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Vii. Environmental Law

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the reasonable doubt standard by providing a third option to a choice between conviction and acquittal.¹⁰³ Since the defendant in *Williams* had a right to an instruction on the lesser included offense, the Fourth Circuit erred in implying a waiver of the statute of limitations from the defendant's request.

Although the Fourth Circuit in *Williams* correctly found that a criminal defendant may waive the statute of limitations, the facts in *Williams* do not give rise to the implication of a valid waiver.¹⁰⁴ The Fourth Circuit's implication of a waiver in *Williams* is inconsistent with Supreme Court precedent that requires a knowing and voluntary waiver to forego rights that affect the integrity of the trial process.¹⁰⁵ Moreover, the Fourth Circuit erred in implying the defendant's waiver from the defendant's request for an instruction of the lesser included offense. The *Williams* decision compromises the policies behind the limitation statutes by allowing trial and punishment for crimes Congress designed the statutes to preclude.

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VII. ENVIRONMENTAL LAW

Receiving Water Quality Not Appropriate BPT Variance Factor

The Federal Water Pollution Control Act of 1972 (Act)¹ established a

¹⁰³ See *supra* 412 U.S. 205, 212-13; *supra* note 101.

¹⁰⁴ See *supra* note 98.

¹⁰⁵ See *supra* text accompanying notes 89-99.

¹ 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981). The Federal Water Pollution Control Act (Act) adopted a new approach to eliminate pollution. See *EPA v. California ex rel. State Water Resource Control Bd.*, 426 U.S. 200, 203-04 (1976). From 1948 until 1972, state water quality standards provided the basis for the establishment of effluent limitations. *Id.* at 202, n.2. Effluent limitations are measurements of the actual amount of pollutants discharged at a particular source. See *Niagara of Wisconsin Paper Corp. v. Wisconsin Dep't of Natural Resources*, 84 Wis. 2d 32, _____, 268 N.W.2d 153, 163 (1978). Prior to 1972, states varied effluent limitation requirements for various dischargers according to the discharger's impact on the desired water quality standard. *Id.* at _____, 268 N.W.2d at 163. Pollution control based on state water quality standards, however, created numerous regulatory problems. *Hercules, Inc. v. EPA*, 598 F.2d 91, 105 (D.C. Cir. 1978). In *American Frozen Food Institute v. Train*, the District of Columbia Circuit recognized the major problem regarding lack of uniform pollution control prior to 1972. See 539 F.2d 107, 115 (D.C. Cir. 1976). The *Frozen Foods* court stated that uniformity was necessary to prevent states from relaxing pollution standards to encourage existing industries to remain in the state or to attract new industries. *Id.* The Supreme Court in *EPA v. California ex rel. State Water Resources Control Board* acknowledged the need for uniform water pollution standards to facilitate the enforcement of pollution regulations. See 426 U.S. at 203. The Supreme Court stated that the

national goal to eliminate the discharge of pollutants by 1985.² Under the Act, dischargers of pollutants³ must participate in a two-stage program

rejection of water quality based pollution controls eliminated the burdensome task of working backwards from first identifying an overpolluted body of water to later determining the responsible source of pollution and then finally to applying the necessary sanctions. *Id.* at 204.

In enacting the Act, Congress recognized the need to eliminate the lengthy delays due to the requirements of scientific assessments of the effect of various sources of pollution on water quality. *See* SENATE COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. REP. NO. 92-414, 92d Cong., 1st Sess. 2770, *reprinted in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972*, at 1419, 1426 (1973) [hereinafter cited as LEGISLATIVE HISTORY]. Numerous scientific uncertainties also make accurate assessment of the actual consequences of various pollutants in water quality difficult. *See* Note, *The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device*, 10 HARV. J. ON LEGIS. 565, 571-72 (1973). A contrasting theory, however, suggests that adequate scientific information exists to allow considerations of the economic impracticalities of treating a particular level or type of pollution when establishing optimal pollution controls. *See* W. BAXTER, *PEOPLE AND PENGUINS: THE CASE FOR OPTIMAL POLLUTION* (1974).

Congress enacted the 1972 Act to remedy some of the problems inherent in the previous system of water pollution control. *See* California *ex rel.* State Water Resources, 426 U.S. at 204-05. The Act shifted the pollution control system's emphasis from reliance on effluent limitations derived from state water quality standards to technologically-based effluent limitations. *Id.* The Act authorizes the EPA to set uniform effluent limitations for different classes and categories of dischargers. *Id.* at 204 n.11. In establishing effluent limitations, the EPA determines the extent to which a particular class of dischargers may reduce effluents through the application of specific forms of technology. *Id.* The EPA then promulgates regulations requiring all dischargers within a particular class to comply with the applicable effluent limitations. *Id.*

² 33 U.S.C. § 1251(a)(1) (1976); *see* Consolidation Coal Co. v. Costle, 604 F.2d 239, 242 (4th Cir. 1979), *rev'd on other grounds sub nom.*, EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1982). In *Consolidation Coal*, the Fourth Circuit described the Act as a legislative directive to restore and maintain the chemical, physical and biological integrity of the nation's waters. *Id.* The *Consolidation Coal* court held that courts must give the Act the broadest possible reading consistent with the commerce clause to facilitate attainment of the Act's goal. *Id.* at 243; *see* Leslie Salt Co. v. Froehke, 578 F.2d 742, 754-55 (9th Cir. 1978) (Act's jurisdiction extends to all of nation's navigable waters). Courts have defined broadly the term "pollutants" referred to in the Act. *See* Weyerhaeuser v. Costle, 590 F.2d 1011, 1043 (D.C. Cir. 1978) (pollutant is any addition to water that alters chemical, physical, biological or radiological integrity of the water); Appalachian Power Co. v. Train, 545 F.2d 1351, 1356 (4th Cir. 1976) (heat recognized as pollutant); Weismann v. District Eng'r U.S. Army Corps of Eng'rs, 526 F.2d 1302, 1306 (5th Cir. 1976) (sediment from developer's dredging constituted pollutant); United States v. Reserve Mining Co., 380 F. Supp. 11, 56 (D. Minn. 1974) (asbestos-like amphibole fibers directly associated with occurrences of cancer constitute pollutant), *modified on other grounds*, 514 F.2d 492 (8th Cir. 1975). *But see* Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 13 (1976) (specific types of radioactive materials covered by Atomic Energy Act not considered pollutants); 2 U.S.C. §§ 2011-2296 (1976 & Supp. 1980) (Atomic Energy Act).

