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Annual Report of the Electric Power Committee

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Annual Report of the Electric Power Committee

Abstract
This is the annual report of the Electric Power Committee for 1979. It reports on legislative and judicial developments, and issues relevant to the Electric Power Committee. This report is in four parts. Part I reviews the extensive developments during 1978 under the federal air and water pollution laws. Part II briefly considers other federal developments of significance to the electric power industry. Part III is an update of last year’s review of developments concerning solar energy. Part IV consists of the 1978 reports from selected states.

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ELECTRICAL POWER COMMITTEE*

Part I
DEVELOPMENTS UNDER THE CLEAN AIR AND
CLEAN WATER ACTS

A. Clean Air Act Developments

Developments in 1978 under the Clean Air Act (CAA)¹ affecting electric utilities centered on rulemaking activity by the Environmental Protection Agency (EPA) implementing various major provisions of the 1977 Amendments to the CAA. Those provisions involved, for example, air quality criteria and standards, prevention of significant deterioration (PSD), new source performance standards (NSPS), and nonattainment provisions. Other developments concerned the litigation resulting from that rulemaking activity and from EPA enforcement and other actions under the pre-1977 regulation framework.

1. Air Quality Criteria and Standards

EPA is preparing to review its national ambient air quality standards (NAAQS) for sulfur oxides (SO₂) and is moving to set short-term nitrogen dioxide (NO₂) ambient standards pursuant to requirements in the 1977 Amendments² to the CAA. As for SO₂, EPA is updating its Air Quality Criteria Document for SO₂. A National Academy of Science report de-

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¹EPA is required by § 109(c) to set such ambient standards unless it finds, based on the short-term NO₂ air quality criteria it must develop, that there is "no significant evidence that such a standard for such a period is requisite to protect public health." 42 U.S.C. § 7409(c).
signed to be a source document in this effort has just been published.\textsuperscript{3} EPA’s November 30, 1978, Regulatory Agenda (November Regulatory Agenda) indicates that the EPA intends to issue any proposed revisions to the NAAQS for SO\textsubscript{2} by May 1980, and any final revisions by December 1980.\textsuperscript{4}

As for the short-term NO\textsubscript{2} NAAQS, EPA was expected to propose a standard in late 1978 but did not do so by year-end. EPA’s November Regulatory Agenda indicates that the agency intends to issue any proposed standards by January 1979, and final regulations by June 1979, although the actual date of proposal is more likely to be in the late spring or early summer.\textsuperscript{5} These new standards, once promulgated, may well create new nonattainment areas requiring emission rollbacks for existing power stations and emission offsets for new power stations.

EPA is also reviewing its NAAQS for particulates and plans to issue any proposed and final revisions by May and December 1980, respectively.\textsuperscript{6}

Previous litigation had established that the proper vehicle for forcing revision of EPA standards is a petition to EPA, followed by (1) a lawsuit in district court, if necessary to compel a response or (2) a lawsuit in the court of appeals (in those cases where review of the action in question normally lies in the court of appeals) to contest the merits of the response.\textsuperscript{7} Several significant decisions were issued at the district court level in 1978. One ordered EPA to issue an NAAQS for lead by a date certain.\textsuperscript{8} Another refused on grounds of mootness to render a declaratory judgment that EPA had delayed unreasonably in responding to an oil industry petition for review and revision of the air quality criteria and NAAQS for photochemical oxidants once EPA had published (on June 9, 1978) a revised criteria document and proposed amendments to the NAAQS.\textsuperscript{9} In a third case the district court ruled it has jurisdiction under the citizen suit provisions to require EPA to review its air quality criteria document for particulates. In its opinion the court noted that EPA’s duty to review is mandatory but that its duty to revise is discretionary and that a failure to revise could only be challenged in a court of appeals.\textsuperscript{10}

In an appellate case concerning attainment dates the Sixth Circuit ruled that Congress did not set a rigid mid-1975 attainment date for achieving

\textsuperscript{3} Envir. Rep. (BNA) 1772 (Cum. Dev.).
\textsuperscript{4} 43 Fed. Reg. 56158. Consolidated Coal Co. petitioned EPA on January 17, 1978, to review and revise the NAAQS for SO\textsubscript{2} by doubling the SO\textsubscript{2} standards. 9 Envir. Rep. (BNA) 1731-1732 (Cum. Dev.).
\textsuperscript{5} Id.
\textsuperscript{6} Id. The American Iron & Steel Institute has petitioned EPA to review and revise the NAAQS for particulates.
\textsuperscript{7} Oljato Chapter of Navajo Tribes v. Train, 515 F.2d 654 (D.C. Cir. 1975).
\textsuperscript{8} NRDC v. Costle, 12 E.R.C. 1422 (S.D.N.Y. 1978).
NAAQS. Hence a later date could be approved by EPA as long as it was no later than three years from the date of EPA approval of the state implementation plan (SIP) or of a SIP revision. The court rejected a utility industry argument that EPA's approval of the new attainment date was invalid because attainment by that date was infeasible. The court cited *Union Electric Co. v. Environmental Protection Agency* for the proposition that the Administrator cannot reject a SIP on grounds of technological infeasibility.

2. State Implementation Plans (SIP)

Litigation concerning SIPs in 1978 has centered on the Ohio SIP's SO₂ requirements. In *Cleveland Electric Illuminating Co. v. Environmental Protection Agency* the Sixth Circuit upheld EPA's selection of a computer model (the Real-Time Air-Quality-Simulation Model or RAM) to establish the SO₂ emissions limitations for sources in urban areas in the EPA-promulgated SO₂ provisions of the Ohio SIP. This model was developed by EPA to produce individually calculated emission limitations necessary to meet ambient standards, in response to petitioners' complaints that the "rollback" model, used in the initial Ohio SIP, failed to do so, resulting in unnecessary overcontrol. The court rejected petitioners' argument that its consultant, Enviroplan, had a more accurate model, because Enviroplan refused (on grounds of proprietary interest) to disclose the operative details of its model for EPA review and evaluation. In the absence of such disclosure and evaluation, the court ruled that the Enviroplan model was not "available technology."

The court recognized that the record did not contain "positive proofs of the accuracy of RAM's predictions." Even so, the court noted, after considering evidence bearing on the over and under prediction of RAM, that even if RAM did over predict, "such a conservative approach in protection of health and life was apparently contemplated by Congress in requiring that EPA plans contain 'emission limitations . . . necessary to insure attainment and maintenance.'"
The court also ruled that EPA did not need to allow cross-examination rights when promulgating the SIP provisions, since this rulemaking action was not required by the statute to be "on the record." The court noted that the Ninth Circuit had provided for cross-examination in its remand in *Bunker Hill Co. v. Environmental Protection Agency.* That case involved a "highly complex and technical issue concerning the technological infeasibility of the use of sulfur burners to . . . control . . . lead smelter emissions." Although the Sixth Circuit indicated that it might itself require cross-examination of an agency's experts in a proper case, it said that petitioners in this case had had ample opportunity to participate fully, particularly in light of the court's prior remand in *Buckeye Power II* to allow their further participation.

