March 1979

Will Judicial Error Allow Industrial Point Sources to Avoid BPT and Perhaps BAT Later - A Story of Good Intentions, Bad Dictum, and Ugly Consequence

Jerome S. Kalur

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38BJ98

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcea@law.berkeley.edu.
Will Judicial Error Allow Industrial Point Sources to Avoid BPT and Perhaps BAT Later? A Story of Good Intentions, Bad Dictum, and Ugly Consequence

Jerome S. Kalur*

I

INTRODUCTION

Section 301(b) of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA)1 is the heart of a plan to reduce or eliminate water pollution discharges from point sources.2 By July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title . . . ; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) [for toxic substances and non-conventional pollutants] . . . effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress to-

Copyright © 1979 by the Ecology Law Quarterly.

* Partner: Weston, Hurd, Fallon, Paisley & Howley, Cleveland, Ohio; B.A., 1966, Shimer College; J.D., 1969, Case Western Reserve University. The author wishes to acknowledge the editorial assistance of Edward Diener, third year student, Boalt Hall School of Law, University of California, Berkeley.


2. FWPCA § 301(b), 33 U.S.C. § 1311(b) (1976) (current version at 33 U.S.C.A. § 1311(b) (West 1978)). It reads:

   (b) In order to carry out the objective of this chapter there shall be achieved—
   (1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title . . . ; or,
   (C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.
   (2)(A) [for toxic substances and non-conventional pollutants] . . . effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress to-
1977, all dischargers were to have achieved compliance with designated effluent limitations via installation of the “best practicable technology currently available” (BPT) at “all point sources of discharge” other than publicly owned treatment facilities. As the second step toward the no-discharge goal, the “best available technology economically achievable for such category or class” (BAT) is to be in place at each point source no later than July 1, 1983. Attainment of these acronyms will approach the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him, that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title.

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 1281(g)(2)(A) of this title.


3. FWPCA § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (1976). See note 2 supra. BPT was to be defined for each major industrial "class and category" in the manner prescribed in FWPCA § 304(b), 33 U.S.C. § 1314(b) (1976) (current version at 33 U.S.C.A. § 1314(b) (West 1978)). EPA defines BPT as "the average of the best existing performance by plants of various sizes, ages and unit processes within each industrial category or subcategory. This average is not based upon a broad range of plants within an industrial category or subcategory, but is based upon performance levels achieved by exemplary plants." 39 Fed. Reg. 6,580 (1974).

The "average of the best performance" may yield unexpected benefits to the small plant, somewhat reversing the popular economy-of-scale concept. For example, a small pulp and paper mill producing 650 tons per day of unbleached kraft would have no trouble meeting BPT requirements based upon an average of plants many times its size. Conversely a large plant which delivers the permitted daily maximum BPT biological oxygen demand of 11.2 pounds per ton of product (40 C.F.R. § 430.12 (1977)), may have very deleterious effects on a small flow receiving stream. Unless coupled with the elusive quantification of water quality standards (FWPCA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (1976)), BPT limitations, as applied to plants on small receiving streams, may not significantly reduce pollution.


technology requirements is directly associated with the primary goal of FWPCA, i.e., "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." Success or failure in the implementation of the successive technology requirements of section 301(b) will determine the outcome of FWPCA's water pollution abatement plan.

Administrative establishment of the initial limitations has been long delayed and troubled. Section 304(b)(A) required the Administrator of EPA within one year after the date of enactment, October 18, 1973, to promulgate guidelines to be used for the setting of effluent limitations. The sheer volume of information required to make an intelligent evaluation of what constituted BPT for numerous industrial categories led to EPA's failure to meet the compliance date. The Administrator's decision to extend the period of promulgation for an additional three years led to establishment of a court-supervised timetable for the publication of guidelines.

During the debate over the passage of FWPCA, Congress became aware of the large number of industrial polluters who would have to seek discharge permits. It was obvious that the task of setting BPT limitations would take considerable time. To fill the expected period between passage of the Act and establishment of limitations, an interim permit program was created by section 402(a)(1) which allowed lawful discharge "prior to the taking of necessary implementing actions [adoption of BPT limitations]." The Administrator, either directly or through approved state permit authorities, issued 4,213 major and 22,745 minor discharge permits under this program.

Despite the requirement in section 402(a)(2) that every interim

10. Over 20,000 applications had been received already for the Corps of Engineers' Permit Program. Letter from William Ruckelshaus, Administrator of EPA, to OMB (Oct. 11, 1972) (recommending Presidential approval of S. 2770), reprinted in 1 LEGISLATIVE HISTORY, supra note 2, at 156.
11. In fact, "Phase II" BPT limitations for the paper industry, for example, were issued in final form almost five years after the passage of FWPCA and only became effective after being sustained upon challenge. See Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 11 ERC 2149 (D.C. Cir. 1978).
12. FWPCA § 402(a)(1), 33 U.S.C. § 1342(a)(1) (1976). Discharges were permitted "upon ... such conditions as the Administrator determines are necessary to carry out the provisions of this Act." Id.
13. These figures were correct as of January 1976 and cover the majority of private
permit contain conditions to assure BPT compliance at the industrial point source no later than July 1, 1977.\textsuperscript{14} EPA generally failed to include such provisions.\textsuperscript{15} This shortcoming may have been caused by the ambiguous wording of section 402(a)(1), which stated that permits issued before adoption of industry limitations were deemed in force "notwithstanding section 301(a)"; nevertheless, they were to be issued "upon condition that such discharges will meet all applicable requirements under section(s) [301] . . . ."\textsuperscript{16} As a result, an interim permit would appear to be valid only until the BPT limits for the subject industry are adopted. Yet, because most interim permits contained no condition to assure BPT compliance by mid-1977, and were issued for the maximum five year period,\textsuperscript{17} many industrial point sources are only now becoming subject to industrywide § 301(b)(1)(A) BPT requirements. A postponement of compliance with the limitations has resulted from this delay, even though the formalized procedures adopted by EPA for obtaining a BPT variance were not followed.\textsuperscript{18} Congress' timetable for pollution cleanup has been upset by EPA's failure to require compliance within a reasonable time after adoption of industry-wide limitations. Although this omission may well be a breach of a nondiscretionary duty and therefore subject to attack under the citizens' suit provision of FWPCA,\textsuperscript{19} to date no such action challenging this deficiency has been brought.

\textsuperscript{15} COMPTROLLER GENERAL OF THE UNITED STATES, IMPLEMENTING THE NATIONAL WATER POLLUTION CONTROL PERMIT PROGRAM: PROGRESS AND PROBLEMS 14-18 (1976). The issue of possible retroactive application of category BPT limitations to an interim permit was raised but not decided in Inland Steel Co. v. EPA, 574 F.2d 367, 373 n.7, 11 ERC 1353, 1356 n.7 (7th Cir. 1978).
\textsuperscript{18} Ironically, the EPA has steadfastly insisted that it cannot extend the July 1, 1977, BPT compliance date, no matter what the circumstance. See Bethlehem Steel Corp. v. Train, 544 F.2d 657, 9 ERC 1420 (3d Cir. 1976), cert. denied, 430 U.S. 975 (1977). In reversing its prior compliance extension decision, Republic Steel Corp. v. Train, 557 F.2d 91, 10 ERC 1306 (6th Cir. 1977), vacated and remanded, 434 U.S. 1030 (1978), the Sixth Circuit recognized the definitive date for achieving BPT compliance. "The legislative history of this provision [Clean Water Act of 1977 § 56(c), 33 U.S.C.A. § 1319(a)(5)(B) (West 1978)] makes it abundantly clear that Congress intended the procedure outlined therein to be the exclusive avenue of relief from the dictates of a mandatory and unconditional July 1, 1977, deadline." Republic Steel Corp. v. Costle, 581 F.2d 1228, 1231, 11 ERC 2041, 2042 (6th Cir. 1978), cert. denied, 12 ERC 1740 (Feb. 21, 1979). The 1977 Amendments to the Act provide for a discretionary extension until Apr. 1, 1979, under certain conditions. See text accompanying note 141 infra.
\textsuperscript{19} FWPCA § 505(a)(2), 33 U.S.C. § 1365(a)(2) (1976). This section provides that any citizen may bring suit on his own behalf, "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Chapter which is not discretionary with the Administrator." Id.
Simultaneously and subsequently to issuance of the interim permits, EPA began to establish effluent limitations by industrial category.\(^{20}\) As it did so, the agency chose to publish regulations containing only single number effluent maxima, as opposed to limitations providing a range of permissible discharge, with EPA’s underlying studies considered the basis for the final numerical limits. These regulations included a variance provision not authorized under FWPCA.\(^{21}\) The single number effluent limitations, originally devised to save time, resulted in voluminous and dilatory litigation.\(^{22}\) Not until the decision in \textit{E.I. duPont de Nemours & Co. v. Train}\(^{23}\) did it become settled that the administrator, and not the state, was the entity entitled to set binding effluent limitations, and that the limitations could be established as sin-


\(^{21}\) The variance provision reads:

\begin{quote}
In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. See, \textit{e.g.}, 40 C.F.R. § 423.12 (1976) (steam-electric generating category). Economic impact must be among the factors considered. Appalachian Power Co. v. Train, 545 F.2d 1351, 9 ERC 1033 (4th Cir. 1976). See text accompanying note 125 infra.