³ *See* 33 U.S.C. § 1311 (1976). Section 1311 provides that the discharge of any pollutant by any person is unlawful. *Id.* "Discharge" involves the addition of any pollutant from any discrete container or conveyance into the nation's navigable waters. United States v. Oxford Royal Mushroom Prods. Inc., 487 F. Supp. 852, 855 (E.D. Pa. 1980). Navigable waters include any waterways of the United States, such as normally dry arroyos, where water

involving the application of increasingly stringent pollution controls.⁴ The first stage⁵ requires existing industrial dischargers to apply the best practical technology available (BPT)⁶ to meet a specific 1977 effluent reduction level.⁷ The second stage⁸ requires dischargers to apply the best technology economically achievable (BAT)⁹ to meet a higher effluent reduction level by 1983.¹⁰

Section 304(b) of the Act authorizes the Environmental Protection Agency (EPA) to define BPT and BAT requirements for general categories of point sources.¹¹ The EPA must consider specific factors listed in section 304 of the Act when setting BPT and BAT re-

might flow and potentially carry discharged pollutants into a body of water, including underground waters. *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975). Any person who adds pollutants to the nation's navigable waters may be a discharger within the meaning of the Act. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (person engaged in agricultural or mining activities may qualify as discharger); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 644 (1st Cir. 1979) (pesticide manufacturers who release effluents into waterways during chemical formulation process may be discharger of pollutants); *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370, 1381 (D. D.C. 1975) (hotel complex developers dumping rock and sand refuse into mangrove wetlands are dischargers of water pollutants). *But see United States v. GAF Corp.*, 389 F. Supp. 1379, 1383 (S.D. Tex. 1975) (discharge of pollutants into subsurface wells not covered by Act). Furthermore, the Act does not only pertain to the intentional discharge of pollutants. *See United States v. Earth Sciences, Inc.*, 599 F.2d at 373 (Act makes dischargers of any pollutant strictly liable).

⁴ 33 U.S.C. § 1311(b) (1976 & Supp. V. 1981); *see EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 75 n.14 (1980) (requirements under the second stage of Act's program must represent an upgrading over first stage requirements); *American Frozen Food Inst. v. Train*, 539 F.2d 107, 115 (D.C. Cir. 1976) (Act authorizes EPA to set interim effluent reduction levels to facilitate gradual progress toward elimination of discharge of pollutants); *infra* notes 5-10 (establishment of BPT guidelines for various categories of dischargers).

⁵ *See* 33 U.S.C. § 1311(b)(1)(A) (1976) (establishment of effluent limitations under first stage of water pollution control program).

⁶ *Id.* § 1314(b)(1)(B); *see infra* note 13 (factors related to assessment of best practicable technology available).

⁷ *See* EPA Effluent Limitations Guidelines, 40 C.F.R. § 423.12 (1982) (specific BPT limitations for various categories of steam electric power generating point sources).

⁸ *See* 33 U.S.C. § 1311(b)(2)(A) (Supp. V 1981) (establishment of effluent limitations for second stage of water pollution control program).

⁹ *Id.* at § 1314(b)(2)(B) (Supp. V 1981); *see infra* note 13 (specific factors related to assessment of best technology economically achievable).

¹⁰ *See* EPA Effluent Limitation Guidelines, 40 C.F.R. § 423.13 (1982) (specific BAT limitations for various categories of steam electric power generating point sources).

¹¹ 33 U.S.C. § 1314(b) (1976); *see id.* at § 1362(14) (Supp. V 1981). Section 1362(14) defines "point source" as including any discernible and discrete conveyance from which pollutants are or may be discharged. *Id.* Point source does not include return flows from irrigated agriculture. *Id.* Section 1314(b) of the Act authorizes the EPA to define BPT and BAT limitations and § 1311 authorizes the EPA to promulgate regulations requiring compliance with the established BPT and BAT limitations. §§ 1311, 1314(b); *see E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 117 (1977). In *E.I. duPont*, the Supreme Court decided that the EPA may set BPT and BAT limitations by regulation if the EPA also includes BPT and BAT variance clauses. *Id.*

quirements.¹² The EPA generally collects data pertaining to section 304 factors from a representative sample of plants within a particular category of point sources.¹³ The EPA then establishes generic BPT and BAT requirements applicable to all plants within a particular industrial category.¹⁴ If the EPA determines that the application of generic BPT requirements to plants with fundamental individual differences is inappropriate,¹⁵ the EPA may vary BPT and BAT requirements for the in-

¹² See 33 U.S.C. §§ 1314(b)(1)(B), 1314(b)(2)(B) (1976 & Supp. V 1981). The Act authorizes the EPA, when setting BPT limitations, to consider factors such as the total cost of the application of technology in relation to effluent reduction benefits achieved from such application, the age of the equipment and facilities involved, the process employed, engineering aspects of the application of different control techniques, process changes, non-water quality environmental impacts (including energy requirements), and other factors the EPA deems appropriate. *Id.* § 1314(b)(1)(B). Regarding consideration of cost factors, dischargers must show that increased costs in implementing BPT requirements would be wholly disproportionate to potential effluent reduction before the EPA may rely on a cost-benefit analysis to select a lower level of technology. *Association of Pac. Fisheries v. EPA*, 615 F.2d 794, 805 (9th Cir. 1980).

The Act requires the EPA, when assessing BAT requirements, to consider factors relating to the age of the equipment and facilities involved, process employed, engineering aspects of the application of various types of control techniques, process changes, the act of achieving effluent reduction, non-water quality environmental impact and other factors the EPA deems appropriate. 33 U.S.C. § 1314(b)(2)(B) (Supp. V 1981).

¹³ See *American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1034 (10th Cir. 1976). When establishing BPT requirements, the EPA must consider data from exemplary plants using the best technology, rather than the average technology in the industry. *Id.* The First Circuit has held that the EPA even may assess technologies not yet applied if it is reasonable to believe that the technology might be available. *United States Steel Corp. v. Train*, 556 F.2d 822, 841-42 (1st Cir. 1976); see *Association of Pac. Fisheries v. EPA*, 615 F.2d 794, 819 (9th Cir. 1980) (EPA may base BAT requirements on information from a single model plant if EPA demonstrates effectiveness of required technology).

¹⁴ See *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 117 (1977) (BPT and BAT requirements do not refer only to certain individual dischargers but are applicable to all dischargers within a particular category).