In a follow-on case the Sixth Circuit upheld most aspects of the computer model (MAXT-24) which EPA chose for setting SIP emission limitations in rural and complex terrain areas. In particular it upheld EPA's refusal to use a widely recognized terrain adjustment factor for hilly terrain, the "half-terrain height displacement theory." That theory was recommended by petitioners, a number of experts in the field, and had been used by EPA itself in approving revisions to another SIP. EPA had developed a different adjustment factor. While neither factor had been validated through field studies, and while the court expressly did not reject the petitioners' theory, it could not find the EPA choice arbitrary or capricious. The court also refused to reject the EPA model because it was not calibrated or because some actual monitor readings indicated that it overpredicted.

The court did, however, reverse EPA in one aspect of the modeling, the use of a certain coefficient for atmospheric stability conditions associated with gusty winds (Class A stability conditions) which was a critical assumption in the case of one-third of the Ohio power plants being modeled. The coefficient had been judged unrealistic by experts in the field, including those attending a Specialists' Conference at the Argonne National Laboratory sponsored by EPA itself in February 1977. In the face of this apparent technical consensus, the court remanded the issue to EPA for further study, despite the agency's argument that it was entitled to use the coefficient until further studies could be done to substantiate the theories since there was, according to the agency, "no experimental or field data to justify...

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10Id. at 1158-59.
11572 F.2d 1286 (9th Cir. 1977).
12572 F.2d at 1160. The court also doubted the *Bunker Hill* court's view that an EPA-promulgated SIP must be economically and technically feasible, noting that this was an open question after *Union Elec. Co. v. EPA*, 427 U.S. 246, 261 n.7 (1976). The court said, in any case, that the record in the *Cleveland Electric* case showed no deficiency in that regard. Id. at 1164.
13*Buckeye Power, Inc. v. EPA*, 525 F.2d 80 (6th Cir. 1975).
15Id. at 665.
changing the dispersion curves or to determine how the dispersion equations should be changed."

In a series of cases attempting to force SIP revisions the courts have held that district courts have jurisdiction under the citizen suit provisions to require that EPA make a decision on a requested SIP revision duty, but that they have no jurisdiction over the content of the decision. While both courts found the section 304 citizen suit, the Mandamus Act, and the Administrative Procedure Act (APA) grounds for jurisdiction easy to dispose of, on the question of district court review of the merits of an SIP revision decision, both struggled with the applicability of section 1331 federal question jurisdiction. Each finally concluded that early intervention on the merits by a district court, before final agency action, would be inappropriate where Congress granted the courts of appeals exclusive jurisdiction once that final action had occurred.

In *New England Legal Foundation v. Costle* several nonprofit business and industry foundations and numerous Connecticut municipalities have brought a class action on behalf of all inhabitants of that state seeking to abate the effects in Connecticut of air pollutants emitted beyond the state's borders. The suit, which originally named representatives of EPA, the state of New York, the state of New Jersey, and Long Island Lighting Company (LILCO) as defendants, presents issues that are unique in several respects. This is one of the first environmental cases in which a plaintiff has complained not only of adverse health and aesthetic effects of out-of-state emissions but also of adverse economic effects. Connecticut businesses and industry are concerned that emissions from New York and Connecticut thwart Connecticut's economic growth by preventing emissions by Connecticut industry and business of pollutants within limits established by EPA. In effect, the court is being asked to apportion among the states the right to pollute the air.

Plaintiffs assert that New York and New Jersey have failed to promulgate and enforce implementation plans adequate to prevent adverse pollution effects in Connecticut. The suit requests that EPA be required to promulgate adequate plans for those states and to terminate federal grants to New York under the CAA. Plaintiffs further assert the violation of their Ninth

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26Id. at 663, quoting EPA's brief at 48-49. In related litigation, an Ohio state court ruled that variances to *ambient air quality standards* could not extend, under Ohio law, beyond the attainment date upheld in *Northern Ohio Lung Ass'n*, note 11, *supra*. Cleveland Electric Ill. Co. v. Williams, 12 E.R.C. 1081 (Ohio Court of Appeals, Franklin County Circuit, 1977).

27See text accompanying note 6 *supra* for analogous cases involving attempts to require EPA review and revision of air quality criteria and standards.

28Kennecott Copper Corp. v. Costle, 572 F.2d 1349 (9th Cir. 1978) (one judge dissenting in part, essentially on the grounds that a nondiscretionary duty to revise, which is reviewable in district court, can arise if the agency's failure to do so is clearly wrong on the merits); Dow Chemical Co. v. Costle, 11 E.R.C. 2064 (E.D. Mich. 1978) (noting that until a state has taken all the necessary steps to present a complete SIP revision request to EPA, no suit lies in district court to require EPA to act at all).

Amendment right to a clean environment and the CAA's abrogation of the Due Process, Equal Protection, and Privileges and Immunities Clauses because of the inequality of its effects among states.

Of equal interest to utilities is the plaintiffs' federal common law nuisance claim seeking to enjoin LILCO from burning high-sulfur fuel. This claim will at least partially determine, for the first time, the relationship between the federal common law of nuisance and the CAA pursuant to which LILCO has received the approval of both New York and EPA to burn the high-sulfur fuel. LILCO has argued, inter alia, that the CAA preempts the federal common law of nuisance and that only a state has standing to assert such a claim.

3. Prevention of Significant Deterioration (PSD)

EPA published its final PSD regulations on June 19, 1978, and they were promptly appealed by both industry and environmental groups. Even before their promulgation, litigation had begun concerning their “effective date.” The United States Court of Appeals for the District of Columbia consolidated all of the related PSD litigation and divided it, for purposes of briefing, into two phases—phase one involving the “effective date” issues and phase two involving the remaining procedural and substantive issues.

The phase one issues were briefed and argued first, in the fall of 1978. EPA had chosen to apply its new regulations as of March 1, 1978, a choice supported by the utility industry litigants. Other industry groups argued that the new rules could not be made effective until states revised their SIPs by July 1, 1979. Environmental groups argued that Congress intended the provisions of the new regulations to apply as of August 7, 1977, the date of enactment of the Amendments.

The initial briefs in phase two of the litigation were submitted in mid-December, 1978. A wide range of issues was raised. Various industry petitioners argued that:

1. The PSD increments were not intended by Congress to be enforced like ambient standards and were improperly promulgated.
2. The PSD baseline determination date was supposed to be the date of the first PSD application in an area, not August 7, 1977, the date of enactment of the 1977 Amendments.
3. While the statute directs the use of fictitious stack heights for a plant at the time it is licensed, EPA cannot—
   (a) use fictitious stack heights to calculate the amount and location of PSD increment consumption by other sources at the time of initial PSD licensing of the plant, nor can it

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For a detailed discussion of the evolution of the PSD provisions of the 1977 Clean Air Act Amendments and of EPA's response to them, see the Joint Statement of the Case by Industry Petitioners in Alabama Power Co. v. Costle, Nos. 78-1006 and consolidated cases (D.C. Cir.).
(b) use fictitious stack heights to calculate later the actual amount and location of PSD increment consumption by the plant itself.

