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XII. Environmental Law

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Challenges to Federal Water Pollution Control Regulations

The federal government first became involved in water pollution control in 1899 with the enactment of section 13 of the Rivers and Harbors Act.[1] Section 13, known as the Refuse Act, prohibited discharge of refuse matter of any kind into navigable waters.[2] Although the primary purpose of the 1899 Act was to aid navigation, the prohibitions also served to prevent egregious pollution by requiring limited discharge permits.[3]

The Federal Water Pollution Control Act Amendments of 1972 (FWPCA)[4] focused on elimination of the discharge of pollutants into navigable waters[5] and established a goal of physically, chemically, and biologically clean waters for the nation by 1985.[6] The FWPCA also established the interim goal of water quality suitable for recreation and sufficient to support the habitation and propagation of fish and wildlife by 1983.[7] The 1972 amendments to the FWPCA directed the

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[1] Rivers and Harbors Act, ch. 425, § 13, 30 Stat. 1152 (1899).

[2] *Id.* The Refuse Act prohibits both the discharge of pollutants into navigable waters of the United States, and the placement of material of any kind along the banks of navigable waters where that material might be washed into the water by high tide or storm, thereby obstructing navigation. *Id.*

[3] *Id.* Upon the recommendation of the Chief of Engineers, the Secretary of the Army may issue a permit for the deposit of restricted materials in navigable waters. *Id.* For a discussion of the history of water pollution control legislation, see Note, *The Clean Water Act of 1977: Great Expectations Unrealized*, 47 U. CIN. L. REV. 259 (1978) [hereinafter cited as *Great Expectations*].

[4] Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (1976).

[5] *See* S. REP. No. 414, 92d Cong., 2d Sess. 8, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3675. Before the 1972 amendments to the Federal Water Pollution Control Act (FWPCA), the focus of pollution control legislation was on monitoring of water quality of interstate streams by the states. The 1972 amendments focused on individual polluters, setting effluent limitations for each discharger. *Id.* "Pollutant" includes sewage, chemical and biological materials, heat, wrecked or discarded equipment, rock, sand, and dirt. 33 U.S.C. § 1362(6) (1976). "Discharge of pollutants" is defined as the addition of pollutants to navigable waters from any point source other than a vessel or floating craft. *Id.* § 1362(12) (1976). Any discrete conveyance from which pollutants are or may be discharged is a "point source." Examples include pipes, tunnels, containers, and vessels. *Id.* § 1362(14) (Supp. I 1977). "Navigable waters" are the waters of the United States, including the territorial seas. *Id.* § 1362(1) (1976). Under the FWPCA, courts interpret the term navigable waters liberally to include any tributary feeding into a navigable waterway that might affect interstate commerce. *See, e.g.*, Leslie Salt Co. v. Froehlke, 578 F.2d 742, 755 (9th Cir. 1978).

[6] *See* 33 U.S.C. § 1251(a) (1976).

[7] *Id.* § 1251(a)(2). Section 1311 prohibits the discharge of any pollutant into the nation's waters except in conformance with the FWPCA. *Id.* § 1311(a). The Act requires nonmunicipal point sources to meet effluent limitations established by the Administrator of the Environmental Protection Agency (EPA) by July 1, 1977. *Id.* § 1311(b)(1)(A); *see id.* § 1314 (1976 & Supp. I 1977). The 1977 limitations are those determined by the EPA to be achievable through use of the best practicable control technology available (BPT) for the regulated industry subcategory. *Id.* § 1311(b)(1)(A) (1976). The interim goals for 1983 are to be

Administrator of the Environmental Protection Agency (EPA) to develop and publish regulations detailing guidelines for effluent limitations within one year of enactment.[8] The Clean Water Act of 1977[9] further amended the FWPCA by altering the enforcement duties of the Administrator.[10]

As a means of controlling pollution under the FWPCA, the EPA Administrator or an approved state agency, issues permits under the National Pollution Discharge Elimination System (NPDES) to individual industrial and municipal point sources that are discharging waste water into the nation's navigable waters.[11] If an individual discharger cannot meet the established limitations for pollution, the discharger may obtain a variance from the established standards.[12] A discharger operating under a permit with a variance is deemed to be in compliance with the law.[13]

The Administrator's decision to issue or deny an NPDES permit is among several actions reviewable in the United States courts of appeals

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achieved by application of the best available control technology (BAT) economically achievable for the industry subcategory which will result in reasonable further progress toward the 1985 goal. *Id.* § 1311(b)(2)(A).

[8] *Id.* § 1314(b). The Federal Water Pollution Control Act (FWPCA), *id.* §§ 1251-1376 (1976), was enacted October 18, 1972. Regulations were to be published by October 18, 1973. *Id.* § 1314(b).

[9] Pub. L. No. 95-217, § 2, 91 Stat. 1566 (codified at 33 U.S.C. §§ 1251-1376 (Supp. I 1977)).

[10] 33 U.S.C. § 1319 (Supp. I 1977). The Clean Water Act provided the Administrator with alternatives to enforcement action under the FWPCA. In contrast to the strict compliance deadline in the FWPCA, the Clean Water Act afforded the Administrator the option of extending the 1977 BPT compliance deadline to April 1, 1979, if the discharger had acted in good faith, if the extension did not result in the imposition of additional controls on any other pollution sources, if the application for extension was timely filed, and if facilities necessary for compliance were under construction. The 1977 amendments also allow the Administrator to issue an enforcement order which includes a schedule for compliance. *Id.* § 1319 (1976) (Supp. I 1977). *See generally* Kalur, *Will Judicial Error Allow Industrial Point Sources to Avoid BPT and Perhaps BAT Later? A Story of Good Intentions, Bad Dictum, and Ugly Consequences,* 7 ECOLOGY L.Q. 955, 978 (1979) [hereinafter cited as Kalur]; Comment, *Federal Enforcement Proceedings Under the 1977 Clean Water Act,* 51 TEMP. L.Q. 884 (1978) [hereinafter cited as *Federal Enforcement*].

[11] 33 U.S.C. §§ 1341-1345 (1976 & Supp. I 1977). The National Pollution Discharge Elimination System (NPDES) provides for lawful exemptions from the no-discharge rule of § 1311. An entity engaged in any activity which may result in the discharge of pollutants into navigable waters must apply for a permit to discharge. The applicant must certify that any discharge resulting from its activity will comply with applicable effluent limitations for its subcategory. *Id.* § 1341(a)(1) (Supp. I 1977); *see* note 7 *supra.*

[12] 33 U.S.C. § 1311(c) (1976). The Administrator may vary the requirements of § 1311(b)(2)(A) (BAT 1983 standards) for any point sources from which it receives an application for relief. *Id.* § 1311(c). The FWPCA does not specifically allow variances from the 1977 BPT standards. *See* notes 68-71 *infra.* The EPA regulations establishing effluent limitations for industry subcategories, however, provide for variances for individual industry facilities. To obtain a variance the individual discharger must submit evidence to the permit issuer to demonstrate that factors applying to its operation are "fundamentally different" from those considered by the Administrator in establishing the industry-wide limitations. *See, e.g.,* 40 C.F.R. § 436.22 (1979) (variance provision for crushed stone industry subcategory).

