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**JUDICIAL MAELSTROM IN FEDERAL WATERS: A
COMPOSITE INTERPRETATION OF THE
FEDERAL WATER POLLUTION CONTROL
ACT AMENDMENTS OF 1972**

I. INTRODUCTION

Early explorers of the vast reaches of the Western Hemisphere were quick to take notice of the beauty of North America's waterways.¹ Verrazano, perhaps the first European to visit these shores, wrote: "[W]e found a very pleasant situation among some steep hills, through which a very large river, deep at its mouth, forced its way to the sea We passed up this river, about half a league, when we found it formed a most beautiful lake three leagues in circuit [T]his region . . . seemed so commodious and delightful" ² Three centuries later, these same waters (New York Bay)³ prompted a tragically accurate comment from Senator Robert Kennedy, who said: "If you fall in here you don't drown—you decay." ⁴ Such commentary is not unusual, for the state of the nation's waters by the mid-1960's was shocking. Lake Erie had literally developed the consistency and appearance of pea soup,⁵ becoming, in effect, a "huge . . . cesspool,"⁶ while the waters of such great rivers as the Hudson had become dangerously disease-ridden.⁷ The cause of the problem—pollution—can be simply described;⁸ its solution, on the other hand, has proven to be a matter of incredible complexity.

Against a background of enormous frustration⁹ Congress passed the Federal Water Pollution Control Act Amendments of 1972 (the Act),¹⁰ a sweeping piece of legislation that has as its goal the final, absolute cessation of harmful

1. An early colonist, for example, referred to the Potomac River as "the sweetest and greatest river I have seene." Bird, *Our Dying Waters*, Saturday Evening Post, April 23, 1966, reprinted in C. Myers, *The Environmental Crisis: Will We Survive?* 27 (1972) [hereinafter cited as Myers].

2. R. Boyle, *The Hudson River: A Natural and Unnatural History* 29 (1969).

3. See id.: "The first European to discover the Hudson River, or at least New York Harbor, was . . . Verrazano . . ."; Myers, *supra* note 1, at 28.

4. Myers, *supra* note 1, at 28.

5. Commoner, *Balance of Nature*, in *Providing Quality Environment in Our Communities* (W. Konkle ed. 1968), reprinted in *Water Pollution, A Scientists' Institute for Public Information Workbook* 17 (G. Berg ed. 1970).

6. Id. at 18.

7. In 1965, a watermelon found floating in the Hudson was determined to be the cause of eight cases of typhoid fever contracted by those who had later eaten it. Myers, *supra* note 1, at 28.

8. For a good general discussion of the causes of water pollution, see *Water Pollution, A Scientists' Institute for Public Information Workbook* (G. Berg ed. 1970).

9. Davis & Glasser, *The Discharge Permit Program Under the Federal Water Pollution Control Act of 1972—Improvement of Water Quality Through the Regulation of Discharges from Industrial Facilities*, 2 *Fordham Urb. L.J.* 179, 192-95 (1974) [hereinafter cited as Davis]; see note 74 *infra*.

10. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq. (Supp. V, 1975) [hereinafter cited as the Act].

water pollution by 1985.¹¹ The strength of congressional determination toward this end can be seen in both the language of the Act itself¹² and its history,¹³ and is perhaps typified by the remarks of Senator Edmund Muskie, a prime mover in the enactment of the legislation, made in connection with the Act's declaration of goals and policy:¹⁴ "These are not merely the pious declarations that Congress so often makes in passing its laws; on the contrary, this is literally a life or death proposition for the Nation."¹⁵

The heart of the Act, the imposition of technology related¹⁶ and water-quality related¹⁷ effluent discharge limitations upon those who use our waterways as some "vast, rancid sewer,"¹⁸ is founded upon a proposition that in its simplicity approaches a tautology—if no one pollutes, there will be no pollution. Realistically, however, the application of these standards has proven to be an "administrative nightmare."¹⁹ The sheer variety and number of water polluters throughout the country are indicative of the problems which have impeded the Act's implementation.²⁰ Unfortunately, the nightmare has not been exclusively administrative.

11. "The objective of this [Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this [Act]—(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985 . . ." The Act § 101(a), 33 U.S.C. § 1251(a) (Supp. V, 1975).

12. *Id.*

13. The Act itself is a compromise bill, designed by a conference committee of both houses of Congress. Staff of Senate Comm. on Public Works, 93d Cong., 1st Sess., *A Legislative History of the Federal Water Pollution Control Act Amendments of 1972* 282 (Comm. Print 1973) [hereinafter cited as *History*].

Each house, prior to the compromise bill, had passed its own version by overwhelming margins. S. 2770, 92d Cong., 1st Sess. (1971), in *History*, supra at 1534; H.R. 11896, 92d Cong., 2d Sess. (1972), in *History*, supra at 893. The House bill passed by a vote of 366 to 11, and the Senate bill passed by 74 to 0. *History*, supra at 141.

Furthermore, the Act itself was passed over a presidential veto. The House vote to override the veto was 247 to 23. 118 Cong. Rec. 37,060-61 (1972). The Senate vote to defeat the veto was 52 to 12. *Id.* at 36,879.

14. The Act § 101(a), 33 U.S.C. § 1251(a)(Supp. V, 1975).

15. *History*, supra note 13, at 164.

16. The Act § 301, 33 U.S.C. § 1311 (Supp. V, 1975).

17. The Act § 303, 33 U.S.C. § 1313 (Supp. V, 1975).

18. *History*, supra note 13, at 862 (remarks of Reps. B. Abzug and C. Rangel).

19. "Development of effluent limitations guidelines and standards of performance has proven to be an administrative nightmare . . ." Davis, supra note 9, at 215; Comment, *The Application of Effluent Limitations and Effluent Guidelines to Industrial Polluters: An Administrative Nightmare*, 13 *Houston L. Rev.* 348 (1976) [hereinafter cited as *Houston*].

20. The Act § 402, 33 U.S.C. § 1342 (Supp. V, 1975), provides for a national pollutant discharge elimination system (NPDES) which requires point sources (that is, individual plants discharging within a limited spatial zone) discharging pollutants into the nation's waters to obtain discharge permits. As of December 31, 1974, the total number of permits issued (industrial and municipal) was 27,925. [1975] *Envir. Rep. (BNA)* 41:2204 (1975). Six months later, by July 1, 1975, the number of issued permits had substantially increased to 40,291. The Sixth Annual Report of the Council on Environmental Quality 65 (1975). For a more complete discussion of the Act, see Davis, supra note 9.

The framers of the Act had hoped to eliminate fundamental interpretive problems from the beginning, "not [by leaving] the final evaluation of the bill to legislative history, but instead [by writing] into law as clearly as possible the intent of the Congress."²¹ The courts' reactions, on the other hand, have not justified the initial optimism. A survey of the many recent circuit court decisions involving the Act's interpretation highlights the rampant judicial confusion. The Fourth Circuit has found the Act to be "vague, uncertain, and inconsistent"²² while the Third Circuit stated that "[t]he failure to provide a clear procedural structure . . . in the administration of the Act is disquieting."²³ The Second Circuit considered the "statutory language [to be] devoid of plain meaning,"²⁴ and concluded that "[i]t would be too much to say that we construe this confusing statute with confidence."²⁵ The Tenth Circuit recently emphasized that "[t]he Act is difficult to understand, construe, and apply."²⁶ Obviously, this judicial reaction strongly conflicts with Senator Muskie's opening enthusiasm concerning the Act's efficacy and clarity.²⁷

The origins and present state of the controversy will be the primary focus of this Note. An explanation of the background and internal structure of the Act itself is necessary before any in-depth study can be made, but as this has been thoroughly explored elsewhere,²⁸ an attempt has been made to abbreviate, where possible, the discussion of the statutory material. This Note will concentrate instead upon the Act from a judicial perspective in an effort to determine what the courts see as the major stumbling blocks in the Act's application.

II. THE ACT

The focus of the present Act is on "effluent limitations" while the criterion of water-quality, the keystone of the previous inefficient legislation,²⁹ has been retained as a measure of program effectiveness and industrial performance.³⁰ Given the Act's ultimate aim, "that the discharge of all pollutants into the navigable waters be eliminated by 1985,"³¹ the altered focus would seem necessary.

Reduced to its essentials, the Act's mechanism is the establishment of a shifting system of standards whereby the level of permissible discharge (effluent limitation) becomes increasingly restrictive, arriving hopefully at a

21. History, *supra* note 13, at 164 (remarks of Sen. Muskie).

22. *E. I. Du Pont de Nemours & Co. v. Train*, Nos. 74-1261 et al., at 14 (4th Cir., March 10, 1976), cert. granted, 96 S. Ct. 3165 (1976) [hereinafter cited as *Du Pont II*].

23. *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1074 (3d Cir. 1975).

24. *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620, 627 (2d Cir. 1976).

25. *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 518 (2d Cir. 1976).

26. *American Petrol. Inst. v. EPA*, Nos. 74-1465 et al., at 8 (10th Cir., Aug. 11, 1976) [hereinafter cited as *American Petrol. II*].

27. See note 21 *supra* and accompanying text.

28. See Davis, *supra* note 9; Houston, *supra* note 19.

29. See note 74 *infra*.

30. S. Rep. No. 92-414, 92d Cong., 1st Sess. 7-8 (1971) [hereinafter cited as S. Rep.].

31. See note 11 *supra*.

zero-discharge condition by 1985.³² The most important sections for the purpose of this Note are sections 301,³³ 304,³⁴ 402,³⁵ and 509.³⁶ These sections deal with the implementation and enforcement of the effluent limitation mechanism as it pertains to existing industrial point sources.