4. EPA should not have required use of a boiler-by-boiler approach to its "commenced construction" rules and should not have required that construction commence on each phase of a multiunit project within 18 months of the projected and approved commencement date for the phase in question.

5. EPA improperly failed in its final PSD regulations to respond to criticism during the comment period of its Proposed Criteria for Acceptable Air Quality Modeling.

6. EPA improperly defined "potential to emit" with reference to uncontrolled, rather than controlled emissions.

7. EPA improperly defined "major emitting facilities" by including operations, mobile sources and temporary sources, and by improperly including aggregations of minor emissions points.

8. EPA improperly included operations producing fugitive dust such as mines, farms, forests, and oil fields within its "major emitting facilities" definition, and even if these sources are properly included, EPA's regulations are arbitrary for various reasons.

9. EPA should have provided that a "major modification" occurs under the Act only where the modification increases net emissions.

10. EPA should have included fuel switches within the baseline, so that they did not consume the increments.

11. EPA should not have applied the PSD requirements to pollutants other than SO₂ and particulates.

12. The PSD permit process should have been limited to sources located in clean air areas and should not have been extended to sources located in "nonattainment areas."

13. EPA should not have included a visible emission standard in "best available control technology" (BACT) requirements.

The Sierra Club and the Environmental Defense Fund argued that:

(1) EPA had improperly exempted certain stationary sources (those involving use of the "bubble concept," those with the potential to emit less than 50 tons per year, and fugitive dust sources) from full preconstruction PSD review.

(2) EPA should have required one year's monitoring data for all pollutants regulated by the Clean Air Act in order to determine compliance with PSD increments (not just for pollutants for which there exists a national ambient air quality standard and then only for determination of compliance with the ambient standards) and has failed, within one year of the enactment of the 1977 Amendments (as the Amendments required), to promulgate regulations detailing conditions under which less than one year's monitoring is adequate.

(3) Ex parte influence by the President and his advisors rendered the 50-ton and fugitive dust exemptions illegal.

(4) The provisions for revision of SIPs are inadequate to ensure maintenance of the PSD increments.
EPA is currently moving toward new rules for the industry's petitioners first point concerning the promulgation of PSD increments for pollutants other than SO₂ and total suspended particulates (proposal by December 1979, and final promulgation by October 1980, according to EPA's November Regulatory Agenda).

4. Nonattainment Area Requirements
EPA adopted its final emission offset policy for use in nonattainment areas, without any further comment period, on January 16, 1979. Some items were left open for further comment.

EPA's policy governs applications for certain new sources in nonattainment areas submitted before July 1, 1979, or within the time allowed for development of a revised SIP for areas designated nonattainment after the initial designations under section 107. For permit applications submitted after those dates, the provisions of the revised state SIP will govern if the SIP meets the nonattainment requirements (Part D) of the CAA. If the SIP does not meet these requirements, the source may not be constructed at all, with the exception of cases where the only nonattainment impact is across a state line, in which case the EPA policy applies.

5. Steam-Electric New Source Performance Standards
Proposed new source performance standards (NSPS) for SO₂, TSP, and NOₓ were announced on September 19, 1978. EPA is considering a number of alternatives, including EPA Staff recommendations, certain Department of Energy (DOE) options and industry proposals. Since final regulations (anticipated by March 1979) will be applicable retroactively to the date of publication of the EPA notice, the notice sets forth the regulatory text of the most stringent proposals (those of the EPA Staff) in order to notify industry of the most severe requirements to which it might be subject.

The EPA Staff, DOE, and industry proposals are as follows:

1. The EPA Staff proposed 85 percent removal of SO₂ emissions regardless of input sulfur with a 0.2 lbs/MBTU floor. (Compliance would be monitored based on a 24-hour average of emissions with three daily exemptions per month, none below 75 percent.) The standard for particulates would be 0.03 lbs/MBTU, and for NOₓ, 0.6 and 0.5 lbs/MBTU for bituminous and sub-bituminous coals, respectively.

2. DOE proposed 85 percent removal of SO₂ but with a floor of 0.8 lbs/MBTU. (Compliance would be based on a 30-day average of emissions.) The particulate standard would be 0.05 to 0.08 lbs/MBTU.

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13Id. at 3298.
3. The industry proposed a sliding scale for percentage removal ranging from 20 percent to 85 percent depending upon the sulfur content of the coal burned. (Compliance would be based on a 30-day average of emissions.) Particulate emissions limits would be 0.08 lbs/MBTU, and NOx limits would remain at 0.7 lbs/MBTU. Continuous monitoring requirements are part of the proposed NSPS. There is also a separate continuous monitoring rulemaking underway for existing sources.

6. Tall Stack Regulations
EPA published proposed rules implementing the “good engineering practice” (GEP) provisions of section 123 of the 1977 Amendments on January 12, 1979. These regulations establish a defined “GEP” stack height as the maximum stack height for which a source may be given credit in establishing its emission limitation in the applicable SIP. The November Regulatory Agenda lists April 1979 as the target date for final tall stack regulations.

7. Visibility Protection Guidelines
EPA is required, by section 169A of the 1977 Amendments, to prepare a report to Congress on “Visibility Protection,” but has not yet done so. On February 8, 1978, the Department of the Interior identified virtually all mandatory Class I federal areas as areas “where visibility is an important value.” By October 1979 EPA plans to publish proposed guidelines for application by state SIPs of “best available retrofit technology” (BART) to certain major stationary sources. These guidelines are to be in final form by August 1980. Under section 169A(c) fossil-fuel fired generating power plants with a total generating capacity in excess of 750 megawatts may be exempted from these requirements if they can demonstrate that they do not and will not, by themselves or in combination with other sources, “emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.”

8. Toxic Substance Regulations
In Adamo Wrecking Co. v. United States the Supreme Court held that “work practice” rules promulgated under the hazardous air pollutant provisions of section 112 of the CAA are not “emission standards” under that section since emission standards must be set on a quantitative basis. In so doing, it rejected the government’s argument that section 307(b)(2) of the
CAA, which prohibits review in an enforcement proceeding of section 112 emission standards, precludes the defendant in a criminal enforcement action from asserting as a defense that the section 112 "emission standard" alleged to be violated is not an emission standard within the meaning of the CAA.

9. Enforcement

Adamo Wrecking\(^4\) held that section 307(b)(2) does not bar the defense that the section 112 emission standard being enforced is not an emission standard within the meaning of the CAA.

While the courts have generally held that preenforcement review of notices of violation and enforcement orders is not available, a district court in Philadelphia recently allowed review of a notice of violation (NOV).\(^42\) In a narrow opinion, the court found federal question jurisdiction over a suit filed to have a preexisting consent order declared valid and an EPA-issued NOV declared illegal. The court distinguished West Penn Power Co. v. Train\(^43\) and assumed jurisdiction because (1) the issuance of the NOV constituted final agency action since the CAA Amendments require that once this occurs an enforcement action must follow, and (2) the legality of the consent order raises legal issues appropriate for judicial review.