[13] 33 U.S.C. § 1342(k) (1976).

under the FWPCA.[14] Approval or promulgation of effluent limitations under the FWPCA is also reviewable in the federal circuit courts.[15] The Fourth Circuit recently heard challenges to FWPCA effluent limitation regulations in *National Crushed Stone Association v. EPA*[16] and *Consolidation Coal Co. v. Costle.*[17] In these two cases, the court upheld certain pollution control regulations and remanded others to the EPA for reconsideration and possible revision.[18]

In its review of the EPA regulations, the Fourth Circuit employed the standards for judicial review of agency action prescribed by the Administrative Procedure Act (APA).[19] Under the APA's narrow review

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[14] *Id.* § 1369(b)(1). The enumeration of actions of the Administrator that are reviewable in the circuit courts does not preclude judicial review of other agency action deemed to be final. Washington v. EPA, 573 F.2d 583, 587 (9th Cir. 1978). Any action determined to be a final agency action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 701-706 (1976), is reviewable in a federal district court unless a statute granting consent to be sued, such as the FWPCA, expressly or impliedly forbids the relief sought. *Id.* § 702 (1976). Legislative intent to prohibit judicial review must be shown by clear and convincing evidence. Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). In the case of the FWPCA, the House Committee Report explicitly rejected any intent to deny judicial review of provisions other than those enumerated in 33 U.S.C. § 1369 (1976). H.R. REP. No. 911, 92d Cong., 2d Sess. 136 (1972); *see* Currie, *Judicial Review Under the Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1225 (1977).

[15] 33 U.S.C. § 1369(b)(1) (1976). Section 1369 expressly provides for judicial review of actions of the Administrator under §§ 1311, 1312, or 1316. *Id.* Effluent limitation guidelines are developed under § 1314. *Id.* § 1314. Prior to 1977 courts were split three ways on the reviewability of effluent guidelines. *Compare* CPC Int'l Inc. v. Train, 515 F.2d 1032, 1037-38 (8th Cir. 1975) (EPA lacks authority to issue effluent limitation regulations and § 1314 "guidelines" are reviewable in district courts) *with* American Petroleum Inst. v. EPA, 540 F.2d 1023, 1030 (10th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977) (EPA has authority to issue effluent limitation guidelines but court held them only "presumptively applicable" to individual sources) *and* Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620, 628 (2d Cir. 1976) (EPA has authority to issue effluent limitation regulations which individual plants may not exceed). In E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977), the Supreme Court noted the potential for inconsistent rulings caused by disallowing review of § 1314 standards in the circuit courts. Thus, the Court held that effluent guidelines developed under § 1314 were within the definition of "regulations" covered by § 1311 and that the guidelines were reviewable in the circuit courts. *Id.* at 136.

[16] 601 F.2d 111 (4th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3513.

[17] 604 F.2d 239 (4th Cir. 1979), *cert. granted sub nom.* EPA v. National Crushed Stone Ass'n, 48 U.S.L.W. 3513.

[18] The FWPCA required the EPA Administrator to develop effluent limitation regulations for 27 categories of polluters based upon technology applicable to each industry. 33 U.S.C. § 1311(b) (1976). Section 1311(b) lists categories of industry polluters to be regulated by the FWPCA. In developing the regulations, the EPA divided the enumerated industry categories into subcategories and established numerical pollutant discharge limitations for each subcategory. 40 C.F.R., Parts 402-460 (1979). The effluent limitation regulations remanded in *National Crushed Stone* appear at 40 C.F.R. §§ 436.22(a) (crushed stone), 436.32(a) (construction sand and gravel) (1979). The Fourth Circuit also reviewed variance provisions for crushed stone, construction sand and gravel, and three subcategories of the coal industry. *See* text accompanying notes 66-78 & 103-116 *infra*.

[19] 5 U.S.C. §§ 551-559, 701-706 (1976). The Administrative Procedure Act (APA) provides for review of agency action made reviewable by statute, and for review of agency action for which there is no other adequate remedy. *Id.* § 704.

standard, a court may overrule an agency only if the agency's action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,[20] or if the agency fails to observe procedure required by law.[21] In addition, a court will set aside any action which exceeds the agency's statutory authority.[22] If an agency has acted properly in enacting a regulation, the court may not substitute its own judgment on the propriety of the regulation for that of the agency.[23]

Agency action in rulemaking is guided by section 4 of the APA[24] which imposes three obligations on an administrator. The administrator must give notice of his intended rulemaking, give interested persons an opportunity to participate in the action by submitting written views, and incorporate in the final rules a statement of their basis and purposes.[25] In *National Crushed Stone* and *Consolidation Coal*, the Fourth Circuit reviewed several EPA rulemaking decisions and ruled on both the procedures followed by the EPA in promulgation of the challenged regulations[26] and the impact of those regulations.[27]

National Crushed Stone Association v. EPA

In *National Crushed Stone*, industry petitioners challenged substantive provisions of the EPA regulations for the crushed stone and the construction sand and gravel industry subcategories of the mineral mining and processing point source category.[28] The petitioners asserted that the EPA failed to follow procedures established by the FWPCA[29] and acted contrary to APA rulemaking requirements.[30] In addition, industry petitioners claimed that the variance provisions[31] in the regulations were inconsistent with the recent Fourth Circuit decision in *Appalachian Power Co. v. Train (Appalachian II)*.[32]

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[20] *Id.* § 706(2)(A).

[21] *Id.* § 706(2)(D).

[22] *Id.* § 706(2)(C).

[23] *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

[24] 5 U.S.C. § 553 (1976).

[25] *Id.* §§ 553(b), 553(c); *see* Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 380 (1974) [hereinafter cited as Wright]. In interpreting the notice requirement, courts have not required detailed findings of fact, but they have demanded explanations for controversial normative and empirical determinations made by the agency. *See, e.g.*, Appalachian Power Co. v. EPA (*Appalachian I*). 477 F.2d 495, 507 (4th Cir. 1973).

[26] *See* text accompanying notes 33-39 *infra*. The procedure followed in issuing effluent limitations was challenged in *National Crushed Stone*. 601 F.2d at 115-18.

[27] *See* text accompanying notes 57-64 & 112-116 *infra*. In both *National Crushed Stone* and *Consolidation Coal*, the Fourth Circuit applied APA judicial review standards to challenged EPA regulations. 604 F.2d at 243; 601 F.2d at 116.

[28] 40 C.F.R. § 436.22 (1979) (crushed stone); *id.* § 436.32 (construction sand and gravel).

[29] 33 U.S.C. § 1251(e) (1976). Section 1251(e) requires the Administrator to accomodate and encourage public participation in the development of pollution control regulations.

[30] 601 F.2d at 116; *see* 5 U.S.C. § 553 (1976); text accompanying notes 24-25 *supra*.

[31] *See* note 12 *supra*; notes 68-71 *infra*.