\(^{22}\) Typical were the decisions in American Frozen Food Inst. v. Train, 539 F.2d 107, 8 ERC 1993 (D.C. Cir. 1976); Hooker Chem. & Plastics Corp. v. Train, 537 F.2d 620, 8 ERC 1961 (2d Cir. 1976); American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 8 ERC 1321 (3d Cir. 1975); American Meat Inst. v. EPA, 526 F.2d 442, 8 ERC 1369 (7th Cir. 1975); CPC Int’l, Inc. v. Train, 515 F.2d 1032, 7 ERC 1887 (8th Cir. 1975); American Pet. Inst. v. EPA, 540 F.2d 1023, 9 ERC 1252 (10th Cir. 1976); and California & Hawaiian Sugar Co. v. EPA, 553 F.2d 280, 9 ERC 2129 (2d Cir. 1977). A discussion of the nuances of most of these decisions is contained in Justice Stevens’ decision in \textit{E.I. duPont de Nemours & Co. v. Train}, 430 U.S. 112, 125 n.15, 9 ERC 1753, 1758 n.15 (1977). It has been stated that the cost of litigation delay will be borne by the industrial challenger. See United States Steel Corp. v. Train, 556 F.2d 822, 847, 10 ERC 1001, 1025 (7th Cir. 1977); Bethlehem Steel Corp. v. Train, 544 F.2d at 661, 9 ERC at 1423 (3d Cir. 1976), \textit{cert. denied}, 430 U.S. 975 (1977).

gle numbers.24 The *duPont* opinion also approved the BPT variance procedure which allows many industrial point sources to avoid or delay FWPCA compliance.25

The adoption of category limitations spawned many challenges from industry.26 These attacks on the limits have been generally unsuccessful, leading to increased industrial reliance on the unauthorized variance procedure adopted by EPA and approved by the Court in the *duPont* case. Since the now-terminating interim permits are generally less severe in their cleanup demands than those discharge permits containing BPT effluent limitation category requirements, it is not difficult to envision the massive number of BPT variance requests that will be submitted as the stricter provisions become applicable this year.27

With the increase in applications for variances will come efforts to expand the criteria upon which variances are to be granted. Chief among these will be claims of economic hardship.28 Plants that have been consistently the worse polluters because of lack of capital to add pollution control technology will apply in large numbers for BPT variances. These problem cases will pressure EPA to expand its limited variance regulation into an open-ended escape valve, a result which EPA may find difficult to avoid.29 The end product may well be indi-

24. *Id.* at 136, 9 ERC at 1759-60. Under the Act, many responsibilities are delegable to the states if they desire to undertake them. FWPCA § 402, 33 U.S.C. § 1342 (1976) (current version at 33 U.S.C.A. § 1342 (West 1978)). *duPont* settled, however, that establishing industrywide effluent limitations is not one of them. 430 U.S. at 136, 9 ERC at 1760-61. The Court did not say that the limits had to be set on a single number basis, only that the Administrator, in his discretion, could choose that method. *See id.*

25. 430 U.S. at 128, 9 ERC at 1759.

26. For the limitation challenges in the Courts of Appeal, see note 22 *supra*. *See also* FWPCA § 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E) (1976), which provides in relevant part: Review of the Administrator's action . . . in approving or promulgating any effluent limitation . . . 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 such business upon application by such person.

The procedure for contesting the interim permit conditions allows for an adjudicatory hearing before the EPA or state permit authority. *Id.* § 402(a)(1), 33 U.S.C. § 1342(a)(1) (1976). The regulations for adjudicatory proceedings are set forth at 40 C.F.R. § 125.36 (1976). Additional evidence, under certain conditions, may be offered upon direct appeal to the Court of Appeals (FWPCA § 509(c), 33 U.S.C. § 1369(c) (1976)). Significant delays in the hearing process have further postponed compliance.

Roughly 20% of the major industrial dischargers have contested the interim permit conditions. EPA, EPA ENFORCEMENT: A PROGRESS REPORT 60 (1976).

27. If, after expiration of their interim permits, dischargers are granted "good faith" extensions to bring technology to class or category BPT levels, many major polluters may be far short of real attainment even by 1983. *See text accompanying note 141 infra.*

28. Precursors of this trend are Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 11 ERC 2149 (D.C. Cir. 1978), and Appalachian Power Co. v. Train, 545 F.2d 1351, 9 ERC 1033 (4th Cir. 1976).

29. For example, the states have authority, with certain conditions, to administer a permit program of their own. FWPCA § 402(b), 33 U.S.C. § 1342(b) (1976) (current version at 33 U.S.C.A. § 1342(b) (West 1978)). Two decisions have limited the Administrator's ability
individual limitations for individual plants, a result which the FWPCA drafters must have been sure could not occur under the statute.

The pressure for variances can only become more intense as the deadline for BAT approaches. Lengthy delay in implementing BPT limitations resulting from the issuance of BPT variances to dischargers after their interim permits expire would further thwart achievement of the Congressional timetable for compliance with BAT.

Thus the concept of uniform minimum pollution cleanup which had motivated the FWPCA drafters, and upon which the FWPCA commentators had based their expectations for obtaining cleaner water, has been placed in severe jeopardy by the Supreme Court's approval in duPont of regulatory BPT variance authority. This Article examines the history, judicial approval, and application of the BPT variance regulation, concluding that Congressional action is needed to prevent further delays in pollution cleanup. Some limits to the application of the BAT statutory variance provision are also explored.

II
THE HISTORY OF THE 1977 VARIANCE REGULATION

A. The Creation of the Regulation

The BPT effluent limitations that were first promulgated did not contain provision for variance from their numerical discharge maxima. Only after extensive adverse comment by the affected industries did EPA determine that BPT limitations should provide for variance in the event "fundamentally different" factors exist on an individual plant basis. Thereafter, each industrial category limitation contained a vari-
ance provision permitting application of stricter\textsuperscript{33} or more lenient\textsuperscript{34} discharge limits upon adequate demonstration 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 guidelines.”\textsuperscript{35} The EPA did not offer any authority to support its assumption of BPT variance authority. Instead, it published an opinion of counsel confined to the parameters upon which a variance would be granted.\textsuperscript{36}

1. Congressional Intent and Variance from the 1977 BPT Limitations

The legislative intent behind FWPCA is that the task of water pollution reduction begin without further delay.\textsuperscript{37} The intention to require immediate compliance by all industrial polluters with the mandated cleanup program manifested itself in the legislative molding of sections 301(b) and 301(c). In response to requests by the Nixon Administration,\textsuperscript{38} the House version of the bill, H.R. 11896,\textsuperscript{39} included

\begin{itemize}
  \item[33.] Theoretically, an affected citizen or environmental group could cause stricter effluent limitations to be applied on an individual plant basis. This would appear as a most unlikely possibility, given: (1) the intimate familiarity with the production process and cleanup state-of-the-art that would be required to force alteration; and (2) the general lack of knowledge of particular plant cleanup status that exists outside the administrative process. Conceivably, state limitations also might require stricter individual cleanup under FWPCA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (1976) (water quality standard compliance) and FWPCA § 510, 33 U.S.C. § 1370 (1976) (stricter state limitations than set by EPA).

  \item[34.] \textit{See}, e.g., Iron and Steel Industry Limitations, 40 C.F.R. § 421 (1976).

  \item[35.] \textit{Id.} For the text of the variance provision see note 21 supra.

  \item[36.] 39 Fed. Reg. 30,073 (1974) (Memorandum of Assistant Administrator for Enforcement and General Counsel). The Memorandum concludes that “factors of a technical and engineering nature” may justify a variance or “adjustment,” but that economic factors will not. \textit{Id.} No authority is cited for this conclusion. As an attempt to justify this distinction, it is stated in the Memorandum that section 301(c) is the only economic variance procedure provided in the Amendments; it is claimed that it may be applied only to the 1983 BAT standards. No justification for 1977 “technical and engineering” BPT variance authority is offered.

  \item[37.] \textit{See}, e.g., S. REP. No. 414, 92d Cong., 1st Sess. 44 (1972) (report of the Senate Committee on Public Works), \textit{reprinted in} [1972] U.S. CODE CONG. & AD. NEWS 3668, 3711, \textit{and in} II LEGISLATIVE HISTORY, supra note 2, at 1462:

  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. \textit{Id.}

  \item[38.] \textit{See} H.R. REP. No. 911, 92d Cong., 2d Sess. 156 (1972) (comments of the Office of Management and Budget and of the Environmental Protection Agency on H.R. 11895 and H.R. 11896 by EPA Administrator Ruckelshaus, concurred in by OMB Director Schultz (at 172) (1971)), \textit{reprinted in} I LEGISLATIVE HISTORY, supra note 2, at 843. In these comments, EPA and OMB requested that a “2 year extension” of the BPT deadline be included within section 301(b). \textit{Id.} See also Hearings on H.R. 11895 and H.R. 11896 Before the House Comm. on Public Works, 93d Cong., 1st Sess. 201 (1972) (testimony of then-CEQ Chairman Train), \textit{reprinted in} I LEGISLATIVE HISTORY, supra note 2, at 1115.

  \item[39.] H.R. 11896, 92d Cong., 2d Sess., 118 CONG. REC. 10,804-31 (1972), \textit{reprinted in} 1
two provisions. The first allowed a BPT variance for physical or legal impossibility. The second provided that BAT standards would not be made applicable until the National Academy of Sciences had issued a favorable report on them and Congress had subsequently voted to apply the standards. This measure passed in the House.

Section 301(b) of the Senate bill, S. 2770, did not contain a provision for extension of either compliance date. The manner in which the two bills were reconciled is therefore of major importance to the question of whether Congress intended that the EPA administratively create a regulation permitting noncompliance. Section 301(b), as enacted, totally excluded the House's proposed BPT variance subsection. Similarly, section 301(c), as enacted, provided that individual plant variation from BAT could be obtained only if the applicant demonstrated that the modified requirements would result in "the maximum use of technology within the economic capability of the owner," and that the modification would still result in "reasonable further progress . . . toward the elimination of point source discharge."

The Conference Report refers only indirectly to the critical deletions and addition. Whatever understanding may be garnered from

---

**Legislative History, supra note 2, at 893-1110.** The initial Senate and House bills referred to Jan. 1, 1976, and Jan. 1, 1981, BPT and BAT effective dates. These were changed in conference to July 1, 1977, and July 1, 1983, respectively. See 118 Cong. Rec. 33,693 (1972), reprinted in I Legislative History, supra note 2, at 162 (statement of Sen. Muskie).

The Administration did not request a two-year delay in the imposition of the limits, apparently because of its basic opposition to the adoption of BAT requirements per se, and because of the original House plan to require a National Academy of Science Study before moving to BAT. H.R. 11896, 92d Cong., 1st Sess. § 315 (1972), reprinted in I Legislative History, supra note 2, at 1042. See also H.R. Rep. No. 911, 92d Cong., 2d Sess. 156 (1972) (comments on H.R. 11895 and H.R. 11896 by EPA Administrator Ruckelshaus), reprinted in I Legislative History, supra note 2, at 843.

