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10-1980

# Environmental Protection Agency v. National Crushed Stone Assn.

Lewis F. Powell Jr.

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D

Another EPA case involving the Clean Air Act regulations with respect to effluent discharge & a variance provision related to ability of a company to afford the costs. Same general problem area before us in Du Pont v Train (1977)

Despite SG's argument there is no genuine conflict.

Also CA4's decision seems right

PRELIMINARY MEMORANDUM

January 11, 1980 Conference
List 1, Sheet 3

No. 79-770-CFX

| | |
|---|---|
| EPA | Cert to CA4 (Haynsworth, Russell, Widener) |
| v. | |
| NAT'L CRUSHED STONE ASS'N | |
| COSTLE (Admin. EPA) | Cert to CA4 (Butzner, Widener, Hall) |
| v. | |
| CONSOLIDATION COAL CO. | Federal/Civil     Timely (w/extns) |

Petr's reply brief adds nothing - DOS

1. SUMMARY: EPA challenges two judgments of the CA4, claiming a conflict among the CAs on the question whether effluent limitations under § 301(b)(1) of the Clean Water Act,

The conflict seems too uncertain for the Court to dig itself into a hole on this one. Moreover, CA4 seems right - DOS

33 U.S.C. § 1311(b)(1), must include a variance provision requiring EPA consideration of the ability of an individual discharger of pollutants to afford the costs of compliance. EPA also suggests that CA4 erred in considering the validity of the variance clauses at issue before those clauses were applied to any individual discharger.

2. STATUTORY BACKGROUND: Section 301(b) of the Act, adopted in the Federal Water Pollution Control Act Amendments of 1972, authorizes EPA to issue two sets of industrial effluent limitation regulations: regulations which were established in 1977 based on "the best practicable control technology currently available," referred to as BPT limitations; and regulations to go into effect not later than July 1, 1987, based on the "best available technology economically achievable," referred to as BAT limitations. (At the time of this Court's opinion in E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977), the BAT limitations were to have been effective by July 1, 1983. The effective date was postponed by the Clean Water Act of 1977.) This Court's du Pont opinion established EPA's authority to enact BPT limitations by regulation on an industry-wide basis, "so long as some allowance is made for variations in individual plants." 430 U.S. at 128. Consideration of the standard variance provision that EPA had developed was deemed by this Court to be premature at that time, however. See id. at 128 n.19. The issue presented in this case concerns the scope of the variance provision included in EPA regulations governing the BPT limitations established for two industries.

BPT

The Act lists factors that are relevant to EPA's determination of what the "best practicable control technology" and "best available control technology" requires. Section 304(b)(1)(B) states that factors relevant to the BPT limitations include:

> consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate . . . .

Section 304(b)(2)(B) lists the factors to be taken into account in assessing the more stringent BAT limitations. They are identical except that they do not include "consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved." However, § 301(c) of the Act does provide that the Administrator may modify the requirements of the BAT limitations for a particular discharger of pollutants who can show that such modifications "(1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants."

3. FACTS and OPINIONS BELOW: In April, 1977, the EPA adopted regulations establishing BPT limitations on discharges from existing point sources in coal preparation plants and other subcategories of the coal mining industry. In July, 1977, the agency published similar regulations governing the crushed stone and construction sand industry. Both

promulgations included EPA's standard variance provision for BPT limitations. In brief, that provision allows the permit issuing authority (EPA or state agencies with Nat'l Pollutant Discharge Elimination Systems) to consider whether the individual discharger's cost of compliance with the limitations significantly exceeds the costs of other dischargers in the same industry. This provision is designed to permit an individual discharger to show that its costs of complying with the BPT limitations will be greater than the average costs considered by EPA in establishing the national guidelines. The issuing authority may not consider or grant a variance, however, based upon a claim that an individual discharger cannot afford the "best practical technology." In effect, EPA's position is that § 301(c)'s allowance of waivers based upon plant-specific considerations of economic hardship is applicable only to BAT limitations.