[32] 601 F.2d at 116; *see* Appalachian Power Co. v. Train (*Appalachian II*), 545 F.2d 1351 (4th Cir. 1976).

The EPA issued its notice of proposed rulemaking for the crushed stone and the construction sand and gravel subcategories along with "interim final" regulations in June, 1976.[33] The notice provided interested persons an opportunity for comment. During the comment period, industry petitioners offered numerous comments on the interim regulations.[34] After the close of the comment period and before the issuance of final regulations,[35] however, the EPA received additional data developed by a private contractor, Versar, Inc.[36] On the basis of the Versar data, the EPA made significant changes in the effluent limitation regulations.[37] Industry officials learned of the existence of the Versar data at a conference with EPA officials in March, 1977, but the EPA refused industry officials access to the information until after the promulgation of final regulations.[38] The petitioners claimed that the EPA's refusal to share its data with industry representatives violated the APA.[39]

The petitioners also challenged the substance of the final regulations.[40] Following issuance of final regulations, the petitioners secured a report by an independent engineer which raised serious questions about the sufficiency of the Versar data as a basis for the new regulations and about the statistical validity of the data.[41] The independent engineer's report questioned whether the EPA had given sufficient consideration to the technical feasibility and economic impact of the more restrictive final regulations.[42]

The EPA admitted that it relied on the Versar data in promulgating the final regulations, and that industry petitioners were not afforded an opportunity to examine the data prior to final promulgation.[43] The

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[33] 41 Fed. Reg. 23,552 (1976). Because the EPA was unable to develop and promulgate effluent limitation regulations within the statutorily established time period, rulemaking procedures were judicially altered. Natural Resources Defense Council, Inc. v. Train, 501 F.2d 692, 704-05 (D.C. Cir. 1975). Under the court-imposed schedule, the EPA issues "interim final" regulations with its notice of proposed rulemaking. The "interim final" regulations are effective immediately, but subject to revision after a 30-day comment period. American Iron & Steel Inst. v. EPA, 568 F.2d 284, 290 (3d Cir. 1977).

[34] 601 F.2d at 116-17.

[35] 42 Fed. Reg. 35,843-52 (1977) (issuance of final regulations).

[36] 601 F.2d at 116-17. Versar, Inc. developed data based on a review of NPDES permits at two EPA regional offices. The comment period for the interim regulations ended in August, 1976. The Versar data was submitted to the EPA in February, 1977. *Id.*

[37] *Id.* at 117. The interim regulations permitted the discharge of water from industry facilities so long as total suspended solids (TSS), both organic and inorganic, did not exceed 30 miligrams per liter (mg/l) of waste water output for any one day. 41 Fed. Reg. 23,552, 23,558-59 (1976). Final regulations raised the maximum mine water effluent limitation to a permissible discharge of 45 mg/l per day but established a 30-day average limitation of 25 mg/l. 40 C.F.R. §§ 436.22(a)(1) (crushed stone), 436.32(a)(1) (construction sand and gravel) (1979).

[38] 601 F.2d at 117.

[39] *Id.* at 116; *see* text accompanying notes 24-25 *supra.*

[40] 601 F.2d at 118.

[41] *Id.*

[42] *Id.*

[43] *See id.* at 117.

justification offered by the EPA for its reliance on the Versar data was that the increased daily limits of total suspended solids (TSS) discharge allowed in the final regulations were in accordance with industry comments received on the interim regulations. The EPA, however, did not justify the inclusion of a monthly average TSS limitation in the final regulations.[44]

Because the FWPCA requires the maximum possible public participation in the development of water pollution control regulations[45] and because the APA requires the agency to explicate fully its rulemaking actions,[46] the Fourth Circuit held that the EPA's refusal to allow industry inspection of and comment upon the Versar data was a critical defect in the decision making process.[47] In remanding the TSS effluent limitations to the EPA for full consideration of industry comments,[48] the court relied on *Portland Cement Association v. Ruckelshaus*,[49] a case whose facts paralleled those presented in *National Crushed Stone*. As a further reason for remand, the Fourth Circuit noted that the EPA had failed to explain fully its reasons for changing the effluent limitations.[50] The court held this failure to comply with required procedures to be fatal under the APA.[51]

Besides the TSS limitation regulations, industry petitioners challenged the introduction of a waste water recycling requirement,[52] a

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[44] *Id.* at 118. The EPA argued that the 30-day average restriction of 25 mg/l was harmless because of the increased daily discharge allowance. This conclusion was challenged by the industry, and the EPA offered no evidence to support its position. *Id.*

[45] *See* 33 U.S.C. § 1251(e) (1976).

[46] 5 U.S.C. § 553(c) (1976); *see Appalachian I*, 477 F.2d at 507.

[47] 601 F.2d at 117.

[48] *Id.* at 119.

[49] 486 F.2d 375 (D.C. Cir. 1973) *cert. denied* 417 U.S. 921 (1974). In *Portland Cement*, the court set aside regulations which had previously been remanded to the EPA for reconsideration. Test information which the EPA had used to justify the initial regulations was refuted by an independent engineer. *Id.* at 393. On remand, the EPA included the independent data in its record without comment. Since the independent data was determined to be of possible significance in the test results, and the EPA had refused to respond to the engineer's challenges, the court found that the EPA had wrongfully based its regulations on data known only to the Agency, and had failed to respond adequately to industry comments. *Id.*

[50] 601 F.2d at 119.

[51] *Id.* Under the APA, an agency action not in accordance with law or procedure must be set aside. 5 U.S.C. § 706(2) (1976). The Fourth Circuit has held that attempts at explaining agency action after the regulations are promulgated are insufficient to cure non-compliance with stated principles. E.I. du Pont de Nemours & Co. v. Train, 541 F.2d 1018, 1026 (4th Cir. 1976), *aff'd in part and rev'd in part on other grounds*, 430 U.S. 112 (1977).

[52] 601 F.2d at 119. The EPA tied a no-discharge provision to the recycling requirement in the final regulations. Under the interim regulations, construction sand and gravel facilities were allowed to discharge mine water provided they met established TSS effluent limitations. 41 Fed. Reg. 23,552, 23,560 (1976). Under the final regulations, neither industry could discharge effluents unless the discharging facility engaged in recycling. 40 C.F.R. §§ 436.22(a)(2) (crushed stone), 436.32(a)(2) (construction sand and gravel) (1979). The court remanded the no-discharge requirements along with the recycling regulations, reasoning that the no-discharge provisions were not meant to stand alone and that the EPA should have the opportunity to reconsider them concurrently with its reconsideration of the recycling provisions. 601 F.2d at 121-22. *See* text accompanying notes 53-64 *infra*.

second major change that first appeared in the final regulations.[53] The interim regulations did not require recycling of any sort for either industry subcategory, but many facilities in the crushed stone industry practiced recycling because of the regulations' no-discharge rule.[54] During the comment period, the crushed stone industry sought final regulations permitting the discharge of waste water without recycling.[55] Without notice to the industry, however, the EPA enacted a waste water recycling requirement encompassing both the crushed stone and the construction sand and gravel industries.[56]