Courts have generally refused to stay enforcement of SIP provisions pending exhaustion of state appellate processes challenging the promulgation of the SIP. Yet, in Union Electric Co. v. Environmental Protection Agency\(^44\) a district court allowed preenforcement review and stayed EPA enforcement of violations of SO\(_2\) emission limitations while the plaintiff in good faith sought a variance under state procedure.

10. Judicial Review

In Adamo Wrecking the Supreme Court reaffirmed that section 307(b)(2) precludes a court from undertaking full review of the procedural or substantive validity of a rule subject to that section during criminal enforcement proceedings. In other litigation, a district court dismissed a petition of the Environmental Defense Fund (EDF) challenging EPA's PSD regulations under the citizen suit provisions, holding that final PSD regulations are reviewable in the United States Court of Appeals for the District of Columbia under section 307(b)(1).\(^45\) In Amoco Oil Co. v. United States\(^46\) a district court exercised jurisdiction under 28 U.S.C. section 1331(a) over a

\(^6\)252 F.2d 302 (3d Cir. 1975).
challenge to the agency's interpretation of an otherwise valid section 211 regulation. The court recognized that an attack on the validity of the regulation is reviewable only in a court of appeals.

B. Clean Water Act (CWA) Developments

1. Effluent Limitations Guidelines

The EPA continued its development of thermal effluent limitations guidelines during 1978 in response to the courts remand order in Appalachian Power Co. v. Train. Development regulations under section 403(c) setting ocean discharge criteria is also proceeding slowly. The November Regulatory Agenda estimates proposed regulations by April 1979, and final regulations by December 1979. The EPA also continued its review of “best available technology” (BAT) requirements and effluent limitations guidelines for toxic substances for the steam-electric category pursuant to the settlement agreement in National Resources Defense Council, Inc. v. Train. The November Regulatory Agenda lists proposed regulations in May 1979 and final regulations in December 1979.

There were new developments in the National Resources Defense Council, Inc. v. Train (now National Resources Defense Council, Inc. v. Costle) litigation. NRDC filed a motion, on September 26, 1978, to “show cause” why EPA should not be held in contempt of court for allegedly failing to comply with four paragraphs of the settlement agreement. NRDC also requested that the settlement agreement be significantly modified in several respects. EPA responded, justifying in detail its actions under the settlement agreement, and intervenors responded, moving to vacate the June 8, 1976, consent decree on the ground that it had been superseded by the toxic's regulatory program in the 1977 Amendments to the Federal Water Pollution Control Act (1977 Amendments). After negotiations between NRDC and EPA and comments by intervenors, NRDC and EPA filed a Joint Motion for Modification of Settlement on December 15, 1978. The Joint Motion adopted the new rulemaking schedule advocated by EPA and adopts new language (1) concerning a program for pretreatment regulations for pollutants other than the sixty-five listed in the 1977 Amendments; and (2) relating to promulgation of water quality standards. Intervenors filed an opposition to the Joint Motion, arguing that the 1977 Amendments superseded the consent decree and that modification of the decree as proposed by EPA and NRDC would violate the rulemaking and public participation requirements of the Administrative Procedure Act, the CWA, EPA Regulations, and the Due Process Clause. The settlement agreement continues to reserve to the parties the right to later litigate the validity of any programs required by it.

545 F.2d 1351 (4th Cir. 1976).
Appalachian Power Co. v. Train required EPA to promulgate new “best practical technology” (BPT) variance regulations for the steam-electric category. In March 1978, EPA finally proposed an “amendment” to its steam-electric BPT variance provision, in order to implement the court’s order. The only changes proposed were (1) a statement that the August 20, 1974, opinion of EPA’s General Counsel, that costs could not be considered under its standard variance clause, would not apply to power plants; and (2) a new interpretation of the phrase “other such factors” to include “significant cost differentials and the factors listed in section 301(c) of the Act.” EPA’s final rule was virtually identical to its March proposal. EPA rejected industry comments suggesting that its proposed regulation was inconsistent with the Appalachian Power decision because it failed to include all of the section 304(b)(1)(B) factors as required by that decision, specifically “total cost . . . in relation to effluent reduction benefits.” The agency also rejected NRDC comments that the factors listed in section 301(c) concerning economic capability in granting variances to the BAT requirements could not be considered in the BPT variance provision. The resulting litigation was transferred to and consolidated in the United States Court of Appeals for the Fourth Circuit and is pending. In addition to the issues raised during the comment period, NRDC argues that section 301(1) of the Clean Water Act forbids the application of the BPT variance to effluent limitation regulations for toxic pollutants.

The EPA debated internally during 1978 whether a “bubble policy” should be applied to BAT, BCT, BPT, and water quality standards.

In Weyerhaeuser Co. v. Costle the Court of Appeals for the District of Columbia Circuit upheld effluent limitations guidelines regulations for the pulp and paper industry. The court dealt extensively with the proper scope of review of EPA action, adopting a differential stance on factual or “policy” determinations, a less differential stance on issues of statutory interpretation, and a relatively independent stance on procedural issues. The court ruled that receiving water quality is not a permissible consideration in

545 F.2d 1351 (4th Cir. 1976).
43 Fed. Reg. 8812-13 (1978). In Commonwealth Edison Co. v. Train, No. 74-2366 (4th Cir., filed July 14, 1978) Commonwealth Edison, a petitioner in Appalachian Power Co. v. Train, note 49, supra, petitioned the court to enforce its Appalachian Power mandate ordering EPA to promulgate a valid BPT variance clause and to enjoin EPA enforcement actions until EPA had complied with the mandate, had allowed petitioner to present a variance request, and had acted on that request. By order dated August 28, 1978, the court denied this petition without prejudice to its later renewal.
The various proposals are described at 9 ENVIR. REP. (Current Developments) 1643-44 and reprinted 9 id at 1659-1665.
setting effluent limitations guidelines, since the phrase "effluent reduction benefits" means those reductions in effluent discharge that occur "whenever less effluent is discharged, i.e., whenever a plant treats its waste before discharge." By so doing, the court effectively read cost-benefit balancing out of the Clean Water Act.

The *Weyerhaeuser* case also upheld the BPT variance regulations for the paper industry by finding that they could "be applied with enough flexibility to support the general rulemaking effort." The court took no position on the application of the variance clause in specific cases, nor on its precise interpretation. It read the BPT variance requirement to mean that a variance need only be granted where "the entire impact of a limitation on an individual mill exceeds that which the EPA is authorized to place on the industry." It ruled that "local receiving water quality" cannot be considered when granting variances. Finally, it ruled that while "total cost" must be considered in granting BPT variances, "the difficulty, or in fact the inability, of the operator to absorb the costs need not control the variance decision," indicating that it reached that conclusion "only after satisfying [itself] that the legislative intent is as clear as the result is harsh."