We [sic] see no valid reason to move from "best practicable treatment" to "best available treatment" for industrial sources simply to move closer to the goal of "no discharge of pollutants." We believe that "best practicable treatment" representing a range of technology should continue as a base.

Id.


In three cases, courts have noted this exclusion as a basis for upholding EPA's refusal to extend the July 1, 1977, deadline because of time lost in litigating either permit conditions or the validity of EPA limitations. United States Steel Corp. v. Train, 556 F.2d 822, 10 ERC 1001 (7th Cir. 1977), Bethlehem Steel Corp. v. Train, 544 F.2d 657, 659, 9 ERC 1420, 1424 (3d Cir. 1976), cert. denied, 430 U.S. 975 (1977); Republic Steel Corp. v. Costle, 581 F.2d 1228, 11 ERC 2042 (6th Cir. 1978), cert. denied, 12 ERC 1740 (Feb. 21, 1979).


the legislative history must come from the general statements in the report about these changes and from the conferees' comments upon presentation of the report to the House and Senate. The Conference Report states:

The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on best available technology economically achievable.\textsuperscript{46}

The conferees had struck from H.R. 11896 the provision authorizing BPT variances, and, in the quoted statement of intent, indicated their determination that the initial BPT limitations not be subject to individual variance.\textsuperscript{47} Senator Muskie echoed this sentiment in his statement presenting the report to the Senate,\textsuperscript{48} referring to BPT as the "minimal level of control [to be] imposed on all sources"\textsuperscript{49} and stating that the technology required by July 1, 1977, be "no less stringent than that defined by ‘best practicable control technology.’"\textsuperscript{50} Strong repetition of this theme was also voiced by Representative Jones in presenting the report to the House.\textsuperscript{51} After noting that BPT requirements must be met by all point sources, he further explained the result of the deletion of the House's variance provision by stating that a discharger who did not, or could not, meet the July 1, 1977, deadline had only one course of action—"go out of business."\textsuperscript{52}

The Congressional intention to prevent exception to uniform BPT compliance was further demonstrated by changes made to section 304(b)(1)(B) by the House-Senate conferees.\textsuperscript{53} Instead of a single step evaluation of age of equipment and facilities to determine what was to constitute BPT, the Administrator was required under the amendments to section 304(b)(1)(B) to undertake, as a second step, a limited cost-benefit analysis which would balance the "total cost of application of

\textsuperscript{46} Id. at 121, [1972] U.S. Code Cong. & Ad News at 3799, I Legislative History, supra note 2, at 304 (emphasis added).


\textsuperscript{48} 118 Cong. Rec. 33,692 (1972), reprinted in I Legislative History, supra note 2, at 161.

\textsuperscript{49} Id. at 33,696, I Legislative History, supra note 2, at 170.

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 33,749, I Legislative History, supra note 2, at 231.

\textsuperscript{52} Id. See also id. at 33,692-93, I Legislative History, supra note 2, at 162.

BPT VARIANCES

1979]

technology in relation to the effluent reduction benefits to be achieved from such application. . . ”54 This further weighing was a retreat from strict control requirements and may have been a legislative compromise for removal of the House BPT variance provision. At the same time, it represented the maximum relaxation of the BPT requirement that was to be permitted.

Congress recognized that the achievement of BPT limitations would be far less taxing to industry than attainment of the BAT requirements. Instead of requiring the installation of the best technology available even if not in use in the industry, the BAT requirement, BPT could be achieved by meeting the “average” of the best performance by plants within the same category.55 It is probable that this comparative disparity in ease of achievement was the basis for rejecting BPT variance authority and, at the same time, for creating BAT variance power. This logical result, coupled with the expressed Congressional desire to reduce discharges to at least the level of average best performance, explains the deletion of the BPT variance provision from the final bill.

2. Is Variance from BPT Reconcilable with the Uniformity Goal of FWPCA?

Nowhere in the Conference Report, nor in the Senate or House debates on the Conference Report, is there any reference to authority allowing variance from BPT limitations on the basis of plant idiosyncrasies, engineering inadequacies, or economic hardship to the discharger. To the contrary, the intent was to eliminate “plant by plant” consideration56 and to restrict the evaluation of factors in creating BPT

54. FWPCA § 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B) (1976). This point is further demonstrated by the history:

The Conferees agreed upon this limited cost benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, or to determine the economic impact of controls on any individual plant in a single community. It is assumed, in any event, that “best practicable technology” will be the minimal level of control imposed on all sources within a category or class during the period subsequent to enactment and prior to July 1, 1977.

118 CONG. REC. 33,696 (1972) (statement of Sen. Muskie), reprinted in 1 LEGISLATIVE HISTORY, supra note 2, at 170.

55. 118 CONG. REC. 33,696 (statement of Sen. Muskie), reprinted in 1 LEGISLATIVE HISTORY, supra note 2, at 169. See also note 3 supra for the slightly varying regulatory definition adopted by the EPA.

56. S. REP. No. 1236, 92d Cong., 2d Sess. 121 (1972) (Joint Explanatory Statement of the Committee of Conference), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3776, 3779, [and in] 1 LEGISLATIVE HISTORY, supra note 2, at 304; 118 CONG. REC. 33,697 (1972) (statement of Sen. Muskie), reprinted in 1 LEGISLATIVE HISTORY, supra note 2, at 172. In the only case in which EPA has stated its rationale for its assumed authority to issue BPT variances, the Agency claimed that by requiring the Administrator to “specify factors to be
limitations guidelines to those affecting classes and categories of point sources. The Conference Report states that there were to be no breaches in the uniformity of the effluent limitations. Senator Muskie, commenting on the Conference Report, referred to application of BPT to industrial sources by July 1, 1977, as the major example of such required "uniformity and finality."

Section 501(a) authorizes the Administrator "to prescribe such regulations as are necessary to carry out his functions under this Chapter." However, these functions do not include impairment of FWPCA's cleanup goals by permitting dissimilar treatment of point sources that are within the same category or class. Having made a "total cost" analysis before promulgating BPT limitations for an industrial category, the Administrator has carried out the statutory function assigned to him in determining the minimum category cleanup target. He has no authority under FWPCA to consider the problems of individual plants.

An example of the practical problems that may arise from consideration of individual plant characteristics is provided by a study of the iron and steel industry. Age of facility was often cited by the industry as a valid reason for different treatment, yet in practice, it proved to be largely irrelevant to the limitations-setting process. The Administrator, after surveying the iron and steel industry, determined that the disparate degree of improvements and modernization of individual facilities made age an irrelevant factor in setting limitations for the

58. The full statement reads, "As far as uniformity and finality are concerned, the conference agreement provides that each polluter within a category or class of industrial sources will be required to achieve nationally uniform effluent limitations based on 'best practicable' technology no later than July 1, 1977." 118 CONG. REC. 33,692-93 (1972) (report of Sen. Muskie), reprinted in 1 LEGISLATIVE HISTORY, supra note 2, at 162.
59. Id.
61. An additional function assigned to the Administrator is to insure compliance with state water quality standards. Such standards may require a stricter BPT limitation level than that provided for by the nationally uniform minimum levels. FWPCA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (1976). These more stringent limitations must be enforced through the permit conditions, but they were not factors under section 304(b)(1)(B) to be considered by the Administrator in setting the nationally applicable BPT limitations. As the factors to be considered in issuing variances should not be different from the factors to be considered in setting limitations, dischargers subject to such stricter limitations should not be able to obtain variances. See United States Steel Corp. v Train, 556 F.2d 822, 10 ERC 1001 (7th Cir. 1977).
tire category.\textsuperscript{64} The assertion of plant age as a "fundamentally different" characteristic,\textsuperscript{65} justifying the nonuniform treatment inherent in a variance, should not be permitted. To do so would reward bad management practices through recognition of differing and individual "technical and engineering" factors, since EPA regards economic considerations as immaterial in a variance application.\textsuperscript{66}

\textbf{B. Case Law Interpretation of the Assertion of Regulatory Variance Authority}

1. \textit{Indirect Approval of Variance Authority: The Fourth Circuit Approach in duPont}

The BPT regulatory variance provision was not subjected to judicial scrutiny until almost two years after its promulgation and incorporation into each industrial category's effluent limitations. In the interim, litigation was only tangentially concerned with the provision. References to variances occurred only in EPA's attempt to justify its decision to issue single number effluent limits. For example, \textit{American Iron & Steel Institute v. EPA}\textsuperscript{67} (\textit{American Iron I}) concerned the validity of EPA's effluent limitations regulations promulgated for the steel industry. Defending its single number limits, EPA argued that the BPT variance clause was a safety valve that would yield sufficient flexibility to meet individual plant cleanup problems.\textsuperscript{68} In ruling against the single number limits, the Third Circuit nonetheless commented that "the variance procedure provides for less flexibility than we believe Congress contemplated."\textsuperscript{69} Similarly, the question of the Administrator's authority to promulgate a variance clause was not at issue but drew comment in the Fourth Circuit's decision in \textit{E.I. duPont de Nemours & Co. v. Train}.\textsuperscript{70} \textit{duPont} concerned challenges to the Administrator's au-

\textsuperscript{64} \textit{Id.} An old plant may be so modernized as to have the capabilities of a new factory, while a new plant, subjected to poor maintenance, may suffer from many of the characteristics of facilities much older. A planned deterioration process is unlikely for a new plant, but is not inconceivable for an older one. Companies may choose to let older plants decline because of inadequate cash flow or plans to build new plants elsewhere. The cost of updating older plants may make it more profitable to let them deteriorate than to repair them.

\textsuperscript{65} \textit{See note 36 supra.}

\textsuperscript{66} Subsequent judicial interpretations have not agreed that the variance criteria may exclude economic factors. See text accompanying notes 125-37 infra. EPA may find that once the Pandora's box of diverse claims is opened, no rational basis for limitation will exist.

\textsuperscript{67} 526 F.2d 1027, 8 ERC 1321 (3d Cir. 1975).

\textsuperscript{68} \textit{Id.} at 1045-46, 8 ERC at 1331.

\textsuperscript{69} \textit{Id.} at 1046, 8 ERC at 1331.