¹⁵ See *C.F. American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 307 (3rd Cir. 1977). The *American Iron* court acknowledged the need to allow flexibility in the federal pollution control system to accommodate diverse conditions among dischargers across the country. *Id.* In *In re Louisiana-Pacific Corp.*, the EPA asserted that under certain circumstances the EPA may adjust general BPT requirements for individual plants. 10 *Env't Rep. Cas. (BNA)* 1841, 1843 n.4 (1977). The EPA stated that individual dischargers may submit evidence that factors relating to a particular plant are fundamentally different from factors considered during the establishment of national effluent guidelines. *Id.* at 1843-44. Section 304 of the Act defines the factors the EPA must consider when evaluating fundamental differences relevant to a BPT variance request. *Id.* If the EPA finds a fundamental difference in section 304 factors, the EPA may establish less stringent effluent limitations for a particular plant. *Id.* at 1843 n.4. The EPA need not consider an individual discharger's economic capability to comply with the generic BPT requirements. See *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 78 (1978). In *National Crushed Stone* the Supreme Court noted that Congress had anticipated and accepted the economic hardship that BPT requirements would cause, including plant closure. *Id.* at 79. The *National Crushed Stone* Court also noted that the purpose of BPT limitations was to avoid requiring the EPA to determine the economic impact of BPT controls on any individual plant. *Id.*

dividual plants.¹⁶ Section 301(c) of the Act specifies the factors that the EPA must consider when evaluating a BAT variance request.¹⁷ The Act does not provide a comparable variance provision regarding BPT requirements.¹⁸

In 1974 the EPA promulgated a regulation establishing a BPT variance provision for steam electric plants.¹⁹ The regulation required the EPA to consider several specific factors when evaluating a BPT variance request.²⁰ The 1980 amended version of the regulation specifically prohibits the EPA from considering receiving water quality as a BPT variance factor.²¹ In *Appalachian Power Co. v. Costle (Appalachian III)*²² the Fourth Circuit considered whether the EPA's exclusion of receiving water quality from the BPT variance provision complied with the plain language of the Act and the Fourth Circuit's prior ruling in *Appalachian Power Co. v. Train (Appalachian I)*.²³

In *Appalachian I*, several steam electric power companies contested a variance provision that authorized the EPA to grant a BPT variance request when factors relating to an individual plant were fundamentally different from factors considered in the establishment of generic BPT requirements.²⁴ The *Appalachian I* court accepted the steam electric companies' contention that the EPA's BPT variance provision was unduly restrictive in failing to require the EPA's consideration of certain factors.²⁵ The *Appalachian I* court concluded that the EPA must amend the

¹⁶ See *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 128 (1977) (variance provision necessary aspect of BPT limitations).

¹⁷ See 33 U.S.C. § 1311(c) (1976). When evaluating a BAT variance request the EPA must consider whether the modified requirements will represent the maximum use of technology within the economic capability of the owner or operator of a particular point source and will result in reasonable further progress toward the elimination of the discharge of pollutants. *Id.*

¹⁸ See *EPA v. National Crushed Stone Ass'n*, 449 U.S. 69, 72 (1980) (no explicit variance provision exists with respect to BPT requirements).

¹⁹ See 40 C.F.R. § 423.12(a) (1976) (amended 1980). The 1974 BPT variance clause permitted individual dischargers to submit evidence that factors relating to the equipment or facilities involved, the process applied, or other factors related to the dischargers were fundamentally different from the factors considered in the establishment of general BPT guidelines. *Id.*

²⁰ See *id.* (factors EPA must consider when granting BPT variance requests).

²¹ See *id.* § 423.12(a) (1982). The current BPT variance provision states that the EPA may not consider a discharger's impact on receiving water quality as a factor relevant to the evaluation of a variance request. *Id.*

²² 671 F.2d 801 (4th Cir. 1982).

²³ 545 F.2d 1351 (4th Cir. 1976); see 671 F.2d at 806.

²⁴ See 545 F.2d at 1359. The *Appalachian I* court interpreted the 1974 BPT variance provision as prohibiting considerations of potential costs to dischargers complying with BPT requirements. *Id.* The power companies in *Appalachian I* argued that the phrase "other such factors" in the BPT variance provision referred to economic factors. *Id.*

²⁵ See *id.* In *Appalachian I*, the Fourth Circuit held that the 1974 BPT variance provision for steam electric plants was too restrictive because the provision excluded considerations of cost relating to individual dischargers. *Id.*

variance provision to include consideration of the factors outlined in sections 301(c) and 304(b) of the Act.²⁶

In 1978 the EPA amended the BPT variance provision to comply with the *Appalachian I* court's ruling.²⁷ The 1978 variance provision did not specify receiving water quality as a relevant BPT variance factor.²⁸ In *Appalachian Power Company v. Train (Appalachian II)*,²⁹ the power companies challenged the 1978 amended variance provision on the ground that the EPA intended to exclude receiving water quality as a BPT variance factor.³⁰ The *Appalachian II* court held that the power companies' challenge was premature absent a clear statement of the EPA's position regarding receiving water quality.³¹ In *Appalachian II* the Fourth Circuit stated in dicta that receiving water quality was an appropriate BPT variance factor.³²

In 1980, The EPA further amended the BPT variance provision specifically to prohibit the EPA from considering receiving water quality when evaluating a BPT variance request.³³ In *Appalachian III*, several

²⁶ See *id.* The Fourth Circuit based the conclusion in *Appalachian I* on the court's interpretation of the statutory structure of the Act. *Id.* The *Appalachian I* court initially noted that § 301(c) allows the EPA to consider affordability factors when evaluating a BAT variance request. *Id.*; see *supra* note 17 (section 301(c) factors). The *Appalachian I* court reasoned that an exclusion of considerations of affordability in the BPT variance provision provided the EPA with more flexibility in granting BAT variances than BPT variances. 545 F.2d at 1359. The court further reasoned that since the Act's two-stage program for elimination of pollution involved the application of increasingly stringent controls, the flexibility allowed in the establishment of 1983 BAT requirements necessarily must be available for the establishment of 1977 BPT requirements. *Id.* The court therefore held that the EPA also must consider § 301(c) affordability factors when evaluating BPT variance requests. *Id.*

²⁷ See EPA Effluent Limitation Guidelines, 40 C.F.R. § 423.12(a) (1978) (amended 1980). The 1978 steam electric variance provision stated that the relevant factors in granting BPT variances may include significant cost differentials and the factors listed in § 301(c) of the Act. *Id.*; see *supra* note 17 (list of § 301(c) factors).

²⁸ 40 C.F.R. § 423.12(a) (1978) (amended 1980); see *supra* note 27 (1978 BPT variance provision for steam electric plants).

²⁹ 620 F.2d 1040 (4th Cir. 1980).

