
130. Id. at 1137, 8 ERC at 1507.
131. Id. at 1141, 8 ERC at 1510.
132. Id.
134. 528 F.2d at 1142, 8 ERC at 1511.
In a subsequent opinion in the same case\textsuperscript{135} the Fourth Circuit further elaborated its view of the confusing legislative history surrounding the Administrator's authority to establish effluent limitations under § 301(b). Rather than "quibble over semantics," though, the court elected to take a common-sense approach to the issue:

The Act is unworkable unless someone takes the initiative in deciding what limitations are generally applicable to discharges, whether by individual plants, categories, subcategories, classification, or otherwise. Because the control technology is determined by the Administrator, it is reasonable that he establish the limitations generally applicable to the categories. Such action is within the performance of his functions.\textsuperscript{136}

\section{F. The Second Circuit}

By the time the Hooker Chemicals and Plastics Corporation and others filed their petition to review the Administrator's regulations establishing effluent limitations for the phosphate manufacturing industry in \textit{Hooker Chemicals and Plastics Corp. v. Train},\textsuperscript{137} a considerable body of law had accumulated on the jurisdictional issue. Notwithstanding this counsel, the Second Circuit did not find the issue an easy one:

Against this background of puzzling statutory language, ambiguous legislative history and conflicting court decisions, we must decide whether the contested regulations were promulgated pursuant to §§ 301 and 304 or were promulgated exclusively pursuant to § 304.\textsuperscript{138}

Finding the language of the statute "devoid of plain meaning,"\textsuperscript{139} the court turned immediately to the legislative history, seeking the congressional intent. Like the Third and Seventh Circuits before it, the Second Circuit found the remarks of Senator Bentsen\textsuperscript{140} and Senator Muskie\textsuperscript{141} to be persuasive evidence favoring the Administrator's authority to issue both § 301(b) effluent limitations and § 304(b) guide-

\begin{itemize}
  \item \textsuperscript{135} E.I. duPont de Nemours and Co. v. Train (duPont II), — F.2d —, 8 ERC 1718 (4th cir.), \textit{cert. granted}, 96 S. Ct. 3165 (1976). The case is further discussed in the text accompanying notes 201-16 infra.
  \item \textsuperscript{136} \textit{Id.} at —, 8 ERC at 1721.
  \item \textsuperscript{137} 537 F.2d 620, 8 ERC 1961 (2d Cir. 1976).
  \item \textsuperscript{138} \textit{Id.} at 627, 8 ERC at 1965.
  \item \textsuperscript{139} \textit{Id.}
  \item \textsuperscript{140} \textit{LEGISLATIVE HISTORY, supra note 111, at 1283.}
  \item \textsuperscript{141} Senator Muskie, explaining the Conference Report to the Senate, stated: "It is the intention that pursuant to subsection 301(b)(1)(A) and Section 304(b), the Administrator will interpret the term "best practicable" when applied to various categories of industries as a basis for specifying clear and precise effluent limitations to be implemented by July 1, 1977."
\end{itemize}
Comments by Representatives Clausen and Dingell were also accorded weight in that direction.

The Second Circuit also found support in both the House and Senate reports accompanying the original bills, and in the Conference Report itself. None of the passages cited by the court actually specify how or by whom effluent limitations were to be set, but they do clearly indicate that regulations establishing effluent limitations were viewed as independent of the guidelines to be promulgated under § 304(b). Since Congress did not expressly designate the official responsible for promulgating these independent regulations, but did grant the Administrator a general rule-making power, the court concluded that the Administrator was the proper official, and that the court therefore possessed review jurisdiction pursuant to § 509.

The Second Circuit expanded the analysis of the interplay between §§ 301 and 304. In the court's view, the function of the § 304 procedure was to give "concrete definitional content" to the effluent limitations required by § 301. The factors outlined in § 304(b)—cost, age of equipment and facilities, engineering aspects, and non-water quality impacts (including energy requirements)—must be considered by the Administrator in his determination of what constitutes the "best practicable" (or "best available") control technology. Once this standard is determined for a particular category of discharger, the Administrator translates that standard into objective (i.e., numerical) terms. Thus, the ultimate result of the § 304(b) procedure is, according to the Second Circuit, "synonymous with § 301's mandated effluent limitations."

The Second Circuit's treatment of the §§ 301 and 304 relationship differs from earlier cases. The Third Circuit in American Iron, for example, flatly rejected as illogical the idea that the Administrator was to promulgate guidelines that he himself would then follow in setting ef-

---

142. 537 F.2d at 627-28, 8 ERC at 1965-66.
143. Id. at 628, 8 ERC at 1966.
144. The court referred to the Report of the House Committee on Public Works, which stated:

The bill establishes a Federal-State discharge permit program. All permits issued under this program shall be consistent with the specific requirements of the bill, including effluent limitations or other limitations, national standards of performance, toxic and pretreatment standards, and ocean discharge guidelines.

145. 537 F.2d at 628, 8 ERC at 1966.
146. Id.
147. Id.
148. Id. at 629, 8 ERC at 1967.
fluent limitations for specific point sources. The Third Circuit felt that the purpose of the guidelines was to guide the permit grantor in incorporating exact effluent limitations into individual permits. However, the American Iron court also recognized that Congress did not intend a full consideration of the § 304(b) factors at the permit-issuing stage. The Third Circuit resolved this apparent inconsistency by devising a scheme under which § 301 limitations would serve as a "ceiling" which no discharger would be permitted to exceed, and the § 304 guidelines would provide permit-issuing authorities with guidance in establishing more stringent limitations.

The Hooker court, on the other hand, apparently had no trouble accepting the idea that the § 304(b) guidelines were to be developed for the benefit of the Administrator himself. As viewed by the Second Circuit, these guidelines were to serve as background information for the establishment of exact effluent limitations under § 301. In one sense, at least, the decision of the Eighth Circuit in CPC I is compatible with this view. The CPC I court felt that the end product of the § 304 procedure would be precise uniform guidelines, established on a categorical basis, which the permit grantors would follow in setting exact effluent limitations for individual point sources. This appears to be very close to the concept of using guidelines to prepare effluent limitations which was endorsed by the Second Circuit. Indeed, since EPA has elected to promulgate effluent limitation regulations under § 301(b) simultaneously with § 304(b) guidelines, it appears that the guidelines themselves have little independent utility. EPA seems to be using the guidelines the way the Second Circuit thought they should be used, namely, to prepare adequate effluent limitations for § 301(b) compliance.

The nature of the § 301(b) and § 304(b) regulations is treated more fully in the discussion of the uniformity issue below.

G. The District of Columbia Circuit

The D.C. Circuit's opinion in American Frozen Food Institute v. Train is the most carefully reasoned of all the cases to consider the jurisdictional issue. While agreeing with the decisions of the Third, Fourth, Seventh, and Tenth Circuits, and citing many of the same passages from the legislative history of the Act, the D.C. Circuit also devel-

150. Id. at 1043-44, 8 ERC at 1328-29.
151. Id. at 1045, 8 ERC at 1330.
152. 539 F.2d 107, 8 ERC 1993 (D.C. Cir. 1976).
oped some new arguments to support the Administrator's power to promulgate regulations under both §§ 301 and 304.

Beginning with the language of § 301 itself, the court sought to explain why the failure of Congress to include a specific directive to the Administrator to promulgate effluent limitations was harmless error:

This argument [that the Administrator lacks the power to promulgate effluent limitations], based on the employment of the passive tense in relation to effluent limitations, ignores the fact that § 301 begins with the fundamental statutory prohibition that (with named exceptions) "the discharge of any pollutant by any person shall be unlawful." This prohibition which is central to the entire Act is statutory and requires no promulgation.¹⁵³

Citing the general rule-making authority which the Act, in § 501, gives to the Administrator, the court observed:

Under this statute, as we read it, the Administrator has no more important function than carrying out the fundamental purposes of the Act spelled out in § 301.¹⁵⁴

Without the national standards required by § 301(b), reasoned the court, the fifty states would be free to establish widely varying pollution limitations, and, as the court stated:

The plainly expressed purpose of Congress to require nationally uniform limitations upon like sources of pollution would be defeated. States would be motivated to compete for industry by establishing minimal standards in their individual permit programs. Enforcement would proceed on an individual point source basis with the courts inundated with litigation. The elimination of all discharge of pollutants by 1985 would become the impossible dream.¹⁵⁵

Finally, the D.C. Circuit believed itself bound by EPA's reasonable interpretation of its statutory authority:

[W]e conclude that the Administrator's decision to issue "guidelines" under § 304 and "effluent limitations" under § 301 through the same procedures on the same day, and in the same document was a permissible interpretation of the statute which we are required to accept.¹⁵⁶

H. Summary: The Jurisdictional Issue

Two distinct and polar positions can be seen in the decisions of the courts which have faced the jurisdictional issue. At one extreme stands the Eighth Circuit, which held that the Administrator is without authority to promulgate § 301(b) regulations, and therefore, that the courts

¹⁵³. Id. at 128, 8 ERC at 2006.
¹⁵⁴. Id. at 129, 8 ERC at 2006.
¹⁵⁵. Id.
¹⁵⁶. Id. at 131, 8 ERC at 2008.
of appeals are without jurisdiction under § 509(b) to review those regulations. At the other extreme stand the decisions of the Second, Third, Fourth, and D.C. Circuits which held that the Administrator does have the authority to promulgate § 301(b) regulations which are in turn reviewable exclusively in the circuit courts. Between these two positions lies the Tenth Circuit's opinion that, regardless of the Administrator's § 301(b) authority, the proper place to decide the issue is the circuit court.