\textsuperscript{70} 541 F.2d 1018, 8 ERC 1718 (4th Cir. 1976), \textit{aff'd in part, rev'd in part}, 430 U.S. 112 (1977). The author of the opinion, Judge Breitenstein, commented further on the variance authority of the Administrator, again in dictum, four months later in a concurring and dissenting opinion in Appalachian Power Co. v. Train, 545 F.2d 1351, 1379, 9 ERC 1033, 1055
authority to issue effluent limitations and to the category limitation levels set for the chemical industry.\textsuperscript{71} No party to the litigation spoke against the validity of the variance regulation.\textsuperscript{72} EPA again contended that the variance clause provided sufficient flexibility to prevent a choice between closing the plant and compliance, thereby permitting single-number effluent limitations to be deemed a reasonable use of administrative discretion.\textsuperscript{73} Although this argument was rejected in \textit{American Iron I},\textsuperscript{74} it was accepted in \textit{duPont} and provided the springboard for the opinion's subsequent discussion of the Administrator's authority to provide for BPT variances.

After noting the existence of a statutory variance provision for BAT, and the failure of section 301(b) to provide for variance from BPT technology,\textsuperscript{75} the court in \textit{duPont} justified administrative authority to correct the omission on several grounds. Firstly, it noted that variance from the BPT limitations must have been authorized, because "the best 'practicable control technology' for 1977 may not be construed more stringently than 'best available technology economically achievable' for 1983 limitations."\textsuperscript{76} Secondly, the court relied on the theory of \textit{United States v. Allegheny-Ludlum Steel Corp.}\textsuperscript{77} that "(p)rovisions for variance, modifications and exceptions are appropriate to the regulatory process."\textsuperscript{78} Finally, the \textit{duPont} opinion rested on the authority of two Clean Air Act decisions, \textit{Portland Cement Ass'n v. Ruckelshaus}\textsuperscript{79} and \textit{International Harvester Co. v. Ruckelshaus}.\textsuperscript{80}

\textsuperscript{(4th Cir. 1976), and again one month later in American Pet. Inst. v Train, 540 F.2d 1023, 1029, 9 ERC 1252, 1259-60 (10th Cir. 1976). In none of these cases was the variance issue briefed or argued in an adversary context.}

\textsuperscript{71. 541 F.2d at 1027-29, 8 ERC at 1720-25.}

\textsuperscript{72. The chemical companies did not challenge the Administrator's authority to create a BPT variance provision, probably because it was not in their interest to do so. The Administrator, of course, did not question his own assertion of authority.}

\textsuperscript{73. See 541 F.2d at 1029, 8 ERC at 1725.}

\textsuperscript{74. The court chose instead to adopt the theory that ranges of effluent limitations were intended by Congress. 526 F.2d at 1044-45, 8 ERC at 1340-41.}

\textsuperscript{75. 541 F.2d at 1028, 8 ERC at 1722.}

\textsuperscript{76. Id.}

\textsuperscript{77. 406 U.S. 742 (1972).}

\textsuperscript{78. 541 F.2d at 1028, 8 ERC at 1722, citing 406 U.S. at 755. The court cites the \textit{Allegheny-Ludlum} opinion for the proposition that "it is well established that an agency's authority to proceed in a complex area such as car-service regulation by means of rules of general application entails a concomitant authority to provide exemption procedure in order to allow for special circumstances." \textit{Id}.}


This dictum from the \textit{duPont} court based on dictum from the \textit{Allegheny-Ludlum} Court resulted in EPA's attempt to exempt all iron and steel producers in Ohio's Mahoning River Valley from compliance with 1977 BPT limitations. This further extension of claimed inherent administrative authority was set aside as an invalid use of administrative authority in \textit{American Iron & Steel Inst. v. EPA (American Iron III)}, 568 F.2d 284, 308, 10 ERC 1549, 1555 (3d Cir. 1977). The language used in striking down the exemption would seem to apply equally well to BPT variances.
The *duPont* court's reasoning is flawed in each respect. The court's fear that BPT limits will be stricter than BAT limits is groundless. The BPT limits are, by definition, much lower than those projected for 1983. In addition, as noted in *American Iron I*, Congress had referred to "ranges" of BPT requirements for classes and categories. As a result, greater safety valves than are authorized for BAT technology were already built into the legislation. BPT is the initial cleanup phase designed to force all industrial point dischargers to reduce pollution by July 1, 1977. When the BAT level is set, a more limited cost-benefit analysis than that for BPT is to be performed. BAT allows less flexibility for polluters than BPT, so Congress included a safety-valve type variance clause in section 301(c). The court's conclusion that failure to provide for BPT variances would result in more stringent requirements of technology than those later mandated by section 301(c) or would be unfair because the BAT limits provide for variation for economic reasons, indicates a fundamental misunderstanding of the Congressionally-intended progressive limitations.

The *duPont* court's reliance on *Allegheny-Ludlum* was misplaced. No reference is made to the context of the decision from which the quote is extracted. *Allegheny-Ludlum* involved ICC regulations on freight car returns. Subsequent to promulgating regulations that required directional return of freight cars to their owners, the ICC issued regulations for exceptions under specified conditions. *Allegheny-Ludlum* held only that an agency may create exceptions from its own regulation. It does not support EPA's creation of an exception to the specific statutory command of section 301(e) that "all" point sources must achieve BPT compliance. This point was recognized by the Third Circuit, which rejected BPT exemptions for Ohio's Mahoning Valley
steel manufacturers.\textsuperscript{88} Reliance upon \textit{Allegheny-Ludlum} and its progeny is therefore inappropriate where Congress has chosen, by statutory language, to forbid the use of such inherent administrative discretion.

Similarly, reliance on \textit{Portland Cement} and \textit{International Harvester} was misplaced. The relevant portion of \textit{Portland Cement} concerned a proposed regulation allowing EPA discretion in enforcement of Clean Air Act standards in certain situations. The \textit{Portland Cement} court expressed its belief that the safety valve permitted more rigorous adherence to an effective regulation.\textsuperscript{89} The agency action in the case was not an unauthorized administrative alteration of a statutory scheme, but rather an exercise of inherent prosecutorial discretion. A similar action was at issue in \textit{International Harvester}, where a one year suspension authority was provided by statute.\textsuperscript{90} In contrast, the very core of the problem in \textit{duPont} was that FWPCA did not provide for EPA authority to create a BPT variance regulation.

Absent from the \textit{duPont} decision is any reference to rules of statutory construction as a justification for upholding BPT variance authority. The most appropriate rule for application, given the affirmative variance language of section 301(c), for BAT, and the absence of such language in section 301(b), for BPT, would be \textit{expressio unius est exclusio alterius} (expression of one thing is the exclusion of the other).\textsuperscript{91} This maxim requires that statutory language be so interpreted that once the legislature speaks to an issue in one circumstance and does not address the same issue in a similar context, it is deemed to have determined that the similar situations were not deserving of the same treatment. Application of this rule to section 301(b) leads to the conclusion that by incorporating a variance procedure in section 301(c) and remaining silent with respect to BPT, Congress did not intend to allow the Administrator to create a BPT variance procedure.\textsuperscript{92} To as-

\textsuperscript{88} American Iron & Steel Inst. v. EPA (\textit{American Iron III}), 568 F.2d 284, 10 ERC 1689 (3d Cir. 1977). EPA's argument that \textit{Allegheny-Ludlum} supported inherent authority was rejected by the court: \textit{"[W]e hold solely that, under section 301(e), an exemption by regulation from effluent limitations is not a permissible means of accommodating diversity."} \textit{Id.} at 307, 10 ERC at 1707.

\textsuperscript{89} 486 F.2d at 399, 5 ERC at 1599-1600.

\textsuperscript{90} 478 F.2d at 623, 4 ERC at 2042-43.

\textsuperscript{91} \textit{BLACK'S LAW DICTIONARY} 692 (4th ed. 1957). It is referred to as the "time honored maxim" in Mt. Sinai Hosp. of Greater Miami, Inc. v. Weinberger, 376 F. Supp. 1099, 1133 (S.D. Fla. 1974). Ironically, EPA applied this rule \textit{sub silenlio} in its rationale for the denial of BPT variances on economic bases. 39 Fed. Reg. 30,073 (1974). In this instance, EPA concluded that Congress, in enacting section 301(c) and providing for BAT variances based upon economic considerations, had thereby excluded a BPT variance \textit{based upon the same grounds}. Nevertheless, EPA did not apply this same form of reasoning in its basic decision to promulgate a BPT variance clause.

\textsuperscript{92} Courts have not been willing to allow administrative agencies to fill gaps in statutory language as they deem appropriate. \textit{See, e.g.}, Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 648 (5th Cir. 1976); Continental Cas. Co. v. United States, 314 U.S. 527, 533
sume otherwise would be to run counter to long accepted construction.

2. Direct Approvals of Variance Authority

a. Cases relying on duPont

After the duPont case, the Administrator's authority to issue BPT variances was challenged directly in Natural Resources Defense Council v. EPA. The Second Circuit did not develop an independent view on this issue, choosing instead to rely almost completely on Judge Breitenstein's duPont dictum in upholding the administrative authority to issue such variances. No inquiry was made to determine Congressional intent with respect to section 301(b). Section 301(e)'s requirement that limitations apply to "all" industrial point sources was ignored. Because point source dischargers are numerous and the limitations might prove "ill-suited to some of the unsampled individual plants," the Second Circuit felt that a BPT variance clause was "peculiarly appropriate."

The Second Circuit assumed that the limitations adopted by the Administrator were only "presumptively" applicable, thereby permitting the permit-issuing authority, in most instances the states, to issue individual permits based upon individual plant differences. This view meshed well with industry demands for personalized treatment of point sources, with the Administrator's limitations serving only as non-binding benchmarks. However, this position on the applicability of EPA limitations was subsequently rejected by the Supreme Court.


93. 537 F.2d 642, 8 ERC 1988 (2d Cir. 1976).
94. Id. at 646, 8 ERC at 1991-92. The decision was rendered on Apr. 28, 1976, less than two months after the Fourth Circuit decided duPont.
95. The bases for confirming the variance authority were both attributed to the Fourth Circuit decisions: (1) variances "are appropriate to the regulatory process"; and (2) precedent (Portland Cement and International Harvester) supports such a rule. Id.
96. The failure to refer to section 301(e) is especially relevant as a result of the Third Circuit's subsequent reliance upon that subsection's "all" requirement to invalidate the Administrator's claim to inherent exemption authority. See American Iron & Steel Inst. v. EPA (American Iron III), 568 F.2d 284, 10 ERC 1689 (3d Cir. 1977). See also note 78 supra.
97. NRDC v. EPA, 537 F.2d at 647, 8 ERC at 1992.
98. Id. The court believed that inflexible limits are unlawful:
   By specifying a permit procedure, Congress implicitly conferred on the permit-grantor the privilege of construing the broader regulations in light of the specific type of plant applying for the permit. Without variance flexibility, the program might well flounder on the rocks of illegality.