³⁰ *Id.* at 1042. In *Appalachian II* the power companies argued that the amended variance provision failed to require consideration of § 304(b)(1)(c) factors including "total cost . . . in relation to effluent reduction benefit." *Id.* at 1044. The power companies urged that effluent reduction benefits included improvements in receiving water quality. *Id.* Refusal to consider effluent reduction benefits therefore resulted in the elimination of receiving water quality as a BPT variance factor. *Id.*

³¹ See *id.* (EPA had not taken any action with respect to the 1978 BPT variance provision at the time of *Appalachian II*).

³² *Id.* at 1046. In *Appalachian II*, the Fourth Circuit reasoned that § 301(c) factors relating to reasonable further progress included possible considerations of improvements in receiving water quality. *Id.* Since the 1978 BPT variance provision allowed consideration of § 301(c) factors, the *Appalachian II* court concluded that the EPA also may consider receiving water quality when evaluating a BPT variance request. *Id.*; see *supra* note 17 (section 301(c) factors).

³³ 40 C.F.R. § 423.12(a) (1982); see *supra* note 21 (exclusion of receiving water quality as BPT variance factor).

steam electric companies contended that the EPA's refusal to consider receiving water quality violated the language of the Act as well as the Fourth Circuit's ruling in *Appalachian I*.³⁴ The power companies argued that the *Appalachian I* court's ruling required the EPA to consider factors listed in sections 304(b) and 301(c) when evaluating a BPT variance request.³⁵ In *Appalachian III*, the power companies asserted that the term "effluent reduction benefits" in section 304(b) and the phrase "reasonable further progress" in section 301(c) referred to improvements in receiving water quality.³⁶ The power companies in *Appalachian III* contended that the Fourth Circuit therefore must require the EPA to consider receiving water quality as a BPT variance factor.³⁷

The *Appalachian III* court upheld the EPA's 1980 amended BPT variance provision.³⁸ The *Appalachian III* court stated that the EPA's determination that receiving water quality was not an appropriate BPT variance factor was consistent with the language of the Act.³⁹ The *Appalachian III* court reasoned that the Supreme Court's holding in *EPA v. National Crushed Stone Association*⁴⁰ supported the EPA's exclusion of receiving water quality as a BPT variance factor.⁴¹ In *National Crushed Stone*, the Supreme Court rejected the requirement that the EPA consider section 301(c) cost factors when establishing generic BPT requirements.⁴² In *Appalachian III*, the Fourth Circuit reasoned that since

³⁴ 671 F.2d 801, 806 (4th Cir. 1982); see 545 F.2d at 1359 (*Appalachian I* court's directive to EPA to consider §§ 301(c) and 304(b) factors in BPT variance evaluation).

³⁵ 671 F.2d at 807; 545 F.2d at 1359; see *supra* note 12 (section 304(b) factors); *supra* note 17 (section 301(c) factors).

³⁶ 671 F.2d at 805-09, 809 n.3; see *supra* note 12 (section 304(b) factors); *supra* note 17 (section 301(c) factors).

³⁷ 671 F.2d at 806.

³⁸ *Id.* at 809; see *supra* note 21 (1980 BPT variance provision amendment).

³⁹ 671 F.2d at 808.

⁴⁰ 449 U.S. 64 (1980).

⁴¹ 671 F.2d at 808.

⁴² 449 U.S. at 75. The *National Crushed Stone* Court held that § 301(c) factors did not apply to BPT requirements. *Id.* The *National Crushed Stone* Court stated that the phrase "maximum use of technology within [a discharger's] economic capability" under § 301(c) did not apply to BPT requirements. *Id.* The Supreme Court noted that BPT guidelines, unlike BAT guidelines, do not require dischargers to commit their maximum economic resources to pollution control. *Id.* A BPT variance provision allowing considerations of a discharger's economic capability, therefore, would be inapposite. *Id.* The Supreme Court also rejected the coal companies' argument that a BPT variance provision must allow for considerations of affordability to provide the EPA with the same amount of flexibility in establishing both BAT and BPT limitations. *Id.* at 84 n.26. The coal companies reasoned that since the Act provided for the application of increasingly stringent controls, BPT limitations, which the EPA applies prior to BAT limitations, must be as flexible as BAT limitations. *Id.* In rejecting the coal companies' argument, the *National Crushed Stone* Court stated that allowing the EPA to consider affordability when evaluating BAT variances but prohibiting considerations of affordability in BPT variance evaluations did not necessarily provide the EPA with more flexibility regarding BAT guidelines. *Id.* at 84. The Supreme Court emphasized that the EPA may grant BAT variances only after the discharger meets the minimal BPT

section 301(c) cost factors did not apply to BPT requirements, other section 301(c) factors also did not apply.⁴³ The *Appalachian III* court concluded that receiving water quality did not apply to BPT requirements to the extent that the Act defines receiving water quality as a factor under section 301(c).⁴⁴

The *Appalachian III* court also decided that the EPA's exclusion of receiving water quality in the 1980 BPT variance provision complied with the plain language of section 304 of the Act.⁴⁵ The *Appalachian III* court reasoned that several circuit courts' decisions and the legislative history of the Act supported the conclusion that the phrase "effluent reduction benefits" in section 304(b) did not refer to improvements in receiving water quality.⁴⁶ The *Appalachian III* court concluded that although the EPA must consider section 304(b) factors when evaluating BPT variance requests, the Act did not require the EPA to consider receiving water quality since receiving water quality was not a section 304(b) factor.⁴⁷

The *Appalachian III* court relied on the Supreme Court's decision in *National Crushed Stone* as support for the EPA's refusal to consider receiving water quality as a BPT variance factor.⁴⁸ In *National Crushed Stone*, various coal mining companies asserted that the EPA must consider section 301(c) factors, including an individual plant's economic inability to meet the costs of implementing generic BPT requirements, when evaluating a BPT variance request.⁴⁹ The coal companies contended that the 1977 BPT variance provision was unduly restrictive since the

guideline. *Id.* In addition, the Supreme Court held that allowing the EPA to grant BPT variances because owners could not meet the costs of implementing the required technology would impede progress towards the Act's goal of effluent elimination. *Id.* at 78. The *National Crushed Stone* Court also noted that Congress passed the Act aware that BPT requirements would create economic hardships. *Id.* at 79; *see supra* note 15 (congressional recognition of economic hardships created by BPT requirements).

⁴³ 671 F.2d at 808; *see supra* note 17 (section 301(c) factors).