In *Republic Steel v. Costle*" the Sixth Circuit overruled its previous decision in *Republic Steel v. Train* where it had granted an extension of the 1977 BPT deadline because of EPA's failure to promulgate final BPT regulations on a timely basis. On remand from the Supreme Court, the Court held that section 309(a)(5)(B) of the amended CWA establishes the only mechanism for granting BPT deadline extensions.

### 2. Section 311 Hazardous Substance Regulations

EPA promulgated hazardous pollutant regulations under section 311 on March 13, 1978. These regulations were set aside by district court in *Manufacturing Chemists Ass'n v. Costle* on three grounds:

1. EPA exceeded its authority in attempting to regulate point source discharges under section 311 where the discharger possesses an NPDES permit;
2. The manner in which EPA established harmful quantities was inconsistent with statutory criteria; and
3. EPA's determination that 261 of the 271 designated hazardous substances are not removable was arbitrary and capricious.

EPA subsequently moved to stay the provisions of the district court's decision relating to reporting under section 311, but this motion was denied."
Congress then adopted amendments to section 311 which clarified the relationship between that section and the National Pollution Discharge Elimination System (NPDES) permit provisions of the CWA. As stated by Senator Muskie, on the one hand, "chronic discharges" associated with manufacturing and treatment technology are to be regulated under sections 402 and 309. On the other hand, "classic spill" situations occurring at a facility with an NPDES permit will be subject to section 311, once EPA has promulgated new regulations under that provision. In addition, the amendments simplify the standards for setting harmful quantities and for assessing penalties under section 311. Significantly, they provide for the recovery, under section 309(b), of clean-up costs incurred in connection with a discharge excluded from section 311 by the new NPDES exception.

Four cases in 1978 dealt with liability for clean-up costs under section 311. In United States v. M/V Big Sam the court held that limitations on liability for clean-up costs under section 311 do not preclude the government from maintaining a suit under the Rivers and Harbors Act of 1899 to recover clean-up costs in excess of the section 311 liability limits. In Tug Ocean Prince v. United States the court reversed a finding by the district court that the oil spill in question resulted from errors of navigation and management on board the tug and not from matters within the tugboat owner's privity and knowledge. The court found that the tugboat owner had failed to supervise properly the operation of the boat (by its failure to require a lookout, failure to designate a captain, and failure to inform the pilot of the copilot's unfamiliarity with the river) and that these omissions constituted "willful misconduct" within the meaning of section 311(f)(1). Thus, the court found that the district court erroneously limited the tugboat owner's clean-up cost liability under section 311(f)(1). In a third case the Fourth Circuit followed United States v. LeBeouf Bros. Towing Co., Inc. and rejected a corporation's argument that civil penalties under section 311 are criminal in nature and that its notification to the government of the spill was entitled to "use immunity" under section 1321(b)(5). The court ruled that a corporation is not entitled to the Fifth Amendment privilege against self-incrimination and that the scope of "use immunity" under section 311(b)(5) was intended to extend only to criminal cases, not to penalties specifically denominated by Congress as "civil penalties." One judge, in a brief concurrence, noted that "different considerations might well arise in the application of [these provisions] to an individual as contrasted to a corporation." Finally, a district court upheld imposition of substantial, as

12 E.R.C. 1010 (2d Cir. 1978).
537 F.2d 149, 9 E.R.C. 1118 (5th Cir. 1976).
opposed to nominal, section 311(b)(6) penalties on a pipeline owner for a rupture and oil spill caused by a third party, notwithstanding defendant's lack of fault. 65

3. Water Quality Criteria, Standards, and Planning
EPA is required by the settlement agreement in Natural Resources Defense Council, Inc. v. Train 66 to develop water quality criteria for the sixty-five toxic pollutants listed there. EPA actively circulated draft criteria documents during 1978 and the industry commented on these. The November Regulatory Agenda indicates that criteria for twenty-nine of these are to be proposed in March 1979, for final adoption by September 1979. The remaining thirty-six criteria are to be proposed in July 1979, and adopted by December 1979.

On May 18, 1978, EPA proposed new guidelines containing a new methodology for deriving water quality criteria for the protection of aquatic life. 67 Those guidelines were not further proposed or finally adopted during 1978.

On July 10, 1978, EPA published a statement describing its current policy regarding state water quality standards under section 303 of the Act and an Advance Notice of Proposed Rulemaking on this question. 68 The three major changes the EPA proposed to its policy were (1) adoption of more stringent criteria which must be met before water quality use designations can be “downgraded”; (2) intensification of EPA efforts to encourage states to “upgrade” use designations; and (3) requiring that state water quality standards be promulgated for specified pollutants. EPA's November Regulatory Agenda indicates that final implementing regulations on these policy issues were due to be proposed in late 1978 and published in final form in early 1979, although no action was taken in 1978 and none has been taken to date in 1979.

EPA’s proposed tightening of its water quality standards policy may have been at least partially influenced by the case of Stream Pollution Control Board v. Alexander. 69 There the court concluded that the Administrator has authority under section 303(c)(4)(B) to promulgate federal water quality standards at any point in time when the Administrator determines that a state's standards do not measure up to the requirements of the CWA. The court denied plaintiff’s request for a preliminary and permanent injunction restraining EPA from promulgating, pursuant to section 303(c)(4), federal water quality standards to supersede portions of the state's standards disapproved by EPA pursuant to section 303(c)(3). In dictum, the court concluded that the 90-day review period under section 303(c)(3) begins to run

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only when the state has submitted all relevant information and not simply from the date when the state first submits its standards.

In *Environmental Defense Fund v. Costle* the district court held that EPA has a duty, in the absence of state action, to implement the load analysis provisions of sections 303(d)(1) and (2) of the CWA. The court also noted that in doing so, EPA would have to comply with section 102(2)(E) of the National Environmental Policy Act (NEPA) by preparing an Environmental Impact Statement (EIS) which studies, develops, and describes alternative methods of controlling salinity, despite the provisions of section 511(c)(1), since the latter section relieves EPA only from the EIS requirement of section 102(2)(C) of NEPA.

On September 20, 1978, EPA published a notice proposing an identification of pollutants suitable for total maximum daily load (TMDL) calculations pursuant to section 304(a)(2)(D) of the CWA. The EPA took this action in response to a court order in *Board of County Commissioners of Calvert County v. Costle.* On December 28, 1978, EPA published a final notice identifying all pollutants, under proper technical conditions, as being suitable for the calculation of total maximum daily loads. Each state was required, within 180 days after publication of the notice, to submit its first identification of waters requiring TMDLs and its first load calculations.

In pending litigation several utility companies have appealed a district court decision finding that EPA regulations establishing an antidegradation policy under the CWA were not ripe for review and that the electric utility company plaintiffs, who were within the class regulated by the antidegradation requirement, lack standing. The appellants also asked the court to decide whether section 308 or section 303, the purported authority for the challenged regulations, authorize EPA to pursue an antidegradation policy.