Id.
99. See id.
the limits were designated not as "presumptively applicable" but as "obligations." The Second Circuit also assumed that without the flexibility afforded by a variance procedure, the discharger would not be afforded an opportunity to be heard upon the limitations, thereby raising the possibility of a due process violation.

This position fails to consider the discharger's right to challenge the limitations within ninety days after they are promulgated, such a procedure has been held to satisfy due process requirements in a similar context.

Instead of employing accepted rules of statutory construction, the judicial opinions justify the Administrator's assumption of authority by relying upon each other. This decisional method reached its peak in *American Petroleum Institute v. EPA (API)*. With Judge Breitstein again writing for the court, this time in the Tenth Circuit, the *API* opinion relied upon *NRDC v. EPA*, which itself had relied upon the original Breitstein dictum in *duPont*. The court in *API* concluded, "We agree with the Second Circuit that the 1977 variance provisions are a valid exercise of EPA's rule-making authority under § 501(a)."

This result begs the question. Section 501(a) only grants the Administrator authority to issue such regulations as will carry out his functions under FWPCA. The cases announce a judicial determination that one of the Administrator's functions is to provide an escape mechanism for those whose unique conditions prevent them from complying with adopted effluent limitations. This decision would appear an unwarranted determination, given both the lack of any affirmative indication of such authority in the statute and the Congressional intent to apply BPT uniformly.

**b. The Supreme Court's *duPont* decision**

Although *duPont* did not involve the question of EPA's authority to issue BPT variances, the Supreme Court spoke on the topic.

102. NRDC v. EPA, 537 F.2d at 647, 8 ERC at 1992.
105. 540 F.2d 1023, 9 ERC 1252 (10th Cir. 1976).
106. *Id.* at 1032, 9 ERC at 1259 (citing with approval NRDC v. EPA, 537 F.2d 642, 8 ERC 1992 (2d Cir. 1976)).
107. See note 94 supra and accompanying text.
108. 540 F.2d at 1033, 9 ERC at 1260.
110. See text accompanying notes 32-66 supra.
111. The issue arose only because of the sweeping language used by the Fourth Circuit in its effort to support section 306 variance authority. *See E.I. duPont de Nemours & Co. v. Train*, 541 F.2d 1018, 1028, 8 ERC 1718, 1724 (4th Cir. 1976).
Holding that BPT effluent limitations could be issued as single numbers, Justice Stevens' opinion states:

We conclude that the statute authorizes the 1977 limitations as well as the 1983 limitations to be set by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations.\(^{112}\)

The Supreme Court's gratuitous approval of BPT variance authority occurred without briefing and argument by the parties, and without adequate research into the intent of Congress.\(^{113}\) Unfortunately, the assumption of inherent administrative authority to grant variances by EPA was confirmed.

Apparently contradicting its approval of BPT variance authority, the \textit{duPont} Court rejected variance authority for section 306\(^{114}\) "new sources."\(^{115}\) The Fourth Circuit, believing that provision for variances and modifications are inherently appropriate to the administrative process, had held that new source regulations must provide for a variance.\(^{116}\) But the Supreme Court, referring to the statutory language that makes it unlawful for any owner of any new source to operate or discharge in violation of the standards set by the Administrator, ruled that Congress intended the standards to be an absolute prohibition, regardless of what the Court of Appeals felt was appropriate.\(^{117}\) The Court held that the Administrator was powerless to issue variances unless specifically authorized by FWPCA to do so. Yet, just as section 306 does not provide for variances, section 301(b)(1)(A), mandating application of BPT effluent limitations to existing point sources, does not provide for variances. Similarly, the language that the court in \textit{duPont} found so persuasive in negating new source variance authority appears in section 301(e), which applies to BPT requirements.\(^{118}\) No explana-

\(^{112}\) 430 U.S. at 128, 9 ERC at 1759 (1977) (emphasis added). This dictum was quickly recognized as settled law in United States Steel Corp. v. Train, 556 F.2d 822, 10 ERC 100 (7th Cir. 1977), where the court stated: "[t]he Supreme Court's opinion in \textit{duPont} v. Train, \textit{supra} . . . infers variance authority in EPA with respect to the 1977 limitations as well." \textit{Id.} at 844, 10 ERC at 1016.

\(^{113}\) The Fourth Circuit \textit{duPont} opinion found support in the FWPCA legislative history for "almost any position one cares to take." 541 F.2d at 1028, 8 ERC at 1723. But nothing in the legislative history supports the position that the Administrator has the authority to issue BPT variances.


\(^{115}\) The language denying "new source" variance authority reads, "In striking contrast to § 301(c), there is no statutory provision for variances, and a variance provision would be inappropriate in a standard that was intended to insure national uniformity." 430 U.S. at 138, 9 ERC at 1764.

\(^{116}\) 541 F.2d at 1028, 8 ERC 1723.

\(^{117}\) 430 U.S. at 138, 9 ERC at 1764. This statement cannot be reconciled with the earlier assertion by Justice Stevens that variances for BPT are necessary. See text accompanying note 112 \textit{supra}.

\(^{118}\) The \textit{duPont} court quoted that portion of section 306(e) which states, "It is unlawful for any owner or operator of any new source to operate such source in violation of any
tion of this contradiction is offered by Justice Stevens; perhaps the off-hand nature of the approval of BPT variance authority is to blame.

C. Application of the Variance Regulation—Factors Constituting a Fundamental Difference

EPA intended that only factors of a technical or engineering nature could make an individual plant so “fundamentally different” as to qualify for a BPT variance. Point source polluters not able to show technical or engineering differences have nevertheless tried to qualify for variances by attacking as too narrow the definition of the factors to be considered. Some of these judicial challenges to EPA’s limitation of factors have succeeded while others have failed.

An unsuccessful challenge to the limitations was raised in United States Steel Corp. v. Train, the first judicial review of interim permit requirements. There the Court chose to view the contested limitations as a request for a variance from the terms of the subsequently adopted iron and steel effluent limitations. The court first upheld the EPA determination that the technical situation at United States Steel’s Gary, Indiana, works did not present “fundamentally different” factors with respect to blast furnace recycling. The court then ruled that, even though the Indiana Water Quality Standards required a higher cleanup level than the interim permit, a variance from the Federal limitations could not be justified on that basis. After rejecting United States Steel’s claim that the uniformity goal of FWPCA would be damaged by refusing such a variance, the court held that the existence of more

standard of performance applicable to such source.” 430 U.S. at 138, 9 ERC at 1764 (emphasis added). Cf. section 301(e), “Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act.” FWPCA § 301(e), 33 U.S.C. § 1311(e) (1976) (emphasis added).


120. 556 F.2d 822, 10 ERC 1016 (7th Cir. 1977).

121. These effluent limitations can be found at 40 C.F.R. § 420 (1977). See 556 F.2d at 844, 10 ERC at 1038.

122. 556 F.2d at 845, 10 ERC at 1017.

123. Id., 10 ERC at 1018. Under FWPCA § 510, 33 U.S.C. § 1370 (1976), the states are permitted to adopt more stringent water quality standards. Pursuant to FWPCA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (1976), those standards must be incorporated into adopted BPT limitations, whether interim or final. This process could create Congressionally sanctioned nonuniformity at levels stricter than minimum requirements, subject to state discretion. A requirement more stringent than the class or category BPT base level may also occur as a result of other federal laws because of subsection C’s command that point source dischargers comply with any more stringent limitation of any other federal law. Applications of the provisions of the Safe Drinking Water Act (42 U.S.C. §§ 300f—300j-9 (1976) (current version at 42 U.S.C.A. §§ 300f—300j-9 (West 1978))) might well result in substantially stricter BPT effluent limitation levels, in defined geographical areas, than are currently applicable.
stringent state limitations is not one of the factors to be considered when determining whether a point source is fundamentally different.\textsuperscript{124}

A more successful industry complaint was that the economic impact of compliance upon a point source should be considered a fundamental difference. In \textit{Appalachian Power Co. v. Train},\textsuperscript{125} certain representatives of the steam-electric industry, as part of a challenge to applicable BPT limitations, attacked their 1977 variance as inadequate. The focus of these claims was that EPA had erred in excluding economic impact as one of the factors to be considered in demonstrating a fundamentally different situation justifying relief from the established limitations. The industry argument ultimately prevailed.\textsuperscript{126}