⁴⁴ 671 F.2d at 808. The *Appalachian III* court's reliance on *National Crushed Stone* did not preclude the possibility that other sections of the Act may allow considerations of receiving water quality. *See supra* note 30 (possible considerations of receiving water quality under § 304(b) of the Act).

⁴⁵ 671 F.2d at 808-09; *see supra* note 12 (section 304(b) factors).

⁴⁶ 671 F.2d at 808; *see* 33 U.S.C. § 1314(b) (1976 & Supp. V 1981). Section 304(b) authorizes the EPA to consider the relation of total cost to effluent reduction benefits when establishing BPT guidelines. *Id.* Courts generally agree that the term "effluent reduction benefits" does not refer to improvements in receiving water quality. *See* *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978) (effluent reduction benefits defined by amount or degree of reduction achieved through application of certain level of technology); *C.F. American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 297 (3rd Cir. 1977) (effluent reduction benefits do not include assessments of water quality impact).

⁴⁷ 671 F.2d at 808; *see supra* note 46 (exclusion of receiving water quality as § 304(b) factor).

⁴⁸ 671 F.2d at 808; *see* 449 U.S. 64 (1980).

⁴⁹ 449 U.S. at 72.

provision did not include the economic capability of a particular plant operator as a BPT variance factor.⁵⁰ The Supreme Court in *National Crushed Stone* held that the Act does not require the EPA to consider section 301(c) affordability factors when evaluating a BPT variance request for the coal mining industry.⁵¹ In considering the affordability question, the Supreme Court stated that the general factors listed in section 301(c) bore a substantial relationship only to BAT requirements, not to BPT requirements.⁵² The *National Crushed Stone* Court reasoned that the phrase "reasonable further progress" in section 301(c) required the existence of some prior standard against which the EPA could measure the amount of progress.⁵³ Although BPT requirements serve as prior standards for BAT requirements, no prior standards exist for BPT requirements.⁵⁴ The Supreme Court concluded that the phrase "reasonable further progress" meant that section 301(c) factors applied only to BAT variances and not to BPT variances.⁵⁵ In addition, the *National Crushed Stone* Court stated that varying BPT requirements based on the economic capability of individual dischargers would undercut the purpose and function of BPT limitations.⁵⁶ The Supreme Court noted that the Act emphasized strict adherence to technologically-based pollution controls as the necessary means to eliminate the discharge of pollutants.⁵⁷ The Supreme Court concluded that allowing variances based on the discharger's economic capability would allow dischargers to resort to practices that would impede effluent elimination.⁵⁸

Although the Supreme Court has not addressed the issue of whether section 304(b) requires the EPA to consider receiving water quality, other circuit courts have held that the phrase "effluent reduction benefits" under section 304(b) of the Act does not require the EPA to consider receiving water quality as a BPT variance factor.⁵⁹ In

⁵⁰ *Id.*; see *supra* note 42 (*National Crushed Stone* Court's analysis of relationship of § 301(c) affordability factors to BPT variance provision).

⁵¹ 449 U.S. at 72; see *supra* note 42 (*National Crushed Stone* Court's rationale for exclusion of § 301(c) affordability factors from BPT variance provision).

⁵² 449 U.S. at 73; see *supra* note 17 (section 301(c) factors).

⁵³ 449 U.S. at 75.

⁵⁴ *Id.*

⁵⁵ *Id.*; see *supra* note 42 (*National Crushed Stone* Court's reasons for exclusion of § 301(c) affordability factors from BPT variance provision).

⁵⁶ 449 U.S. at 76.

⁵⁷ *Id.* The *National Crushed Stone* Court noted that Congress, in enacting the Act, expected all dischargers to either conform to BPT standards or cease production. *Id.* Allowing variances based on a discharger's inability to meet BPT implementation costs would frustrate congressional intent. *Id.*

⁵⁸ *Id.*

⁵⁹ See *Crown Simpson Pulp Co. v. Costle*, 642 F.2d 323, 327 (9th Cir. 1981) (EPA may not grant BPT variances on basis of receiving water quality alone); *Association of Pac. Fisheries v. EPA*, 615 F.2d 794, 807 n.8 (9th Cir. 1980) (BPT variances not based on considerations of receiving water quality at individual discharger's sites); *Weyerhaeuser Co. v.*

Weyerhaeuser Co. v. Costle,⁶⁰ the District of Columbia Circuit affirmed the EPA's refusal to consider receiving water quality as a section 304 factor relevant to a BPT variance request.⁶¹ In *Weyerhaeuser*, several paper mill operators who discharged effluents into the Pacific Ocean protested the EPA's refusal to consider the ocean's capacity to dilute or absorb pollutants when establishing effluent limitations.⁶² The paper mill operators argued that the amount of pollutants discharged was small in comparison to the vastness of the Pacific Ocean and that the EPA therefore should modify effluent limitations for paper mill operators discharging into the ocean.⁶³ The District of Columbia Circuit stated that the EPA may grant a BPT variance only when section 304 factors for an individual paper mill operator were fundamentally different from the factors considered in the establishment of generic BPT standards.⁶⁴ The District of Columbia Circuit referred to the comparison of section 304 factors in a BPT variance evaluation as the "fundamental difference" test.⁶⁵ The District of Columbia Circuit concluded that receiving water quality was not a section 304 factor relevant to the fundamental difference test.⁶⁶ The *Weyerhaeuser* court reasoned that the legislative history of the Act supports the EPA's refusal to consider receiving water quality as a section 304 effluent reduction benefit factor relevant to a BPT variance evaluation.⁶⁷ The *Weyerhaeuser* court explained that the Act's shift to technologically based effluent limitations was aimed primarily at eliminating the burdensome task of assessing water quality at individual discharge sites.⁶⁸

Costle, 590 F.2d 1011, 1042 (D.C. Cir. 1978 (receiving water quality not factor relevant to evaluation of BPT variance request).

⁶⁰ 590 F.2d 1011 (D.C. Cir. 1978).

⁶¹ *Id.* at 1044.

⁶² *Id.* at 1041.

⁶³ See *id.* at 1041 n.40. In *Weyerhaeuser* the paper mill operators proposed an environmental balancing test. *Id.* The operators asserted that when environmental "debits" for pollution disposal problems incident to treatment outweighed the environmental "credits" for preventing discharges into the ocean, the EPA should favor ocean-discharging plants. *Id.*

⁶⁴ *Id.* at 1039; see *supra* note 12 (section 304(b) factors relevant to establishment of BPT limitations).

⁶⁵ 590 F.2d at 1039.

⁶⁶ *Id.* at 1038, 1044.