The conclusion of the majority of the circuits is that the failure of Congress specifically to direct the Administrator to "promulgate" effluent limitation regulations under § 301(b) was simply an oversight. According to these courts, the legislative history, though full of somewhat conflicting statements on the point, exhibits more evidence in favor of the Administrator's authority than against it. Moreover, as the Second and D.C. Circuits correctly observed, the fact that a statute is susceptible to more than one interpretation does not preclude a court from deferring to the administrative agency's choice of one of them, so long as that interpretation is reasonable. The prevailing standards of statutory construction require reviewing courts to accept reasonable agency interpretations of their statutory authority. EPA's interpretation satisfies this standard.

The only contrary view, expressed by the Eighth Circuit, clearly is wrong for at least two reasons. First, the Eighth Circuit's conclusion that the Administrator possesses only the authority to issue § 304(b) guidelines, which are to be followed by permit grantors in setting standards on a case by case basis, flies directly in the face of a clearly expressed congressional intent that effluent limitations are not to be established on a point source by point source basis but rather are to be nationally promulgated on a category or class basis. All of the major reports—Senate, House, and Conference—reflect this preeminent congressional concern. The principal drafters and supporters of the legislation—Senators Muskie and Bentsen and Congressmen Dingell and Clausen—expressed this view time after time. Moreover, the prior failure of federal water pollution control legislation suggests that anything less than uniform national standards would not have been acceptable to the 92d Congress. The few scraps of legislative history cited by the CPC I court in derogation of this principle are simply too weak to be persuasive.

Second, the Eighth Circuit's conclusion that it had no jurisdiction to review the Administrator's § 301(b) regulations because he had no statutory authority to issue them creates a number of serious inconsistencies. It means that the circuit courts could review effluent limitations on an individual case-by-case basis—as each permit-issuing au-
EFFLUENT LIMITATIONS

Authority established them—but could not review the uniform national guidelines upon which they were based. The latter would have to be reviewed in the district courts. More importantly, this conclusion contradicts § 509(b)(1)(E) of the Act which clearly and unequivocally vests the circuit courts with jurisdiction over effluent limitations established by the Administrator pursuant to § 301. The Eighth Circuit's attempt to explain away this precise reference to the Administrator's § 301(b) authority must fail because, as the Third Circuit pointed out, § 301(c), the section to which the Eighth Circuit thought § 509(b) refers, did not even exist at the time § 509(b) was drafted.

Finally, even assuming that both the statute and the legislative history are ambiguous and confusing on the question of the Administrator's authority—which regrettably they are—the Eighth Circuit's refusal to accept the EPA's reasonable interpretation of its own statutory authority was error. A solid line of Supreme Court precedent has established that a reviewing court must accept an administrative agency's interpretation of its statutory authority unless that interpretation is unreasonable.\textsuperscript{157}

Notwithstanding the Eighth Circuit's erroneous interpretation of the statute, its conclusion that the Administrator can issue effluent limitation guidelines under § 304(b) which are binding and enforceable by means of EPA's § 402 veto power is not far from the conclusion reached by the other circuits. The CPC I court merely took a different, albeit incorrect, route to a similar result. If followed, however, the CPC I opinion would create unnecessary problems in the area of judicial review. Moreover, as will be seen, the CPC I approach leads to further confusion on the second issue to be discussed—uniformity in standard-setting.

III

THE UNIFORMITY ISSUE

Establishing the Administrator's authority to promulgate effluent limitation regulations under § 301(b) resolves only one-half of the present controversy. Second, and more difficult, is the question of the legal effect of those regulations. As mentioned earlier, the industry position is that permit-issuing authorities must be allowed sufficient discretion to tailor general effluent limitations to fit the vagaries of individual cases. In support of this position, industry points to situations where compliance with strict effluent standards might result in other undesirable effects like excess water loss through evaporation caused

\textsuperscript{157} See note 92 \textit{supra}. 
by the use of certain control technologies. According to industry, such situations can be avoided only by giving local agencies the flexibility to take local conditions into account when effluent limitations are incorporated into permits.

The EPA, on the other hand, contends that effluent limitations must be kept as uniform as possible; that they must be established on the basis of industrial categories and subcategories, not point sources; and that the truly exceptional case is taken care of by the variance procedure. In the EPA's view, Congress made clear its intention to have effluent limitations established on the basis of categories of point sources, and anything less than that would jeopardize the clean water goals of the Act. Certainly, the task of establishing effluent standards for each point source would create a major administrative burden and thereby perhaps impede EPA's enforcement of the Act.

Notwithstanding EPA's position and the congressional desire for uniform national standards, there are practical problems associated with this approach. The number of factors that must be accounted for in setting such standards, even on a subcategorical basis, are legion. As former Administrator Ruckelshaus described it:

> there is no way that anyone sitting in Washington can properly prepare a document which specifies the effluent limitations for all of the tens of thousands of plants around the country.

> Every plant involves individual factors which differentiate it from others and directly affect what would be the best practicable control technology for that plant.

Thus, a classic dilemma is presented: how does one fashion a uniform rule that takes account of the exceptional case? The cases discussed below evidence several different judicial approaches to this dilemma. The focus of this discussion is upon the EPA regulations affecting existing, rather than new, sources of pollution, although it is recognized that regulations for both types are promulgated simultaneously. Discussion of new source regulations is omitted for two reasons. First, the Administrator's authority to set national standards for new sources is made explicit by § 306(b). Second, new source standards, being prospective in nature, do not create the same problems as standards for existing sources, which require retrofitting old plants with new pollution control equipment or methods.

---

158. See, e.g., Am. Iron and Steel Institute v. EPA, 526 F.2d 1027, 1036, 8 ERC 1321, 1323 (3d Cir. 1975). Excess water loss can result from the use of cooling towers, a control device used to eliminate warm water discharges from power plants.

159. 3 ENV. RPTR.-CURR. DEV. 706 (1972).

160. 33 U.S.C. § 1316(b) (Supp. V, 1975); Am. Iron and Steel Institute v. EPA, 526 F.2d 1027, 1035 n.6, 8 ERC 1321, 1322 n.6 (3d Cir. 1975).
A. The Eighth Circuit

Because the CPC I court found that it lacked jurisdiction to review the Administrator's § 301(b) regulations, it never reached the uniformity issue. However, in a subsequent case, Grain Processing Corp. v. Train, the district court for the Southern District of Iowa, citing the controlling opinion of the Eighth Circuit, did take jurisdiction over this issue. The subject of the lawsuit was the effluent limitation guidelines promulgated by EPA for the Corn Wet Milling subcategory of the Grain Mills Point Source Category. Although it conceded that each plant within the corn wet milling industry was unique and that application of identical technology would not lead to identical results, EPA had nevertheless set single number effluent limitation guidelines for the industry. Industry objected on the grounds that the guidelines (1) did not set out a range of numbers for effluent reduction, and (2) did not specify factors for the permit issuers to follow in setting limitations for particular plants. The court phrased the issue in this fashion:

The Court must determine whether Congress intended to apply the range and factors concepts to subcategories of industries or whether they were to be used in considering the permit for each individual point source.

Turning to § 304(b), the court concluded that Congress intended the guideline regulations to be two-pronged. On the one hand, they were to state the degree of effluent reduction attainable through application of first, BPCTCA, and second, BATEA, on the basis of whole categories. On the other hand, the regulations were to specify factors for the permit issuers to consider in determining, for each individual point source, the best measures to achieve the prescribed levels of discharge.

The court based this conclusion on the language of § 304(b) itself, finding the legislative history too confusing to be dispositive of the issue. In pertinent part that section requires the Administrator to publish regulations which:

162. For example, for the 1977 "best practicable" standard EPA set BOD₅ for any one day at 150 pounds per 1000 square bushel of corn. BOD₅ is a measure of the oxygen-consuming capability of certain wastes. 407 F. Supp. at 101, 8 ERC at 1564.
163. Id. at 104, 8 ERC at 1567.
164. Id. at 102, 8 ERC at 1565.
165. Id. at 103, 8 ERC at 1565.
166. See text accompanying notes 65-66 supra.
167. 407 F. Supp. at 104, 8 ERC at 1566.
168. Id. at 103, 8 ERC at 1565. The court rejected Senator Muskie's interpretation of § 304(b) to the effect that Congress intended the factors described in that section to be considered within categories of point sources rather than by individual point
(1) (A) identify, . . . the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources . . . ; and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources . . . within such categories or classes. . . .

These provisions then are repeated for the 1983 "best available" standard. The factors to be accounted for in assessing both the 1977 and the 1983 levels of technology include: the cost of the technology in relation to the benefits derived from effluent reduction, the age of equipment and facilities involved, the process involved, the engineering aspects of various control techniques, process changes, and nonwater quality environmental impacts (including energy requirements).

On its face, § 304(b) clearly requires the Administrator to make two separate determinations—first, to identify degrees of effluent reduction attainable with 1977 and 1983 technology; and second, to specify factors to be considered in selecting specific control measures to meet these standards. However, the language of § 304(b) makes it unclear whether these determinations are to be made with regard to different subjects. Whereas the statute, in subsection (b)(1)(A), directs that the first determination be made for "classes or categories of point sources," in subsection (b)(1)(B), prescribing the second determination, it uses the phrase "point sources . . . within such categories or classes." No explanation for this change in terminology is evident in the legislative history. However, it is fair to infer from the use of the word "within" that Congress intended the factors specified by § 304(b) to be applied on a less than category-wide basis. It is not fair to conclude, however, that individual application of these factors on a source by source basis is required, since Congress did not specify such a procedure. As with much of the Act's language, § 304(b) is ambiguous.
To resolve the ambiguity, the *Grain Processing* court could have construed § 304(b) to require application of the prescribed factors on a *subcategory*, rather than individual, point source basis. This was the interpretation offered by EPA. The EPA approach was reasonable because (1) subcategories are "within" the larger industrial categories defined by EPA, and (2) subcategorization accounts for design differences among types of industrial plants within a given category. Indeed, as later cases show, the announced congressional intention to avoid point source by point source determinations leaves subcategorization as the only alternative to setting effluent limitations on the basis of large categories only.