\textit{Appalachian Power} correctly struck down an arbitrary line drawn by EPA between factors it would and would not consider as contributing to a fundamental difference. Support for the court's decision lies in the Fourth Circuit's \textit{duPont} variance dictum\textsuperscript{127} and in analysis of the factors EPA considers for issuance of a variance.\textsuperscript{128} To decide the parameters of the variance regulation, it is only logical that the factors that give rise to a determination of fundamental difference should include the same elements that were considered in setting the underlying limitations for the entire industry.\textsuperscript{129} One of the factors considered in the latter standard is the "total cost" of the technological cleanup which is mandated.\textsuperscript{130} Other factors include technical and engineering crite-

\begin{itemize}
\item \textsuperscript{124} The irony of advocating a variance in pursuit of uniformity was not lost upon the court. 556 F.2d at 847, 10 ERC at 1018.
\item \textsuperscript{125} 545 F.2d 1351, 9 ERC 1033 (4th Cir. 1976).
\item \textsuperscript{126} \textit{Id.} at 1359, 9 ERC at 1039.
\item \textsuperscript{127} See text accompanying notes 69-72 \textit{supra}.
\item \textsuperscript{128} Regulations discuss the factors in depth. \textit{See, e.g.,} 40 C.F.R. § 422.12 (phosphate manufacturing category).
\item \textsuperscript{129} This method is that adopted by the \textit{Appalachian Power} majority. 545 F.2d at 1359, 9 ERC at 1039.
\item \textsuperscript{130} Section 304(b)(1)(B) requires total cost balancing against the effluent reduction benefits to be achieved. Since a BPT variance request would deal with individual plant idiosyncrasies, the local cost-benefit balancing, in determining any fundamental differences, would also require consideration of the local environmental impact of failure to achieve the BPT level. This point was not discussed in \textit{Appalachian Power}, but would seem to be implicit in such analysis. A suggestion is made in \textit{Appalachian Power} that a unique factor supporting a variance may be the "significant cost differentials of the particular point source involved." 545 F.2d at 1360 n.23, 9 ERC at 1039-40 n.23. This statement may mean that an industrial discharger which could demonstrate an installation cost grossly out of proportion to the cleanup expenses borne by its competitors could make a case for a variance. The potential for expansion and avoidance of BPT category limitations that was inherent in note 23 of \textit{Appalachian Power} did not go unnoticed by industry.
\item The decision in \textit{Weyerhaeuser Co. v. Costle}, 590 F.2d 1101, 11 ERC 2149 (D.C. Cir. 1978), both sanctions and expands the suggestion of note 23. In \textit{Weyerhaeuser}, a proceeding for review of "Phase II" BPT regulations for the "bleached" segment of the paper industry, petitioners claimed that the promulgated variance regulation was inadequate because it did not allow consideration of the same factors required to set classwide limitations under section 304(b)(1), namely the economic factors of individual plant compliance. In analyzing
\end{itemize}
ria. Excluding cost but retaining technical and engineering criteria as factors that may justify a BPT variance, as EPA has done, would appear to be an arbitrary distinction. As Appalachian Power notes, since the 1977 limitations are less stringent than the 1983 BAT limitations, the BPT regulatory variance should encompass at least as many factors as does the statutory BAT variance. Consequently, so long as EPA maintains its claim of authority to issue BPT variances, economic impact logically should be considered in granting those variances.

The holding in Appalachian Power that the BPT variance regulation was too limited demonstrates the quagmire EPA has entered by attempting to ease the BPT requirements. It further demonstrates continued judicial assumption of validity for the Administrator's actions in the petitioner's claim, Judge McGowan cited the *duPont* dictum (see text accompanying notes 111-13 supra) as validating BPT variances and then proceeded to determine which factors should be incorporated in the regulations. *Id.* at 1032-51, 11 ERC at 2162-2170. He made this determination through a seriously flawed analogy between the BAT criteria, FWPCA § 304(b)(2)(B), 33 U.S.C. § 1314(b)(2)(B) (1976) and the BPT criteria, FWPCA § 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B) (1976). 590 F.2d at 1035-36, 11 ERC at 2165. The court then argues that "analogously," the BPT criteria require consideration of the "total cost" of compliance; therefore, the regulatory BPT variance should also provide for consideration of individual economic impact as a factor of possible fundamental difference which may justify issuance of a variance. *Id.* at 1036, 11 ERC at 2166.

Absent from the Weyerhaeuser court's analysis is any reference to the sequential cleanup concept embodied in the required progression from BPT to BAT. The initial and supposedly uniform BPT level was to be achieved only after the total cost of compliance balancing had been done. No individual plant balancing was to occur at this first level. The court's analogy fails to consider that section 304(b)(1)(B) requires a cost-benefit or "total cost" analysis, while no such balancing is required in setting BAT limits. As a result, Congress felt it necessary to include section 301(c) for individual BAT exemptions.

After validating economic considerations as a proper factor in the consideration of a variance, the Weyerhaeuser court attempted to limit the utility of such an element in obtaining a variance. By so limiting its holding, the court admits its deep concern for the Pandora's box that has been opened by the administrative-judicial creation of a BPT variance provision.

We have explored this issue carefully, and we express our conclusion emphatically: Although the "total cost" of all pollution control at the petitioning mill must be considered under a satisfactory variance provision, it is only relevant "in relation to the effluent reduction benefits to be achieved" at the mill; section 304(b)(1)(B); so long as those costs relative to the pollution reduction gains are not different from those that may be imposed on the industry as a whole, the difficulty, or in fact the inability, of the operator to absorb the costs need not control the variance decision. *Id.* at 1036, 11 ERC at 2166. Despite the court's effort to characterize its extension of the variance factors as a "pin-hole safety valve", *id.* at 1040, 11 ERC at 2169, the potential for serious delay and obfuscation of BPT attainment now exists. Each individual point source discharger may assert that it will be subject to an overall cost of economic compliance which is different from that mixture of the average "best" plants considered and that it is, therefore, entitled to an exemption. The multitude of subjective issues raised by such anticipated claims, to be adjudicated by state authorities in most instances, will strike directly at the uniformity concept so implicit in the intent of the drafters of section 301.

131. FWPCA § 304(b), 33 U.S.C. § 1314(b) (1976) (current version at 33 U.S.C.A. § 1314(b) (West 1978)).
132. 545 F.2d at 1359. 9 ERC at 1039.
133. *Id.*
promulgating the variance regulations. Had an inquiry been made into the statutory history or into applicable rules of statutory construction, it is unlikely that the variance portion of the decision would have been decided as it was. The result of this continuing assumption of validity is that an opportunity now exists for the substantial destruction of the drafters' minimum uniformity goal. In addition to the difficult and prolonged period required for category BPT limitation setting and appeals therefrom, there has been added the specter of plant-by-plant limitation decisions through the regulatory variance procedure. The same factors considered in EPA's initial determination of limitations can now be analyzed and redetermined locally by, in most instances, local authorities. Such special treatment might place those plants that do not comply with the category limitations in an advantageous economic position and thereby increase the resistance to regulation of those plants that could otherwise be expected to comply without substantial difficulty.

D. Effect of the Clean Water Act of 1977 on the Variance Provision

Noncompliance with deadlines, inadequate funding for public dischargers, and the need for clarification of many issues led to enactment of amendments to FWPCA at the close of 1977. While the July 1, 1977, date for compliance with BPT requirements was not changed, alternative methods were provided for dealing with those private dischargers that failed to meet the deadline. Because of the extensive interdependence of FWPCA's effluent cleanup sections and the regulatory framework already implemented, the amendments will result in numerous questions of interpretation and attempts to harmonize conflicting requirements. One of the first questions to arise will be the effect of the changes on BPT variances, both those already in force and those requested in the future.

134. See text accompanying notes 55-66 supra.
135. See text accompanying notes 104-08 supra.
136. Local scrutiny will occur under the authority granted states to administer pollution discharge permit programs See FWPCA § 402(b), 33 U.S.C. § 1342(b) (1976) (current version at 33 U.S.C.A. § 1342(b) (West 1978)); see also notes 24 & 27 supra.
137. The confusion caused by the judicial creation of administrative authority is illustrated in American Pet. Inst. v. EPA. 540 F.2d 1023, 9 ERC 1252 (10th Cir. 1976). In American Petroleum, the industrial petitioners' attack on the scope of the variance factors to be evaluated was rejected. The court held that because the EPA Administrator created the variance authority without reference to his statutory obligations, he is free to restrict the regulation as he deems appropriate. Id at 1033, 9 ERC at 1260.
139. See text accompanying notes 165-74 infra.
140. When section 402(a)(1) interim permits expire and their requirements are less restrictive than class or category BPT requirements, the dischargers will probably seek variance relief from the additional cleanup mandate.
The 1977 Amendments provide the Administrator with an alternative to enforcement actions. The Administrator can grant an extension until April 1, 1979, for compliance with BPT upon his determination that: 1) the discharger has acted in good faith and has committed the necessary resources to achieve BPT compliance as soon as possible after July 1, 1977; 2) the extension, if granted, will not result in the imposition of any additional controls on any other point or nonpoint source; 3) an application for a discharge permit was filed prior to December 31, 1974; and 4) the facilities necessary for compliance with BPT limitations are under construction.\textsuperscript{141} Such a niggardly approach to extension of the 1977 deadline suggests again the Congressional determination to achieve uniformity in BPT compliance as the initial cleanup step.\textsuperscript{142} The Administrator is not given authority to allow variation from class or category limits. The 1977 Amendments reaffirm Congressional intent to permit no changes in substantive limitation requirements. This confirmation militates against the Administrator’s prior assumption of regulatory authority to alter the BPT limitations in response to individual claims of difference.

III

STATUTORY VARIATION FROM BAT LIMITATIONS

In addition to promulgation of BPT limitation, EPA simultaneously issued BAT limitations to be met by July 1, 1983.\textsuperscript{143} The adopt-

\begin{footnotes}

In addition, section 301(i)(2), 33 U.S.C. § 1311(i)(2), provides for BPT compliance extensions to not later than July 1, 1983, for those private dischargers who had proposed to attain BPT compliance by contracting with municipal dischargers for waste treatment, where the municipal facilities have not become available because of grant or construction problems. \textit{See also} FWPCA § 301(b)(2)(B), 33 U.S.C. § 1311(b)(2)(B) (1976).

\footnotetext[142]{As stated in the legislative history of the 1977 Amendments, “The committee intends that current limitations, \textit{i.e.}, those represented by BPT and any more stringent requirements of first round \textit{[discharge]} permits should represent a ‘floor’ or minimum requirement of the modifications authorized by this section.” S. Rep. No. 370, 95th Cong., 1st Sess. 44, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 4326, 4369. Elsewhere in the legislative history it is noted, “Under existing law there are no circumstances that justify a time for compliance extending beyond July 1, 1977. . . . Thus, the decision . . . in Republic Steel Corp. v. Train \textit{[Republic Steel I]} (6th Cir. 1977), was an incorrect interpretation of existing law.” \textit{Id.} at 60, [1977] U.S. CODE CONG. & AD. NEWS 4326, 4385.

\footnotetext[143]{BAT limits originally were to be issued within one year of enactment of the 1972 Amendments (FWPCA). FWPCA § 304(b), 33 U.S.C. § 1314(b) (1976) (current version at 33 U.S.C.A, § 1314(b) (West 1978). Revisions of these limits are required at least every five years. FWPCA § 301(d), 33 U.S.C. § 1311(d) (1976). For an example of BAT limits, see 40 C.F.R. § 430 (1975) (pulp and paper industry). The Clean Water Act of 1977 extends the
tion of these phase II limitations has also resulted in numerous judicial challenges. The majority of challenges have focused on whether available technology refers to that which is currently available, the industry position, or that which, to a reasonable probability, will be ready for use by 1983, the EPA position. The response of the courts has been equivocal. Despite agreement that the administrative record need only demonstrate there "is a reasonable basis to believe that the technology will be available by 1983," the courts have tended to treat the current BAT standards as only preliminary and therefore subject to further review before they become enforceable. 