The foundation of the petitioners' challenge to the recycling provisions of the final regulations was a claim that implementation of the recycling technology would not result in decreased pollution.[57] The petitioners claimed that, in fact, the best practicable technology (BPT) is not recycling, but use of a settling pond and discharge of the settled process generated water without recycling.[58] The EPA conceded that the addition of the recycling requirement would be costly and burdensome to industry facilities, and the Agency was unable to refute petitioners'

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[53] The interim regulation divided discharge water into two components, "mine dewatering" and "process generated" waste water. 41 Fed. Reg. at 23,558 (1976) (interim regulations—crushed stone), *id.* at 23,558-59 (interim regulations—construction sand and gravel). Interim regulations prohibited discharge of process generated water in the crushed stone subcategory. *Id.* at 23,558 (interim regulations—crushed stone). The crushed stone industry could meet the no-discharge requirement by returning process generated waste water to a settling pond and then reusing the settled clear water in the production cycle. *Id.* at 23,554 (interim regulations). Recycling was specifically mentioned in the regulations as a possible technology which would enable the crushed stone industry to comply with the no-discharge requirements, but it was not required for the industry. Interim regulations for the construction sand and gravel subcategory specifically rejected recycling as a required technology for that industry subcategory and allowed discharge of process generated waste water because of an industry practice of commingling mine water and process generated water in the same settling pond. The interim regulations permitted discharge of the commingled waters subject to the same TSS limitation as mine dewatering. *Id.* at 23,559 (interim regulations—construction sand and gravel).

Final regulations for both subcategories provided for discharge of process generated waste water according to the TSS limitations established for mine dewatering; only those facilities which recycled waste water were allowed to discharge. Facilities that did not recycle were held to a no-discharge provision. 40 C.F.R. §§ 436.22(a)(1), 436.32(a)(1) (1979). The definition of "process generated" waste water was expanded, however, to encompass commingled waters which, under the interim regulations, could be discharged regardless of whether a facility recycled its process waters. *Id.* § 436.21(b).

[54] 41 Fed. Reg. at 23,558 (1976) (interim regulations—crushed stone).

[55] 601 F.2d at 120.

[56] *Id.*

[57] In addition to the technical challenge to the final regulations, the petitioners challenged the recycling requirement as fatally vague. *Id.* Neither the term "recycling" nor the breadth of its application is defined anywhere in the final regulations. The lack of a clear definition of an essential term could render the regulations void for vagueness, E.I. du Pont de Nemours v. Train, 541 F.2d 1018, 1033 (4th Cir. 1976), and the court noted this vagueness as a contributing factor in its decision to remand the recycling regulations. 601 F.2d at 120.

[58] 601 F.2d at 121.

claims of an alternative BPT.[59]

The Fourth Circuit remanded the recycling provisions primarily because of EPA's failure to show any environmental benefit from the adoption of the recycling technology.[60] Relying on its earlier decision in *E.I. du Pont de Nemours & Co. v. Train*[61] the Fourth Circuit noted that the EPA must consider the total environmental impact when requiring alterations in industry operations.[62] The court held that if the EPA cannot show an environmental benefit from the adoption of its prescribed techniques, then it has not shown that the required alteration is in fact the best practicable pollution control technology available.[63] The court concluded that if the EPA had data to support its recycling requirement, its reliance on that data should be clearly explained in the rulemaking record.[64]

The final major question[65] raised by the petitioners for the construction sand and gravel and the crushed stone industry subcategories concerned variance provisions in the regulations.[66] Under the FWPCA, the Administrator may modify the 1983 effluent limitation standards upon application of an industry facility,[67] but the 1977 (BPT) standards are not subject to any variance under the statute. The regulations promulgated by the Administrator, however, allowed individual facilities in each industry subcategory to apply for variance from the BPT standards.[68] In *Appalachian II*,[69] the Fourth Circuit

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[59] *Id.*

[60] *Id.*

[61] 541 F.2d 1018, 1034 (4th Cir. 1976).

[62] 601 F.2d at 121.

[63] *Id.*

[64] *Id.; see Appalachian II*, 545 F.2d at 1364.

[65] The petitioners also challenged the EPA's change in the regulatory definition of process generated waste water and the timing of the regulations. 601 F.2d at 124. The final regulations expanded the definition of process generated waste water to include commingled waters. *See* 40 C.F.R. §§ 436.21(e) (crushed stone), 436.31(e) (construction sand and gravel) (1979). This change affected both recycling and discharge provisions. *See* note 53 *supra*. Petitioners claimed that the expanded definition was so different from the one in the interim regulations that it should be set aside as a significant change in the regulations without notice to the industry. 601 F.2d at 124; *see* text accompanying notes 24-25 *supra*. The court did not find the definition invalid on its face, and declined to act until the definition could be considered in the context of new recycling and discharge regulations. 601 F.2d at 125. The court upheld the regulatory definition without prejudice to raise the matter in a subsequent petition after the EPA's reconsideration of remanded regulations. *Id.*

The court also declined to take action against the EPA on the timeliness of the regulations. Final regulations were issued on July 12, 1977, to become effective August 12, 1977. The statutory deadline for compliance with BPT regulations was July 1, 1977. The court acknowledged that the timing of the regulations raised serious questions, but declined to rule on those questions because the regulations were remanded on other grounds. *Id.*

[66] 601 F.2d at 124; *see* 40 C.F.R. §§ 436.22 (crushed stone), 436.32 (construction sand and gravel) (1979).

[67] 33 U.S.C. § 1311(c) (1976).

[68] *E.g.*, 40 C.F.R. § 436.22 (1979) (crushed stone subcategory). In developing effluent limitation regulations, the EPA developed data pertinent to each industry subcategory and

upheld the concept of a variance clause for BPT standards,[70] but found the clause developed by the EPA to be too restrictive.[71]

The petitioners in *National Crushed Stone* attacked the crushed stone and construction sand and gravel variance provisions as contrary to the holding of *Appalachian II*.[72] The EPA argued that review of the variance provisions would be premature prior to any actual industry request for a variance, and that *Appalachian II*, therefore, would not apply.[73] In *Appalachian II*, the Fourth Circuit proceeded with its review of variance provisions because of the EPA's unmistakeable position on variance requests.[74] In *National Crushed Stone*, the court acknowledged that the EPA had changed its position on variance provisions after *Appalachian II*,[75] and that the Agency's actions might have resolved the

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established discharge limitations accordingly. The regulations allow for reconsideration of the applicability of the subcategory limitations when an individual discharger can show that factors relating to equipment, facilities, processes, or "other such factors" affecting its own facility are fundamentally different from the factors the EPA considered in establishing the limitations. *Id.* The same language appears in all industry subcategory variance provisions. The EPA has been criticized for limiting its variance review to technical and engineering factors, and the variance provisions for at least one subcategory have been remanded to the EPA for reconsideration. *See* text accompanying notes 69-71 *infra*.