⁶⁷ *Id.* at 1036, 1042-43. The *Weyerhaeuser* court stated that Congress wanted to guarantee uniformity in water pollution regulation to prevent a state from relaxing regulations to encourage industrial growth in the state with the least stringent pollution control requirements. *Id.* at 1042. In addition, the *Weyerhaeuser* court noted that the Act's goal was the complete elimination of the discharge of pollutants. *Id.* at 1043. The *Weyerhaeuser* court stated that the nation's quality of life depended on the preservation of the nation's natural bounty. *Id.* The *Weyerhaeuser* court concluded that the benefits resulting from the preservation of the nation's waters outweighed the costs incurred in the elimination of effluents. *Id.*

⁶⁸ *Id.* at 1042-43; see *supra* note 1 (legislative history supporting EPA's refusal to consider receiving water quality).

The Ninth Circuit also has concluded that section 304(b) does not require the EPA to consider receiving water quality at individual plants.⁶⁹ In *Association of Pacific Fisheries v. EPA*,⁷⁰ however, the Ninth Circuit affirmed the EPA's limited consideration of receiving water quality as a section 304(b) factor relevant to the establishment of BPT limitations for subcategories of dischargers.⁷¹ In *Pacific Fisheries*, the EPA divided fish processors into two subcategories.⁷² The EPA classified processing facilities not located in population centers as "remote" processors and facilities located near population centers as "nonremote" processors.⁷³ The EPA applied less stringent BPT requirements to remote processors.⁷⁴ In *Pacific Fisheries*, several nonremote processors questioned the rationale underlying the EPA's division of fish processors into remote and nonremote subcategories and protested the EPA's application of less stringent BPT requirements to remote processors.⁷⁵ The EPA had approved different subcategory BPT requirements for remote and nonremote processors because of fundamental differences in the receiving water quality and in the implementation costs at the various processing sites.⁷⁶ The *Pacific Fisheries* court upheld the EPA's distinction between remote and nonremote processors.⁷⁷ The *Pacific Fisheries* court also determined that the Act permitted the EPA to consider improvements in receiving water quality as a section 304 effluent reduction benefit warranting the establishment of different subcategory BPT requirements for remote and nonremote processors.⁷⁸ The Ninth Circuit reasoned that although the Act emphasized pollution limitations based on technology rather than on water quality,⁷⁹ Congress probably did not intend completely to prohibit EPA's consideration of subcategory-wide

⁶⁹ *Crown Simpson Pulp Co. v. Costle*, 642 F.2d 323, 327 (9th Cir. 1981).

⁷⁰ 615 F.2d 794 (9th Cir. 1980).

⁷¹ See *id.* at 809 (EPA decided that differences in receiving waters and costs of implementing BPT requirements allowed the establishment of different BPT requirements for subcategories of Alaskan fish processors).

⁷² See *id.* at 803-04 (EPA divided fish processors into "remote" and "nonremote" subcategories).

⁷³ *Id.*

⁷⁴ *Id.* at 803. In *Pacific Fisheries*, the EPA required nonremote fish processors to screen fish solids but allowed remote processors simply to grind solids before discharging the solids. *Id.* The EPA stated that the waters into which remote processors discharged ground effluents were significantly different from the waters into which nonremote processors discharged screened effluents. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 803-05; see *supra* note 74 (different BPT requirements for subcategories of fish processors).

⁷⁷ 615 F.2d at 809.

⁷⁸ *Id.* at 807.

⁷⁹ See *id.* at 807 n.8. The *Pacific Fisheries* court acknowledged that in enacting the Act, Congress intended to free the EPA from constantly showing that improvements in receiving water quality were due to the application of effluent limitations at particular sites. *Id.*

water quality impacts.⁸⁰ The *Pacific Fisheries* court left open the question of whether the EPA must consider receiving water quality when evaluating individual BPT variance requests after the EPA has considered receiving water quality when setting subcategory BPT limitations.⁸¹

In *Crown Simpson Pulp Co. v. Costle*,⁸² however, the Ninth Circuit narrowly interpreted the holding in *Pacific Fisheries*.⁸³ The *Crown Simpson* court stated that the EPA may establish different BPT levels only for general subcategories of dischargers based on a limited consideration of receiving water quality in unusual factual situations.⁸⁴ The Ninth Circuit further stated that the EPA should not consider receiving water quality when evaluating BPT variances for individual dischargers even after the EPA has considered receiving water quality in setting subcategory BPT requirements.⁸⁵ In *Crown Simpson*, two pulp mill companies sought review of the EPA's denial of a BPT variance request.⁸⁶ The companies asserted that receiving water quality was a factor relevant to the fundamental difference test under section 304.⁸⁷ The companies argued that the EPA must grant a BPT variance request when adherence to BPT guidelines resulted in non-water quality environmental costs that were significantly higher than the benefits to receiving water quality.⁸⁸ The EPA stated that allowing considerations of improvements in receiving water quality was contrary to the language and intent of the Act.⁸⁹ The Ninth Circuit upheld the EPA's decision.⁹⁰ The Ninth Circuit stated

⁸⁰ *Id.* The *Pacific Fisheries* court noted remarks made at a Senate debate as support for the proposition that the definition of water pollutant varies according to the type and location of the water involved. *Id.* at 806 n.7; see LEGISLATIVE HISTORY, *supra* note 1, at 1347-48 (effluents dumped outside bays, where tidal action is present, not considered pollutants).

⁸¹ 615 F.2d at 807, n.9.

⁸² 642 F.2d 323 (9th Cir. 1981).

⁸³ *Id.* at 327; see Note, *EPA May Not Consider Quality of Receiving Water in Granting a Variance From Effluent Limitations*, 22 NAT. RESOURCES J. 711, 713 (1982) (comparison of Ninth Circuit's decisions in *Crown Simpson* and *Pacific Fisheries*).

⁸⁴ 642 F.2d at 328.

⁸⁵ See *id.* The *Crown Simpson* court determined that the granting of variances based on differences in receiving water quality, even in cases where the EPA had considered receiving water quality when setting subcategory BPT requirements, would return water pollution control to the pre-1972 ineffective status. *Id.*

⁸⁶ See *id.* at 325 (paper mill operators asserted that EPA improperly refused to consider receiving water quality as BPT variance factor).

⁸⁷ *Id.* at 326; see *supra* note 12 (section 304 factors relevant to fundamental difference test).

⁸⁸ 642 F.2d at 326.