The *Grain Processing* court did not choose to adopt this construction. Instead, it interpreted the change in language as an indication of congressional intent that the factors specified in § 304(b)(1)(B) are to be used to determine control measures for each individual point source. The court stated:

As the Court interprets the language of section 304(b), the guideline regulations to be promulgated by the EPA are meant to set forth two basic standards for both the 1977 and the 1983 technologies. First, the guidelines are to "identify ... the degree of effluent reduction attainable through the application of the ... technology ... for classes and categories of point sources ..." [citation omitted]. ... Second, the guidelines should specify the factors which may be taken into account in determining, for each individual point source, the best measures to achieve the application of the relevant technology.\(^{174}\)

The court then went a step further, finding that the guidelines must also establish a range of numbers for effluent reduction:

Thus, the guideline regulations are to be two-pronged. They should state the effluent reduction possible for the entire class or category of point sources within a given range and they should also analyze those factors deemed important for the writing of an individual permit within that range.\(^{175}\)

Thus, the court substituted a "range of numbers" approach for the "single number" approach EPA was using. The court did not explain where it got the idea, but it undoubtedly picked it up from the 1971 Report of the Senate Committee on Public Works, which states:

In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category.\(^{176}\)

---

174. 407 F. Supp. at 104, 8 ERC at 1566 (emphasis added by the court).
175. *Id.*
However, the Grain Processing court failed to indicate with any degree of certainty whether this range of numbers would establish a minimum, or base, level of effluent limitation by which the states, and consequently the dischargers, would be bound. Either the court failed to recognize the need for minimum federal standards as a means of achieving uniformity or it failed to make its position clear on the issue. Hence, the court's statement that "[g]uidelines can be drawn to give the permit issuers some discretion and still preserve uniformity,"[177] is, to some extent, wishful thinking.[178] The court's range of numbers approach would not be inconsistent with the concept of uniform national standards if the court in fact understood the highest number on the range (i.e., the most permissive effluent limitation) to be a minimum level of control. Permit issuers would be bound by the minimum or least stringent limitation, and could relax that minimum only in the case of a formal variance.[179] However, the court's opinion does not disclose whether the court meant the range established by the Administrator to be this rigid.

Although the range of numbers approach, properly understood, constitutes no threat to uniformity, it seems an unnecessary formality to require of EPA's already burdened regulatory program. First, in setting minimum standards for each industrial subcategory, EPA automatically creates a "range" of discharge levels from zero up to the prescribed limit. Second, EPA would find it difficult to forecast situations in which a more stringent level would be appropriate, and would thus find it difficult to fix exact points along a range which would be of any benefit to permit issuers. The decision to require stricter effluent limitations belongs to individual permit issuers. Nevertheless, where identification of a range of numbers is possible it may be appropriate to set them out in the regulations. Such a decision, however, should rest within the agency's discretion in the absence of a clear statutory mandate, which here is lacking.[180]

177. 407 F. Supp. at 105, 8 ERC at 1567.
178. The court also noted that the Administrator's veto power over state-issued permits would help preserve uniformity, id., but this approach hardly seems consistent with the professed congressional desire for uniform national standards. Revocation of permits is, at best, a rather inefficient way to achieve uniformity.
179. The variance procedure is discussed in notes 190-91 infra.
180. The decisions in Am. Meat Institute v. EPA, 526 F.2d 442, 8 ERC 1369 (7th Cir. 1975), Am. Petroleum Institute v. Train (Am. Petroleum II), Nos. 74-1465, 74-1466, 74-1621, & 74-1622 (10th Cir., filed Aug. 11, 1976), E.I. duPont de Nemours and Co. v. Train (duPont II), — F.2d —, 8 ERC 1718 (4th Cir. 1976), and Am. Frozen Food Institute v. Train, 539 F.2d 107, 8 ERC 1993 (D.C. Cir. 1976), discussed infra, are in agreement that the statute does not require EPA to formally establish ranges of effluent limitations within categories of point sources.
B. The Third Circuit

As noted earlier, the Third Circuit, in *American Iron and Steel Institute v. EPA*, 181 believed the § 304(b) guidelines were intended to guide the permit issuers, rather than the Administrator himself, in setting specific effluent limitations for individual dischargers. 182 The court recognized the paradox inherent in establishing supposedly uniform effluent limitations under § 301(b) while permitting those standards to be modified on a case-by-case basis through application of the factors specified by § 304(b). While the court recognized the congressional desire, as expressed in the Report of the House-Senate Conference Committee, for uniformity in setting effluent limitations, 183 it also recognized a counter-balancing intent, as expressed in the Report by the Senate Committee on Public Works, that the § 304(b) factors be considered on a plant-by-plant basis. 184

The *American Iron* court reconciled this seeming contradiction by, in effect, creating its own scheme to mesh the uniformity goal of § 301(b) with the individual considerations required by § 304(b). Under the court's scheme, the Administrator, pursuant to § 301(b), would promulgate effluent limitations on a categorical basis, and these limitations would prescribe the minimum amount of control (the "base" level), or, conversely, the maximum amount of effluent discharge (a "ceiling") permissible. In determining this "base level" and concomitant pollutant ceiling, the Administrator would consider the numerous differences in processes and capabilities of point sources. 185 The Third Circuit did agree that the standards promulgated by the Administrator would be single number effluent limitations.

Having satisfied his obligation under § 301(b), the Administrator would then promulgate guidelines under § 304(b) which would guide the permit issuers in deciding whether, and by how much, the limitation to be applied to an individual point source should be more stringent than the base level (or more stringent than the ceiling). 186

181. 526 F.2d 1027, 8 ERC 1321 (3d Cir. 1975).
182. See text accompanying notes 104-10 supra.
183. S. REP. No. 92-1236, 92d Cong., 2d Sess. 121 (1972):
   The conferees intend that the Administrator or the States, as the case may
   be, will make the determination of the economic impact of an effluent limita-
   tion on the basis of classes and categories of point sources, as distinguished
   from a plant by plant determination.
   limitations to any individual plant, the factors cited above should be applied to that speci-
   fic plant.”
185. Am. Iron and Steel Institute v. EPA, 526 F.2d 1027, 1045, 8 ERC 1321, 1330
   (3d Cir. 1975).
186. To be more stringent than the base level a standard would require more effective
technology. To be more stringent than the ceiling would require a lower amount of effluent discharge. *Id.*
In the Third Circuit's view, Congress intended the states to exercise a limited degree of discretion, carefully circumscribed by the Administrator's guidelines. To support this view, the court cited several passages from the legislative history, indicating a congressional desire that *ranges* of discharge levels be used in establishing the guidelines. Chief among them was the following excerpt from the Report of the Senate Committee on Public Works:

In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the age of plants, their size and the unit processes involved and the cost of applying such controls. In effect, for any industrial category, the Committee expects the Administrator to define a *range* of discharge levels, *above a certain base level applicable to all plants within that category*. In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant. *In no case, however, should any plant be allowed to discharge more pollutants per unit of production than is defined by that base level.*

The Third Circuit's view differs from the *Grain Processing* court's concept of ranges insofar as the latter did not expressly recognize the binding nature of the federally established minimum standards. Thus, *Grain Processing* left open, perhaps inadvertently, the question of whether states can relax, as well as tighten, the federal standards; and if so, by what criteria. *Grain Processing* and *American Iron* are in agreement that the Administrator must promulgate regulations setting forth a specific range of effluent limitations. However, *Grain Processing*, by adopting the *CPC I* holding, would require that these ranges be established as *guidelines* under the authority of §304(b) only, thereby diluting their ultimate effect. *American Iron*, on the other hand, recognized the Administrator's authority to set single number effluent limitations under §301(b) and to issue guidelines under §304(b) containing ranges of more stringent limitations for the benefit of the permit issuers. Finally, both the *Grain Processing* and *American Iron* courts felt that the permit issuers (states) ought to have more discretion in modifying the minimum federal standards than the formal variance procedure advocated by EPA; but *American Iron* apparently would give the permit issuers less discretion than *Grain Processing*. This conclusion is by no means certain, however, since neither court spelled out the procedure through which relaxation of minimum standards would be effected.

Having thus interpreted the relationship of §§301(b) and 304(b), the *American Iron* court turned to the regulations the Administrat-

tor had promulgated for the Iron and Steel Point Source Category and its twelve subcategories. Here the court found that the Administrator's methodology did not comport with the court's interpretation of the statute in several important respects. First, the regulations failed to specify the factors called for by §§ 304(b)(1)(B) and 304(b)(2) (B). Second, they did not specify permissible "ranges" of limitations below the ceiling (i.e., more stringent limitations). The Administrator's response to the court was two-fold. First, he contended that subcategorization itself automatically took all of the required factors into account, and implicitly provided a range of limitations from zero discharge to the specific limitation prescribed. Under this scheme each subcategory limitation constitutes a point along the range of effluent limitations established for a whole category. This range complements the ones within individual subcategories, from zero to the re-established effluent standard. Second, he contended that the variance procedure provided by the statute and EPA regulations provided sufficient flexibility by allowing individual dischargers to obtain variances from the limitations upon a showing that the factors relevant to a particular point source are "fundamentally different" from the factors considered in the establishment of the guidelines.