Section 301(a)³⁷ provides that, with certain exceptions,³⁸ the discharge of *any* pollutant shall be unlawful. The exceptions exist basically to alleviate the degree of economic disruption which would necessarily have followed had this section been implemented immediately.³⁹ Section 301(b)⁴⁰ demands that by July 1, 1977 existing industrial point sources of pollutants achieve that level of discharge attainable through application of the "best practicable control technology currently available as defined by . . . section [304](b)"⁴¹ By 1983, however, classes or categories of point sources are required to achieve that discharge reduction attainable through "application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal . . . in accordance with regulations issued . . . pursuant to section [304](b)(2)"⁴² This section further demands that where technologically and economically feasible, a class or category of point sources shall be required entirely to eliminate the discharge of pollutants.⁴³ The 1983 standards reflect a desire to attain an interim goal, wherein a given water body's biological integrity would be stabilized even though a zero-discharge condition may not have been reached.⁴⁴

Section 301(b) also states that "there shall be achieved . . . effluent limitations."⁴⁵ This language has proven to be particularly troublesome, for it is uncertain whether this is merely a statement of statutory intent or whether it actually triggers the implementation of the effluent limitation mechanism.⁴⁶

32. The Act § 101(c)(1), 33 U.S.C. § 1251(c)(1) (Supp. V, 1975); S. Brubaker, In Command of Tomorrow 122 (1975) [hereinafter cited as Brubaker].

33. The Act § 301, 33 U.S.C. § 1311 (Supp. V, 1975).

34. The Act § 304, 33 U.S.C. § 1314 (Supp. V, 1975).

35. The Act § 402, 33 U.S.C. § 1342 (Supp. V, 1975).

36. The Act § 509, 33 U.S.C. § 1369 (Supp. V, 1975).

37. The Act § 301(a), 33 U.S.C. § 1311(a) (Supp. V, 1975).

38. The Act is basically one of control of discharge. Therefore, discharge is allowable but only under the conditions defined by the Act. See notes 39-71 *infra* and accompanying text.

39. S. Rep., *supra* note 30, at 43.

40. The Act § 301(b), 33 U.S.C. § 1311(b) (Supp. V, 1975).

41. The Act § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (Supp. V, 1975).

42. The Act § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A) (Supp. V, 1975).

43. *Id.*

44. The attainment of the interim goal is further aided by § 302 of the Act, 33 U.S.C. § 1312 (Supp. V, 1975): if in particular bodies of water the effluent limitations imposed under § 301(b)(2), 33 U.S.C. § 1311(b)(2) (Supp. V, 1975), are found to actually impede the attainment of a certain level of water quality, § 302(a), 33 U.S.C. § 1312(a) (Supp. V, 1975), provides for the application of more stringent standards. See S. Rep., *supra* note 30, at 46.

45. The Act § 301(b), 33 U.S.C. § 1311(b) (Supp. V, 1975).

46. See notes 72 & 73 *infra* and accompanying text.

Section 304⁴⁷ provides for the accumulation of the vast amounts of information necessary to determine the "degree of effluent reduction attainable through the application of the *best practicable control technology currently available*"⁴⁸ and the "degree of effluent reduction attainable through the application of the *best control measures and practices achievable*."⁴⁹ In each case the determination is two-tiered: identification of the amount and characteristics of pollutants for each stage of effluent limitation,⁵⁰ and specification of the factors to be considered in defining the appropriate applicable technology.⁵¹ The effectuating language of section 304 is, "the Administrator shall . . . publish . . . regulations, providing *guidelines* for effluent limitations . . ."⁵² This language, particularly the word "guidelines," underlies much of the current debate in the courts.⁵³

The effluent limitation program outlined above⁵⁴ is given partial effect⁵⁵ by section 402,⁵⁶ which establishes a National Pollutant Discharge Elimination System (NPDES). Although all discharge is prohibited,⁵⁷ permits for such discharge may be obtained by application to the Administrator of the EPA. If the Administrator determines that the discharge complies fully with effluent limitations established under the requirements of subchapter III⁵⁸ of the Act, a permit may be issued.⁵⁹ Furthermore, this section allows and encourages the ultimate take over of the permit issuance function by states whose permit programs are determined to be in full compliance with the Act's discharge

47. The Act § 304, 33 U.S.C. § 1314 (Supp. V, 1975).

48. The Act § 304(b)(1)(A), 33 U.S.C. § 1314(b)(1)(A) (Supp. V, 1975) (emphasis added).

49. The Act § 304(b)(2)(A), 33 U.S.C. § 1314(b)(2)(A) (Supp. V, 1975) (emphasis added).

50. The Act §§ 304(b)(1)(A), (2)(A), 33 U.S.C. §§ 1314(b)(1)(A), (2)(A) (Supp. V, 1975).

51. "Factors relating to the assessment of best . . . technology . . . shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate . . ." The Act § 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B) (Supp. V, 1975); see the Act § 304(b)(2)(B), 33 U.S.C. § 1314(b)(2)(B) (Supp. V, 1975).

52. The Act § 304(b), 33 U.S.C. § 1314(b) (Supp. V, 1975) (emphasis added).

53. See note 75 *infra*.

54. New source standards, not being central to the controversy at hand, have not been discussed in this Note. The effluent limitation requirements for new sources are governed by the Act § 306, 33 U.S.C. § 1316 (Supp. V, 1975), and are virtually identical to those governing the 1983 interim goal for existing sources. Compare *id.* with the Act § 301(b)(2)(A), 33 U.S.C. 1311(b)(2)(A) (Supp. V, 1975).

55. The controversy revolves in part around the question of the degree to which different sections of the Act are to be employed in the regulation of discharge. See, e.g., notes 214-25 *infra* and accompanying text.

56. The Act § 402, 33 U.S.C. § 1342 (Supp. V, 1975).

57. See note 37 *supra* and accompanying text.

58. That is, the requirements of the current applicable technology as established by § 304, 33 U.S.C. § 1314 (Supp. V, 1975). "Subchapter III" includes all of this section plus those requirements applicable to new sources, thermal discharges, toxic sources, and so forth. The Act, Subchapter III—Standards and Enforcement, 33 U.S.C. §§ 1311-28 (Supp. V, 1975).

59. The Act § 402(a)(1), 33 U.S.C. § 1342(a)(1) (Supp. V, 1975).

restrictions.⁶⁰ The Administrator retains substantial discretion in granting⁶¹ or withdrawing⁶² approval of any state's permit program.

Section 509,⁶³ which governs administrative procedure and judicial review, is one of the more inflamed spots at the heart of the present controversy. This section gives the circuit courts original jurisdiction to review only certain of the EPA's actions under the Act. These include issuance of new source standards,⁶⁴ issuance of toxic source standards,⁶⁵ determination of the validity of state permit programs⁶⁶ and the issuance or denial of permits by the Administrator.⁶⁷ The particularly troublesome subsection is 509(b)(1)(E), which provides for initial circuit court review of any Administrator's action "in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306 . . ." ⁶⁸ It is immediately apparent that section 509(b)(1)(E) makes no mention whatever of section 304, the crucial section under which the applicable technology is defined. The glaring omission of section 304 from section 509(b)(1)(E) has set the scene for a judicial struggle that has lasted for well over a year⁶⁹ and is likely to continue for at least that long.⁷⁰

The question is two-fold. First, the passive voice of section 301(b), "there shall be achieved . . . effluent limitations,"⁷¹ does not specify how, and by whom, these effluent limitations will be achieved. It is clear that the limits of section 301 "best practicable" and "best available" technologies are defined by

60. "At any time after the promulgation of the guidelines . . . the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administration a full and complete description of the program it proposes to establish and administer The Administrator shall approve each submitted program unless he determines that adequate authority does not exist: (1) To issue permits which—(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title . . ." The Act § 402(b), 33 U.S.C. § 1342(b) (Supp. V, 1975).

61. *Id.*

62. The Act § 402(c)(3), 33 U.S.C. § 1342(c)(3) (Supp. V, 1975).

63. The Act § 509, 33 U.S.C. § 1369 (Supp. V, 1975).

64. The Act § 509(b)(1)(A), 33 U.S.C. § 1369 (b)(1)(A) (Supp. V, 1975).

65. The Act § 509(b)(1)(C), 33 U.S.C. § 1369(b)(1)(C) (Supp. V, 1975).

66. The Act § 509(b)(1)(D), 33 U.S.C. § 1369(b)(1)(D) (Supp. V, 1975).

67. The Act § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) (Supp. V, 1975).

68. The Act § 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E) (Supp. V, 1975).

69. The first case to squarely face this problem was *CPC Int'l Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975). Since this decision on May 5, 1975, thirteen circuit court cases have dealt with the same or similar issues. See *American Petrol. II*, *supra* note 26, at 6-7. In the interim, the Eighth Circuit has acknowledged and reaffirmed the existence of the controversy. *CPC Int'l Inc. v. Train*, No. 74-1448, at 1-3 n.1 (8th Cir., Aug. 18, 1976) [hereinafter cited as *CPC II*].

70. Two cases from the Fourth Circuit are now pending before the Supreme Court. *Du Pont II*, *supra* note 22; *E. I. Du Pont de Nemours & Co. v. Train*, 528 F.2d 1136 (4th Cir. 1975), cert. granted, 96 S. Ct. 1662 (1976). However, the cases are docketed for the 1976-77 session, and final determination will take some time. 45 U.S.L.W. 3040-41, Nos. 75-978, 75-1473 (U.S. July 27, 1976).