[69] 545 F.2d 1351 (4th Cir. 1976).

[70] *Id.* at 1358. The Fourth Circuit originally authorized BPT variances in the *Du Pont* case. 541 F.2d at 1029. Reasoning that the 1977 BPT standards are only presumptively applicable to particular industry facilities, the *Du Pont* court accepted variance provisions as a valid method of adapting the standards to individual facilities. *Id.* Although the court's reasoning in *Du Pont* has been criticized, *see* Kalur, *supra* note 10, at 696-70, other courts have relied on the authority of the Fourth Circuit's *Du Pont* decision in their approval of variance provisions. *Id.* at 672.

[71] 545 F.2d at 1359. In *Appalachian II*, the Fourth Circuit reviewed the variance provision in a case challenging the EPA's water pollution control regulations for the steam electric power generating point source category. *Id.* at 1358; *see* 40 C.F.R., Part 423 (1979). The court found that the EPA utilized a very narrow interpretation of the language of the variance provision. *See* note 68 *supra*. Noting that economic factors were considered in establishing the 1977 limitations, and that economic factors may be considered in granting a variance from the 1983 standards, the court reasoned that economic factors should also be considered in evaluating an application for variance from the 1977 standards. The court concluded that the factors taken into consideration for granting a variance from the standard ought to be at least as broad as the factors relied upon in establishing the standard, and that the variance clause as written and applied was too restrictive. 545 F.2d at 1359.

[72] 601 F.2d at 122.

[73] *Id.*

[74] 545 F.2d at 1359.

[75] 601 F.2d at 123. The Fourth Circuit noted two Agency actions which reflected the EPA's shifting position. First, in 1977, in an Administrator's case decision, the EPA specifically cited *Appalachian II*. *In re* Louisiana-Pacific Corp., 10 ENVIRON. CAS. (BNA) 1841, 1842 (1977). In *Louisiana-Pacific*, the California State Water Resources Control Board sought variances for dischargers, claiming, *inter alia*, that the costs of compliance for the dischargers in question, when considered against water quality factors, would justify a variance. *Id.* at 1844. While the Administrator rejected California's individualized cost-benefit arguments, he clearly accepted cost differentials as pertinent in granting a variance for a particular point source. *Id.* at 1854. Second, the court took note of the EPA's formal withdrawal of previous interpretations of variance provisions inconsistent with *Appalachian II*. 601 F.2d at 123; *see* 43 Fed. Reg. 50,042 (1978).

variance issue.[76] Based on its interpretation of an EPA position paper, however, the Fourth Circuit concluded that the EPA's actions were inadequate to bring the provisions into conformity with *Appalachian II*,[77] and remanded the variance provisions for rewording to comply with the *Appalachian II* decision.[78]

Decisions on the technical, environmental aspects of FWPCA regulations generally have little, if any, effect on substantive regulations in other industry subcategories.[79] Neither the Fourth Circuit nor any other court has previously reviewed the effluent limitation regulations for the construction sand and gravel subcategory or for the crushed stone subcategory. The Fourth Circuit's action in *National Crushed Stone* was consistent with its previous decisions[80] and with decisions in other circuits concerning similar issues raised by other industries.[81]

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[76] 601 F.2d at 123.

[77] *Id.* The Fourth Circuit interpreted the EPA's published withdrawal of inconsistent opinions to be worded in such a way as to conflict with *Appalachian II*. *Id.* In the Agency position paper, the EPA general counsel noted that the EPA would grant a variance to an industry facility that could show that its own compliance costs were significantly greater than the compliance costs considered by the EPA when establishing the regulation. 43 Fed. Reg. 50,042 (1978). The Fourth Circuit interpreted its *Appalachian II* decision as requiring a variance for any facility that cannot achieve compliance by applying the maximum technology within the facility's financial capability. 601 F.2d at 124. The court added that its construction of the variance provisions is in accordance with that of the D.C. Circuit in Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978). In fact, the two courts' decisions differ markedly. The *Weyerhaeuser* court's conclusion is based on consideration of a facility's costs as compared to those imposed on the industry as a whole. 590 F.2d at 1036. *Weyerhaeuser* supports the EPA interpretation of the variance provisions, rather than the conclusion drawn by the Fourth Circuit.

[78] 601 F.2d at 124.

[79] *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973). Because of the technical complexity of the individual standards, the courts educate themselves in the technicalities of the regulations only to the extent necessary to determine whether the EPA's action in rulemaking was based on consideration of relevant factors and was free of any clear error of judgment. *Id.*

[80] The Fourth Circuit approached its review of the technical regulations in *National Crushed Stone* in the same way it has approached substantive challenges to regulations in other industries, by checking the Agency record to find adequate support for the Agency's decision. *See* Tanner's Council of America, Inc. v. Train, 540 F.2d 1188, 1193 (4th Cir. 1976) (remanding effluent limitations for leather tanning and finishing industry citing insufficient Agency record); FMC Corp. v. Train, 539 F.2d 973, 978 (4th Cir. 1976) (remanding plastics and synthetics point source effluent limitations because EPA failed to substantiate bases for limitations); text accompanying notes 40-64 *supra*.

[81] Marathon Oil Co. v. EPA, 564 F.2d 1253, 1268 (9th Cir. 1977) (EPA did not show conclusively that prescribed TSS limitations could be achieved by application of BPT); California & Hawaiian Sugar Co. v. EPA, 553 F.2d 280, 287 (2d Cir. 1977) (regulations for crystalline cane sugar refineries upheld as based on adequate technical support); Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620, 632 (2d Cir. 1976) (EPA's consideration of factors affecting phosphate manufacturing industry was sufficient to uphold BPT effluent limitations); American Petroleum Inst. v. EPA, 540 F.2d 1023, 1034 (10th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977) (technical regulations for petroleum industry were adequately supported by record); American Meat Inst. v. EPA, 526 F.2d 442, 455 (7th Cir. 1975) (regulations for all four subcategories of slaughterhouses and packinghouses upheld because in-

The administrative issues resolved in *National Crushed Stone* concerned the application of APA requirements of notice and full explication in agency rulemaking.[82] The Fourth Circuit acted in harmony with other circuits in requiring that technical data be made available to the regulated industry[83] to satisfy both the APA rulemaking procedure[84] and the FWPCA requirement for participation in rulemaking.[85] In *National Crushed Stone,* the Fourth Circuit also reviewed procedural regulations which affect all industry subcategories.[86] The court's holding on the variance provisions followed the groundwork laid in *Du Pont*[87] and *Appalachian II.*[88] Although the Fourth Circuit claimed to be in accordance with the D.C. Circuit, the final action taken by the two courts differs substantially.[89] The Fourth Circuit's decision to remand the variance provisions in *National Crushed Stone* for rewording will heighten the conflict between circuits on the availability of variances for financially strapped industry facilities.[90]

Consolidation Coal Co. v. Costle

In *Consolidation Coal Co. v. Costle,*[91] the Fourth Circuit heard both administrative and environmental challenges to FWPCA[92] regulations for the coal mining point source category.[93] Industry petitioners challenged the standard variance clause language in the regulations,[94] the lack of an

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dustry failed to refute EPA's data on effects of air temperatures on BPT limitations); American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1062 (3rd Cir. 1975), *cert. denied,* 435 U.S. 914 (1978) (new source regulations for by-product coke plants set aside because EPA's basis for regulations was not adequately demonstrated).