In answer to the first of these contentions, the court stated that (1) the "range" EPA used was not legitimate because it utilized a

188. 526 F.2d at 1045, 8 ERC at 1330. 189. Id. 190. There are two so-called variance provisions in the Act. The first, in § 301(c), specifically relates to the 1983 standard, enabling a discharger to escape an established effluent limitation after July 1, 1977, provided he can show economic hardship and provided the Administrator is satisfied that reasonable progress toward the elimination of the discharge of pollutants is being made. 33 U.S.C. § 1311(c) (Supp. V, 1975). The second "variance" procedure was created by EPA out of its general rule-making authority under § 501(a), 33 U.S.C. § 1361(a) (Supp. V, 1975), to provide variances from the 1977 standards, since the statute is silent on that point. This procedure was challenged unsuccessfully in Natural Resources Defense Council, Inc. v. EPA, 537 F.2d 642, 8 ERC 1988 (2d Cir. 1976), where the court held that "provisions for variances, modifications and exceptions are appropriate to the regulatory process." 537 F.2d at 646, 8 ERC at 1991. 191. 40 C.F.R. § 406.12 (1975) provides, inter alia:

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. . . . If such fundamentally different factors are found to exist, the Regional Administrator (or the State) shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors.

Variance clauses are included in the effluent limitation regulations promulgated for each category and subcategory of point source. See, e.g., 40 C.F.R. § 415.62 (1975).
standard (zero discharge) which the EPA itself acknowledged could not feasibly be met; (2) the regulations did not specify the factors permit-issuers are to consider; and (3) subcategorization does not reflect any of the innumerable differences within particular subcategories.\(^{192}\)

In answer to the Administrator's second contention, the court found that (1) even if the Administrator's variance procedure is proper it does not satisfy the requirement that the factors called for by § 304(b) be included in his guidelines; and (2) the standard used for granting a variance—"fundamentally different"—provided for less flexibility than Congress contemplated.\(^{193}\) Having concluded that the Administrator's arguments were without merit, the court ordered him to promulgate new guidelines and to reconsider his effluent limitations in light of the base level and ceiling concepts.\(^{194}\)

In sum, the American Iron court's holding stands for three main propositions. First, the Administrator's regulations under § § 301(b) establish a ceiling on discharges for categories of point sources using single number effluent limitations. Second, the Administrator's § 304(b) regulations (1) establish degrees of effluent reduction for categories of point sources within specified ranges below (i.e., more stringent) the established ceiling, and (2) specify factors for permit issuers to consider in adjusting effluent limitations for point sources within categories (or subcategories). Third, a single number effluent limitation may be exceeded only via a formal variance.

C. The Seventh Circuit

In the American Meat case,\(^{195}\) the industrial petitioners focused

\(^{192}\) Am. Iron and Steel Institute v. EPA, 526 F.2d 1027, 1046, 8 ERC 1321, 1330-31 (3d Cir. 1975).

\(^{193}\) Id. at 1046, 8 ERC at 1331.

\(^{194}\) Id. at 1046-47, 8 ERC at 1331.

The American Iron court made one other finding important to this discussion. The industrial petitioners had contended that the effluent limitations should be established on a net rather than a gross basis. In other words, in setting effluent limitations for a particular discharger, the permit issuer must first subtract the amount of pollutants already present in the intake water. Otherwise, one discharger would be forced to clean up water that had already been polluted by other companies. According to petitioners, this would constitute a violation of due process. Id. at 1056, 8 ERC at 1338.

The court found merit in this contention. Indeed, the Administrator himself had recognized this problem and had proposed regulations to allow credits for pollutants already in the water. Id. The proposed regulations would essentially leave the decision to allow or disallow a credit to the Regional Administrators. The Third Circuit, however, felt that the regulations ought to carefully define the scope of this discretion and clearly instruct the Regional Administrators as to those circumstances under which a credit must be given. The Administrator was ordered to draft such regulations. Id. at 1056, 8 ERC at 1339.

\(^{195}\) Am. Meat Institute v. EPA, 526 F.2d 442, 8 ERC 1369 (7th Cir. 1975).
their attack on the substantive, rather than the procedural, aspects of the Administrator's §§ 301 and 304 regulations for the Meat Products Point Source Category and its four subcategories. Nevertheless, the question of the Administrator's power to set across-the-board effluent limitations pursuant to § 304(b) was raised by amici curiae. Rather than conducting an extensive investigation of the statute and its legislative history to answer this question, as the Third Circuit had done, the Seventh Circuit simply followed the command of the Supreme Court in Train v. Natural Resources Defense Council, Inc., and accepted the EPA's interpretation of its own authority.

The Seventh Circuit also accepted, without discussion, the validity of EPA's variance procedure. The variance procedure was the subject of greater judicial scrutiny in subsequent cases and is treated more fully below.

D. The Fourth Circuit

In duPont I the Fourth Circuit decided it had jurisdiction to review the Administrator's regulations under §§ 301(b) and 304(b). In duPont II the same court considered the second part of the dispute. Once again, industry took the position that the guidelines called for by § 304(b) were to be considered by, but not be binding upon, the permit issuer. EPA, on the other hand, argued that effluent limitations established by regulation were, with certain exceptions, to be applied uniformly across the nation by permit issuers. The regulations issued by EPA, though termed "effluent limitation guidelines," were actually a combination of the § 301(b) effluent limitations and § 304(b) guidelines, and were intended to bind permit issuers.

Reflecting its earlier view of the dubious value of the Act's legislative history, the Fourth Circuit approached the uniformity issue from a pragmatic, as opposed to a legalistic, perspective. Turning first to the statute itself, and the definition of effluent limitation—"any restriction established by a state or the Administrator"—the court concluded

196. The petitioners contended that the data base did not support the EPA regulations. Id. at 452-66, 8 ERC at 1376-87.
197. 421 U.S. 60, 87, 7 ERC 1735, 1744 (1975).
198. 526 F.2d at 452, 8 ERC at 1376. The court had previously taken a similar position on the jurisdictional issue as well.
199. Id. at 499 nn.14 & 15, 8 ERC at 1373 nn.14 & 15.
202. Id. at —, 8 ERC at 1721.
that both the Administrator and the states were empowered to set effluent limitations. Given this framework, the question then became: whose standard should control? The court answered this question as follows:

For all sources, both existing and new, we believe that the solution which most nearly satisfies the congressional intent is recognition that the [Administrator's] regulations are presumptively applicable to permit applications. The regulations control unless that presumption is rebutted.

The effect of this ruling was to make EPA's standards uniformly applicable unless a discharger could demonstrate that his situation merited an exception to the uniform standard. However, the court did not say who was to decide whether an exception was warranted or what type of showing was required to win an exception. Presumably, since the court recognized the authority of both the states and the Administrator to set effluent limitations, either authority could grant the exception. But the exception question raises a more difficult problem: namely, what factors must be shown to rebut the presumption that the national standard applies to a particular discharger?

The Fourth Circuit did not answer this question directly, but it did furnish a general hint:

The balance of general rule and narrow exceptions assures all possible uniformity without sacrifice of the flexibility needed to adjust for disparate plants in dissimilar circumstances.

The court also referred to the variance procedures provided by the Act and EPA regulations. However, the court did not discuss these procedures in any detail, particularly the "fundamentally different" standard which EPA uses to determine whether a variance ought to be granted. Consequently, it is impossible to know whether the court envisioned a rebuttable presumption standard which would be as stringent as EPA's variance standard. The court's reference to plants in "dissimilar circumstances," however, seems to indicate that a lesser standard was contemplated to rebut the presumption. If so, EPA would need

204. — F.2d at —, 8 ERC at 1722.
205. Id. at —, 8 ERC at 1722 (emphasis added).
206. Id. (emphasis added).
207. See notes 190-91 supra.
208. — F.2d at —, 8, ERC at 1722.
209. In a very recent decision, the Fourth Circuit has further clarified its position on the rebuttable presumption question. In Appalachian Power Co. v. Train, — F.2d —, 9 ERC 1033 (4th Cir. 1976), the court said that the single number limitations issued under § 301 are presumptively applicable only and therefore are not "so rigid as to compel an inflexible application of the Act." — F.2d at —, 9 ERC at 1038. Furthermore, the court called the clause allowing for modification of the 1977 effluent limitations for
additional regulations to define precisely what constitutes “dissimilar circumstances.”

The Fourth Circuit also agreed with EPA’s use of subcategorization and single number effluent limitations to effectuate the objectives of the Act. On the question of categorization, the court noted the disparity between the language of § 301(b)(1)(A), calling for 1977 “effluent limitations for point sources,” and § 301(b)(2)(A) calling for 1983 “effluent limitations for categories and classes of point sources,” and was unable to explain it. However, the court refused to require EPA to “start over and make the 1977 determinations on the basis of many thousands of individual plants” because that would certainly postpone attainment of the Act’s objectives. Under the circumstances, the court felt it would be best to allow the permit grantor to apply the factors specified by § 304(b)(1)(B) to individual point sources, and grant variances where warranted.

Regarding the promulgation of single number effluent limitations, the Fourth Circuit expressly rejected the conclusion of the Third Circuit that the regulations must provide a range of numbers. Whether a range is required for certain categories is a matter to be left to the expertise of the Administrator. The Fourth Circuit also saw nothing wrong with identifying a range from zero up to the amount specified in the limitation, reasoning that the Act’s ultimate goal is the elimination of all pollutant discharges.

Regarding the use of the § 304(b) factors, which caused the Third Circuit so much trouble, the Fourth Circuit said:

We construe the congressional intent to be that the specified factors shall be applied by the permit issuer in determining whether the presumptively valid effluent limitations should apply to a particular source of discharge.