71. The Act § 301(b), 33 U.S.C. § 1311(b) (Supp. V, 1975).

section 304 "guidelines,"⁷² but whether or not section 301 gives the Administrator authority to regulate actual discharge by promulgation of section 304 guidelines is by no means certain. Second, if the Administrator can issue "regulations" under the guise of section 304, is initial review thereof available in circuit or district courts? The tension between sections 301 and 304, created by the ambiguity of section 509, has threatened the Act's efficacy by promoting an unnecessary amount of litigation,⁷³ the inefficiency of which is reminiscent of that experienced with the pre-1972 programs.⁷⁴

III. THE CONTROVERSY

The majority of the cases present similar factual situations. The EPA had issued a series of "regulations"⁷⁵ that were to be applied to various industrial

72. Notes 41 & 42 *supra* and accompanying text.

73. See note 69 *supra*.

74. Legislative and public concern with pollution of the nation's lakes, rivers, and bordering seas is not a recent fad. Prior to enactment of the present law in 1972 there had been no fewer than thirteen congressional attempts, dating back nearly a quarter of a century, to arrive at a workable scheme for the prevention, control, and abatement of water pollution. 33 U.S.C. § 1251 (Supp. V, 1975) (listing the thirteen acts and amendments in the area of water pollution control since the first act in 1948). Starting in 1948, federal legislation in the field had been severely limited by an overriding principle of public policy: the states, it was felt, should spearhead the national attack on pollution. S. Rep., *supra* note 30, at 1. Consequently, the federal role had been confined to one of mere support and assistance (e.g., support of research projects, limited financial aid to treatment plants, etc.). S. Rep., *supra* note 30, at 1-2. And, though by 1965 the federal role had been radically upgraded, *id.* at 2 (the 1965 legislation gave a newly created federal agency a large role in the development and application of states' water quality standards, see Act of Oct. 2, 1965, Pub. L. No. 89-234, 79 Stat. 903), the continued reliance upon state initiative had led only to overwhelming inefficiency. The level of expertise concerning the nature of dischargers, the quantity and quality of pollutants and available abatement procedures, etc., was minimal. Existing research programs and sewage treatment plant funding were inadequate. Worst of all, violations of the few existing statutory provisions went virtually unprosecuted. S. Rep., *supra* note 30, at 4-7. Estimates range from one to two prosecutions since 1948. *Id.* at 5; Houston, *supra* note 19, at 349-50 & n.13. In any case, with so small a chance of penalty, there is little wonder that "foot-dragging [was] a rational response for polluters." Brubaker, *supra* note 32, at 121.

The entire spectrum of inadequacies inherent in the pre-1972 legislative programs can be traced to their misplaced reliance upon curative, rather than preventive, measures. The 1965 legislation attempted to provide for definitive water quality standards by taking into account various considerations of ecology, esthetics, and public health. Act of Oct. 2, 1965, Pub. L. No. 89-234, § 5(c)(3), 79 Stat. 908 ("Standards of quality established . . . shall be such as to protect the public health [and] enhance the public health or welfare . . . and shall take into consideration [the] use and value [of] public water supplies, propagation of fish and wildlife [and] recreational . . . and other legitimate uses [of water standards]."). The fact also remained that enforcement proceedings could not be initiated until it was too late. Legal action could be brought only after the discharge of pollutants had caused the water quality to fall below the established standards which were themselves expressions of absolutely minimal levels of water quality. Act of Oct. 2, 1965, Pub. L. No. 89-234, § 5(c)(5), 79 Stat. 909. See S. Rep., *supra* note 30, at 4-5. The water quality standards had established "the maximum levels of pollution allowable." *Id.* at 4. Put another way, these standards had established the poorest acceptable water. The statutory enforcement procedure was thus doomed to failure before it was ever begun.

categories and subcategories.⁷⁶ These regulations were claimed by the EPA to include both *effluent limitations*, established pursuant to section 301, and *guidelines*, established pursuant to section 304.⁷⁷ Thus, for every industrial category the applicable regulations include two elements: (1) a statement of

A further complication in the enforcement of water quality standards was the time-consuming and convoluted nature of the enforcement procedure itself. Any abatement action began with an enforcement conference being called by the state or the EPA. The conference would then advise the EPA Administrator who could, after issuing preliminary recommendations, convene a hearing board to produce final recommendations. Brubaker, *supra* note 32, at 121. Then a suit was brought, wherein the court was required to review everything which had gone before, plus any "additional evidence . . . necessary to a complete review of the standards and . . . alleged violation." Act of Oct. 2, 1965, Pub. L. No. 89-234, § 5(c)(5), 79 Stat. 909. The conference procedure alone, prior to the trial, required a minimum of a year to complete. Brubaker, *supra* note 32, at 121.

Enforcement was also complicated by another aspect of reliance upon water quality standards. If one assumes, for example, that the water quality of a certain body of water has become unacceptable due to the discharge from a number of industrial sources, a successful action could be maintained only by crossing what one court has termed "a virtually unbridgeable causal gap . . ." CPC Int'l Inc. v. Train, 515 F.2d 1032, 1035 (8th Cir. 1975). Linking the discharge from a single source to the below-quality water under these circumstances was nearly impossible.

Finally, the water quality standards themselves could not be translated into reliable effluent limitations for a given body of water due to the imprecision of the models for water quality and the variable effect of different effluents in different waters. S. Rep., *supra* note 30, at 8. For example, by changing a single variable, temperature, a water body's assimilative capacity can be altered. Further, water temperature is itself affected by many factors: rainfall, flow velocity, idiosyncratic climatic conditions, etc. See Davis, *supra* note 9, at 200. Stated simply, while enforcement was aimed at single measures, no single measure was reflective of water quality. Brubaker, *supra* note 32, at 120.

75. The word "regulation" is put in quotations for a particular reason: the controversy itself is centered on whether the materials put out by the EPA were promulgated effluent limitation regulations, or published effluent limitation guidelines. Thus, to name the EPA materials as either guidelines or regulations is itself a solution of the problem. See Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620, 626 (2d Cir. 1976). However, for ease of usage the word regulation will be used, with this warning in mind.

76. See, e.g., 40 C.F.R. §§ 406.10-.16 (1976); note 80 *infra*. It should be recalled that pursuant to § 304(b) of the Act, 33 U.S.C. § 1314(b) (Supp. V, 1975), the Administrator was required to publish guidelines applicable to classes or categories of point sources. The guidelines identified both the factors to be considered in determining the requisite technology (that of 1977 versus 1983) and the quantity and quality of specific proscribed pollutants. See notes 47-51 *supra* and accompanying text. The result was volume 40 of the Code of Federal Regulations, a massive compilation of industrial categories and regulations applicable thereto. It is interesting to note that the original statutory deadline for these regulations, Oct. 18, 1973, the Act § 304(b), 33 U.S.C. § 1314(b) (Supp. V, 1975), was missed, and that the ultimate regulations resulted from a court-imposed timetable. See National Resources Defense Council, Inc. v. Train, 510 F.2d 692, 697-98 (D.C. Cir. 1975).

77. 40 C.F.R. § 401.12 (1976). The title of this section, "[l]aw authorizing establishment of effluent limitations guidelines for existing sources", *id.*, alone is indicative of the combination of §§ 301 and 304. One should take note particularly of the hybrid phrase "effluent limitations guidelines" which appears nowhere in the Act itself. Compare the Act § 301, 33 U.S.C. 1311 (Supp. V, 1975) with the Act § 304, 33 U.S.C. § 1314 (Supp. V, 1975).

the data used to arrive at the categorical limitations⁷⁸ and (2) a pronouncement, in table form, of that quantity of discharge allowable (hence, *effluent limitations*).⁷⁹

The judicial actions arose from petitions to review these regulations⁸⁰ and, since the arguments on both sides remain fairly consistent throughout, a summary is appropriate. First, all parties, and the courts themselves, agreed that circuit court review of new source regulations was not at issue;⁸¹ the disputes centered instead on whether the circuit court could review the *existing* source regulations.⁸² A necessary corollary to the jurisdictional issue was whether or not section 301 actually gave the EPA the authority to issue effluent limitations as regulations in the first place.⁸³

The petitioners' views took the following form: the EPA entirely lacks the power under section 301 to promulgate existing source effluent limitations by regulation.⁸⁴ Rather, the argument goes, effluent limitations are to be imposed on a plant-by-plant basis during the permit-granting stage.⁸⁵ At this point, and not before, section 304(b) guidelines are to be consulted.⁸⁶ Since the EPA lacks a separate regulatory power under section 301, the published regulations were products of section 304.⁸⁷ The conclusion follows that the

78. See, e.g., 40 C.F.R. § 406.12(a) (1976); note 80 *infra*.

79. See, e.g., 40 C.F.R. § 406.12(b) (1976); note 80 *infra*.

80. Chronologically, the major cases appeared as follows: *CPC Int'l Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975) (Corn Wet Milling Subcategory of Grain Mills Point Source Category, 40 C.F.R. § 406.10-.16 (1975)); *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027 (3d Cir. 1975) (Iron and Steel Manufacturing Point Source Category, 40 C.F.R. § 420 (1976)); *American Meat Inst. v. EPA*, 526 F.2d 442 (7th Cir. 1975) (Meat Products Point Source Category, 40 C.F.R. § 432 (1976)); *Du Pont II*, *supra* note 22 (Inorganic Chemicals Manufacturing Point Source Category, 40 C.F.R. § 415 (1976)); *Hooker Chems. & Plastic Corp. v. Train*, 537 F.2d 620 (2d Cir. 1976) (Phosphate Manufacturing Point Source Category, 40 C.F.R. § 422 (1976)); *American Frozen Food Inst. v. Train*, 539 F.2d 107 (D.C. Cir. 1976) (Canned and Preserved Fruits and Vegetables Processing Point Source Category, 40 C.F.R. § 407 (1976)); *American Petrol. II*, *supra* note 26 (Petroleum Refining Point Source Category, 40 C.F.R. § 419 (1976)). There are other cases, dealing with other industrial categories, but these are the major ones for the purposes here. For a more complete listing, see *American Petrol. II*, *supra* note 26, at 6-7.

81. This follows from the explicit mention of § 306, 33 U.S.C. § 1316 (Supp. V, 1975) in § 509(b)(1)(e), 33 U.S.C. § 1369(b)(1)(e) (Supp. V, 1975). See *CPC Int'l Inc. v. Train*, 515 F.2d 1032, 1034 (8th Cir. 1975). See also note 54 *supra*.

82. See, e.g., *American Petrol. Inst. v. Train*, 526 F.2d 1343, 1345 (10th Cir. 1975); *American Meat Inst. v. EPA*, 526 F.2d 442, 448 (7th Cir. 1975); *CPC Int'l Inc. v. Train*, 515 F.2d 1032, 1037 (8th Cir. 1975).