[82] 601 F.2d at 119; *see* text accompanying notes 24-25 *supra.*

[83] Marathon Oil Co. v. EPA, 564 F.2d 1253, 1275 (9th Cir. 1979); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d at 392.

[84] *See* 601 F.2d at 117.

[85] *See id.* at 119; *see* 33 U.S.C. § 1251(e) (1976).

[86] *See* note 68 *supra.*

[87] 541 F.2d 1018 (4th Cir. 1976); *see* note 70 *supra.*

[88] 545 F.2d 1351 (4th Cir. 1976); *see* text accompanying notes 69-78 *supra.*

[89] Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978); *see* note 77 *supra.*

[90] The D.C. Circuit, in *Weyerhaeuser,* accepted the EPA's position on variance when a regulation imposes a greater than normal restriction on a particular facility. 590 F.2d at 1032. After *National Crushed Stone,* the Fourth Circuit requires a variance for any facility that is financially incapable of complying with BPT regulations.

[91] 604 F.2d 239 (4th Cir. 1979). *Consolidation Coal* petitioners included 17 coal producers, their trade association, five citizens' environmental associations, and the Commonwealth of Pennsylvania. *Id.* at 242.

[92] *See* text accompanying notes 1-27 *supra.*

[93] *See* 40 C.F.R., Part 434 (1979) (regulations for coal mining industry category).

[94] The FWPCA effluent limitation regulations contain a provision for a variance for a given facility in the industry subcategory. An individual discharger may submit evidence to the EPA Regional Administrator to demonstrate that factors affecting the discharger's performance are fundamentally different from the factors considered by the EPA in establishing the regulations. If the Regional Administrator determines that fundamentally different factors do exist, he or she may establish individualized effluent limitations in the dis-

environmental quality standard in the variance clause,[95] the application of the regulations pertaining to coal preparation plants,[96] the exclusion from the regulations of mines in six western states,[97] and the timing of the promulgation of the regulations.[98] The Commonwealth of Pennsylvania and citizens groups joined to challenge the exclusion of post-mining discharges from the industry regulations, and the construction of the catastrophic rainfall exemption in the regulations.[99]

Narrow standards prescribed by the Administrative Procedure Act (APA) governed the court's review of the challenged EPA regulations in *Consolidation Coal.*[100] Since the FWPCA required the EPA to develop complex pollution control data in a very limited time, the Fourth Circuit stated that it would be hesitant to contradict the EPA's substantive conclusions solely because they were developed on a limited data base.[101] The court recognized that an overly expansive review of the regulations would impede progress toward elimination of water pollution.[102]

The industry petitioners' first challenge to the regulations attacked the variance provisions applicable to the coal mining industries.[103] Effluent limitation standards established pursuant to the FWPCA may be varied by the EPA upon application by an individual industry facility.[104] The coal industries' regulatory variance provisions are identical to those promulgated for other industry subcategories.[105] Industry petitioners attacked their variance provisions claiming that the FWPCA requires the EPA to consider cost factors[106] in permitting variances both from the 1977 standards, which are based on employment of the best practicable control technology available (BPT)[107] and from the 1983 standards, which

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charger's NPDES permit. *E.g.*, 40 C.F.R. § 434.22 (1979); *see* text accompanying notes 67-71 *supra.*

[95] 604 F.2d at 244.

[96] *Id.* at 249.

[97] *Id.* at 246.

[98] *Id.* at 245; *see* text accompanying notes 117-21 *infra.*

[99] 604 F.2d at 250-54.

[100] 5 U.S.C. § 706(2) (1976); 604 F.2d at 243; *see* text accompanying notes 19-23 *supra.*

[101] 604 F.2d at 243.

[102] *Id.*

[103] *Id.*

[104] *Id.* n.16; *see* 40 C.F.R. § 434.22 (1979).

[105] *Compare* 40 C.F.R. § 434.22 (1979) (coal preparation plants) *with* 40 C.F.R. § 436.22 (1979) (crushed stone).

[106] 33 U.S.C. § 1311(c) (1976). Section 1311(c) allows variance from 1983 (BAT) standards for facilities that are utilizing pollution control techniques to the maximum extent of their economic capability. The FWPCA does not provide for variance from 1977 (BPT) standards, but effluent limitation regulations do allow a BPT variance for a facility that can demonstrate that it operates under fundamentally different factors than those factors upon which the EPA based its regulations. *See* text accompanying note 68 *supra.* Courts have determined that cost factors must be included in the EPA's consideration of a variance application. *See* Appalachian Power Co. v. Train (*Appalachian II*), 545 F.2d 1351 (4th Cir. 1976); *In re* Louisiana-Pacific, 10 ENVIRON. CAS. (BNA) 1841, 1852 (1977); *Federal Enforcement, supra* note 10, at 886.

[107] BPT standards are those which should have been attained by July 1, 1977. *See* note 7 *supra.*

can be achieved only by application of the best available technology (BAT).[108] The petitioners argued that the variance clause, as written, did not require the EPA to consider cost factors in evaluating variance applications.[109] The Fourth Circuit recently reviewed the crushed stone and construction sand industry variance provisions in *National Crushed Stone* and remanded them for revision to include consideration of cost factors in conformity with its earlier decision in *Appalachian II*.[110] The *Consolidation Coal* court likewise remanded the coal industry variance provisions for revision to conform with *National Crushed Stone*.[111]

Industry petitioners also challenged the variance provisions on environmental grounds,[112] citing the EPA's failure to include a cost-benefit analysis of the impact of industry expenditures on the quality of receiving water in its determination of whether to grant a variance.[113] The Fourth Circuit rejected petitioners' claims that consideration of a variance request should include an evaluation of the quality of receiving water. The court reasoned that the FWPCA concentrates on individual point sources of pollution, eliminating consideration of the quality of water at any one site.[114] Poor water quality does not release an individual facility from the requirement to apply BPT or to meet its own subcategory effluent limitations.[115] The Fourth Circuit thus upheld the variance provisions against petitioners' challenge to the provisions' net environmental benefits.[116]

The final regulations for the coal mining industries were promulgated less than three months before the deadline for compliance with BPT standards.[117] Because of the timing, industry petitioners considered the

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[108] BAT standards are the goals for 1983. *See* note 7 *supra*.

[109] 604 F.2d at 243. The language of the variance provisions requires the EPA to consider technical and engineering factors and "other such factors" in evaluating an application for variance from BPT standards. *See* note 70 *supra*.

[110] 601 F.2d at 124; *see* text accompanying notes 65-78 *supra*.

[111] 604 F.2d at 244.

[112] *Id.*

[113] *Id.* Receiving water is the water into which a facility discharges waste water.