“fundamentally different” plants “unduly restrictive” because of its failure to consider cost in a variance request. Id. at —, 9 ERC at 1038-40.

On August 31, 1976, the court modified its earlier opinion by requiring EPA, in coming forward with “a meaningful variance clause,” to take into consideration the factors, applicable to existing sources, set forth in §§ 304(b)(1)(B) and 304(b)(2)(B). 7 ENV. RPTR.—CURR. DEV. 726 (1976). The court stated that the 1977 standards for existing sources should not be more stringent than the 1983 standards, and that reference to the 1983 standards, in the variance clause, is necessary for determination of whether the 1977 standards have been more stringently applied. Id. The court remanded to EPA the 1977 variance clauses for the Steam Electric Power Point Source Category so that these changes could be made.

210 F.2d at —, 8 ERC at 1722.
211 Id.
212 Id. at —, 8 ERC at 1723.
213 Id.
214 Id.
215 Id.
Once again, the court failed to indicate how much latitude the permit issuers should have in applying the factors and determining whether, in a given case, the uniform national standard ought to be relaxed. Of course, EPA retains the power to veto any state-issued permit within ninety days, but it is unlikely that EPA possesses the administrative capability to monitor adequately the thousands of permits which must be issued annually under the Act.

E. The Tenth Circuit

In *American Petroleum Institute v. Train (American Petroleum II)*, the Tenth Circuit joined the growing list of courts holding that EPA has the authority to issue regulations establishing uniform, nationwide effluent limitations. However, the court did not totally accept the EPA interpretation regarding the legal effect of those regulations. Finding the Act "ambivalent" on the question of whether EPA's effluent limitations are uniformly applicable nationwide or are to be used merely for guidance by states issuing NPDES permits, the court rejected the EPA claim that the regulations "must be mechanically cranked into each permit." Instead, the court sought an "accomodation" between the EPA and the industry positions.

The accommodation chosen by the Tenth Circuit was the same as that adopted by the Fourth Circuit in *duPont II*: namely, that EPA's regulations are only "presumptively applicable" to each permit applicant. Strangely, though, the court refused to invalidate the EPA regulations, which had not been issued as rebuttable presumptions. For the purpose of "general rule making," said the court, "we accept the use of single numbers in the effluent limitations under consideration." Like the Fourth Circuit, the Tenth Circuit apparently felt that determination of the applicability of EPA standards to individual point sources must await concrete factual situations. Unfortunately, the Tenth Circuit, like the Fourth Circuit, ventured no suggestions regarding the criteria to be used in determining whether, in a given case, the national standard or something less stringent ought to be applied.

Both the *American Petroleum II* and *duPont II* decisions raised the possibility of practical enforcement problems with their rebuttable

\[\text{References:}\]

2. *Id.* at —, 9 ERC 1252 (10th Cir. 1976).
3. *Id.* at —, 9 ERC at 1257.
4. *Id.*
5. *Id.*
6. *Id.* at —, 9 ERC at 1259.
presumption approach to EPA's §§ 301-304 regulations. First, this approach invites litigation over every permit employing national standards as effluent limitations. As a result, enforcement agencies will be spending more time than necessary defending, rather than monitoring compliance with, selected effluent limitations, and enforcement will be less effective. Second, without fairly specific criteria to guide them, permit issuers will be at a loss to decide, in the first instance, when to "mechanically crank" the national standards into permits and when to devise alternative effluent limitations. Development of appropriate criteria is complicated by the fact that the Act does not provide for "rebuttable effluent limitations," and therefore offers no guidance regarding the test to be applied. Third, where permit issuers are entitled to modify national standards, particularly by devising less stringent limitations, they will be combining rule-making (i.e., standard-setting) with enforcement (i.e., permit-issuing) activities. This approach cuts sharply against the procedure envisioned by Congress by which effluent limitations were to be published well ahead of permit issuance so that industry could develop suitable means of compliance.222

F. The Second Circuit

The Second Circuit made even shorter shrift of industry arguments in Hooker Chemicals and Plastics Corp. v. Train223 than did the Fourth Circuit in duPont II. Regarding the industry allegation that the Administrator's regulations for the Phosphate Manufacturing Point Source Category violated § 304(b)(1)(B) by failing to specify the required factors, the court simply took EPA at its word that these factors had been considered in arriving at the final regulations.224

Regarding the allegation that the regulations were invalid because they failed to prescribe permissible ranges of discharges within each category and subcategory of existing sources, the Second Circuit stated:

We disagree with this argument and believe that whenever Congress spoke of "ranges" in the debates over the Act, it meant only the spectrum comprised of various discharge levels on a subcategorical, rather than individual, basis. . . . Congress intended that the regulations establish a single discharge level for a given subcategory. This is implicit in the Congressional choice of the superlative form in the statutory language requiring achievement of the degree of effluent reduction attainable by the application of "best" technology.225

223. 537 F.2d 620, 8 ERC 1961 (2d Cir. 1976).
224. Id. at 630, 8 ERC at 1967-68.
225. Id. at 630, 8 ERC at 1968.
The Second Circuit did not discuss the problem of the atypical plant in the *Hooker* case, but it did deal with this problem in a companion case, *Natural Resources Defense Council, Inc. v. EPA.*\(^{226}\) In that case, the Natural Resources Defense Council challenged EPA's variance regulations\(^{227}\) on the ground that they violated the congressional direction that variations among dischargers be dealt with in rule-making proceedings on a categorical basis, and not by adjudicatory proceedings on an individual permit basis. In the NRDC view, categorization is the exclusive method for accounting for point source differences. The availability of the variance procedure would allow a "Balkanization" of the regulatory process, according to NRDC.\(^{228}\) The court rejected these arguments in favor of EPA's contention that, while Congress clearly intended effluent limitations to be uniform, it also intended that uniformity be required only for plants "similarly situated." Thus, according to EPA, the variance procedure was a needed "administrative safety valve" to insure that distinct plants receive appropriate differential treatment.\(^{229}\) The court further explained the rationale for using a variance procedure:

In the context of the Federal Water Pollution Control Act Amendments the variance provision is peculiarly appropriate. The sheer number of point sources potentially subject to regulation and the rapidly approaching statutory deadlines required the EPA to restrict itself in the regulation promulgation process to a representative sampling of plants. It is entirely possible that the resulting regulations will prove ill-suited to some of the unsampled individual plants to which they will be applied in the permit process. Unless the variance clause is established there is no guarantee that such a defect could be effectively remedied if it occurred.\(^{230}\)

Thus, unlike the Third Circuit, which in *American Iron* found the EPA variance procedure too inflexible and incapable of satisfying the dictates of § 304(b) because it does not give the permit grantors enough discretion, the Second Circuit found the procedure the perfect mechanism for permit grantors to exercise independent judgment.\(^{231}\) Interestingly, the court did not ground EPA's authority to create the variance procedure upon § 304(b), or even § 301(c), but upon § 501 (a), the section vesting EPA with general rule-making power.\(^{232}\)

In sum, the Second Circuit's solution to the uniformity issue was to allow EPA to establish single number effluent limitations on a cate-

---

226. 537 F.2d 642, 8 ERC 1988 (2d Cir. 1976).
228. 537 F.2d at 646, 8 ERC at 1991.
229. *Id.*
230. *Id.* at 647, 8 ERC at 1991-92.
231. *Id.* at 647, 8 F.R.C at 1992.
232. *Id.*
gorical basis, and to establish a variance procedure allowing permit grantors to modify the uniform standards for point sources which can be shown to be "fundamentally different" from the norm.

G. The District of Columbia Circuit

Citing much of the same legislative history it used to decide the jurisdictional issue, the D.C. Circuit in *American Frozen Food Institute v. Train* joined the Second, Fourth, Seventh, and Tenth Circuits in rejecting the industry contention that the Administrator was required to set guidelines and limitations for individual point sources of pollution rather than by categories and subcategories of industry as the Administrator had done:

As we have pointed out in Parts I and II, both the legislative history of the Act and its statutory structure and language mandate our rejecting the argument that the Act required the Administrator to set "guidelines" and "efluent limitations" for individual plants.

The solution to the problem of taking the atypical plant into consideration, said the court, lay not in the standard-setting procedure but in the permit-granting process and in the variance procedure:

We believe that Congress intended individual plant considerations to be taken into account within the nationally set effluent limitations in the granting of state permits under §§ 402(b) and (c), or the granting of federal permits under § 402(a)(1). Additionally, tightly drawn variance procedures are provided for 1983 limitations by § 301(c) and for 1977 standards by 40 C.F.R. §§ 407.42 and 407.52 (1975).

Nor did the D.C. Circuit see any need for the Administrator to establish a "range" of effluent limitations within industrial categories. The court could find no such requirement in the statute itself and felt that, if there were an implicit requirement, it would be met by the fact that the permit issuing authority under § 402 would be able to employ any limitation it found appropriate for a specific plant which fell between a "range" of zero pollutant discharge and the nationally set effluent limitations. In those cases where a range of less stringent limitations were called for, the permit issuer could employ the variance procedure to excuse compliance with the national standards for those plants able to demonstrate "fundamentally different" factors affecting their performance.

---

233. 539 F.2d 107, 8 ERC 1993 (D.C. Cir. 1976).
234. Id. at 131, 8 ERC at 2008.
235. Id.
236. Id. at 140, 8 ERC at 2015-16.
237. Id.
different" standard without discussing its compliance with congressional intent.

Ironically, the D.C. Circuit cited the Third Circuit's *American Iron* opinion in support of its conclusion that a range of effluent limitations, beginning with zero discharge, was automatically created whenever the Administrator set a national standard.288 The Third Circuit had specifically rejected this identical argument by EPA in the *American Iron* case.239 Moreover, the Third Circuit had also rejected EPA's contention that the variance procedure provided the flexibility needed to take the factors specified in §§ 304(b)(1)(B) and (b)(2)(B) into account.240 Yet the D.C. Circuit accepted this contention without discussion.