Petitions to review both sets of regulations were filed in various CAs, and all were ultimately transferred to CA4.

a. Nat'l Crushed Stone

In Nat'l Crushed Stone Ass'n v. EPA, the CA remanded several substantive regulations to the EPA for reconsideration. Those substantive regulations are not at issue here. With respect to the variance provisions, the CA ruled that they did not comport with its earlier opinion in Appalachian Power Co. v. Train, 545 F.2d 1351, 1358-60 (CA4 1976), and remanded them to the EPA for compliance with that earlier opinion. (The relevant portion of the opinion is reprinted at pp. 29a-35a of the petn.)

The regulations at issue in Appalachian Power had established BPT limitations on the discharge of heat into navigable waters from steam electric generating plants. The CA found that the variance clause included in those regulations, identical to the clause contained in the sand and crushed stone regulations, permitted consideration of technical and engineering factors, exclusive of cost, in granting variances. The CA concluded that thus interpreted, the clause was unduly restrictive. The CA's conclusion was based on the fact that the more stringent BAT limitations contemplated waivers based on cost; logically, the temporary BPT standards should be no less flexible. Moreover, the CA found that EPA's standard variance clause did not include consideration of factors specifically set forth in § 304(b)(1)(B), such as the total cost of applying the best practicable technology and the non-water quality environmental impact.

In Nat'l Crushed Stone, the CA found that the standard variance clause suffered from the same deficiencies as had the clause in Applachian Power. It rejected EPA's claim that review of the clause would be premature prior to any actual claim for a variance in a discharge permit application because EPA's position on such applications had been made clear in administrative opinions. The CA did note that EPA had promulgated a new policy with respect to variances on August 21, 1978, which would have placed the agency's views more in line with Appalachian Power, but that policy specifically noted that "EPA continues to believe that § 301(c) . . . applies only to . . . (BAT) limitations." See 43 Fed. Reg. 50042 (1978).

Thus, EPA's policy remained inconsistent with Appalachian Power, which had required the agency to take § 301(c) into account in developing its variance provision.

The CA rejected EPA's argument that the § 301(c) requirements would permit plants to obtain a variance simply because they could not afford to comply with the BPT limitations. Rather, § 301(c) permits a variance only if the plant is doing all that the maximum use of technology within its economic capacity will permit and such use will result in reasonable further progress toward the elimination of the discharge of pollutants. EPA's argument, "no better than [a] straw m[a]n," had been considered and rejected in Appalachian Power. The argument was not even addressed to the principal concerns of the industry challengers to the variance, who wanted specific factors, other than affordability, to be considered in applications for variances.

Finally, the CA noted that its construction of the variance provisions were in general accord with that of the CADC in Weyerhauser Co. v. Costle, 590 F.2d 1011 (1978). That court had held that a BPT variance clause must be analogous to a BAT variance clause, as CA4 had held in Appalachian Power.

b. Consolidation Coal

In the Consolidation Coal case, a different panel of CA4 held that the substantive BPT limitations regulating the coal mining industry were valid. The industry challengers also complained, however, that the variance clause in those regulations failed to require the permit issuing authority to consider the factors set forth in §§ 301(c) and 304(b)(1)(B) of

the Act. The CA noted that the clause at issue was identical to the clause considered in Nat'l Crushed Stone, and remanded the variance regulations for revision in conformity with the opinion in that case. (The relevant portion of the opinion is reprinted at pp. 50a-52a of the petn.)

3. CONTENTIONS:

a. The SG

Despite that court's conclusion to the contrary, the ~~CA~~ SG contends that the views of CA4 are in conflict with the views of the CADC in Weyerhauser. In Weyerhauser, CADC held that an identical variance clause, included in the regulations governing the pulp paper industry, can be applied with sufficient flexibility to enable the court to conclude that it provided for the meaningful variance required by this Court's du Pont decision. The CADC also concluded that the ability to secure variances from the BPT limitations requirements should be analogous to the statutorily provided ability to secure variances with respect to the more stringent BAT limitations. 590 F.2d at 1034. However, with respect to the relevance of economic hardship, CADC concluded "emphatically," that:

> Although the "total cost" of pollution control at the petitioning mill must be considered under a satisfactory variance provision, it is only relevant "in relation to the effluent reduction benefits to be achieved" at that mill, section 304(b)(1)(B); so long as those costs relative to the pollution reduction gains are not different from those that may be imposed on the industry as a whole, the difficulty, or in fact the inability, of the operator to absorb the costs need not control the variance decision.