4. National Pollutant Discharge Elimination System (NPDES) Program

EPA undertook wholesale reorganization and reform of its NPDES procedural rules in 1978. It circulated drafts of its proposed revisions in February and March. On January 6 the EPA proposed specific revisions concerning (1) implementation of the priority pollutants settlement agreement requirements; and (2) EPA review of state-issued permits. On May 23,

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Id. at 1134.


No. 78-0572 (D.D.C.).

40 C.F.R. § 130.17, dealing with water quality, which provides that "[e]xisting instream water uses shall be maintained and protected" and that "[n]o further water quality degradation . . . is allowable."

Commonwealth Edison Co. v. Train, No. 77-1612 (7th Cir., filed May 25, 1977). The case has been briefed and argued, but there has been no decision to date.

1978, EPA promulgated these regulations in final form and on the same day proposed to amend them to ensure that holders of NPDES permits issued in the near future take the steps necessary to comply with the July 1, 1984, BAT deadline for toxic pollutants in the event that no "final [BAT] regulations" trigger the permit reopener provisions. The proposed amendment provided for two alternative types of NPDES permits where permits had to be issued before September 30, 1980 for the steam-electric industry: (1) short-term permits which must expire by September 30, 1980, at which time new permits incorporating schedules for compliance with case-by-case BAT limitations for toxics must be issued if no final regulations are in effect; and (2) long-term permits issued for the usual five-year term including case-by-case BAT limitations for toxics and BCT limitations and schedules of compliance for meeting them. These proposed regulations were made final on December 11, 1978.

On August 21, 1978, EPA published proposed new NPDES procedural regulations. It also published "Interim Final Regulations Implementing sections 301(c) and 301(g) of the Act." EPA also published (1) proposed regulations governing Spill Prevention and Control Countermeasure (SPCC) plans to prevent discharges of hazardous substances from industrial facilities; and (2) proposed regulations implementing section 304(e) of the Act establishing "Criteria and Standards for Imposing Best Management Practices for Ancillary Industrial Activities." The EPA also plans to issue, but has not yet proposed, regulations governing the substantive criteria for section 301(c) and section 301(g) variances from BAT requirements.

EPA's NPDES procedural reform regulations are far-reaching in nature and were extensively commented on by industry and others during the comment period. They are expected to be promulgated in final form by early 1979.

On November 16 EPA issued public notice of a draft policy guidance concerning NPDES permit requirements for solid waste disposal facilities in waters of the United States. This EPA policy, if made final, could be interpreted to require utilities to obtain NPDES permits for ash ponds and scrubber sludge facilities located in wetlands or in impounded "intermit-
tent” or “wet weather” streams or depressions, where the facilities receive wastes from trucks or other vehicles. No permit would be granted where there are practicable alternatives which (1) do not involve a discharge into “waters of the United States” (broadly defined in EPA’s existing and proposed procedural regulations) or (2) could be conducted in a manner less damaging to the affected aquatic ecosystem.

The applicant would have the burden of carrying out a study of all possible alternatives. On December 27, 1978, the National Wildlife Federation (NWF) petitioned EPA for rulemaking on this subject, asking that EPA—

1. define solid waste disposal as a discharge subject to the NPDES permit program;
2. issue effluent limitation guidelines for the solid waste disposal point source category; and
3. regulate these activities by permit under section 402.

The NWF urges EPA to adopt a “zero discharge” approach in light of alternative means of disposal such as upland sanitary landfills, incineration, and resource recovery. EPA has taken no action to date.

By letter dated February 28, 1978, the NWF filed a “Petition for Rulemaking Under the Federal Water Pollution Control Act” in which it requested that EPA regulate hydroelectric dams as a point source category under section 402(a) of the CWA. The petition, listing—

1. low concentrations of dissolved oxygen,
2. high concentrations of heavy metals, and
3. atmospheric gas supersaturation, as problems in discharges from hydroelectric impoundments, specifically requested EPA to “designate and set uniform effluent limitations for discharges.”

EPA has not yet taken action with respect to the NWF rulemaking petition.

In *South Carolina Wildlife Federation v. Alexander*† a district court denied a government motion to dismiss a suit brought to require the Corps of Engineers to obtain an NPDES permit from EPA for the release of impounded water through turbines in a federal hydroelectric dam. The court found that plaintiff’s allegations that the dam causes downstream water pollution, if true, were a sufficient basis for EPA jurisdiction under section 402. The court noted that release of impounded water, low in oxygen levels and high in dissolved metals because of impoundment, constituted the “addition” of pollutants to a navigable water. The court indicated that it could not hold as a matter of law that the dam and/or its turbines did not constitute point sources, noting that if plaintiffs made their case at trial, the project would be a point source:

There was a significant volume of litigation in 1978 affecting the NPDES system. There are appeals pending in the Fifth and Tenth Circuits of district court decisions holding that mine-related pollution such as leachate

overflow, rainfall runoff, and drainage from mine pits constitutes non-point source pollution and is outside the scope of the NPDES permit program.\(^6\)

In *Inland Steel Co. v. Environmental Protection Agency*\(^7\) the Seventh Circuit held that EPA has authority to issue NPDES permits with "reopener" provisions which require permit modification to reflect toxic pollutant standards subsequently adopted under section 307(a). EPA’s modification authority rests on section 402(b)(1)(C)(iii) which provides that the Administrator may issue permits that can be terminated or modified for cause including, but not limited to, a "change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge." Section 402(k) does not, according to the court, insulate the permittee from a mid-term modification to reflect subsequent section 307(a) toxic standards, but rather ensures that the permittee will not be held in noncompliance with the new standards unless and until the permit is modified to include the new standards. EPA has subsequently relied on *Inland Steel* as authority to issue NPDES permits with a reopener provision requiring permit modification to reflect effluent limitations and standards promulgated under sections 301 and 304 for "priority pollutants," as opposed to the toxic pollutant standards under section 307(a) that were at issue in *Inland Steel*. In addition EPA maintains that, upon modification to incorporate such subsequently promulgated limitations and standards, a permittee may be forced to comply with all then applicable requirements of the CWA.

In *Niagara of Wisconsin Paper Corp. v. Wisconsin*\(^8\) the Wisconsin Supreme Court ruled that unexpire Wisconsin NPDES permits which incorporated effluent limitations based on EPA’s interim regulations must be modified to reflect less stringent BPT limitations adopted by EPA in final regulations. State law provides that state permit effluent limitations may not exceed federal effluent limitations, and due process considerations require permit modifications to incorporate final effluent limitations promulgated under formal rulemaking procedures.

In *Seacoast Anti-Pollution League v. Costle*\(^9\) the First Circuit continued the line of cases holding that APA adjudicatory hearing requirements apply to section 402 proceedings and, in this case, to section 316(a) proceedings. In *Chesapeake Bay Foundation v. United States*\(^10\) a district court held that state issuance of an NPDES permit and EPA’s lack of objection to that issuance do not constitute major federal action under NEPA. A similar issue


\(^{12}\)574 F.2d 367, 11 E.R.C. 1353 (7th Cir. 1978).