BAT limitations are to be minimally uniform, and are to represent an improvement over BPT. Additionally, section 301(c) makes provision for individual treatment of point sources that request a BAT variance. Because the applicable date for phase II attainment is so distant, regulations governing issuance of BAT variances have not been


145. Tanners' Council of America v. Train, 540 F.2d at 1195, 8 ERC at 1886. See also Hooker Chem. & Plastic Corp. v. Train, 537 F.2d at 636, 8 ERC at 1971-72. These decisions would appear to conform with the look-into-the-future legislative intent as expressed by Representative Jones in presenting the Conference Committee Report to the House. "By the term 'best available demonstrated technology economically achievable,' the managers mean those plant processes and control technologies which, at the pilot plant or seminworks level, have demonstrated both technological performance and economic viability sufficient to reasonably justify the making of investments in new production facilities." 118 CONG. REC. 33,749 (1972), reprinted in 1 LEGISLATIVE HISTORY, supra note 2, at 232.

146. See Tanners' Council of America v. Train, 540 F.2d at 1195, 8 ERC at 1886, "At present, the 1983 limitations seem premature," and American Iron & Steel Inst. v. EPA, 526 F.2d at 1062, 8 ERC at 1346, "[T]he Act contemplates a period of a few years after which the accuracy of the Administrator's evaluations and projections can be reviewed in the light of actual experience." These views apparently contemplate judicial review of the original BAT limits and subsequent amendments, despite FWPCA § 508(b)(1)'s (33 U.S.C. § 1369(b)(1) (1976)) requirement that review of effluent limitations be foreclosed unless sought within ninety days of promulgation or, after the foreclosure date, only if based, "solely on grounds which arose after such ninetieth day." / /.

147. See 118 CONG. REC. 33,750 (1972) (statement of Rep. Jones), reprinted in 1 LEGISLATIVE HISTORY, supra note 2, at 232. See also note 144 supra.

148. FWPCA § 301(c), 33 U.S.C. § 1311(c) (1976) provides:

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator, and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.
promulgated, nor have the courts had occasion to define the scope of
the factors to be considered in passing upon such requests. Neverthe-
less, based upon the legislative history and the decisions rendered to
date, it is possible to make certain preliminary observations.

A. Vague and Conflicting Language

Industrial point dischargers will carry a two-fold burden in seek-
ing a BAT variance. Firstly, the applicant must demonstrate to the Ad-
ministrator that its proposed cleanup efforts will represent "maximum
use of technology within [its] economic capability." Secondly, the
applicant must show that "further progress toward elimination of pol-
lutants" will be made. A BAT variance must result in a cleanup
level stricter than existing BPT effluent limitation levels, regardless of
the economic capability of the applicant. Beyond that guidepost ex-
ists a vague area which will have to be defined by administrative regu-
lation.

Because the economic capability of the owner or operator will
have to be balanced against "reasonable further progress" toward dis-
charge elimination, numerous cost evaluation issues are sure to arise.
Determining the economic capability of applicants will be difficult.
Environmental improvement might conflict with the survival of the dis-
charging source. It is not yet known whether the resources of a large
corporation will be considered in deciding the economic capability for
one of the corporation's plants, or whether point sources will be forced
to run a deficit for a finite period of time in order to achieve compli-
ance. The legislative history of FWPCA is of little use on this point.
The Administrator will have to approach these questions with the

149. Section 301(c) makes no provision for delegation of this task to state approved au-
thorities. FWPCA § 301(c), 33 U.S.C. § 1311(c) (1976).
150. Id.
U.S.C.A. § 1311(b)(2)(A) (West 1978)).
152. Section 301(c) was a product of the Conference Committee and received little or no
comment during the debates on approval of the Committee's report. See text accompanying
notes 42-43 & 45-52 supra. The only direct comment was by Representative Jones during
his introduction of the report. His statement does little more than restate the problem. "The
managers expect the Administrator to adopt a reasonable approach to determinations under
this provision. When the term 'economic capability' is referred to, it means the economic
capability of the given point source." 118 CONG. REC. 33,750 (1972), reprinted in 1 LEGISLA-
TIVE HISTORY, supra note 2, at 232. It is difficult to interpret Representative Jones' comment
as sanctioning a definitional equivalent of "point source" and individual plant. The Con-
gressional purpose could not have been to base economic capability determinations upon
individual plant profitability, at least where the facility has other corporate affiliations. For
example, the major oil companies have consistently used vertical integration to make their
refining and marketing operations operate at cost or with minimal profit while deriving their
1979, EPA announced a settlement agreement with Wheeling-Pittsburgh Steel Corporation
concerning Clean Air Act and Clean Water Act violations. Ten of the company's plants are
cleanup timetable of FWPCA in mind; Congress intended to totally eliminate the discharge of water pollutants from industrial point sources by 1985.153

The Administrator must also consider the effect of previously issued BPT variances upon the ability of a point source to attain compliance levels somewhere between the BPT and BAT limitations. It may be presumed that many of the dischargers that apply for and obtain BPT variances will also seek BAT variances. Before any BAT variance issues, the point source would have to have reached the BPT limitations for the industry. A source failing to meet the BPT level of performance by the July 1, 1984, compliance date for BAT would be in violation of permit limitations and subject to enforcement proceedings.154

B. Possible Conflict with “Fishable and Swimmable” Requirements

Although it chose to reduce the prior emphasis on water quality standards as a means of forcing cleanup, Congress did not abandon this concept in FWPCA.155 A hybrid called “water quality related effluent limitations” is to be created when necessary and is to be made applicable to point sources by July 1, 1983.156 These limitations are to force the cleanup required for the achievement of the “fishable and swimmable” recreational goal157 in the event it cannot be attained even by

153. It is hereby declared that, consistent with the provisions of this chapter—
   (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985; . . . .
155. FWPCA § 303(a), 33 U.S.C. § 1313(a) (1976). Water quality standards have been defined as, “a set of rules defining a required quality for the ambient water, such as a requirement for at least five parts per million of dissolved oxygen, or no more than 1000 local fecal coliform bacteria per 100 milliliters.” Zener, The Federal Law of Water Pollution Control, in FEDERAL ENVIRONMENTAL LAW 658 (E. Dolgin & T. Guilbert eds. 1974).
156. These limitations shall be imposed:
   Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.
157. It is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983
full compliance with BAT limitations. Thus, while all plants discharging into a body of water might be in compliance with national BAT limitations or be operating under a BAT variance, they may still be subject to stricter standards imposed in order to reach the fishable and swimmable goal. In short, they may have to be better than best.

The question may arise as to the weight to be given to a previously issued BAT variance when EPA must decide upon alternative control strategies that may be required to meet water quality related effluent limitations. The Administrator must weigh the "economic and social dislocation" of more stringent cleanup against the need to attain the goals of FWPCA. In the event a point source discharger had previously obtained a BAT variance based upon economic inability to comply, the Administrator's decision on imposition of stricter controls poses a dilemma when that point source represents the major economic base of a community.

C. Possible Conflict with the Areawide Waste Treatment Management Planning Process

A seemingly valid BAT variance could also run afoul of an approved section 208 "area-wide waste treatment management plan." Section 208 was envisioned as a land use planning vehicle to help achieve and maintain appropriate water quality, both point and non-

158. Compliance may require application of pollution abatement measures without regard to economic cost to the industrial point source. The Senate Report approves such a concept in its statement that, "Alternative effluent control strategies such as the transportation of effluents to other less affected waters or control of in-plant processes would have to be developed." S. REP. No. 414, 92d Cong., 1st Sess. 46-47 (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3668, 3713, [and in] II LEGISLATIVE HISTORY, supra note 2, at 1464-65. The Administrator is even permitted to determine if the clean water need requires the "economic and social dislocation" that would be caused by closing the offending plants. FWPCA § 302(b)(1), 33 U.S.C. § 1312(b)(1) (1976).


160. Such plans are mandated:

(a) For the purpose of encouraging and facilitating the development and implementation of areawide waste treatment management plans—

(1) The Administrator . . . shall . . . publish guidelines for the identification of those areas which, as a result of urban-industrial concentrations or other factors, have substantial water quality control problems.

(b) (1) Not later than one year after the date of designation of [an organization capable of developing areawide plans] such organization shall have in operation a continuing areawide waste treatment management planning process . . . . Plans prepared in accordance with the process shall contain alternatives for waste treatment management, and be applicable to all wastes generated within the area involved . . . .


point source in origin. Approved planning agencies that operate under approved plans are permitted to exercise veto authority over discharge permits that may prevent compliance with the regional water quality plan criteria.

In passing upon applications for BAT variances, the Administrator will have a mandatory duty under Section 208(e) to quantify the effects of a BAT variance upon the attainment and maintenance of water quality within each planning region. A variance fully justified by the limited economic capability of the discharger might at the same time be impermissible under the applicable areawide plan. Presumably, issuance of a BAT variance under such circumstances could result in judicial challenge by the local planning agency or affected entities under the citizens' suit provision.