83. See notes 71 & 72 *supra* and accompanying text.

84. See, e.g., *American Meat Inst. v. EPA*, 526 F.2d 442, 448-49 (7th Cir. 1975); *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1035 (3d Cir. 1975); *CPC Int'l Inc. v. Train*, 515 F.2d 1032, 1037 (8th Cir. 1975).

85. See note 84 *supra*.

86. *Id.*

87. See, e.g., *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620, 626 (2d Cir. 1976); *American Petrol. Inst. v. Train*, 526 F.2d 1343, 1345 (10th Cir. 1975); *CPC Int'l Inc. v. Train*, 515 F.2d 1032, 1037 (8th Cir. 1975).

circuit courts lack jurisdiction to review the guidelines because section 509(b)(1)(E), judicial review, makes no mention of section 304.⁸⁸

The petitioners' argument appears, therefore, to construe the power structure of subchapter III of the Act hierarchically. Section 301, the "base," becomes little more than a statement of general statutory intention, while the "punch" of the statute is derived from the permit programs of section 402, which partially incorporate the section 304 guidelines.

In EPA's view, the regulations were firmly based upon a section 301(b) power to publish limitations. This power was derived from the phrase, "there shall be achieved . . . effluent limitations."⁸⁹

According to the EPA, the passive voice signalled congressional intent to require the EPA to regulate discharge by promulgation of effluent limitations under section 301(b).⁹⁰ The limitations so imposed would apply uniformly to industrial categories as minimum standards which would "be mechanically cranked into individual permits issued by the states or the EPA."⁹¹ The EPA interpretation also allows initial circuit court review of regulations pursuant to section 509, because section 301 "promulgation" is explicitly covered therein. Under this view, then, the Act provides a double-barreled anti-pollution mechanism: regulation through promulgation of limitations, and additional regulation through NPDES.

IV. THE JUDICIAL SOLUTION

A. *The Eighth Circuit*

The first court to consider these issues was the Eighth Circuit in *CPC International Inc. v. Train*.⁹² This is the only circuit which has upheld the petitioners' construction of the Act.⁹³ The court's determination that section 301 did not grant the EPA regulatory authority turned upon what it felt to be unambiguous passages in the legislative history⁹⁴ and upon a rigid construction of the passive voice of section 301: "there shall be achieved . . . effluent limitations."⁹⁵ The Eighth Circuit pointed first to the existence in other sections of the Act⁹⁶ of express provisions for the promulgation of national standards as applied to other-than-existing point sources; specifically, new sources and toxic discharges.⁹⁷ These active provisions were seen to differ fundamentally (and intentionally) from the passivity of section 301 in several aspects.

88. *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620, 624 (2d Cir. 1976).

89. The Act § 301(b), 33 U.S.C. § 1311(b) (Supp. V, 1975).

90. See, e.g., *CPC Int'l Inc. v. Train*, 515 F.2d 1032, 1037 (8th Cir. 1975). See also *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1036 (3d Cir. 1975).

91. *CPC Int'l Inc. v. Train*, 515 F.2d 1032, 1037 (8th Cir. 1975). See also *American Petrol. II*, supra note 26, at 16; *Du Pont II*, supra note 22, at 17.

92. 515 F.2d 1032 (8th Cir. 1975).

93. *American Petrol. II*, supra note 26, at 13.

94. *CPC II*, supra note 69, at 2 n.1.

95. The Act § 301(b), 33 U.S.C. § 1311(b) (Supp. V, 1975).

96. 515 F.2d at 1038, citing the Act § 306(b)(1)(B), 33 U.S.C. § 1316(b)(1)(B) (Supp. V, 1975).

97. 515 F.2d at 1038, citing the Act §§ 306-07, 33 U.S.C. §§ 1316-17 (Supp. V, 1975).

First, the word "standards," which took on special meaning because of the purpose of the Act,⁹⁸ was employed in these active sections. Second, these standards were to be published specifically by regulation, enforced independently of the permit system,⁹⁹ and promulgated according to a strict schedule.¹⁰⁰ Because these details were included in those sections of the Act which did provide the EPA with national regulatory authority, their omission from section 301 meant that the EPA could not promulgate effluent limitations pursuant to that section.¹⁰¹

That existing sources were to be treated differently from new sources did not strike the court as anomalous: ample justification for this result was found in a remark by Russell Train, respondent and EPA Administrator, to the effect that "[a]cross-the-board requirements can be justified for new plants, since they have many options in terms of processes, inputs, and the like, *which is not the case for existing facilities.*"¹⁰²

Finally, the lack of regulatory power under section 301 was driven home by another "intentional omission" in the statutory language. The court pointed out that there was a deadline for promulgation of guidelines under section 304, but no such deadline for section 301 requirements. It concluded that this inconsistency would be "inexplicable"¹⁰³ unless Congress had intentionally omitted any authority to regulate under section 301.

The court also rejected EPA's argument that permit issuance under section 402 was to be governed by regulations published pursuant to section 301.¹⁰⁴ Instead, the court found clear evidence in the language of section 402(d)(2)¹⁰⁵ that permit issuance was to follow the effluent limitation guidelines promulgated under section 304(b).¹⁰⁶ It was at this point that the court relied heavily upon the legislative history.¹⁰⁷ Of the commentaries cited, all made some reference to either the "guidelines" or "permits" as the primary method of enforcement.¹⁰⁸

98. That is, the Act itself is a method of implementation of regulations to improve the national water standard. See note 74 *supra*.

99. 515 F.2d at 1038, citing the Act § 306(b)(1)(B), 33 U.S.C. § 1316(b)(1)(B) (Supp. V, 1975).

100. 515 F.2d at 1038, citing the Act § 307, 33 U.S.C. § 1317 (Supp. V, 1975).

101. 515 F.2d at 1038.

102. *Id.* at 1038 n.13, quoting History, *supra* note 13, at 1115 (emphasis added).

103. 515 F.2d at 1039.

104. See note 91 *supra* and accompanying text.

105. "No permit shall issue [if it is] outside the guidelines . . . of this chapter." The Act § 402(d)(2), 33 U.S.C. § 1342(d)(2) (Supp. V, 1975).

106. 515 F.2d at 1038.

107. *Id.* at 1039-42.

108. "'Effluent limitations . . . would be established . . . by means of the permits . . .'" *Id.* at 1039, quoting a letter to Chairman Blatnik of the House Public Work's Committee from EPA Administrator Ruckelshaus (emphasis omitted). "'By 1976 each . . . source should have . . . a permit setting forth the effluent limitations . . .'" *Id.* at 1040, quoting History, *supra* note 13, at 1463 (emphasis omitted). "[S]ection [304] . . . guidelines [reflect] the mandate of § 301 [T]hese guidelines would define the effluent limitations . . .'" *Id.*, citing History, *supra* note 13, at 1469 (emphasis omitted). "'EPA . . . will set . . . the uniform, national standards by way of guidelines . . .'" *Id.* citing History, *supra* note 13, at 727 (emphasis omitted).

Such authority was apparently deemed sufficient to support the court's interpretation.¹⁰⁹ Even so, it is doubtful that the Eighth Circuit would have held in favor of the petitioner's view if it were not for the administrative retention of veto power over the entire permit process. The administrative veto, set out in section 402(c)¹¹⁰ of the Act, was considered crucial to the attainment of the national goal of elimination of discharge.¹¹¹ Any potential problems of non-uniformity in enforcement were curable through administrative veto of the permit.¹¹²

The overall mechanism of the Act, as interpreted by the Eighth Circuit, is a more substantial version of the petitioner's construction. Section 301 is the basic national mandate.¹¹³ Under this section, all discharge of pollutants is illegal except that which is permissible through application of the required technology. Section 301 itself does not give the Administrator of the EPA the power to promulgate nationally uniform regulations for existing sources. Rather, to further the Act's ultimate aim,¹¹⁴ while ensuring adequate state participation and control,¹¹⁵ federally established effluent limitation guidelines for existing sources are to be published and utilized at the permit issuance stage. The guidelines are to reflect the maximum amount of discharge reduction possible¹¹⁶ under the appropriate technology. In issuing permits for industrial plants account is to be taken of peculiar factors that, in extraordinary cases, will allow variance from the established guidelines. To insure national uniformity and to avoid the evils of non-compliance which plagued the pre-1972 programs,¹¹⁷ the Administrator has retained full veto power over those permits and permit programs which he feels will impede implementation of the Act. Though judicial review of section 304 guidelines has not been specifically provided for in the statute, the circuit courts may

109. See *id.* at 1039.

110. "Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(h)(2) of this title." The Act § 402(c)(2), 33 U.S.C. § 1342(c)(2) (Supp. V, 1975). "Whenever the Administrator determines . . . that a State is not [so] administering a program . . . he . . . shall withdraw approval of any such program" The Act § 402(c)(3), 33 U.S.C. § 1342(c)(3) (Supp. V, 1975).

111. The court's concern with the pivotal role of administrative veto power over permits is indicated by the fact that almost three pages of its opinion deals exclusively with this area. 515 F.2d at 1040-42. "It is in this light that [the section 402(d)(2)] proviso, that the Administrator may veto permits which do not comply with the guidelines, takes on vital importance." *Id.* at 1041-42 (emphasis omitted).

112. See *id.* at 1042.

113. *Id.* at 1040, citing *History*, *supra* note 13, at 1469.

114. "Uniformity, finality, and enforceability." *History*, *supra* note 13, at 162 (remarks of Sen. Muskie).

115. "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution It is further the policy of the Congress to . . . provide Federal . . . aid to State . . . agencies . . . in connection with the prevention, reduction, and elimination of pollution." The Act § 101(b), 33 U.S.C. § 1251(b) (Supp. V, 1975). See 515 F.2d at 1039-43.

116. 515 F.2d at 1037-38 n.11, citing *History*, *supra* note 13, at 1468.