[114] 604 F.2d at 245. In passing the FWPCA, Congress determined that pollution control based on overall water quality considerations had been ineffective in combating pollution. Since 1972, therefore, the federal government has concentrated on development and regulation of effluent reduction technology to achieve the goal of restored waters, rather than on receiving water quality. *See* EPA v. California, 426 U.S. 200, 204-05 (1976); *Great Expectations, supra* note 3, at 262. Since the FWPCA concentrates on individual point sources, the Fourth Circuit accordingly has determined that no facility should be required to make improvements in intake water beyond those achievable by application of BPT for the specific industry in question. In effect, industries receive credit for the quality of their intake water. *Appalachian II*, 545 F.2d at 1377-78.

[115] Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1041 (D.C. Cir. 1978); *Appalachian II*, 545 F.2d at 1378; *In re* Louisiana-Pacific, 10 ENVIRON. CAS. (BNA) 1841, 1847 (1977).

[116] 604 F.2d at 245.

[117] The statutory deadline for compliance with BPT standards was July 1, 1977. 33 U.S.C. § 1311(b)(1)(A) (1976). The challenged regulations for the coal mining industry were promulgated in April, 1977. 42 Fed. Reg. 21,380 (1977). The FWPCA required the Administrator to promulgate effluent limitation guidelines for all water polluting industries by Octo-

regulations unachievable by the required deadline and, therefore, invalid.[118] The Fourth Circuit upheld the challenged coal industry standards, however, despite their untimely promulgation.[119] Relying on its interpretation of legislative history of the FWPCA,[120] the court determined that the Administrator has discretion to grant an extension of the compliance date in cases in which noncompliance is the result of the Administrator's delay in promulgating guidelines.[121]

The industry also challenged the exclusion of western coal mines from the application of effluent limitation guidelines.[122] The industry claimed that postponement of TSS limitations for western coal mines violated the FWPCA's uniformity requirement.[123] Additionally, industry petitioners asserted that lack of adequate notice of the exclusion of western mines violated both the APA[124] and the FWPCA.[125]

While acknowledging the statutory requirement of uniformity within all industry subcategories, the Fourth Circuit found no violation of the Act in the exclusion of western mines.[126] The court noted that the FWPCA enables the Administrator to create industry subcategories based on a broad range of factors[127] and does not prohibit consideration of

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ber 18, 1973. 33 U.S.C. § 1314(b) (1976). Because of the overwhelming nature of the task, the EPA was unable to meet the statutory schedule. The result of this inability to develop all the required regulations was a court-imposed, court-supervised timetable for promulgation of industry effluent limitations. Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 704-05 (D.C. Cir. 1975); Kalur, *supra* note 10, at 957.

[118] 604 F.2d at 245.

[119] *Id.* at 246.

[120] *See* S. REP. No. 370, 95th Cong., 1st Sess. 61, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4386. The Senate Report focuses on good faith efforts by the discharger to control pollution in order to earn an extension of the compliance deadline. *Id.*

[121] 604 F.2d at 246. Neither the text of the 1977 FWPCA amendments nor the Senate Report specifically mention delay by the Administrator as a possible justification for granting an extension for compliance. In fact, courts have specifically refused to grant a judicial waiver of the BPT July 1, 1977 deadline on the basis of late promulgation of the regulations. *E.g.*, Republic Steel Corp. v. Costle, 581 F.2d 1228, 1231 (6th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979). *Cf.* United States Steel Corp. v. Train, 556 F.2d 822, 854-55 (7th Cir. 1977) (inability to meet deadlines not excused when reason for delay was industry's involvement in litigation of the regulations).

[122] 604 F.2d at 246. Final effluent limitation regulations for the coal industry subcategories do not apply in Colorado, Montana, North Dakota, South Dakota, Utah, or Wyoming. 40 C.F.R. § 434.32(a) n.1 (1979); *see* 42 Fed. Reg. 21,381, 21,382-83 (1977).

[123] 604 F.2d at 246. Effluent limitations established under the FWPCA must be applied to all point sources discharging pollutants. 33 U.S.C. § 1311(e) (1976). There is no provision for exemption of any non-municipal point source from effluent limitation.

[124] 604 F.2d at 246; *see* 5 U.S.C. § 553 (1976). Section 553 describes the APA requirements for rulemaking. *See* Wright, *supra* note 25, at 380.

[125] 604 F.2d at 246; *see* 33 U.S.C. § 1251(e) (1976). Section 1251(e) provides for public participation in the development and revision of any effluent limitation established by the Administrator. The section of the FWPCA which outlines the requirements for establishment of effluent limitation guidelines specifically mentions that the EPA must afford the opportunity for industry and public participation. 33 U.S.C. § 1314 (1976).

[126] 604 F.2d at 249.

[127] *Id.* at 247; *see* 33 U.S.C. § 1314(b)(1) (1976).

geographic factors in establishing a subcategory. Therefore, the court approved the EPA's segregation of western mines.[128] While the exclusion of mines in western states did not alone amount to the creation of an additional industry subcategory differentiated by geographic factors, the Fourth Circuit interpreted the exclusion as an interim step in that direction.[129] Accordingly, the court approved the EPA's action pending further study concerning creation of a new subcategory.[130]

In their administrative challenge, the industry petitioners claimed that the final regulations did not convey adequate notice of the exclusion of western coal mines.[131] Without notice or an opportunity to comment on the regulations, the petitioners asserted that the regulations were violative of the notice and comment provisions of the APA,[132] and the participation requirement of the FWPCA.[133] The 1976 interim rules[134] applied to all mines, and the Administrator's notice of proposed rulemaking indicated that the EPA had considered geographic factors in developing the interim limitations.[135] Therefore, the Fourth Circuit held that the Administrator's procedures in promulgating the coal mining industry regulations fully complied with the requirements of both the APA and the FWPCA.[136]

A notice of proposed rulemaking need not specify every detail of the rule finally promulgated so long as the notice fairly apprises interested persons of the subjects and issues before the agency.[137] The 1975 notice had adequately advised the industry of the factors to be considered. The final regulations did not change the quality of effluent limitations for western mines, but merely individualized the level of pollution each could

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[128] 604 F.2d at 247.

[129] *Id.* The EPA found, during the regulations comment period, that western coal mines were able to discharge less concentrated pollutants than mines in the East. The EPA attributed this phenomenon to Western topography, geology, and mining technology. 42 Fed. Reg. 21,380, 21,382-83 (1977). The court noted that this data was sufficient to differentiate mines in the named western states but insufficient to delimit a separate subcategory. 604 F.2d at 248.

[130] 604 F.2d at 248. The court noted that exclusion of the western mines from the regulations did not exempt them from discharge limitation. Exemption would violate the FWPCA. By excluding the mines, the Administrator simply authorized state and federal NPDES permit issuers to set individualized effluent limitations for the mines until further data could be developed for the entire subcategory. *Id.*

[131] 604 F.2d at 246.

[132] *See* 5 U.S.C. § 553 (1976); Wright, *supra* note 25, at 380.