Although it relied primarily on its reading of the statute and the legislative history in deciding the uniformity issue, the D.C. Circuit also found the Administrator's own interpretation reasonable and therefore binding.241 Additional support for its conclusion was found in the opinions of the Fourth, Seventh and Third Circuits discussed above. What the D.C. Circuit neglected to mention, however, was that, while all of these courts reached somewhat similar conclusions on the essential issue, not all of the courts interpreted the Administrator's responsibilities under §§ 301 and 304 in the same way. Only the Second and D.C. Circuits totally accepted the EPA interpretation of its statutory responsibility.

The D.C. Circuit also had some rather stinging criticism for the Eighth Circuit's view that EPA has no power to set national effluent standards:

> In our view any interpretation of this profoundly important statute which denied the Environmental Protection Agency the power to set nationally effective standards would be a clear refusal to follow the intent of the Congress and a gross misinterpretation of the statute itself.242

In recent rebuttal, the Eighth Circuit, in *CPC International Inc. v. Train (CPC II)*,243 denied the D.C. Circuit's accusation that its *CPC I* opinion had "failed to see the forest for the trees," and re-affirmed its belief that the "nonambiguous passages" of the Act's legislative history required it to reject EPA's interpretation.244 The chief reason

---

238. *Id.*
239. See text accompanying notes 185-86 *supra*.
240. See text accompanying note 193 *supra*.
241. 539 F.2d at 131, 8 ERC at 2008.
242. *Id.*
244. *Id.* at 2 n.1.
cited by the Eighth Circuit for this renewed rejection was the failure of the EPA, and all the other circuit courts, to explain why, if EPA itself could set limitations under § 301, Congress would have given EPA a veto power (§ 402(d)(2)) over permits not in conformity with § 304 (b) guidelines:

The reference in this veto provision to the § 304(b) guidelines and the extensive debate which preceded the addition of § 402(d)(2) to the final draft of the statute are inconsistent with the EPA's contention that it has the power to issue effluent limitations for existing plants by regulation under § 301. The District of Columbia Circuit and the Seventh Circuit ignore this language. The Third Circuit deals with the language... but its reasoning is unpersuasive.

The Eighth Circuit's continued rejection of EPA's interpretation seems to be based on the court's inability to find convincing evidence in the statute or the legislative history to support EPA's claim to an implied power to set effluent limitations under § 301(b). This inability is understandable since all of the available information is ambiguous on this point. Furthermore, the Eighth Circuit denies that its own interpretation would "emasculate" the Act, as claimed by the D.C. Circuit.

Under our ruling, the limitations written into individual permits for existing point sources should be substantially similar to those written into permits if the EPA's theory of the Act were to be adopted.

In its new opinion, the Court acknowledged the anomalies created by its interpretation, but declared itself powerless to correct them because that would require amendatory legislation. Having once acknowledged that the two constructions both create anomalies, however, the Eighth Circuit could have deferred to the administrative interpretation, following the counsel of Train v. Natural Resources Defense Council, Inc.

The D.C. Circuit recently decided another case, American Paper Institute v. Train, which reaffirms its American Food decision. In upholding the EPA's effluent limitations guidelines for five subcategories of the Pulp, Paper and Paperboard Industry Point Source Category, the court affirmed the lower court's decision that the Administrator has the authority to promulgate single number, nationally uniform effluent limitations pursuant to §§ 301 and 304. The decision marked the first time a federal court has not remanded any part of contested effluent limitations to EPA.

245. Id. at 3 n.1.
246. Id. (emphasis added).
249. Id. at —, 9 ERC at 1071.
H. Summary: The Uniformity Issue

As with the jurisdictional issue, two distinct and polar positions can be discerned in the opinions of the courts which have considered the uniformity issue. At one extreme stands the Eighth Circuit's CPC I opinion and its progeny, Grain Processing, which hold that the Administrator has no statutory authority to set uniform national effluent limitations, but rather, according to Grain Processing, must promulgate "ranges" of effluent limitation guidelines, based on categories of point sources, to be followed by permit issuers in setting specific effluent limitations for individual point sources. Under this view, effluent limitations are established on a permit by permit basis, but the EPA guidelines are nevertheless binding on the permit issuers, and are enforceable through EPA's § 402 veto power.

At the other end of the spectrum lie the opinions of the D.C. and Second Circuits, under which the Administrator has the authority to set uniform national effluent limitations for categories and subcategories of industrial point sources without formally establishing ranges of permissible discharges within each category or subcategory. Under this view, permit issuers have the authority to set effluent limitations for individual point sources that are more stringent than the nationally promulgated standards, and have the authority to set less stringent limitations pursuant to an administratively established variance procedure in the event a discharger can demonstrate that his plant is "fundamentally different" from others within his subcategory.

Between these two positions lie the decisions of the Third, Seventh, and Fourth Circuits. In the Third Circuit's view, the Administrator must establish uniform effluent limitations under § 301(b), which provide a "ceiling" for dischargers on a categorical basis, but he also must promulgate effluent limitation guidelines under § 304(b) which provide the permit issuer with "ranges" of effluent limitations within categories and subcategories, and which specify factors to be taken into account by the permit issuers in setting effluent limitations for individual point sources. While it is clear that the Third Circuit recognizes the right of permit issuers to set effluent limitations more stringent than the national standard, it is less clear whether that court would agree that the permit issuer could only grant a variance upon a showing of "fundamental difference" which is what EPA regulations require. From the court's rejection of EPA's variance procedure, it can be inferred that the Third Circuit believes a lesser degree of difference may be adequate.

Although the Seventh Circuit did not deal with the procedural aspect of the Administrator's §§ 301-304 regulations in as great detail as
the other courts, it did conclude that EPA's interpretation calling for across-the-board effluent limitations is a permissible one within the language of the Act; and therefore, under the Supreme Court's holding in *Train v. Natural Resources Defense Council, Inc.*,\(^5\) is binding. The court also cited the EPA variance procedure, but did not discuss whether this procedure is an appropriate means for permit issuers to modify national standards in individual cases.

In the Fourth Circuit's view, the uniform national effluent standards set by the Administrator are "presumptively applicable" to categories and subcategories of point sources, and the Administrator is not required to, but may in his discretion, establish "ranges" of discharges within given categories. The Fourth Circuit recognizes the authority of the permit issuer to modify the national standards when presented with evidence that rebuts the presumption of applicability. While it is clear that the Fourth Circuit considers the factors specified in §§ 304(b)(1)(B) and (b)(2)(B) relevant evidence in this respect, it is less clear what standard of proof the court would require to rebut the presumption. Although the court cited the EPA's formal variance procedure as a source of authority for permit issuers to modify national effluent standards, it also referred to point sources in "dissimilar circumstances" as a basis for adjusting uniform standards—clearly a lesser standard than the "fundamental difference" test of the EPA variance procedure.

Out of this confusing mass of judicial opinion, only one view seems predominantly consistent with the purpose and intent of the Act—the view espoused by the Second and D.C. Circuits.\(^251\) First, it seems beyond doubt that Congress intended the § 301(b) effluent limitations to be "uniform as possible."\(^252\) The Senate, House, and Conference Reports are all in agreement on this point. Statements of individual congressmen are also supportive. Furthermore, although congressional intent on this point is less manifest, it seems only natural that Congress intended the Administrator to be the one to set the national standards. National standards could hardly be formulated by the several states in the individual permit process. Both the Second and D.C. Circuits' holdings are entirely consistent with this view.

Second, it seems equally clear that Congress did not envision a plant-by-plant determination of whether the national standards ought to be applied to a particular source. Rather, the legislative history, particularly the Report of the House-Senate Conference Committee, clear-

---

250. 421 U.S. 60, 7 ERC 1735 (1975), discussed in note 92 supra.
251. The decision of the Seventh Circuit was not inapposite, but the court did not elaborate on its holding that EPA's interpretation is reasonable so it is difficult to use its decision as precedent.
ly indicates a congressional desire that the applicability of national standards to particular sources be determined on a categorical, not individual, basis. As a practical matter, a plant-by-plant determination undoubtedly would prove administratively unworkable. It would certainly destroy the goal of uniformity. Under these circumstances, the EPA's use of subcategories to differentiate within larger categories of point sources is entirely compatible with the congressional desire. Both the Second and the D.C. Circuits' endorsement of the EPA position is correct.

Third, it is clear from the legislative history behind § 304(b) that congressional references to "ranges" of discharges were not intended to undercut the uniform national effluent standards established under § 301(b). However, it is not apparent what function these "ranges" were intended to play in the establishment of national standards. The statute itself does not mention "ranges" and the legislative history, though it clearly contemplates consideration of ranges of discharge levels, does not reveal what the Administrator, or the permit issuer, is to do with ranges once they are established. Perhaps Congress had in mind the states' power, under § 510, to establish standards stricter than the national standards, and the ranges were intended to provide guidance in that direction. In any event, the establishment of a single number limitation automatically establishes a "range"—from zero to the established limitation. The D.C. Circuit recognized this fact when it approved EPA's regulations for the iron and steel industry incorporating this approach.