117. See note 74 *supra*.

nevertheless review them through their authority to review action taken by the EPA regarding issuance or veto of any permit.¹¹⁸

B. *The Third and Seventh Circuits*

Approximately six months later, the same issues were considered by the Third Circuit, in *American Iron & Steel Institute v. EPA*,¹¹⁹ and the Seventh Circuit, in *American Meat Institute v. EPA*.¹²⁰ The opinions in each case share approximately the same logical structure; however, as there are different emphases, individual analysis is required.

In the Third Circuit, *American Iron & Steel* came to court armed with the precedent¹²¹ set in the *CPC* case.¹²² In fact, petitioners relied so heavily upon the *CPC* holding that the Third Circuit's opinion, concluding that section 301 did in fact grant the EPA the power to promulgate effluent limitation regulations independently of the permit process,¹²³ became little more than a point-by-point refutation of the *CPC* position.¹²⁴

The court agreed with *CPC* that no explicit language in section 301 granted the Administrator "or anyone else" the power to promulgate effluent limitations.¹²⁵ But relying on section 509(b)(1)(E), the court found these powers to be implicitly authorized. That section provides judicial review of "the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under section 301" ¹²⁶ Since the Act allowed review of section 301 promulgation, obviously promulgation under section 301 existed.¹²⁷

Furthermore, section 509(b)(1)(E) listed review of section 402 permit proceedings separately from review of section 301 actions. To the Third Circuit this distinction gave "effluent limitations" a significance independent of "permits."¹²⁸

The Eighth Circuit had explained the section 301 reference in section 509(b)(1)(E) by pointing to section 301(c), a section which empowers the Administrator to modify any of the requirements of section 301(b)(2)(A).¹²⁹ The Third Circuit stated that "modification," as used in this section, meant "relaxation." Thus, because "relaxation" of requirements was not "promulga-

118. The Act § 509(b)(1)(D), 33 U.S.C. § 1369(b)(1)(D) (Supp. V, 1975).

119. 526 F.2d 1027 (3d Cir. 1975).

120. 526 F.2d 442 (7th Cir. 1975).

121. See 526 F.2d 1027, 1037 (3d Cir. 1975).

122. Compare 526 F.2d 1027, 1036 (3d Cir. 1975) with notes 96-101 *supra* and accompanying text.

123. 526 F.2d 1027, 1036-37 (3d Cir. 1975).

124. See, e.g., *id.* at 1037-42.

125. *Id.* at 1036.

126. *Id.* at 1037, quoting the Act § 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E) (Supp. V, 1975).

127. 526 F.2d at 1037.

128. *Id.*

129. 515 F.2d at 1043. See § 301(c) which states in part: "The Administrator may modify the requirements of subsection (b)(2)(A) of this section . . ." The Act § 301(c), 33 U.S.C. § 1311(c) (Supp. V, 1975); *CPC Int'l Inc. v. Train*, 515 F.2d 1032, 1043 (8th Cir. 1975).

tion,"¹³⁰ the mere authorization to relax the requirements of section 301 clearly could not be "within the scope of section [509 promulgation] . . ." ¹³¹ In addition, the Third Circuit found separate reference to sections 301 and 402 not only in section 509 but throughout the Act as well.¹³² The court felt that if the petitioner's view were correct, that is, if limitations could only be set by the permit process, then only a reference to section 402 would have been necessary. Such a construction would render the actual language of the Act redundant,¹³³ and therefore would violate one of the cardinal rules of statutory interpretation.¹³⁴ The Eighth Circuit had explained this redundancy by finding that the reference to section 301 was actually a reference to section 301(f),¹³⁵ an absolute prohibition on discharge of radiological and radioactive-type wastes. The Third Circuit's rejection of this reasoning, based upon a flat declaration that a "prohibition" is not a "limitation,"¹³⁶ constituted further justification for its conclusion that section 301 was itself the fount of EPA regulatory authority.¹³⁷

Though the Third Circuit, like the Eighth, derived support for its position from various parts of the Act's legislative history,¹³⁸ its final point was more directly substantiated by recent Supreme Court cases on the scope of judicial review of agency rule-making. The most recent of such decisions, *Train v. Natural Resources Defense Council, Inc.*,¹³⁹ makes clear the proposition that where an act of Congress is ambiguous and susceptible to a number of constructions, the interpretation made of it by the appropriate administrative agency should be given deference. Following this guideline,¹⁴⁰ the Third Circuit in this instance found the EPA's interpretation to be correct and therefore refrained from substituting its judgement for that of the Agency.¹⁴¹

Despite the semantic quibbling, the *American Iron & Steel* decision, like *CPC*, provides a fairly coherent picture of the mechanism of the Act. The section 301 limitations represent the maximum level of permissible effluent discharges.¹⁴² According to the decision, this ceiling is to take into account the

130. 526 F.2d at 1037 & n.15.

131. *Id.* at 1037.

132. *Id.* at 1038-39.

133. 526 F.2d at 1038.

134. See 50 Am. Jur. Statutes § 359 (1944).

135. 515 F.2d at 1043. See the Act § 301(f), 33 U.S.C. § 1311(f) (Supp. V, 1975). "Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters." *Id.*

136. 526 F.2d at 1038.

137. *Id.*

138. *Id.* at 1039-45. "It is the Committee's intention that pursuant to subsection 301(b)(1)(A) and Section 304(b) the Administrator will interpret the term "best practicable" when applied to various categories of industries as a basis for specifying clear and precise effluent limitations . . ." *Id.* at 1040, quoting History, *supra* note 13, at 1468 (emphasis omitted).

139. 421 U.S. 60 (1975). See 526 F.2d at 1041.

140. 526 F.2d at 1042.

141. *Id.* at 1047.

142. *Id.* at 1045.

varying capabilities of point sources. Then, in an additional step, the Administrator must promulgate guidelines for use by the permit issuer in deciding whether *more stringent* limitations are to be imposed on individual point sources. That is, "section 304 guidelines are intended to provide precise guidance . . . in establishing a permissible level of discharge that is more stringent than the ceiling."¹⁴³

The Seventh Circuit, in deciding *American Meat Institute v. EPA*¹⁴⁴ agreed with the Third Circuit. In so doing, however, the court focused on the Supreme Court's standard of agency review—that the court need only find the agency approach to be reasonable.¹⁴⁵ Thus, when the Seventh Circuit found several phrases in the Act referring to "effluent limitation . . . under section 301,"¹⁴⁶ its task was complete. The EPA position was held to be reasonable.¹⁴⁷ This, of course, automatically gave the EPA authority to issue effluent limitations under section 301, while conferring upon the circuit court the authority to review the regulations under section 509(b)(1)(E).¹⁴⁸

The court also implied an alternate basis for its decision. Under its interpretation of *CPC* a practical anomaly results: judicial review of individual permits based upon nationally uniform limitations would be available in the circuit courts, whereas review of the limitations themselves would be reviewed in the district courts.¹⁴⁹ Such a result was seen to conflict with the congressional intent (derived from the legislative history) to insure quick and consistent application of national guidelines by providing direct review in the courts of appeal.¹⁵⁰ This conflict with congressional intent was the final proof needed to sustain the EPA's interpretation.¹⁵¹ Even so, the court implied that its position was one of expedience rather than a final resolution of the interpretive difficulties, for it held the EPA view correct only "to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the 'correct' one."¹⁵²

C. The Fourth and Tenth Circuits

The Fourth and Tenth Circuits were the next courts to consider the issues; in each circuit the issues were broken down into two segments and decided separately. In the Fourth Circuit, the cases were both entitled *E. I. Du Pont de Nemours & Co. v. Train*¹⁵³ and in the Tenth Circuit, *American Petroleum Institute v. Train*.¹⁵⁴

143. *Id.*

144. 526 F.2d 442 (7th Cir. 1975).

145. *Id.* at 449-50. See notes 139-41 *supra* and accompanying text.

146. See, e.g., the Act §§ 509(b)(1), 302(a), 33 U.S.C. §§ 1369(b)(1), 1312(a) (Supp. V, 1975).

147. 526 F.2d at 452.

148. *Id.*

149. *Id.*, citing *CPC Int'l Inc. v. Train*, 515 F.2d 1032, 1038 (8th Cir. 1975).

150. 526 F.2d at 452. See History, *supra* note 13, at 330-31, 822-23, 1502-03.

151. 526 F.2d at 452.

152. *Id.*, quoting *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975).

153. 528 F.2d 1136 (4th Cir. 1975), cert. granted, 96 S. Ct. 1662 (1976); *Du Pont II*, *supra* note 22.

154. 526 F.2d 1343 (10th Cir. 1975); *American Petrol. II*, *supra* note 26.

The first case in each series considered only the jurisdictional question: whether the circuit court had original jurisdiction to review the EPA action in question.¹⁵⁵ Both circuits answered this question in the affirmative.¹⁵⁶ In the latter case in each series, the courts' resolutions of the substantive issues represented somewhat of a turning point: they both refused to become involved in a hair-splitting survey of legislative history.¹⁵⁷ Such a pursuit was considered futile, for each court quickly realized that "[s]upport [could] be had for diametrically opposed conclusions."¹⁵⁸ Instead, the courts concentrated on an analysis of the language of the Act itself.

It should be noted at the outset that there exist surprising parallels between the language and structure of the Fourth and Tenth Circuits' decisions.¹⁵⁹ The discussion that follows will therefore center on the Fourth Circuit case, with the understanding that the Tenth Circuit is in complete accord.

155. This approach begs the question: it can be argued that circuit court jurisdiction, pursuant to section 509, can be had only for review of section 301 and that, therefore, acceptance of jurisdiction to review EPA action with regard to existing sources of pollution holds an implicit acceptance of EPA authority to regulate under § 301. Nevertheless, both circuits found the distinction critical, for it enabled them to confer jurisdiction upon the circuit courts while deferring the substantive issues for later determination.

For example, the Fourth Circuit concluded that it was "unnecessary to decide the substantive question of authority to issue the regulations under § 301 alone in order to decide the question of which federal court has jurisdiction to review them," *E. I. Du Pont de Nemours & Co. v. Train*, 528 F.2d 1136, 1141 (4th Cir. 1975), cert. granted, 96 S. Ct. 1662 (1976), while the Tenth Circuit concluded that, for their purposes, the question of EPA authority to promulgate § 301 regulations was "beside the point." *American Petrol. Inst. v. Train*, 526 F.2d 1343, 1345 (10th Cir. 1975).