⁸⁹ *Id.* at 325. In *Crown Simpson*, the EPA stated that a fundamental difference in terms of nonwater quality impact must exist for the EPA to grant a BPT variance. *Id.* The *Crown Simpson* court concluded that the significance of nonwater quality impact due to lack of improvement in receiving water quality was irrelevant. *Id.*

⁹⁰ *Id.* at 327.

that the section 304 fundamental difference test did not require the EPA to consider receiving water quality when evaluating BPT variance requests.⁹¹ The *Crown Simpson* court reasoned that Congress intended to facilitate water pollution control by eliminating the requirement that the EPA evaluate the impact of various pollution control measures on various bodies of water.⁹² A requirement that the EPA consider receiving water quality at each plant, therefore, would frustrate congressional intent.⁹³

The *Appalachian III* court's rejection of receiving water quality as a BPT variance factor also is consistent with a prior Fourth Circuit holding.⁹⁴ In *Consolidation Coal Co. v. Costle*⁹⁵ the Fourth Circuit stated that congressional intent supported the EPA's refusal to consider receiving water quality as a BPT variance factor.⁹⁶ In *Consolidation Coal* several coal mining companies protested the EPA's failure to consider receiving water quality as an environmental benefit relevant to a BPT variance evaluation.⁹⁷ The Fourth Circuit decided that receiving water quality was not a BPT variance factor.⁹⁸ The *Consolidation Coal* court reasoned that Congress outlined in the Act a limited number of cases in which the EPA may consider receiving water quality.⁹⁹ Section 301(h) of the Act, for example, authorizes consideration of receiving water quality as a basis for less stringent discharge standards for publicly owned treatment works that discharge into marine waters.¹⁰⁰ The Fourth Circuit reasoned that the inclusion of section 301(h) in the Act demonstrated

⁹¹ *Id.* at 328.

⁹² *Id.*; see *supra* notes 42 & 57 (congressional intent underlying Act).

⁹³ See 642 F.2d at 328 (considerations of receiving water quality contrary to congressional intent).

⁹⁴ 671 F.2d 801, 808-09 (4th Cir. 1982); see *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 245 (4th Cir. 1979) (rejection of receiving water quality as BPT variance factor), *rev'd in part sub nom.*, *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980).

⁹⁵ 604 F.2d 239 (4th Cir. 1979), *rev'd in part sub nom.*, *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980).

⁹⁶ *Id.* at 245. The *Consolidation Coal* court held that Congress intended to exclude considerations of receiving water quality from BPT variance evaluations. *Id.* The *Consolidation Coal* court noted that Congress, while considering amendments to the water pollution control program, heard arguments regarding the importance of considering receiving water quality. *Id.* The *Consolidation Coal* court concluded that the absence of an amendment allowing considerations of receiving water quality demonstrated congressional intent to exclude considerations of receiving water quality. *Id.*

⁹⁷ *Id.* at 244.

⁹⁸ *Id.* at 245.

⁹⁹ *Id.*; see 33 U.S.C. § 1311(h) (Supp. V 1981) (EPA may consider receiving water quality when setting BPT limitations for certain publicly owned treatment works).

¹⁰⁰ See 33 U.S.C. § 1311(h) (1976 & Supp. V 1981). Section 1311(h) authorizes consideration of receiving water quality in granting BPT variance requests for certain publicly owned treatment works. *Id.* Unless plants qualify for consideration under § 1311(h), EPA otherwise considers receiving water quality only as a basis for standards that are more stringent than the generic BPT limitations. *Id.*

congressional intent to allow EPA's consideration of receiving water quality only pursuant to specific authorization under the Act.¹⁰¹

In *Appalachian III*, the Fourth Circuit correctly reaffirmed the EPA's refusal to consider receiving water quality.¹⁰² The *Appalachian III* court properly concluded that the Supreme Court decision in *National Crushed Stone* undermined the power companies' contention that section 301(c) allowed consideration of receiving water quality as a BPT variance factor.¹⁰³ The *National Crushed Stone* Court construed the phrase "reasonable further progress" in section 301(c) to limit the applicability of section 301(c) factors to BAT rather than BPT variance evaluations.¹⁰⁴ The Supreme Court did not limit its analysis of the possible relationship between section 301(c) and BPT variances to considerations of section 301(c) cost factors.¹⁰⁵ The Supreme Court stated that section 301(c) factors in general did not bear a substantial relationship to considerations underlying BPT requirements and therefore were inapplicable to BPT variance decisions.¹⁰⁶ The Supreme Court's holding in *National Crushed Stone*, therefore, prohibits consideration of receiving water quality as a BPT variance factor to the extent that the Act defines receiving water quality as a section 301(c) factor.¹⁰⁷

The District of Columbia Circuit's decision in *Weyerhaeuser* and the Ninth Circuit's holding in *Crown Simpson* also support the *Appalachian III* court's refusal to consider receiving water quality as a section 304 BPT variance factor.¹⁰⁸ The *Weyerhaeuser* court held that an analysis of the congressional intent underlying the Act required the exclusion of receiving water quality as a section 304(b) effluent reduction benefit factor.¹⁰⁹ The *Crown Simpson* court also stated that receiving water quality was not a section 304 factor relevant to the fundamental difference test

¹⁰¹ 604 F.2d at 245. The holding in *Consolidation Coal* differed from the Fourth Circuit's holding in *Appalachian II, Id.*; see 620 F.2d at 1045. The *Appalachian II* court stated in dicta that receiving water quality may be an appropriate BPT variance factor. *Id.* The Fourth Circuit, however, based the *Appalachian II* decision on the rationale that the Supreme Court later rejected in *National Crushed Stone*. 620 F.2d at 1045; see EPA v. National Crushed Stone Ass'n, 449 U.S. at 72 (Supreme Court's affirmance of EPA's exclusion of § 301(c) affordability factors from BPT variance provision).

¹⁰² 671 F.2d at 808.

¹⁰³ *Id.*; see *supra* note 42 (*National Crushed Stone* Court rationale underlying decision that § 301(c) factors did not apply to BPT requirements).

¹⁰⁴ 449 U.S. 64, 75 (1980).

¹⁰⁵ See *id.* at 73 (section 301(c) is not applicable to BPT standards).

¹⁰⁶ *Id.*; see *supra* note 42 (*National Crushed Stone* Court rationale regarding inapplicability of § 301(c) factors to BPT limitations).

¹⁰⁷ 449 U.S. at 75; see *supra* notes 30 & 46 (possible inclusion of receiving water quality as a § 304(b) effluent reduction benefit factor).

¹⁰⁸ *Crown Simpson Pulp Co. v. Costle*, 642 F.2d 323, 327 (9th Cir. 1981); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1036 (D.C. Cir. 1978).