590 F.2d at 1036 (emphasis in original). Thus, the SG asserts that CADC's opinion conflicts with the opinion of CA4.

The SG contends that this issue is important because the identical variance clause has been issued in regulations governing 40 other industries. If CA4's view is followed, and pollutant dischargers can obtain exemptions from BPT limitations requirements on the basis of their inability to afford the requisite technological controls, Congress' objective of eliminating pollution of the nation's navigable waters will be frustrated.

Finally, CA4's view is inconsistent with the legislative history of the 1972 amendments. Congress deliberately adopted the BPT limitations as a minimum level of effluent control that all dischargers must meet, even if the cost of compliance with those limitations would drive some dischargers out of business. CA4 ignored this legislative history when it based its decision on the abstract logical proposition that the less stringent requirements of the BPT limitations should be as flexible as the more stringent requirements of the BAT limitations, which allow for modifications under the standards of § 301(c). The reason that Congress wanted the BPT limitations to be administered less flexibly is that those requirements were intended to establish a minimum floor on the control of pollutant discharge.

The SG raises a second question for review by this Court, though his presentation of this question is somewhat tentative. He continues to argue, as the EPA argued below, that judicial review of the variance clauses was premature because no individual discharger has actually been denied a variance. However, because the EPA's position on the

interpretation to be given the variance provisions has become clear, and because it presents a discrete legal issue, it may be capable of pre-enforcement review under Abbott Laboratories v. Gardner, 387 U.S. 136, 149-53 (1967). If the Court agrees that the issue is not ripe, the SG asks this Court to grant the petn and vacate CA4's judgment on that ground, so that EPA will not have to modify the variance clause and the issue will be preserved for enforcement review. If the Court thinks that the issue is ripe, the SG seems to invite it to limit a grant of cert to the question presented on the merits.

b. The Respondents

First, resps contend that there is no clear conflict between CA4 and CADC on the standards EPA must apply in considering applications for a variance. Both CAs agree that the standards applicable under the BPT limitations must be analogous to those under the BAT limitations; both agree that the total cost of the technology in relation to the pollution reduction benefits must be considered; and both agree that this balancing of costs is but one factor EPA must consider. The SG ignores the fact that CADC's holding with respect to economic hardship considerations stated that such considerations "need not control the variance decision." It did not consider such factors irrelevant. Moreover, CA4 rejected the EPA's argument that its opinion made hardship a controlling factor: § 301(c) requires that modifications based on economic capabilities of the discharger also "will result in reasonable further progress toward the elimination of the discharge of pollutants." Finally, in Weyerhauser the CADC conducted only a threshold

review of the BPT variance regulation governing the pulp paper industry. Actual variance decisions arising under the jurisdiction of the CADC may provide this Court with the means of resolving any concrete conflicts that develop between the approaches of the two courts. (In Weyerhauser, CADC observed that the Appalachian Power approach to BPT variances may have been "somewhat broader" than its approach, evidently not perceiving the sharp conflict seen by the SG. See 590 F.2d at 1036 n.35.)

Second, the issue presented does not raise an important question impacting upon EPA's ability to administer the BPT limitations. The deadline for compliance with those limitations was July 1, 1977. Presumably, most petitions for variances have been filed by now. Moreover, Congress' goal of eliminating pollutant discharges will not be frustrated under CA4's approach, because progress toward achieving that goal is made a relevant factor under § 301(c).