Both decisions, finding that circuit court jurisdiction did exist, were explained in the following way. The section (301 or 304) under which the regulations at issue were promulgated is irrelevant. Even if § 301 merely set out the Act's technological objectives (the Eighth Circuit's view), the § 304 guidelines must nevertheless be seen as the means to the § 301 ends. *E. I. Du Pont de Nemours & Co. v. Train*, 528 F.2d 1136, 1142 (4th Cir. 1975), cert. granted, 96 S. Ct. 1662 (1976); *American Petrol. Inst. v. Train*, 526 F.2d 1343, 1345 (10th Cir. 1975). Thus, any action taken by the Administrator under § 304 is to be considered pursuant to § 301, and is therefore reviewable by the circuit courts under § 509. *E. I. Du Pont de Nemours & Co. v. Train*, 528 F.2d 1136, 1142 (4th Cir. 1975), cert. granted, 96 S. Ct. 1662 (1976); *American Petrol. Inst. v. Train*, 526 F.2d 1343, 1345 (10th Cir. 1975).

156. *E. I. Du Pont de Nemours & Co. v. Train*, 528 F.2d 1136 (4th Cir. 1975), cert. granted, 96 S. Ct. 1662 (1976); *American Petrol. Inst. v. Train*, 526 F.2d 1343 (10th Cir. 1975).

157. *American Petrol. II*, supra note 26, at 9-10; *Du Pont II*, supra note 22, at 13-14.

158. *Du Pont II*, supra note 22 at 13-14.

159. Judge Breitenstein, Senior Circuit Judge for the Tenth Circuit, was on the bench during all four cases. A comparison of the language of the *Du Pont II* and *American Petrol. II* cases is interesting. For example, the sentence, "[p]rimary enforcement of the Act is secured through the permit system established by § 402," *Du Pont II*, supra note 22, at 6, is repeated verbatim in *American Petrol. II*, supra note 26, at 4, without a citation to the former case. Or, compare "[i]nherent in this dispute is the question of national uniformity versus state power and responsibility," *Du Pont II*, supra note 22, at 17, with "[i]n essence, the conflict concerns national uniformity versus state power and responsibility," *American Petrol. II*, supra note 26, at 16. Again, no cite to the former is given in the latter. Therefore, when the court in *American Petrol. II* says "[w]e can do no more than the Fourth Circuit did in *duPont II*," *id.* at 17, the word "we" invites curiosity. The reader is asked to draw his own conclusions.

First, the Fourth Circuit found the EPA publications to be *both* "effluent limitations" and "guidelines,"¹⁶⁰ a permissible combination of sections 301 and 304 that was called for by the practical exigencies of the time.¹⁶¹ Second, though it recognized that section 301 said nothing about regulations (as opposed to section 304, which did), it found the source of the power to impose section 301 limitations in a section of the Act which had not been mentioned by the other courts—section 501(a).¹⁶² This section authorizes the Administrator "to prescribe such regulations as are necessary to carry out his functions under this Act."¹⁶³ The question of the extent of the Administrator's functions was resolved in the following way. The court noted that section 301(e) provides for limitations¹⁶⁴ without indicating who has the authority to promulgate them. Noting that the Act would be "unworkable"¹⁶⁵ unless someone had the necessary authority, the establishment of limitations was held to be one of the Administrator's functions which he was authorized to carry out by prescribing regulations.

Having reached this point, the court then considered the effect of the regulations in light of their hybrid nature as both section 301 limitations and section 304 guidelines.¹⁶⁶ A position had to be adopted which resolved the tension between the requirements of national uniformity and adequate leeway for local variations¹⁶⁷ because, while petitioners urged that the regulations were guidelines to be *considered* by the permit issuer, EPA argued that the limitations were uniformly applicable throughout the nation, and thus *binding* on the permit issuer.¹⁶⁸ Resolution of these conflicting positions would result in a determination of whether limitations may be imposed on the basis of industrial categories, or whether the limitations must be made on a plant-by-plant basis. The court based its decision on practical administrative considerations.¹⁶⁹ The regulations are presumed to be applicable to all permit applications.¹⁷⁰ Thus, a balance is created which "assures all possible uniformity without sacrifice of the flexibility needed to adjust for disparate plants"¹⁷¹ The regulatory process is initiated by promulgation of limitations on

160. American Petrol. II, *supra* note 26, at 15; Du Pont II, *supra* note 22, at 13.

161. That is, the "court imposed timetable," Du Pont II, *supra* note 22, at 7-8, 13, 16. It might also be noted that if the court did not find the combination of these two steps permissible, it probably would have had to dismiss for lack of jurisdiction. See note 155 *supra*.

162. Du Pont II, *supra* note 22, at 15; the Act § 501(a), 33 U.S.C. § 1361(a) (Supp. V, 1975).

163. Du Pont II, *supra* note 22, at 15.

164. The Act § 301(e), 33 U.S.C. § 1311(e) (Supp. V, 1975).

165. Du Pont II, *supra* note 22, at 15-16. "The Act is ineffective unless somebody fixes effluent limitations." American Petrol. II, *supra* note 26, at 17.

166. See note 161 *supra* and accompanying text.

167. See notes 114 & 115 *supra* and accompanying text. The issue of federalism is itself central to the Act's interpretation, and is beyond the scope of this article. For a discussion of this and other constitutional difficulties inherent in the Act, see Smith, Highlights of the Federal Water Pollution Control Act of 1972, 77 Dick. L. Rev. 459, 461-67 (1973).

168. Du Pont II, *supra* note 22, at 17.

169. *Id.* at 21-23.

170. *Id.* at 18.

171. *Id.*

a subcategorical basis, and proper balance is achieved when "[p]roblems relating to specific factual situations are [determined] at the permit-issuing stage."¹⁷²

D. *The Second and District of Columbia Circuits*

Within a period of two months both the Second and District of Columbia Circuits¹⁷³ had opportunities to interpret the interaction of sections 301, 304, 402, and 509. Although the result in each case is similar to that reached in the Fourth and Tenth Circuits, the analysis employed is not.

The Second Circuit, drawing as it did upon a more substantial judicial history than the others, showed hesitation in its decision. The court stated that "[t]he jurisdiction question and its subsidiary issues admit of no easy answer [for] [t]he Act states neither that effluent limitations are to be promulgated in permits nor that they are to be promulgated independently by regulations."¹⁷⁴ Consequently, the court's ultimate construction of the Act—that section 304 structures the procedure and criteria to be utilized by the Administrator in satisfying section 301's mandate of effluent limitations—was neither based wholly upon interpretation of specific statutory language, nor upon a final resolution of conflicting passages in the legislative history. Instead, recognizing the conflict in the earlier cases,¹⁷⁵ the court began with the simple observation that due to the "very magnitude" of the congressional task the "problem of statutory interpretation was unavoidable . . ."¹⁷⁶ Thus, the court felt no need for a comprehensive survey of the entire legislative history, and concluded that a few "citations suffice to demonstrate that the draftsmen . . . intended the promulgation of effluent limitations by regulations apart from the permit-granting process."¹⁷⁷

In support of the independence of the regulations from the permit process the court cited legislative history passages which stated that the *economic impact* of effluent limitations was not to be made on a plant-by-plant basis.¹⁷⁸ That the Act required a series of effluent limitation regulations also applicable nationally to industrial categories and subcategories was seen to flow logically from the same passages,¹⁷⁹ as was the view of section 301 as the source of EPA authority to promulgate such regulations.¹⁸⁰

The Court of Appeals for the District of Columbia Circuit¹⁸¹ apparently approved the reasoning of the Second Circuit's decision and suggested as well that the economic determination rationale demanded fuller explication.

172. *Id.* at 23.

173. *American Frozen Food Inst. v. Train*, 539 F.2d 107 (D.C. Cir. 1976); *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620 (2d Cir. 1976).

174. 537 F.2d at 627.

175. *Id.* at 625-27.

176. *Id.* at 627.

177. *Id.* at 628.

178. *Id.*, citing *History*, *supra* note 13, at 255.

179. *Id.* at 628.

180. See *id.*

181. *American Frozen Food Inst. v. Train*, 539 F.2d 107 (D.C. Cir. 1976).

The District of Columbia Circuit gave a detailed analysis,¹⁸² finding that section 301 was the source of EPA regulatory authority because "a plant-by-plant determination of the economic impact of an effluent limitation . . . should be avoided."¹⁸³ In this light, section 301 was seen as the "fundamental control section [which] contemplates national standards of effluent limitations (rather than individual plant standards)."¹⁸⁴ Petitioner's argument, that limitations are to be imposed individually through the permit process, was rejected.¹⁸⁵

V. EVALUATION

With the exception of the Eighth Circuit, all of the courts to consider the issues have upheld the EPA position that it does have the power to issue regulations under section 301.¹⁸⁶ Yet in many cases the approach taken remains unconvincing, particularly when contrasted with corresponding points of the *CPC* opinion.

It will be recalled that the Eighth Circuit took a fairly rigid view of the statutory language. Section 301 was not seen as the source of EPA regulatory authority because, in direct contrast to other express provisions, it contained no specific reference to the promulgation of national effluent limitations.¹⁸⁷ It is submitted that this view finds further support in other statutory language. For example, section 301(e) states that effluent limitations "shall be applied . . . in accordance with the provisions of this *chapter*."¹⁸⁸ The word *chapter* is a direct reference to the entire Act, for section 301 itself is a small section of subchapter III, Standards and Enforcement.¹⁸⁹ The obvious implication is that the power to regulate effluent discharge is external to section 301, for the specific sections governing new and toxic sources are totally self-contained, with express provision for the application of standards *according to those sections*.¹⁹⁰ The result here also provides direct support for the *CPC* interpretation of section 301 as the national mandate (the goal), rather than the national authority (the means).