\(^{13}\)268 N.W.2d 153, 11 E.R.C. 2024 (Wis. 1978).

\(^{14}\)572 F.2d 872, 11 E.R.C. 1358 (1st Cir. 1978).

is pending in litigation in the Tenth Circuit where NRDC is challenging the Nuclear Regulatory Commission’s delegation of licensing authority to a state, arguing that NRC’s involvement in the licensing procedure in New Mexico is, notwithstanding the delegation to the state, sufficient to constitute major federal action so that impact statement requirements are not eliminated by the delegation.91

One recent case has dealt with EPA delegation of the NPDES program to states. In Central Hudson Gas and Electric v. Environmental Protection Agency92 the Second Circuit held that a court of appeals does not have jurisdiction under section 509(b)(1)(F) of the CWA to review EPA’s retention of authority over those NPDES permits in adjudication at the time of delegation of the NPDES program to the state, since such EPA exercise of authority is not an agency decision to “issue or deny” permits. The court went on, however, to resolve the case on the merits, holding that EPA may maintain authority over permit proceedings on which adjudicatory hearings had been requested at the point of delegation, notwithstanding the language of section 402(c)(1) which directs EPA, once a state has taken over administration of the NPDES program, to “suspend the issuance of permits.”

A number of decisions have continued the development of the law relating to EPA review and judicial review of state-issued NPDES permits. In Washington v. Environmental Protection Agency93 the Ninth Circuit held that EPA cannot base its objections to a state NPDES permit on interim guidance documents. The court noted that exercise of the veto power is “contingent upon the antecedent formulation of guidelines regulations under section 304(b) in conformity with the rulemaking provisions of the Administrative Procedure Act.”

In Chesapeake Bay Foundation v. United States94 a federal district court held that it had no jurisdiction over a citizen suit challenging the legality of the Virginia NPDES permit program and EPA approval of that program since section 509(b)(1) of the CWA gives exclusive jurisdiction to the courts of appeals over EPA approval of state programs. The court also held that it had no jurisdiction over an EPA failure to object to state issuance of an NPDES permit, citing previous cases to the same effect. The court said that EPA’s right to object to an individual permit is “totally discretionary and can be waived completely.” It found that the right to object had been “committed to Agency review,” apparently meaning committed to agency “discretion,” and thus found no jurisdiction with regard to these issues.

91Natural Resources Defense Council v. Nuclear Regulatory Commission, 12 E.R.C. 1306 (10th Cir. 1978) (allowing private uranium mill operator to intervene in the litigation on grounds that operator’s claimed interest in litigation would not be represented adequately by existing parties). See also Environmental Defense Fund v. Costle, 12 E.R.C. 1131 (D.D.C. 1978) (denying defendant’s motion to dismiss, noting that § 102(2)(E) is independent of and broader than the EIS requirement of § 102(2)(C) and does not fall within the prohibition of § 511(c)(1)).
92763 F.2d 583, 11 E.R.C. 1339 (9th Cir. 1978).
The court in *Washington v. Environmental Protection Agency* noted that courts of appeals do not have jurisdiction under section 509(b)(1)(F) to review an EPA veto of a state-issued permit, noting that jurisdiction over such a veto lies in federal district court under section 10 of the APA.

In *Shell Oil v. Train* the court held that a district court lacks jurisdiction to review state issuance of an NPDES permit and the state's refusal to grant a BPT variance. Shell had not urged review of the EPA failure to veto the permit; rather, it had requested review of "affirmative action on the part of the Administrator in making or causing the Regional Board to make a decision against it." In the words of the court, "In short, Shell's theory is that EPA 'coercions' transform the actions of the state agency into federal agency action reviewable in the federal court." Noting that the Supreme Court has been "distinctly unwilling to view federal dealings with a state or state agency as evidencing either coercion or undue influence," the court rejected Shell's arguments and noted that the existence of a state judicial forum for review of the state decision forecloses the availability of the federal forum under the APA. The court noted that "proper respect for both the integrity and independence of the state administrative mechanism, mandated by Congress in this context, required that Shell's complaint be dismissed."

Judge Wallace dissented, arguing that Shell's complaint alleged EPA action "which is the functional equivalent of the formal veto in *Washington v. EPA.*" He would therefore have allowed review of this functional veto in federal district court pursuant to section 10 of the APA.

Finally, in *Pacific Legal Foundation v. Costle* the Ninth Circuit held that an "extension" by EPA of an NPDES permit is an EPA action "issuing or denying" a permit and thus is appealable under section 509(b)(1)(F) of the CWA. The court noted, however, that in its opinion a "modification" of an EPA permit by EPA is not an "issuance or denial" and thus is not appealable under that section. The court seems to assume, without comment, that modification of a permit (altering the meaning and scope of only those provisions modified, as opposed to an extension which affects all provisions of a permit by projecting their life) is not appealable in a court of appeals, but it does not indicate how or where such a modification is appealable.

5. Section 404 Developments

In *Parkview Corp. v. Department of the Army* a district court granted a preliminary injunction preventing the Corps and municipal defendants
from removing fill, appurtenant structures, and other materials pending a hearing on the merits, after finding that a Corps compliance order requiring removal, purportedly issued under section 309 of the CWA, exceeded the Corps jurisdiction, since that section empowers only EPA to issue enforcement orders. The court did not address the power of the court to issue such an order under section 404(s). The court also noted that the plaintiff had raised a substantial question as to whether the area in question was located within a wetlands area as defined by the Corps' own regulations. The plaintiff relied on a version of the Corps' regulations in force at the time the work in question was begun while the Corps relied on a newer version which became effective later.

6. Section 511(c)(2) Developments
The Nuclear Regulatory Commission (NRC) has been active recently in interpretation of its role in evaluating aquatic environmental impacts when licensing nuclear power plants. In *Public Service Company of New Hampshire* (Seabrook Station Units 1 and 2)\(^{101}\) the NRC ruled that it would accept for purposes of its cost-benefit analyses when licensing nuclear power plants, without independent inquiry, the EPA determination as to the appropriate cooling system and as to the nonradiological aquatic impacts associated with that cooling system. Subsequently, an Atomic Safety and Licensing Board and the Atomic Safety and Licensing Appeal Board ruled that NRC permits cannot include nonradiological aquatic monitoring requirements, on the grounds that such requirements overlap EPA's jurisdiction under the CWA and are prohibited by section 511(c)(2) of the CWA which provides that no other federal agency shall, as a result of its NEPA jurisdiction, "impose ... any effluent limitation" other than one established by EPA under the CWA.\(^{102}\)

On November 16, 1978, the full Commission exercised its authority to review, on its own motion, a decision of the Atomic Safety and Licensing Appeal Board in the *Indian Point* case\(^{103}\) in which the Appeal Board had bowed to staff demands that a May 1, 1982, closed-cycle cooling requirement be retained in the Indian Point licenses. The Appeal Board had rejected requests that this condition be deleted or that the date for closed-cycle cooling be made indefinite pending final resolution by EPA under the NPDES system as to whether closed-cycle cooling is required or not. In taking up the matter, the NRC asked the parties to address two issues: (1) the implications of the *Seabrook* decision with respect to closed-cycle cooling at Indian Point Unit No. 2 and existing termination date of May 1,
1982, for once-through cooling; and (2) to what extent the Indian Point license condition imposing closed-cycle cooling should be modified to take proper account of EPA's authority. These issues have now been briefed and await disposition by the Commission.