Fourth, it is apparent that Congress was also intent upon demanding similar compliance from similarly situated dischargers, but conversely, not upon demanding the same level of performance from dischargers in dissimilar situations. The only question is, how dissimilar must the situations be before an exception is warranted? Unfortunately, Congress neglected to supply specific guidance on this point, although it did enumerate, in general terms in § 304, the factors to be considered. Moreover, the D.C. Circuit, though it referred to the EPA variance procedure with approval, did not venture any opinion regarding the quantum of proof necessary to win a variance. In fact, all of the courts which have considered this problem have hedged their answers, preferring to wait for specific cases to decide the issue. While such restraint may be appropriate for courts, which must decide real,

253. See id. at 125.
and not hypothetical, controversies, it does not provide any guidance to permit issuers.

In the absence of legislative or judicial guidance, one can only speculate whether the administrative standard of "fundamental difference" is appropriate to the variance procedure. One thing is clear, however; Congress was keenly aware that some, perhaps many, industrial dischargers, particularly the older ones, would not be able economically to comply with the effluent limitations and would be forced out of business.\textsuperscript{256} In only two instances did Congress provide for individual variances based on cost: in § 301(c) (dealing with the 1983 BATEA standard), and § 302(b)(2) (dealing with water quality requirements). A reasonable conclusion to be drawn from these specific inclusions is that Congress did not intend a general cost-based variance to be available. As one commentator has expressed it:

This uniformity [in federal standards] would be lost if individual cost-based variances could be granted, especially where the standards are enforced through a permit program administered by the states, which may have varying attitudes toward variance applications. Thus, apart from the cost variance provided for the 1983 "best available" standard by § 301(c), cost is not a factor in applying effluent standards to individual dischargers.\textsuperscript{257}

The administration of the variance procedure now appears to be a crucial link in the regulatory chain which is intended to pull industry into compliance with the 1985 goal of zero discharge. The presence of national effluent standards will be of little use if permit issuers are allowed to destroy uniformity on a piecemeal basis by granting variances in large numbers of cases. EPA will find it difficult to perform its technology-forcing duty under the Act if its commands are being ignored at the other end of the process. The variance procedure admittedly is a necessary "escape valve" in the regulatory process, but it remains to be seen whether those permitted to escape will outnumber those confined by the uniform standards.\textsuperscript{258}

\textsuperscript{256} For example, the Report by the Senate Committee on Public Works states:

In some cases, where industries have done nothing, their capacity to comply may be stretched to the limit. The Committee recognizes this, and suggests that to provide opportunity for further delay would only reward polluters who ignored the requirements of the 1965 Act and penalize those discharge sources who moved quickly to comply.


\textsuperscript{258} Experience in the field of land use regulation, particularly in zoning laws, has demonstrated the abuses inherent in a too-lax variance procedure. \textit{See generally} Shapiro, \textit{The Zoning Variance Power}, 29 Md. L. REV. 1 (1969); Wexler, "A Zoning Ordi-
As a matter of law, the decisions of the Second, Seventh, and D.C. Circuits are, in general, based on a sounder rationale than those of the other circuits. Like all of the courts, these circuits searched the statute and the legislative history, finding some support for their conclusions and some conflicting evidence. Rather than attempting to resolve all such conflicts, as other courts did, these circuits followed the principle recently reaffirmed by the Supreme Court that an administrative agency's reasonable interpretation of its statutory authority is binding upon a reviewing court. 259

Furthermore, the arguments advanced by the other circuits in support of their various conclusions are not persuasive. For the reasons previously stated, the decision of the Eighth Circuit must be rejected because its interpretation would render the uniformity goal a nullity.

The Third Circuit, while it understood the principal purpose of the Act, became entangled in the admittedly confusing lines of thought expressed in the legislative history. Instead of simply accepting EPA's construction of the statute, which was at least a permissible one, the court substituted its own. That interpretation introduced an unnecessary element of uncertainty into the legal effect of the national standards.

The court's rejection of the idea that the § 304(b) guidelines may sensibly serve as guides for the Administrator in setting limitations as well as for the permit issuers seems unwarranted. There is no reason why the factors required by § 304(b) should not be considered in setting both the minimum federal standards and the more stringent state standards. Hence, if one accepts the Administrator's authority to set the minimum federal standards, which the Third Circuit did, one should also accept his use of the § 304(b) guidelines in arriving at such standards. Furthermore, the court's belief that the states, as permit issuers, should have broad discretion in setting individual effluent limitations is inconsistent with its finding that the Administrator's promulgated standards could be made only more stringent by the states. A range of limitations from zero to the established "ceiling" is all that is required to provide the states with the necessary discretion. Finally, the Third Circuit's abrupt dismissal of the EPA variance procedure as too inflexible was ill-considered, and did not take into account the strong congressional desire that uniform national standards, once established, should not be rendered meaningless through liberal exceptions.

Likewise, the Fourth Circuit, although professing to be bound by the reasonable interpretation of the EPA, nevertheless created the

259. See note 92 supra.
EFFLUENT LIMITATIONS

"presumptive applicability" concept, an idea that must have been a product of judicial imagination since there is absolutely no support for it in either the Act or its legislative history. Having accepted a part of the EPA's interpretation, it would have been more consistent to have accepted the whole, rather than erecting additional obstacles to the legal efficacy of the national standards.

CONCLUSION

The importance of uniform national effluent standards to accomplishment of the lofty objectives of the Federal Water Pollution Control Act Amendments cannot be overemphasized. The lack of uniform standards has in the past led to lax standards, and consequent water quality deterioration, in certain areas of the country. Industries were dissuaded from locating in states with strict water quality standards. Localities downstream from permissive jurisdictions were unable to maintain desired water quality. Consequently, in the 1972 Amendments to the Federal Water Pollution Control Act, Congress deliberately rejected past water pollution control strategies and adopted a uniform approach to standard-setting.

Unfortunately, as clear as the congressional dissatisfaction with non-uniform standards appears in the legislative history of the 1972 Amendments, particularly in the Report by the Senate Public Works Committee, the drafters of the Amendments failed to spell out the procedure by which uniform effluent standards for existing sources were to be set. Rather than explicitly directing EPA, in § 301(b), to establish such standards for existing sources, as they had done for new sources in § 306, the drafters chose ambiguous language which merely required that effluent limitations "be achieved" by prescribed deadlines. This use of the passive voice created a problem because, under the general scheme of the Act, it was contemplated that the EPA would initially administer the national discharges permit program created by the Act, but that the states would eventually assume responsibility, subject to EPA approval, for this program. In light of this objective of federalism, and in the absence of statutory designation, it was unclear which of these entities had the power to promulgate regulations setting effluent standards for existing sources.

Without any clear indication of congressional intent, the courts considering the effluent limitations controversy have reached conflicting conclusions. Consequently, the Supreme Court has been called upon to decide (1) who has the authority to set effluent limitations (the Administrator or the permit issuer); (2) how the limitations are to be set (uniformly, on the basis of categories of point sources, or individually, on a case-by-case basis); (3) what legal effect the standards
set by the Administrator have, if indeed he is the proper official to set them (binding except for a formal variance, or only erecting rebuttable presumptions); and (4) where the limitations (if set individually) or standards (if set uniformly) must be reviewed (in the courts of appeals or in the district courts).

The decisions expected of the Supreme Court in the duPont cases will be very significant, since the Administrator has nearly finished setting effluent standards for all existing categories of industrial point sources, and, except in the area affected by the Eighth Circuit's opinion (CPC I), has promulgated regulations under both §§ 301(b) and 304 (b). Should the Supreme Court decide that the Administrator does not have § 301(b) authority, these regulations are likely to be invalidated. Furthermore, Congress is not at this time considering statutory amendments to clarify the Administrator's authority. Thus, the task of unravelling the controversy falls to the Supreme Court.

If the Supreme Court is to find any golden thread in the tangle of statutory provisions and legislative history surrounding this controversy, it must be that Congress intended effluent limitations to be as uniform as possible. With this concept firmly in place, most of the confusion generated by the numerous litigants can be avoided. Any construction of the statute which would render the goal of uniformity unattainable must be rejected. What this means in practice, of course, is that EPA's interpretation must be accepted. It must be accepted not because it is the only one possible, but because it is a reasonable attempt to carry out the congressional mandate that similar point sources be treated in a similar fashion. EPA achieves this goal by dividing broad categories of point sources into smaller subcategories with similar, if not identical, designs; minimum effluent standards are then established for each subcategory. For truly exceptional cases a variance procedure, requiring more than a showing of financial burden, is provided. This approach provides as much flexibility as is possible without a case-by-case determination of effluent limitations, and it finds support in the legislative history of the 1972 Amendments which, if nothing else, demonstrates that such a plant-by-plant determination was not contemplated when Congress created the effluent limitation device.