If one accepts this view of section 301 as a statement of the national goal, the weaknesses of the Eighth Circuit decision as seen by the other courts all but disappear. The Third Circuit had reasoned, for example, that because section 509(b)(1)(E) explicitly refers to promulgation under section 301, distinct regulatory authority must exist under the latter section.¹⁹¹ While the

182. *Id.* at 114-23.

183. *Id.* at 122, citing *History*, *supra* note 13, at 255 (emphasis partially deleted).

184. *Id.* at 124.

185. *Id.* at 131.

186. *American Petrol. II*, *supra* note 26, at 13.

187. See notes 96-101 *supra* and accompanying text.

188. The Act § 301(e), 33 U.S.C. § 1311(e) (Supp. V, 1975) (emphasis added).

189. This contrasts with the heading of 33 U.S.C. § 1251 et seq., "Chapter 26—Water Pollution Prevention and Control [New]." 33 U.S.C. at 2697 (Supp. V, 1975).

190. The Act §§ 306(e), 307(d), 33 U.S.C. §§ 1316(e), 1317(d) (Supp. V, 1975). See notes 97-101 *supra* and accompanying text.

191. See notes 126-28 *supra* and accompanying text.

Eighth Circuit had explained the reference in section 509(b)(1)(E) to section 301 by pointing to section 301(c), a modification provision,¹⁹² the Third Circuit felt compelled to disagree. The latter drew a distinction between relaxation and promulgation.¹⁹³ However, this distinction does not withstand closer scrutiny. If, as its title clearly indicates,¹⁹⁴ section 301(b) requires the setting of a schedule of compliance (*i.e.*, the goal), surely the *act* of setting time limitations on the achievement of certain levels of effluent discharge is itself promulgation. Any modification thereof, to the extent that it represents a new, replacement mandate, would therefore also be a promulgation.

The Third Circuit had also concentrated on those portions of the Act which, had petitioner's interpretation of them been accepted, would have been rendered redundant. Because section 301 had been mentioned in several places in the Act as a separate provision, the court was able to give this section its own regulatory significance.¹⁹⁵ The court pointed specifically to section 505 which provides for direct suit by citizens against a violator of any administrative limitation set according to, among others, sections 301 and 402 (permits).¹⁹⁶ The Eighth Circuit, relying on section 301(f), which prohibits the discharge of radiological and radioactive wastes,¹⁹⁷ found no inherent redundancy. The Third Circuit also distinguished a prohibition from a limitation.¹⁹⁸ This distinction is less than compelling. It must be realized that if a point source were discharging radioactive wastes, it could hardly be doing so in violation of section 402, since a permit would never be granted allowing such discharge in the first place. Therefore, if separate provision for citizen enforcement of the section 301(f) prohibition were not made, it is possible that a citizen suit would be precluded—a result directly inconsistent with one of the Act's major underlying policies.¹⁹⁹ Certainly, small redundancies are preferable to large paradoxes.

The Third Circuit opinion is fundamentally inconsistent in more ways than one. For example, the court concluded that section 301 requires the imposition of limitations which establish the maximum level of permissible effluent discharge.²⁰⁰ Then, section 304 guidelines are to be utilized by the permit issuer in deciding whether *more stringent* limitations are to be imposed on individual point sources.²⁰¹ Although on its face the interpretation seems sensible, it is submitted that the reasoning is backwards.

192. See note 129 *supra* and accompanying text.

193. See notes 130-31 *supra* and accompanying text.

194. "Timetable for achievement of objectives," 33 U.S.C. § 1311(b) (Supp. V, 1975). "Modification of timetable," 33 U.S.C. § 1311(c) (Supp. V, 1975).

195. See notes 132-37 *supra* and accompanying text.

196. See note 132 *supra* and accompanying text.

197. See note 135 *supra* and accompanying text.

198. See note 136 *supra* and accompanying text.

199. "Public participation in the . . . enforcement of any regulation, standard, effluent limitation, plan, or program established . . . under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States." The Act § 101(e), 33 U.S.C. § 1251(e) (Supp. V, 1975).

200. *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1045 (3d Cir. 1975).

201. *Id.*

First, the express language of section 301 must be examined.²⁰² It is clear that because section 301 makes no mention of the determination of effluent limitations *without* making reference to section 304, any action taken pursuant to section 301 with regard to the setting of limitations must follow the requirements of section 304.²⁰³ Second, it must be emphasized that section 304 speaks only of that degree of effluent discharge attainable through application of the *best* available technology.²⁰⁴ These represent the most stringent applicable limitations. The next step, provided in sections 304 (b)(1)(B) and (b)(2)(B), is the specification of those factors to be taken into account when considering which individual point sources within a given category will be allowed to deviate from the best attainable level of discharge.²⁰⁵ This refers to the application of *less* stringent standards to those point sources whose individual characteristics require such variance. Therefore, the Third Circuit interpretation of section 301 effluent limitations as the *maximum* permissible discharge level within a given category (or, that section 301 represents the base level of allowable effluent control) is clearly erroneous, as is the court's interpretation of the function of the permit process as the application of *more* stringent standards to those point sources which seem to require it.

Furthermore, the Act and its history are replete with manifestations of a desire to set strict standards and allow deviations only where absolutely necessary.²⁰⁶ This is expressly stated in section 101 and reflected in section 304. The national goal is the absolute cessation of discharge.²⁰⁷ The Act does not state, as the Third Circuit would insist, that the national goal is a permissible level of discharge that in certain circumstances will be made more stringent.

The Seventh Circuit approach avoided the pitfalls surrounding the Third Circuit's decision. In fact, the issues which concerned the court in the Third Circuit received summary attention in the Seventh. The latter court felt itself compelled to "uphold a decision of less than ideal clarity if the agency's path

202. E.g., "there shall be achieved . . . effluent limitations for point sources . . . which shall require the application of the best practicable control technology . . . as defined by the Administrator pursuant to section 1314(b) . . ." The Act § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (Supp. V, 1975).

203. See notes 39-52 *supra* and accompanying text.

204. "[T]he best practicable control technology currently available . . ." The Act § 304(b)(1)(A), 33 U.S.C. § 1314(b)(1)(A) (Supp. V, 1975). "[T]he best control measures and practices achievable . . ." The Act § 304(b)(2)(A), 33 U.S.C. § 1314(b)(2)(A) (Supp. V, 1975).

205. E.g., "specify factors to be taken into account in determining the best measures and practices available . . . to be applicable to any point source . . . within such categories or classes." The Act § 304(b)(2)(B), 33 U.S.C. § 1314(b)(2)(B) (Supp. V, 1975).

206. "Clean water means the elimination of the discharge of pollutants . . . Only when technology is not available to achieve such a goal will exceptions be made and even then exceptions will not be made if the quality of the receiving body of water would be impaired beyond a level acceptable to public health and recreation standards." History, *supra* note 13, at 1278 (remarks of Sen. Montoya). See note 44 *supra* and accompanying text.

207. The Act § 101(a)(1), 33 U.S.C. § 1251(a)(1) (Supp. V, 1975)

may reasonably be discerned.'"²⁰⁸ This result was viewed as required by the rule of *Train v. Natural Resources Defense Council, Inc.*²⁰⁹

However, the mere acknowledgement of the rationality of the EPA's interpretation ignores the strengths of the opposing side, as almost any approach can be deemed reasonable. *Natural Resources* does not mandate the acceptance of the EPA's interpretation. If the court feels that the EPA action is either not in accordance with law²¹⁰ or "in excess of statutory . . . authority . . . or short of statutory right,"²¹¹ it could overturn the agency's position. It is also clear that the Eighth Circuit's view of section 301 as the national mandate automatically renders the EPA's promulgation under that section "in excess of statutory . . . authority."²¹²

The Second Circuit approach is also unsatisfactory because the particular legislative history upon which the court relied can easily support the opposite conclusion. Furthermore, the passages relied on by the court are irrelevant to the issues it had to decide. Thus, the legislative commentary which forms the foundation of the Second Circuit decision, also relied on by the District of Columbia Circuit, to the effect that the *economic impact* of effluent limitations is not to be made upon a plant-by-plant basis,²¹³ is not decisive of the present issues, especially when one considers that the Act's ultimate goal is the elimination of pollution "*without regard to cost.*"²¹⁴ More importantly, the conclusion drawn from such statements, that section 301 demands application of uniform effluent limitations on a categorical basis, without regard to cost, conflicts directly with section 304 which specifically includes cost as a factor to be considered in applying guidelines to individual point sources.²¹⁵ Further, the only references to effluent limitations in section 301 includes specific reference to section 304.²¹⁶ The court's reasoning, therefore, increases, rather than tempers, the tension between sections 301 and 304.

Once again, the problems raised here can be eliminated by viewing section 301 as a statement of objectives—that "there shall be achieved . . . effluent limitations."²¹⁷ Objectives are distinct from implementation. The conclusion is virtually inescapable that the uniform achievement of effluent limitations on a categorical basis, without regard to cost, is but a reflection of the ultimate aim and not a method of implementation. This construction is buttressed by the paradoxical results of the Second and District of Columbia

208. *American Meat Inst. v. EPA*, 526 F.2d 442, 453 (7th Cir. 1975), quoting *Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

209. 421 U.S. 60 (1975); see notes 139-41 *supra* and accompanying text.

210. 5 U.S.C. § 706(2)(A) (1970).

211. 5 U.S.C. § 706(2)(C) (1970).

212. *Id.* If § 301 is a timetable only, and not the source of EPA regulatory authority, subsequent EPA promulgation of regulations under that section is clearly not within the scope of its statutory authority.

213. *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620, 628 (2d Cir. 1976).

214. *History*, *supra* note 13, at 170 (emphasis added).

215. The Act § 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B) (Supp. V, 1975).

216. The Act §§ 301(b)(1)(A), (b)(2)(A), 33 U.S.C. §§ 1311(b)(1)(A), (b)(2)(A) (Supp. V, 1975).

217. The Act § 301(b), 33 U.S.C. § 1311(b) (Supp. V, 1975).

Circuits' opinions. For example, section 304 specifies cost as one of the factors to be considered in allowing individual variances.²¹⁸ This obviously refers to the implementation of individual variances at permit issuance, for individual characteristics could not possibly be taken into account on a categorical basis.²¹⁹ Yet, this is precisely what the language of the courts' opinions implies.