D. Effect of the 1977 Clean Water Act

The 1977 Amendments added subsection 301(g). Under its provisions, a discharger of "conventional" pollutants may obtain an individual plant modification of the class or category BAT limitations. Such an alteration in discharge limitation must be approved by the state, whether or not it is administering the program as an approved authority. The applicant for a modification must demonstrate that

---

163. FWPCA § 208(e), 33 U.S.C. § 1288(e) (1976). Whether the veto would be exercised by the local planning body or the state approved agency issuing discharge permits is unclear.
165. Clean Water Act of 1977 § 301(g), 33 U.S.C.A. § 1311(g) (West 1978). The July 1, 1983, compliance date is dropped from paragraph (2)(A) of section 301(b), and replaced by differing deadlines based upon type of pollutant: (1) toxic pollutants previously identified by the Committee on Public Works, July 1, 1984; (2) toxic pollutants not listed by the Committee and listed in section 307(a)(1), not later than three years after limits adopted; (3) "conventional pollutants" to be identified through section 304(a)(4), July 1, 1984; and (4) all others, not later than three years after limits established or July 1, 1984, whichever is later, but not later than July 1, 1987. See Clean Water Act of 1977 § 301(b)(2)(C)-(F), 33 U.S.C.A. § 1311(b)(2)(C)-(F) (West 1978). In addition, new subsection (k) of section 301, provides that in the event a discharger has experienced delays in installing innovative technology that will, when completed, exceed BAT limitations, he may obtain an extension to no later than July 1, 1987. Clean Water Act of 1977 § 301(k), 33 U.S.C.A. § 1311(k) (West 1978).
166. Conventional pollutants are classes of oxygen demanding substances, solids, and nutrients. 43 Fed. Reg. 32,857 (1978). EPA has proposed that biological oxygen demanding substances, suspended solids, fecal coliform bacteria, pH, chemical oxygen demand, phosphorous, oil, and grease be classed as conventional pollutants. Id. at 32,857-58.
167. The state could be the administrator of the permit discharge program under
the lowering of BAT below class or category limits will: 1) result in at least BPT compliance; 2) not adversely affect water quality so as to cause additional cleanup requirements for other dischargers into the same body of water; and 3) not prevent attainment of the fishable and swimmable goal of FWPCA or pose an unacceptable risk to human health or the environment.

Subsection 301(g)(2) makes clear that the BAT variance provision is coexistent with the BAT modification provision. As a result, a discharger of conventional pollutants will have two statutory procedures available to avoid compliance with BAT limitations. The BAT variance provision permits delay in achieving BAT and a variance under it should be easier for an industrial discharger to obtain, given the criteria, at least for marginal operations. On the other hand, modification pursuant to section 301(g)(1), while more difficult to obtain, will provide much longer lasting, possibly permanent exemption from the expense of installation of additional discharge technology. Both pollutant limitation reduction mechanisms may be used in sequence or alternatively and without prejudice to use of the other. The BAT variance provision is directed to the subjective economic position of the

---

FWPCA § 402(b), 33 U.S.C. § 1342(b) (1976) (current version at 33 U.S.C.A. § 1342(b) (West 1978)).

168. This requirement refers to section 301(b)(1)(A) BPT levels, not section 402(a)(1) interim permit BPT levels.

169. Congress intended to limit modifications to those conventional pollutants for which water quality standards have been developed and for which it is readily apparent whether BPT limitations have resulted in water quality suitable to meet the "fishable and swimmable" goal. S. REP. NO. 370, 95th Cong., 1st Sess. 44, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 4326, 4368-69.


171. The section states:

(b) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.


172. But neither a section 301(c) variance nor a section 301(g) modification of BAT limits is possible for section 307 listed toxic pollutants. Clean Water Act of 1977 § 301(1), 33 U.S.C.A. § 1311(1) (West 1978).

173. Modification applications under section 301(g) will not operate to stay BAT limitation compliance progress without the granting of a stay order by the Administrator. A bond or other appropriate security may be required. Clean Water Act of 1977 § 301(j)(2), 33 U.S.C.A. § 1311(j)(2) (West 1978). Finding a basis for determination of ability to pay for additional controls or effluent charges remains a problem. Individual plants may not be profitable. However, overall corporate profits may make installation of appropriate technology feasible, if not rational, from an economics standpoint. See Yohe, Substitution and the Control of Pollution, 3 J. ENVTL. ECON & MANAGEMENT 312, 320 (1976); Hass, Optimal Taxing for the Abatement of Water Pollution, 6 WATER RESOURCE RESEARCH 353, 358 (1970).

174. See note 171 supra.
individual discharger and the maximum cleanup progress that it can attain from BPT and towards BAT. The modification provision does not focus on the economic capability of the discharger, but upon the effect on water quality of its failure to achieve BAT, assuming it has met BPT. If such a failure would not result in interference with FWPCA's clean water goals, compliance with industry BAT limitations will not be required.

The 1977 Amendments highlight the necessity for all industrial point sources to attain BPT limitations. Without uniformity, the subsequent timetable for compliance is imperiled. While Congress has expressed a grudging willingness to give a little more time for good faith efforts to reach BPT, it has not acquiesced in the Administrator's unilateral provision for relaxation of uniform BPT requirements by variance.

IV
CONCLUSION

The intent of Congress in 1972 and 1977 was to require nothing less than uniformity in the pre-BAT cleanup period. Aside from outright noncompliance with the law, at least three methods have evolved through which industrial point source dischargers have been able to delay and avoid meeting BPT limitations for their industry: (1) by holding a five-year section 402(a)(1) interim permit, which does not require compliance with subsequently promulgated category BPT limitations when they are issued or shortly thereafter; (2) by obtaining an EPA-issued "exemption," as was done by Ohio's Mahoning River iron and steel plants; and (3) by obtaining a variance from the BPT limitations upon demonstration of the existence of fundamentally different factors affecting the individual discharge source.

The failure of industrial point sources to meet BPT limitations by the deadline disrupts the plan for obtaining cleaner water in several respects. Primarily, it substantially reduces the likelihood that a point source discharging conventional pollutants will meet BAT limitations by July 1, 1984. A plant so technologically or economically different from other "best" average pollution reducing plants in the industry that it is entitled to the establishment of lower BPT limits will have an even stronger rationale for noncompliance with stricter BAT limitations.

175. This attempt to avoid BPT ultimately failed. \textit{See} note 78 \textit{supra}. The State of Ohio has subsequently (Feb. 1978), with EPA approval, issued NPDES permits that delay some BPT compliance dates to as late as 1983 for Mahoning Valley Steel Manufacturers. These permits may be evidence that economic factors may be considered separately from the variance regulation when political pressures on EPA become too great.

176. The discharger can also claim that it will have to come much farther to meet BAT than those sources that initially achieved at least the industry wide BPT requirements.
Additionally, in the face of this initial noncompliance, the procedures designed to result in swimmable water in the most severely polluted waterways may not be able to function. For example, since Ohio's Mahoning River Valley steel plants required variance or exemptions from minimal national BPT, it is logical to assume that those economically marginal plants will be unable later to meet the subsequently applicable water quality related effluent limitations (section 302), areawide water quality management plans (section 208), and the soon-to-be-adopted Safe Drinking Water standards for cities downstream.

The BPT regulatory variance is a response to the heavy pressure that has been placed upon EPA by the technology timetable of FWPCA and the consequent industry response. Faced with often meritorious economic and technological reasons for postponing installation of pollution control equipment, EPA has sought to provide flexibility through the variance regulation. Nevertheless, such administrative authority was not provided in the statute, and under the compliance scheme of FWPCA, cannot be provided during the first cleanup phase without causing severe damage to the entire program. To date, those courts that have touched upon EPA's attempt to accommodate those it regulates have reached poor and contradictory results. The consequence of this administrative-judicial combination of error can only be continued deterioration of water quality.

Attainment of FWPCA's goals may require enactment of stronger measures affording even less administrative discretion. This method was envisioned during the 1972 Senate debate over the Proxmire-Humphrey "effluent charges" amendment. The amendment, tendered during the floor debate over S. 2770, sought to require the promulgation, with subsequent assessment, of a schedule of effluent charges for all those dischargers, other than municipalities, whose pollutants detract from the quality of the water. Charges were to be set at levels that would cause the discharger to opt for the installation of appropriate technology to reduce discharge levels below applicable

177. E.g., Bethlehem Steel found it to be "physically impossible" to install the required control equipment by July 1, 1977. See Bethlehem Steel Corp. v. Train, 544 F.2d 658, 659, 9 ERC 1420, 1421 (3d Cir. 1976). This time complaint as opposed to the limits complaint is now met by Clean Water Act of 1977 § 309(a)(5)(B) 33 U.S.C.A. § 1319(a)(5)(B) (West 1978). See text accompanying note 141 supra.

178. 117 CONG. REC. 38,826-34 (1971), reprinted in II LEGISLATIVE HISTORY, supra note 2, at 1316-36.

179. The Senate version of the 1972 FWPCA amendments. More discussion of S. 2770 can be found at text accompanying note 42 supra.

180. 117 CONG. REC. 38,826 (1971), reprinted in II LEGISLATIVE HISTORY, supra note 2, at 1316.

181. Id. The charges were to cause "attainment of the standards and goals of this Act," and to provide, "economic incentives . . . to minimize pollution." Id.
limits, thus permitting attainment of water quality standards. In this way, it was hoped that effective enforcement of effluent limitations would occur without the necessity of judicial or administrative enforcement methods.

Senator Muskie, as the floor manager of S. 2770, led the opposition to the Proxmire-Humphrey amendment. He pointed out that additional bureaucracy would be required to establish and collect the charges, especially since fees would have to be levied on a plant-by-plant basis. He also noted that the amendment’s operative terms were keyed to water quality standards and not effluent limitations. This tying would have resurrected the old controversy over demonstrating the cause and effect relationship of individual plant discharge to overall water quality. Lastly, he objected that a charge system would be inadequate in those instances where technology was not sufficiently advanced to determine the cost of cleanup. These conceptual and practical problems led to defeat of the amendment despite general agreement that its concept was meritorious.

Another approach to enforcement without discretion was part of the Senate version of the Clean Water Act of 1977, S. 1952. Section 319 provided that a noncompliance fee would be imposed automatically upon all sources not in compliance with BPT by July 1, 1978. No additional bureaucracy would be needed to calculate such charges because the discharger would be required to develop the pollution control cost data. Even then, the full cost of technology implementation was to be posted in the form of a bond, pending the outcome of the litigation. The noncompliance fee provision did not emerge from conference committee.

The problem will continue to exist. Industrial dischargers that have sought or will seek BPT variances often are the most serious violators of limits. They raise in capital letters the alternative of jobs or clean water, sometimes validly, sometimes invalidly, and they are the...
major pressure upon a bureaucracy assigned the task of discretionary enforcement. Until Congress is willing to state in the law itself, and not just in the legislative history, that dischargers must comply with the established limits or go out of business, this country's water quality will remain burdened with the ugly consequences of the Administration's pressured discretion.