Third, CA4's decision was correct. The legislative history quoted by the SG was not addressed to the standards applicable to the approval of variances. The requirement that variances be provided for BPT limitations was established only after this Court's opinion in du Pont. Both du Pont and Appalachian Power were decided prior to the 1977 amendments to the Act, and Congress disapproved neither decision. Moreover, the chairman of the House conferees on the Act explained that the "total cost" consideration required by § 304(b)(1)(B) includes "external costs such as potential unemployment." Economic capability is thus made a relevant factor in the consideration

of variance applications even if one does not construe the provisions of § 301(c) as applicable to BPT limitations.

Resps agree with the SG's secondary position that the merits of the issue presented to the CA were ripe for review.

4. DISCUSSION: I am inclined to agree with the respondents that the conflict among the CAs alleged to exist here, if indeed there is a conflict, is one that this Court need not resolve. CADC's opinion in Weyerhauser presents only a tentative judgment that the EPA's standard variance clause may be flexible enough to satisfy this Court's du Pont opinion. In actual variance decisions that arise from that circuit, a clearer conflict with the approach followed in CA4 may emerge. It seems just as likely, however, that dischargers will find that issuing authorities under either CA's approach will reach similar decisions on waivers because of the amalgam of factors that are relevant.

no real conflict

The CADC's opinion also provides some support for the resps' argument that the economic hardship concern made relevant in § 301(c) to BAT limitations is also relevant, albeit under the total cost concept of § 304(b)(1)(B), to BPT limitations. CADC accepted the definition of total costs offered by the chairman of the House conferees, and it thus concluded that "certain economic factors [potential unemployment, dislocation, etc.] must be considered but . . . need not be decisive if associated with commensurate pollution-ending gains, and they do not, without more include the fact that the opertator is experiencing difficulty in, or is unable to, absorb the costs." 590 F.2d at 1036 n.35 (my

emphasis). It was based on this interpretation of the total cost concept that the CADC concluded that CA4's approach in Appalachian Power "may be somewhat broader than ours and was reached by a different analysis." Id. Given CA4's explicit rejection of EPA's argument that Appalachian Power makes economic hardship factors controlling in a variance application, I fail to see how the two approaches can be expected to yield differing results in many cases or how CA4's approach will lead to frustration of the Act's purposes.

This is not to say that Weyerhauser is completely consistent with the arguments made by the SG here. One might also conclude, however, that this Court's du Pont decision, requiring some variations in different plants, is not completely consistent with the legislative history cited by the SG. My only point is that the conflict alleged to exist between CA4 and CADC is theoretical at best, and may not lead to dissimilar practical results.

The ripeness issue, as the SG concedes, is not independently certworthy. There is no conflict among the CAs on that point. Moreover, the decisions of CA4 and CADC appear correct.

Although the question may be close, on balance I recommend that the petn be denied. There are 2 responses.

Murphy 12/31/79 Ops in petn

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

I'll not join

From: Mr. Justice White

Circulated: 17 JAN 1980

Recirculated: ______

Re: 79-770 - Environmental Protection Agency v. National Crushed Stone Association; and Douglas Costle, Administrator, EPA, v. Consolidation Coal Co.

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MR. JUSTICE WHITE, dissenting.

To achieve the national goal of eliminating the discharge of pollutants into the Nation's navigable waters, the Federal Water Pollution Control Act Amendments of 1972 (Act), 86 Stat. 816, 33 U.S.C. § 1251 et seq., directs that by 1977 the discharge of pollutants was to be limited to the extent made possible by "the best practicable control technology currently available" (BPT). By 1987, more stringent limitations, based on "the best available technology economically available" (BAT), were to be observed. The Environmental Protection Agency (EPA) was to issue regulations to implement both of these standards, which it proceeded to do. These regulations contained variance clauses setting forth the grounds upon which the EPA or an authorized state agency could modify or ease the requirements at the behest of an individual discharger.