Other problems arise with the District of Columbia Circuit's position. The cornerstone of the court's argument is the statement in the conference report noting that "[t]he conferees intend that the Administrator or the State, as the case may be, will make the determination on the basis . . . of classes"²²⁰ From this statement the court concluded that section 301 required the promulgation of effluent limitations applicable categorically.²²¹ However, reliance upon this same statement leads to a bizarre result. The states are able to regulate only by issuing individual permits which must follow the requirements of section 301²²² which are in turn defined by section 304.²²³ Combining the conference report with the District of Columbia Circuit decision, the following results: (1) section 301 effluent limitations are set on a categorical basis; (2) state permit programs, also in compliance with section 301 are set on a categorical basis; (3) though section 304 (individual factors) provides the substantive basis for section 301, the fact that section 301 must be applied categorically means that section 304 will be ignored. Such illogic is scarcely desirable.

Undue reliance upon legislative history led the court to applications inconsistent with the holdings of courts with which they are in apparent agreement. For example, the District of Columbia Circuit asserted that, "[i]t is important to remember . . . that § 301 is the basic enforcement mechanism relied upon by Congress"²²⁴ This contrasts with the Fourth Circuit's holding that "[p]rimary enforcement of the Act is secured through the permit system established by § 402."²²⁵ It is important to point out that this inconsistency exists even though the District of Columbia and Fourth Circuits have both upheld the EPA's interpretation of section 301.

The lengths to which the courts have gone to support the authority of the EPA in issuing regulations pursuant to section 301, coupled with the myriad inconsistencies which follow, forces one to question the validity of the attempts in the first place. With this idea in mind, the Fourth and Tenth Circuit cases seem, at least, refreshing. Gone are both the semantic hair-

218. See the Act § 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B) (Supp. V, 1975).

219. This follows because the factors here are considered on an individual point source basis, which occurs at the permit stage. The Act § 402, 33 U.S.C. § 1342 (Supp. V, 1975)

220. *American Frozen Food Inst. v. Train*, 539 F.2d 107, 122 (D.C. Cir. 1976), citing *History*, supra note 13, at 254.

221. 539 F.2d at 124.

222. The Act, § 402(b)(1)(A), 33 U.S.C. § 1342(b)(1)(A) (Supp. V, 1975).

223. See note 216 supra and accompanying text.

224. 539 F.2d at 127.

225. *Du Pont II*, supra note 22 at 6.

splitting utilized by the Third Circuit and the inordinate reliance on legislative history exhibited by the Second and District of Columbia Circuits. Instead, the Fourth and Tenth Circuits were able to remain relatively free of logical inconsistencies by using the "intent of Congress to improve and preserve the quality of the Nation's waters" as the "guiding star" which illuminates "[a]ll issues."²²⁶ The courts' approach is as effective as it is poetic. By realizing that the Act would be "unworkable" without someone issuing regulations, the courts easily established section 301 as the source of EPA regulatory authority.²²⁷ And, more importantly, a realization of the practical union of section 304 and 301 resolves both the jurisdictional question and the trade-off between necessary local variation and national uniformity.

One problem remains. The Eighth Circuit has recently declined to abandon its position as the sole member of the minority.²²⁸ Though noting the vehemence of the other circuits' rejection of *CPC*, the court held firm. In a footnote to its latest opinion on the subject, *CPC International Inc. v. Train*,²²⁹ the court stated: "The District of Columbia Circuit suggests that we 'failed to see the forest for the trees'. We deny faulty vision."²³⁰

The dissimilarity of interpretation among the circuits is readily apparent. Not so obvious, however, is that the practical differences stemming from these widely disparate views are relatively minor. In most cases, the limitations written into the permits for individual point sources should be quite similar. In most cases, the balance of national uniformity and limitation finality on the one side with the retention of state responsibility on the other has been left intact. The only real difference is that section 304(b) guidelines for existing sources would be susceptible to initial judicial review at the district court level under the *CPC* view, and at the circuit court level under every other view. Most of the circuits see this as an anomalous result, since it is both contrary to the congressional intent to provide expeditious judicial review²³¹ and a waste of judicial resource.²³²

But is this "anomaly" so objectionable? It is clear that no matter which interpretation is followed, the burden on all courts, both district and circuit, will be extremely heavy. Because the Act requires both a permit for every individual discharger within a category²³³ and separate guidelines/limitations for every category,²³⁴ several consequences are inevitable. First, every category will bring an industry-wide challenge of the effluent limitations. This, as

226. *American Petrol. II*, supra note 26, at 10.

227. See note 164 supra and accompanying text.

228. *CPC II*, supra note 69.

229. *Id.*

230. *Id.* at 2 n.1, citing *American Frozen Food Inst. v. Train*, 539 F.2d 107, 129 n.5 (D.C. Cir. 1976).

231. See, e.g., *CPC II*, supra note 69, at 2-3 n.1; *American Frozen Food Inst. v. Train*, 539 F.2d 107, 123 (D.C. Cir. 1976); *American Meat Inst. v. EPA*, 526 F.2d 442, 452 (7th Cir. 1975).

232. See, e.g., *CPC II*, supra note 69, at 4 n.1; *American Frozen Food Inst. v. Train*, 539 F.2d 107, 123 (D.C. Cir. 1976); *American Meat Inst. v. EPA*, 526 F.2d 442, 452 (7th Cir. 1975).

233. The Act § 402, 33 U.S.C. § 1342 (Supp. V, 1975).

234. The Act §§ 301, 304, 33 U.S.C. §§ 1311, 1314 (Supp. V, 1975).

we have seen, has already occurred.²³⁵ Then, every individual discharger will challenge his own permit, a result which also has occurred.²³⁶ Coupled with the citizen suit provision which allows action by just about any interested party,²³⁷ the volume of litigation is potentially enormous. It seems reasonable that under the CPC view, which does not provide original circuit court jurisdiction, dischargers and others would be more likely to litigate in one action—in a challenge of the permit which contains *both* limitations and guidelines—when the point source itself is affected by the regulations. By allowing two types of dilatory judicial challenges²³⁸ in the circuit courts, the other circuits may be opening the doors to double trouble. It is this result which is more truly a waste of judicial resource.

VI. CONCLUSION

The controversy continues. Though there are signs that the nation's waters are on the road to recovery,²³⁹ the existence of contrary indications²⁴⁰ renders the question of the Act's meaning one of more than academic importance. Yet, the courts' struggles in this area highlight a concern more fundamental than the application of a single statutory scheme.

The Eighth Circuit touched upon the problem when it declared: "We cannot disregard the intention of Congress and rewrite the statute simply because of the practical problem of initially reviewing two closely related sets of regulations at two different levels in the judicial system."²⁴¹ Nevertheless, the extent to which the other circuits felt compelled to, in essence, legislate because of this perceived practical anomaly²⁴² is apparent in the wide dissimilarity of their approaches.²⁴³

235. See notes 69 & 80 *supra* and accompanying text.

236. Hearings Before the Subcomm. on Investigations and Review of the House Comm. on Public Works and Transportation, 94th Cong., 1st Sess. 9 (1975).

237. See *Sun Enterprises, Ltd. v. Train*, 532 F.2d 280 (2d Cir. 1976). There, a corporation downstream and a fishing and hunting club in the area of the permit-authorized discharger brought suit challenging the issues permit. Similar actions are likely to be brought in the future.

238. The Act §§ 509(b)(1)(E), (b)(1)(F), 33 U.S.C. §§ 1369(b)(1)(E), (b)(1)(F) (Supp. V, 1975).

239. The Sixth Annual Report of the Council on Environmental Quality 362 (1975).

240. See, e.g., Libman, *Troubled Waters*, *The Wall Street Journal*, Sept. 8, 1976, at 42, col. 1; Bray, *Kepone and The Toxic Control Bill*, *The Wall Street Journal*, Sept. 29, 1976, at 24, col. 4; *The Wall Street Journal*, Oct. 1, 1976, at 6, col. 1.

241. CPC II, *supra* note 69 at 4 n.1.

242. Importantly, the effect of this so-called anomaly is by no means clear. Notes 231-38 *supra* and accompanying text. Therefore, the effort of the courts to avoid what may be, in practical terms, an illusory obstacle, becomes even more questionable.

243. *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1074 (3d Cir. 1975) (Adams, J., concurring): "[T]he difficulty in interpretation impinges on the powers of the coordinate branches of government within the federal system. Ours is a cooperative federalism in which the states and the national government share responsibilities for many programs. The definition of the roles of the state and national governments in areas where they share concurrent powers is essentially a matter for Congress, not for the courts. The failure to create clear boundaries for the authority of the states and the EPA has thrust upon the courts a responsibility to infer legislative intent from the disparate provisions of this complex legislation. The courts have not evaded their responsibil-

Judicial exercise of legislative functions may well be compelled by the ambiguity of the Act itself. But, less obvious is the additional effect of the doctrine illustrated in *Natural Resources Defense Council*. Giving agency interpretations of complex and ambiguous statutes such a high degree of deference increases the probability that statutory nuances will be overlooked. The result, as here, is confusion. Somewhere, a definitive line must be drawn.

The recent grant of *certiorari* in the two *Du Pont*²⁴⁴ cases may lead to a final resolution of these fundamental issues. Due to the straightforward approach of the Fourth Circuit, and the effectiveness of its solution, these cases probably will be affirmed. Still, it is to be hoped that the Eighth Circuit's attempt to do justice to all of the Act's language will be given due consideration.

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ity, but our disagreement with the Eighth Circuit underlines the extent to which the courts can write law, even in areas of Congressional authority, when there has been a failure to manifest legislative intent by clear statutory commands." *Id.* (footnote omitted).

244. See note 70 *supra* and accompanying text.