¹⁰⁹ 590 F.2d at 1042-43; see *supra* note 67 (*Weyerhaeuser* court's analysis of congressional intent as support for exclusion of receiving water quality as BPT variance factor).

for evaluating BPT variance requests.¹¹⁰ *Weyerhaeuser* and *Crown Simpson* therefore support the *Appalachian III* court's conclusion that the EPA's refusal to consider receiving water quality as a BPT variance factor complied with section 304 of the Act.¹¹¹ Furthermore, the *Appalachian III* court's affirmation of the EPA's 1980 variance provision is consistent with the Fourth Circuit's earlier decision in *Consolidation Coal*.¹¹² The *Consolidation Coal* court held that the EPA may consider receiving water quality only pursuant to specific authorization under the Act.¹¹³ The Act does not authorize consideration of receiving water quality in evaluating BPT variance requests by steam electric companies.¹¹⁴ Since *Appalachian III* involved the validity of a BPT variance regulation for steam electric companies, the Fourth Circuit correctly concluded that the EPA must exclude considerations of receiving water quality from the 1980 BPT variance regulation.¹¹⁵

The Fourth Circuit's holding that section 304 of the Act does not authorize consideration of receiving water quality as a BPT variance factor, however, is not entirely consistent with the Ninth Circuit's position concerning possible limited consideration of receiving water quality under the Act.¹¹⁶ Although the Ninth Circuit stated in both *Pacific Fisheries* and *Crown Simpson* that the EPA's consideration of receiving water quality at individual plants would frustrate congressional intent,¹¹⁷ the Ninth Circuit also concluded that in unusual factual settings, the EPA may consider receiving water quality when setting BPT requirements for subcategories of dischargers.¹¹⁸ Section 304 of the Act outlines the factors that the EPA must consider when setting generic BPT re-

¹¹⁰ 642 F.2d at 327.

¹¹¹ *Crown Simpson Pulp Co. v. Costle*, 642 F.2d at 327 (*Crown Simpson* court's rejection of receiving water quality as BPT variance factor); *Weyerhaeuser Co. v. Costle*, 590 F.2d at 1036 (*Weyerhaeuser* court's rejection of receiving water quality as BPT variance factor).

¹¹² *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 245 (4th Cir. 1979) (receiving water quality not considered BPT variance factor), *rev'd in part sub nom.*, *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980).

¹¹³ 604 F.2d at 245; *see supra* note 99 (specific authorizations under the Act for consideration of receiving water quality).

¹¹⁴ *See supra* note 18 (Act does not include BPT variance provision).

¹¹⁵ 671 F.2d at 808.

¹¹⁶ *See* 671 F.2d at 808-09 (*Appalachian III* court's rejection of receiving water quality as § 304 factor); *Crown Simpson Pulp Co. v. Costle*, 642 F.2d 323, 328 (9th Cir. 1981) (Ninth Circuit's recognition of EPA's limited consideration of receiving water quality in unusual factual settings); *Association of Pac. Fisheries v. EPA*, 615 F.2d 794, 807 (9th Cir. 1980) (Ninth Circuit's affirmation of limited consideration of receiving water quality).

¹¹⁷ *Crown Simpson Pulp Co. v. Costle*, 642 F.2d at 328; *Association of Pac. Fisheries v. EPA*, 615 F.2d at 807.

¹¹⁸ *Crown Simpson Pulp Co. v. Costle*, 642 F.2d at 328; *Association of Pac. Fisheries v. EPA*, 615 F.2d at 807; *see supra* note 74 (*Pacific Fisheries* court's approval of EPA's consideration of differences in receiving water for remote and nonremote fish processors).

quirements.¹¹⁹ If the EPA, when setting subcategory BPT limitations, may consider receiving water quality in even a limited number of situations, then section 304 must authorize the EPA's consideration of receiving water quality.¹²⁰

In *Appalachian III*, the Fourth Circuit cited *Weyerhaeuser* as specific support for the EPA's refusal to consider receiving water as a BPT variance factor.¹²¹ The *Weyerhaeuser* court stated that the EPA must consider the factors outlined in section 304 when evaluating variance requests.¹²² If section 304 authorizes a consideration of receiving water quality in establishing subcategory BPT requirements, then the EPA must consider receiving water quality when evaluating BPT variance requests.¹²³ The argument for exclusion of receiving water quality as a BPT variance factor therefore is reduced to considerations of practicality.¹²⁴

The legislative history of the Act supports the suggestion that consideration of receiving water quality when setting subcategory BPT limitations may be practical in limited instances.¹²⁵ Consideration of receiving water quality on an individual discharger basis, however, may be totally impractical.¹²⁶ An analysis of the legislative history of the Act clearly reveals congressional desire to facilitate the enforcement of water pollution regulations by substituting uniform, technologically based pollution guidelines for the pre-1972 water quality based guidelines that varied from state to state.¹²⁷ Varying BPT requirements according to differences in receiving water quality at individual plants makes uniformity impossible and shifts the emphasis in water pollution control back to water quality standards.¹²⁸ The legislative history of the 1972 amendments to the Act, therefore, supports the Fourth Circuit's conclusion in *Appalachian III* that receiving water quality is not a BPT variance factor under the Act.¹²⁹

¹¹⁹ 33 U.S.C. § 1314(b)(1)(B) (1976); see *supra* note 12 (section 304(b) factors relevant to establishment of BPT guidelines).

¹²⁰ See *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 70 (1980) (EPA to base BPT limitations upon regulatory guidelines established under § 304(b)).

¹²¹ *Appalachian Power Co. v. EPA*, 671 F.2d 801, 808 (4th Cir. 1982); *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1039 (D.C. Cir. 1978).

¹²² 590 F.2d at 1036.

¹²³ See *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 77-78 (1980) (EPA must consider § 304 factors used in establishing BPT guidelines when evaluating BPT variance request).

¹²⁴ See *supra* note 1 (elimination of considerations of receiving water quality facilitates enforcement of water pollution regulations).

¹²⁵ See LEGISLATIVE HISTORY, *supra* note 1, at 1347-48 (EPA may consider tidal water action when establishing effluent limitations).

¹²⁶ See *id.* at 1426.

¹²⁷ See *id.* at 309 (uniformity achieved under the Act by requiring application of effluent limitations to all plants within a given category, regardless of particular plant's location or quality of receiving water).

¹²⁸ See *id.* (Act aimed at achieving uniformity in pollution control).

¹²⁹ 671 F.2d at 808-09; see *id.* at 388 (BPT requirements not governed by existing quality