The conflict found by Mr. Justice White is not all that obvious. I would not join -
David

Relying on the statutory specification of the factors to be considered in granting variances, as well as upon the legislative history, the EPA contends that the fact that an individual discharger may be financially incapable of footing the bill for the best practicable control technology currently available does not necessarily entitle the discharger to a variance from the 1977 BPT limitations. The Court of Appeals for the Fourth Circuit in the two cases before us disagreed and invalidated the variances clauses contained in the regulations covering two different industries.

The petition for certiorari of the EPA asserts that the two decisions will significantly affect its ability to enforce the water pollution control laws, that they threaten similar variance clauses in regulations applicable to a good many other industries, and that Weyerhauser v. Costle, 590 F.2d 1011 (D.C. Cir. 1978), sustained the identical variance provision as applied to the pulp and paper industry. It seems to me that this kind of an issue with respect to the construction of an extremely important and relatively new and complex statute that contains compliance target dates should be promptly settled by this Court, particularly in light of the developing conflict between two Courts of Appeals and the dilemma that these decisions pose for the Agency. It is obvious that the issue

will recur, and the Court should give it plenary consideration now, rather than later.

With all due respect, I would grant the petition for writ of certiorari and dissent from its denial.

Court .................... Voted on ................, 19...

Argued ................, 19... Assigned ................, 19... No. 79-770

Submitted ................, 19... Announced ................, 19...

EPA

vs.

NATIONAL CRUSHED STONE ASSN.

P.S. saw
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conflict
JPS saw no
conflict.

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Relisted
for Byron
to write

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| White, J. | | ✓ | | | | | | | | | | | |
| Marshall, J. | | | ✓ | | | | | | | | | | |
| Blackmun, J. | | | ✓ | | | | | | | | | | |
| Powell, J. | | | ✓ | | | | | | | | | | |
| Rehnquist, J. | | | ✓ | | | | | | | | | | |
| Stevens, J. | | | ✓ | | | | | | | | | | |

January 18, 1980

Court .................... Voted on................., 19...

Argued ................., 19... Assigned ................, 19... No. 79-770

Submitted ..............., 19... Announced ..............., 19...

EPA

vs.

NATIONAL CRUSHED STONE ASSN.

Relisted for Mr. Justice White.

I did not join BRW.

~~Monday~~ ~~Order~~ ~~[illegible]~~

Relist for ~~BRW~~ HAB?

| | HOLD FOR | CERT. | | JURISDICTIONAL STATEMENT | | | | MERITS | | MOTION | | ABSENT | NOT VOTING |
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| Rehnquist, J | | | | | | | | | | | | | |
| Stevens, J | | | | | | | | | | | | | |

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: ______

Recirculated: 21 JAN 1980

Printed
1st DRAFT

# SUPREME COURT OF THE UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL CRUSHED STONE ASSOCIATION ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-770. Decided January —, 1980

MR. JUSTICE WHITE, dissenting.

To achieve the national goal of eliminating the discharge of pollutants into the Nation's navigable waters, the Federal Water Pollution Control Act Amendments of 1972 (Act), 86 Stat. 816, 33 U. S. C. § 1251 *et seq.*, directs that by 1977 the discharge of pollutants was to be limited to the extent made possible by "the best practicable control technology currently available" (BPT). By 1987, more stringent limitations, based on "the best available technology economically available" (BAT), were to be observed. The Environmental Protection Agency (EPA) was to issue regulations to implement both of these standards, which it proceeded to do. These regulations contained variance clauses setting forth the grounds upon which the EPA or an authorized state agency could modify or ease the requirements at the behest of an individual discharger.

Relying on the statutory specification of the factors to be considered in granting variances, as well as upon the legislative history, the EPA contends that the fact that an individual discharger may be financially incapable of footing the bill for the best practicable control technology currently available would not entitle the discharger to a variance from the 1977 BPT limitations and need not be considered. The Court of Appeals for the Fourth Circuit in the two cases before us disagreed and invalidated the variances clauses contained in the regulations covering two different industries.