In the final analysis, the decisions of the Second, Seventh, and D.C. Circuits represent a justifiably restrained approach to the interpretation of this ambiguous statute. Certainly the temptation is great to exercise judicial license in weighing the myriad sentiments expressed in the legislative history of the 1972 Amendments. But the need to simplify the already complex administrative structure of the Act argues against fashioning novel, but cumbersome, regulatory schemes. Unless the Supreme Court in the duPont cases determines that EPA's adminis-
trative approach is grossly out of line with the basic intent of the Act, it undoubtedly will endorse it. Perhaps then the difficult standard-setting phase of the Act can be quickly completed and the even more difficult enforcement phase can be accelerated. If that does not happen, the prospects for even approaching the Act's goals within the allotted time frame are bleak indeed.
## APPENDIX A

### CASE LAW REGARDING THE EFFLUENT LIMITATIONS CONTROVERSY

<table>
<thead>
<tr>
<th>Cases</th>
<th>Jurisdictional Issue</th>
<th>Uniformity Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Courts of Appeals</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. <strong>CPC I</strong> (8th Cir.)</td>
<td>Administrator does not have authority to promulgate regulations under § 301(b) setting effluent limitations on the basis of categories of point sources. Therefore, the circuit courts do not have jurisdiction pursuant to § 509(b)(1)(E) to directly review Administrator's regulations purportedly issued under §§ 301(b) and 304(b). Rather, the district courts, pursuant to the Administrative Procedure Act, have initial jurisdiction to review Administrator's regulations as § 304(b) guidelines only.</td>
<td>Because Administrator does not have authority under § 301(b) to set effluent limitations for categories of point sources, the permit issuers must set limitations on point source by point source basis. However, they must follow Administrator's § 304(b) guidelines, and if they do not, Administrator may, within 90 days, veto non-conforming permit pursuant to § 402(d)(2).</td>
</tr>
<tr>
<td>2. <strong>American Iron</strong> (3d Cir.)</td>
<td>Administrator has authority to set specific effluent limitations under § 301(b), as well as effluent limitation guidelines under § 304(b). Therefore, circuit courts have jurisdiction under § 509(b)(1)(E) to directly review Administrator's regulations promulgated concurrently under § 301(b) and § 304(b) which establish effluent limitations on the basis of categories of point sources.</td>
<td>Administrator must set uniform national effluent standards under § 301(b) which will constitute a &quot;ceiling&quot; on the discharge of identified pollutants for categories and subcategories of point sources. Administrator must also establish &quot;ranges&quot; of more stringent limitations below the &quot;ceiling&quot; and &quot;factors&quot; for permit issuers to consider in setting exact limitations for individual point sources.</td>
</tr>
<tr>
<td>3. <strong>American Meat</strong> (7th Cir.)</td>
<td>Id.</td>
<td>Administrator's interpretation of his statutory authority and obligations is &quot;reasonable&quot; and is therefore binding upon reviewing court. Hence, the regulatory scheme adopted by the Administrator, consisting of uniform national effluent standards established for categories of point sources, which can be relaxed only through a formal &quot;variance&quot; procedure, complies with the Act's requirements.</td>
</tr>
<tr>
<td>4. <strong>American Petroleum I</strong> (10th Cir.)</td>
<td>Id.</td>
<td>Not decided.</td>
</tr>
<tr>
<td><strong>American Petroleum II</strong> (10th Cir.)</td>
<td>Id.</td>
<td>Follows 4th Circuit in finding Administrator's effluent limitations to be &quot;presumptively applicable.&quot;</td>
</tr>
<tr>
<td>5. <strong>duPont I</strong> (4th Cir.)</td>
<td>Administrator's regulations under §§ 301(b) and 304(b) establish effluent limitations which are &quot;presumptively applicable&quot; to categories of point sources. Presumption may be rebutted if consideration of the &quot;factors&quot; specified in § 304(b) (e.g., cost, age of plant) would so warrant.</td>
<td>Administrator's regulations under §§ 301(b) and 304(b) establish effluent limitations which are &quot;presumptively applicable&quot; to categories of point sources. Presumption may be rebutted if consideration of the &quot;factors&quot; specified in § 304(b) (e.g., cost, age of plant) would so warrant.</td>
</tr>
</tbody>
</table>
Permit issuers are to apply these "factors" on a point source by point source basis to determine whether uniform standard ought to apply. Administrator need not establish "ranges" of effluent limitations, but may if he so chooses.

<table>
<thead>
<tr>
<th>Cases</th>
<th>Jurisdictional Issue</th>
<th>Uniformity Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>6. Hooker (2d Cir.)</td>
<td>Id.</td>
<td>Administrator may establish single number effluent limitations under § 301(b) on a categorical basis, and may account for &quot;ranges&quot; within such categories by creating subcategories. Administrator, not permit issuer, must consider the &quot;factors&quot; specified by § 304(b), and he may do so when he formulates uniform national standards.</td>
</tr>
<tr>
<td>7. American Food (D.C. Cir.)</td>
<td>Id.</td>
<td>Administrator may set single number uniform national effluent standards for categories and subcategories of point sources. He need not establish &quot;ranges&quot; of effluent limitations; in any case, a &quot;range&quot; between zero and the established limitation is automatically created with the setting of the uniform national standard. Permit issuers may relax uniform national standards only through the formal variance procedure established by the Administrator.</td>
</tr>
</tbody>
</table>

District Courts

1. Grain Processing (S.D. Ia.)

Adopts holding of CPC I

Administrator must promulgate effluent limitation guidelines under § 304(b) which (1) establish a range of levels of effluent reduction possible for a given point source category, and (2) set forth the "factors" to be considered by permit issuers in setting exact limitations for individual point sources. Permit issuers would set effluent limitations on a point source by point source basis, and Administrator could veto those permits found to be in non-compliance with the pertinent guidelines.


Courts of appeals, not district courts, have jurisdiction under § 509(b)(1)(E) to directly review Administrator's regulations promulgated pursuant to §§ 301(b) & 304(b).

Not decided.

3. duPont (W.D. Va.)

Id.

Id.

4. Shell Oil (N.D. Calif.)

Id.

Id.
### Table of Parallel Citations

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>101</td>
<td>1251</td>
<td>308</td>
<td>1318</td>
</tr>
<tr>
<td>102</td>
<td>1252</td>
<td>309</td>
<td>1319</td>
</tr>
<tr>
<td>103</td>
<td>1253</td>
<td>310</td>
<td>1320</td>
</tr>
<tr>
<td>104</td>
<td>1254</td>
<td>311</td>
<td>1321</td>
</tr>
<tr>
<td>105</td>
<td>1255</td>
<td>312</td>
<td>1322</td>
</tr>
<tr>
<td>106</td>
<td>1256</td>
<td>313</td>
<td>1323</td>
</tr>
<tr>
<td>107</td>
<td>1257</td>
<td>314</td>
<td>1324</td>
</tr>
<tr>
<td>108</td>
<td>1258</td>
<td>315</td>
<td>1325</td>
</tr>
<tr>
<td>109</td>
<td>1259</td>
<td>316</td>
<td>1326</td>
</tr>
<tr>
<td>110</td>
<td>1260</td>
<td>317</td>
<td>1327</td>
</tr>
<tr>
<td>111</td>
<td>1261</td>
<td>318</td>
<td>1328</td>
</tr>
<tr>
<td>112</td>
<td>1262</td>
<td></td>
<td></td>
</tr>
<tr>
<td>113</td>
<td>1263</td>
<td>401</td>
<td>1341</td>
</tr>
<tr>
<td>114</td>
<td>1264</td>
<td>402</td>
<td>1342</td>
</tr>
<tr>
<td>115</td>
<td>1265</td>
<td>403</td>
<td>1343</td>
</tr>
<tr>
<td></td>
<td></td>
<td>404</td>
<td>1344</td>
</tr>
<tr>
<td>201</td>
<td>1281</td>
<td>405</td>
<td>1345</td>
</tr>
<tr>
<td>202</td>
<td>1282</td>
<td></td>
<td></td>
</tr>
<tr>
<td>203</td>
<td>1283</td>
<td>501</td>
<td>1361</td>
</tr>
<tr>
<td>204</td>
<td>1284</td>
<td>502</td>
<td>1362</td>
</tr>
<tr>
<td>205</td>
<td>1285</td>
<td>503</td>
<td>1363</td>
</tr>
<tr>
<td>206</td>
<td>1286</td>
<td>504</td>
<td>1364</td>
</tr>
<tr>
<td>207</td>
<td>1287</td>
<td>505</td>
<td>1365</td>
</tr>
<tr>
<td>208</td>
<td>1288</td>
<td>506</td>
<td>1366</td>
</tr>
<tr>
<td>209</td>
<td>1289</td>
<td>507</td>
<td>1367</td>
</tr>
<tr>
<td>210</td>
<td>1290</td>
<td>508</td>
<td>1368</td>
</tr>
<tr>
<td>211</td>
<td>1291</td>
<td>509</td>
<td>1369</td>
</tr>
<tr>
<td>212</td>
<td>1292</td>
<td>510</td>
<td>1370</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>511</td>
</tr>
<tr>
<td>301</td>
<td>1311</td>
<td>512</td>
<td>1372</td>
</tr>
<tr>
<td>302</td>
<td>1312</td>
<td>513</td>
<td>1373</td>
</tr>
<tr>
<td>303</td>
<td>1313</td>
<td>514</td>
<td>1374</td>
</tr>
<tr>
<td>304</td>
<td>1314</td>
<td>515</td>
<td>1375</td>
</tr>
<tr>
<td>305</td>
<td>1315</td>
<td>516</td>
<td>1376</td>
</tr>
<tr>
<td>306</td>
<td>1316</td>
<td>517</td>
<td>1377</td>
</tr>
<tr>
<td>307</td>
<td>1317</td>
<td>518</td>
<td>1378</td>
</tr>
</tbody>
</table>
Papers on Ocean Resource Regulation

The Ecology Law Quarterly begins in this issue a series of papers on ocean resource regulation. As the burden on renewable and nonrenewable land resources mounts, the ocean must supply an increasing proportion of humanity's needs. The potential harvest of food and minerals from the ocean is vast and expands with advances in technology. The ocean is not only a stockpile of resources but also a medium for transportation and communication. What national and international policies should be adopted to resolve conflicts among uses, and users, of the sea? Equally important, how shall society accommodate both the exploitation of marine resources and the protection of the marine environment which nurtures these resources? These questions subsume many political and economic issues, including the allocation of access to ocean resources, the distribution of benefits, and the adoption of regulatory mechanisms.

The first paper in this series, opposite, discusses the new problem of deep seabed mining. Future papers will analyze international management of whales, dolphins, and porpoises, and the creation of a legal regime for the Arctic Ocean. Authors with topics in the area of ocean resource regulation are invited to submit manuscripts or outlines to the Articles Editor, Ecology Law Quarterly, School of Law (Boalt Hall), University of California, Berkeley, California 94720.