7. Enforcement
EPA announced important new enforcement policy initiatives on April 11, 1978.104

There was considerable enforcement litigation under the CWA in 1978. South Carolina Wildlife Federation v. Alexander105 held that EPA has a mandatory duty under section 309(a)(3) to issue a compliance order once it finds a violation of the CWA, but has no mandatory duty to bring a civil or criminal enforcement action in the courts.

A number of cases deal with the effect of failure by EPA to take certain steps during the enforcement process. In United States v. City of Colorado Springs106 the district court ruled that lack of 30-day notice to the city and state in accordance with section 309(a)(1) of the CWA does not entitle the city defendant to dismissal of federal enforcement action for alleged violations of its sewage treatment plant discharge permit, since EPA may proceed unilaterally to issue an administrative compliance order or to initiate a civil suit. In United States v. Hudson Farms107 a district court ruled that failure to issue an abatement order under section 309(a)(3) does not entitle a defendant to dismissal of an indictment in a federal criminal action for alleged violations of the CWA, since the Administrator's duty to issue an administrative order or to initiate civil action, even if a mandatory duty, is not a prerequisite to bringing a criminal action. Similarly, in United States v. Frezzo Brothers, Inc.108 another judge in the same district ruled that the issuance of an order or the institution of a civil suit by the Administrator is not a prerequisite to the filing of a criminal prosecution. The court also ruled that defendant could be guilty of a violation of section 301(a) of the CWA whether or not effluent standards applicable to the defendants had been set, since they acknowledged that they neither had a permit under section 402 nor had they applied for one.

In United States v. Outboard Marine Corp.109 a district court rules that prior issuance of an administrative compliance order under section 309(a)(3) of the CWA does not bar commencement of a civil action at a later point by the EPA under section 309(b). The court also noted that section 402(k) does not provide immunity from liability under the Rivers and Harbors Act of 1899 for illegal discharges of polychlorinated biphenyls.

104 For reprint of full text see 8 ENVIR. REP. (BNA) 2011-2020.
(PCBs) alleged to have occurred prior to the discharger's filing of an application for a section 402 permit. Finally, the court held the complaint sufficient in its allegation that the permit does not authorize Outboard Marine to discharge PCBs where defendant's permit application represented that no chlorinated hydrocarbons were contained in its discharge outfalls, and the permit, as issued, was based on those representations. The complaint is sufficient under those circumstances. The court held that defendant's NPDES permit does not constitute a defense unless defendant is in compliance with it, a factual issue to be decided by the trier of fact.

In an anomalous decision, a district court in *United States v. Velsicol Chemical Corp.* appeared to hold that Velsicol was guilty of discharging a pollutant to navigable water in violation of its NPDES permit where it discharged endrin and heptachlor to the city sewer system, but not directly to "waters of the United States." These discharges were in violation of the interim pretreatment standards for those pollutants set in its NPDES permit. It is not clear why Velsicol held an NPDES permit in the first place, although perhaps it was because the court had previously entered an order on January 6, 1976, denying Velsicol's motion to dismiss in which Velsicol argued that it discharged through the city system rather than directly into waters of the United States. In the present opinion, the court set a civil penalty of $30,000 for over 300 days of violation.

8. Judicial Review Developments

In *Teneco Oil Co. v. Environmental Protection Agency* the court construed the venue provisions of section 509, ruling that venue is proper in the Fifth Circuit for judicial review under section 509(b)(1)(F) of an EPA-issued NPDES permit despite the fact that none of the oil companies involved resides within the Fifth Circuit, since each transacts business within the circuit. The court assumed that the venue provisions of section 509 will require, as does the general venue statute, that a corporation resides only at its place of incorporation. The companies argued, however, that each "transacts such business" within the Fifth Circuit because its principal place of business is within the circuit. EPA argued that "transacts such business" refers only to operations directly affected by the Administrator's action, in this case the off-shore oil platforms for which permits had been issued, which were adjacent to areas outside the Fifth Circuit.

In *Natural Resources Defense Council, Inc. v. Costle* a district court ruled that NRDC was entitled to an award of attorneys' fees under section 505(d) of the CWA in the litigation which resulted in the settlement agreement, noted earlier, concerning toxic pollutants, finding that the fees claimed were in accordance with the prevailing local rate. The court refused

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111 12 E.R.C. 1076 (5th Cir. 1978).
to allow NRDC attorneys' fees for opposing motions to intervene by third parties in the litigation since the government also opposed intervention and since award of attorneys' fees between nonadverse parties would contravene the purpose of section 505(b) to encourage efficient enforcement of the CWA. Third-party industries, who had successfully sought intervention as defendants, were not allowed attorneys' fees since award of attorneys' fees to voluntary intervenors would contravene the purpose of section 505(b)—which was to reimburse only defendants victimized by harassing and frivolous litigation.

Finally, in *Homestake Mining Co. v. Environmental Protection Agency*\(^{13}\) a mining company petition challenging EPA's denial of a request for modification of an NPDES permit was dismissed for a lack of jurisdiction where it was filed more than 90 days after EPA's denial. The court essentially ruled that the 90-day period for review ran from date plaintiff's request for modification was denied by EPA, not the date five days later on which plaintiff received notice of the EPA decision. The court did not reach EPA's argument that the 90-day period ran from the date the permit was originally issued. EPA had argued that petitioner's request for modification was not based solely upon grounds which arose after the ninetieth day after the original permit issuance.

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**Part II**

**OTHER FEDERAL DEVELOPMENTS**

The pursuit of alternative energy sources received only sporadic encouragement over the past year. Coal proponents have been buoyed by the Interior Department's move toward reopening the leasing of western federal coal lands with the issuance late in 1978 of a draft environmental impact statement on a proposed new program for managing the production of such coal. The government has not generally leased tracts in the West since 1971.

Even after these tracts are leased, however, the transportation of coal remains a problem. Innovative proposals such as the coal slurry pipeline have not been favorably received. The House Committee on Interior and Insular Affairs reported H.R. 1609, the Coal Pipeline Act of 1978, to the full House for its consideration. The purpose was to facilitate the acquisition of rights-of-way by coal slurry pipeline carriers. By the use of pumps a coal slurry pipeline would carry large quantities of finely ground coal suspended

\(^{13}\)12 E.R.C. 1335 (8th Cir. 1978).