[133] *See* 33 U.S.C. § 1251(e) (1976); note 125 *supra.*

[134] 41 Fed. Reg. 19,832, 19,836 (1976). The interim regulations included a notice of proposed rulemaking. The notice advised the industry that the EPA would consider geographic location in the development of effluent limitations. *Id.*

[135] 40 Fed. Reg. 48,831 (1975). The court noted that the FWPCA itself served as additional notice that individual discharge permits might contain more stringent limitations if conditions required. 604 F.2d at 248-49; *see* 33 U.S.C. § 1311(b)(1)(C) (1976).

[136] 604 F.2d at 248.

[137] Action for Children's Television v. FCC, 564 F.2d 458, 470 (D.C. Cir. 1977); *see* American Iron & Steel Inst. v. EPA, 568 F.2d 284, 293 (3d Cir. 1977).

discharge. The court determined, therefore, that the notice in this case was adequate to apprise industry representatives of the EPA's intentions, and that the regulations were not invalid due to lack of notice.[138]

Industry petitioners challenged the EPA's final regulations for the subcategory of coal preparation plants and associated areas[139] as impermissively vague.[140] Coal preparation plants are defined by the regulations so as to be clearly considered point sources.[141] Associated areas, however, include plant yards, access roads, and slurry ponds,[142] and the petitioners complained that the regulations failed to distinguish between point sources and non-point sources.[143] The FWPCA does not require the EPA to promulgate regulations for non-point sources of pollution,[144] yet, according to the petitioners' interpretation of the regulations, the point source regulations could be read to apply to surface runoff from coal plant associated areas.[145]

The Fourth Circuit dismissed the petitioners' vagueness complaints.[146] The court held that when read in context, the challenged regulations could not be interpreted to apply to surface runoff. Since the definition of point source in the regulations conforms to the statute, the court found no defect in the regulations and refused to invalidate them in the abstract.[147]

Non-industry petitioners in *Consolidation Coal* challenged the exclusion from effluent limitation regulations of point source discharges from inactive mines as arbitrary and capricious.[148] The Commonwealth of Pennsylvania complained that a lack of federal regulations on post-mining discharges hinders the State's effort to regulate inactive mines. The Commonwealth thus sought to compel uniform, federal regulation of post-mining discharges. Industry petitioners joined the Administrator on this issue, defending exclusion of post-mining activities.[149]

The Fourth Circuit agreed that the record supported petitioners'

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[138] 604 F.2d at 249.

[139] *See* 40 C.F.R. §§ 434.20-22 (1979).

[140] 604 F.2d at 249.

[141] 40 C.F.R. § 401.11(d) (1979). The FWPCA regulations specify that a coal preparation plant is a facility where coal is prepared for transit to a consuming facility. *Id.* § 434.11(e).

[142] *Id.* § 434.11(f).

[143] 604 F.2d at 249.

[144] *See* 33 U.S.C. § 1314(f) (1976) (Administrator to issue information, including guidelines for nonpoint sources).

[145] 604 F.2d at 250.

[146] *Id.*

[147] *Id.*

[148] *Id.* The Commonwealth of Pennsylvania and several environmental groups sought to compel the EPA to promulgate regulations for inactive surface mines during reclamation and revegetation and for underground mines after coal production ceases. *Id.* Congress recognized the problem of polluted drainage from abandoned mines in passing the FWPCA. The Act, however, requires only analysis of the problem, not development or application of effluent limitations. *See* 33 U.S.C. §§ 1257, 1314(f)(2)(B) (1976).

[149] 604 F.2d at 250.

claims that post-mining pollution abatement is an integral part of the coal production process.[150] In upholding the Administrator's exclusion of post-mining discharges, however, the court concluded that the Administrator had created an active mining subcategory in the challenged regulations.[151] Referring to its own reasoning concerning the exclusion of western mines, the court held the Administrator's decision to exclude inactive mines from the point source regulations reasonable considering the inadequacy of information available to the EPA.[152] The court noted, however, that the Administrator can regulate post-mining discharges by the issuance of permits, even though he has promulgated no national industry standards.[153]

In *Consolidation Coal,* the Fourth Circuit affirmed six actions of the EPA Administrator in promulgating water pollution control regulations.[154] The Fourth Circuit had not previously considered the specific environmental issues raised in *Consolidation Coal.*[155] Rather than set aside regulations as incomplete or lacking in uniformity, the Fourth Circuit chose to resolve ambiguities in favor of the Administrator by considering industry facilities excluded from the regulations to be separate subcategories.[156] The court's creative approach to the issues

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[150] *Id.* Because mining changes the drainage characteristics of the land so dramatically, pollution from mining sites may continue indefinitely even after mining operations have ceased. *Id.* at 251.

[151] *Id.; see* 40 C.F.R. § 434.11(d) (1979). In these regulations, the Administrator defined a coal mine as an active mining area and specifically excluded surface mining areas that had been graded in preparation for reclamation. *Id.* § 434.11(b) (1979).

[152] 604 F.2d at 252. The *Consolidation Coal* court conceded that techniques for reducing pollution from inactive mines are generally known in the industry. *Id.* In addition to technical data and public comments, however, the EPA must consider the total cost of BPT in each industry subcategory. 33 U.S.C. § 1314(b)(1)(B) (1976). The court also cited the need for cooperation between the Administrator and the Secretary of the Interior in the enforcement of mining regulations under the FWPCA and the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. I 1977) as a justification for approving the Administrator's failure to promulgate regulations for inactive mine point sources. 604 F.2d at 252.

[153] 604 F.2d at 252; *see* 33 U.S.C. § 1342(a)(1) (1976); United States Steel Corp. v. Train, 556 F.2d 822, 844 (7th Cir. 1977).

[154] 604 F.2d at 244-53. The sixth regulatory challenge concerned the construction of the catastrophic rainfall exemptions for the coal mining point source category. Non-industry petitioners sought to have those provisions conform to similar rainfall exemptions for other industries. *Id.* at 253. The regulations challenged were 40 C.F.R. §§ 434.22(b), 434.32(b), and 434.42(b) (1978). After oral argument in *Consolidation Coal,* the Administrator clarified the catastrophic rainfall provisions. The revised final regulations, promulgated in 44 Fed. Reg. 2590 (1979), are currently codified at 40 C.F.R. §§ 434.22(b), 434.32(b), and 434.42(b) (1979). The revision of the regulations disposed of the petitioners' challenge. 604 F.2d at 254.

[155] The Fourth Circuit had not previously considered the question of receiving water quality, or the creation of separate industry subcategories for western mines and post-mining activities. The court had considered environmental issues for other industry categories however. *See, e.g.,* National Crushed Stone Ass'n v. EPA, 601 F.2d 111 (4th Cir. 1979); E.I. du Pont de Nemours & Co. v. Train, 541 F.2d 1018 (4th Cir. 1976); *see* text accompanying notes 40-64 *supra.*

[156] *Cf.* American Iron & Steel Inst. v. EPA, 568 F.2d 284, 307 (3d Cir. 1977). The Third