The petition for certiorari of the EPA asserts that the two decisions will significantly affect its ability to enforce the

water pollution control laws, that they threaten similar variance clauses in regulations applicable to a good many other industries, and that *Weyerhauser* v. *Costle*, 590 F. 2d 1011 (D. C. Cir. 1978), sustained the identical variance provision as applied to the pulp and paper industry. It seems to me that this kind of an issue with respect to the construction of an extremely important and relatively new and complex statute that contains compliance target dates should be promptly settled by this Court, particularly in light of the developing conflict between two Courts of Appeals and the dilemma that these decisions pose for the Agency. It is obvious that the issue will recur, and the Court should give it plenary consideration now, rather than later.

With all due respect, I would grant the petition for writ of certiorari and dissent from its denial.

Court ...................... Voted on................., 19...
Argued ................., 19... Assigned ................., 19... No. 79-770
Submitted ..............., 19... Announced ..............., 19...

EPA

vs.

NATL. CRUSHED STONE ASSN.

Relisted for Mr. Justice Blackmun.

Order List

| | HOLD FOR | CERT. | | JURISDICTIONAL STATEMENT | | | | MERITS | | MOTION | | ABSENT | NOT VOTING |
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| Blackmun, J. | | | | | | | | | | | | | |
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| Stevens, J. | | | | | | | | | | | | | |
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GRANT

Marsel

April 25, 1980 Conference
List 1, Sheet 4

No. 79-770

Motion of Petitioners to Dispense with Appendix

EPA

v.

NATIONAL CRUSHED STONE ASSOC., et al.

CA 4

The SG, on behalf of the federal petrs, and with the consent of all parties, asks to dispense with printing the appendix because the appendix to the cert petn contains all necessary materials.

The request appears appropriate.

4/15/80

Marsel

PJC

April 25, 1980

*Court* .................... *Voted on*................., 19...

*Argued* ................., 19... *Assigned* ................, 19... No. 79-770

*Submitted* ..............., 19... *Announced* ..............., 19...

EPA

vs.

NATIONAL CRUSHED STONE ASSOC.

Motion to dispense with printing the appendix and to proceed on the original record.

Grant

| | HOLD FOR | CERT. | | JURISDICTIONAL STATEMENT | | | | MERITS | | MOTION | | ABSENT | NOT VOTING |
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| Rehnquist, J. | | | | | | | | | | | | | |
| Stevens, J. | | | | | | | | | | | | | |

July 8, 1980

Linda,

Please advise each of my new clerks that I am out of this case. I do not want one of them to spend time preparing a bench memo.

LFP

L.F.P.

Supreme Court of the United States
Washington, D. C. 20543

GM
PC
PB
PS

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

July 9, 1980

No. 79-770, EPA v. National Crushed Stone Association, et al.

Dear Mike,

As my former law firm is one of the counsel in the above case, please mark me "Out" on the public record.

I believe you did this when the case was under consideration for certiorari. In any event, now that the briefs are in and I know definitely that my firm is counsel, I want to be sure that the record reflects my recusal.

Sincerely,

L.F.P.

Michael Rodak, Jr., Esquire
Clerk, United States Supreme Court
1 First Street, N. E.
Washington, D. C. 20543

cc: The Chief Justice
Mr. Justice Stevens

Linda - See that copies of this letter go to the CJ & to JPS

bcc: Ms. Blandford
Mr. Justice Powell's Chambers

November 12, 1980

<u>70-770 EPA v. National Crushed Stone Association</u>

Dear Byron:

Please show on the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

| THE C. J. | W. J. B. | P. S. | B. R. W. | T. M. | H. A. B. | L. F. P. | W. H. R. | J. P. S. |
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| Join BRW 11/21/80 | agree 11/13/80 | Join BRW 11/13/80 | 1st Draft 11/12/80 | Join BRW 11/13/80 | | out letter 11/12/80 | Join BRW 11/20/80 | Join BRW 11/13/80 |
| | | | 2nd Draft 11/14/1980 | | | | | |
| | | | 4th Draft 11/25/80 | | | | | |

79-770 EPA v. National Crushed Stone