MEMORANDUM

TO: Senator Edmund S. Muskie
FROM: Leon G. Billings

SUBJECT: Effluent Guidelines for Thermal Electric Power Plants

The Environmental Protection Agency has published guidelines setting forth effluent limitations for thermal electric power plants which represent a radical departure from the requirements of the law as well as from precedents established within other previously issued effluent guidelines. For the first time, EPA has asserted that effluent limits based on best practicable technology should represent not only the capabilities of technology to reduce effluent discharges but also whether or not that technology can be installed by the deadlines set forth in the Act.

There are two reasons to be disturbed by this approach:

1. The legislative history of both the House and Senate clearly indicates that effluent limitations are to be set forth in a permit and are to be based on the degree of effluent reduction which "practicable" or "available" technology will allow. Deadline for achievement was established by the statute. The statute eliminated agency discretion to determine when effluent limitations based on technical guidelines would be achieved. Best practicable treatment must be achieved on or before July 1, 1977 -- best available technology must be achieved on or before July 1, 1983.

2. All effluent guidelines issued to date reflect the effluent reductions available through the application of practicable or available technology and assume that the Congress meant what it said when the deadline of July 1, 1977, was established. "Practicability" and "availability" are a function of what technology can deliver in the form of reduced discharges. The capability of technology to deliver such reductions must be assessed against specific factors. Once these assessments are made, each industrial category is required to achieve the applicable limits with the statutory deadlines.
Should these guidelines, as proposed, be allowed to stand, best practicable technology for many power plants would never be applied because EPA would have determined that any applicable effluent limits were not achievable by July 1, 1977. This would appear to be a basis for appeal of existing guidelines by all other industries. They will argue that no effluent limitations should be applied because it can be demonstrated that by definition the time is too short. This would completely defeat the purpose of the 1972 Act which was to remove "time" as an argument for delay.

The only apparent reason for this radical change in policy appears to be the bureaucratic interpretation of the implications of the energy crisis. The Subcommittee staff was told that EPA thought that compromises on thermal pollution needed to be made in light of the energy crisis.

Whether or not this is good public policy, flexibility is not established in the law. In any event, no justification has been put forth which indicates that a requirement to install cooling facilities for thermal discharges will have significant impact on the overall national availability of energy.

One of the agency's arguments is that best practicable and best available technology for the utility industry are the same thing -- the elimination of the discharge of pollutants -- that utilities all over the country presently utilize closed cycle cooling facilities which are demonstrated to work.

Thus, the compromise set forth is an agency reinterpretation of the law. It suggests that the deadlines of 1977 and 1983 are not the applicable deadlines because both requirements would be the same and therefore the 1977 deadline can be ignored.

Additionally, the agency has circulated proposed guidelines to implement the thermal pollution "cap cut" provision of the bill. You will recall that one of the issues on which there was strong disagreement between the House and the Senate was the House provision that allowed power companies (primarily) to come before the Administrator and demonstrate that their heat discharges would have no effect "on the protection and propagation of fish, shellfish, and wildlife" and that upon such a demonstration adequate to the satisfaction of the Administrator, a modification of technology-based effluent limitation could be granted.

The Agency's proposed guidelines for this section (Sec. 316(a)) make virtually impossible the establishment of a technology-based effluent limitation for power plants. In fact, the guidelines are written in such a way as to place the burden of proof on the Administrator to demonstrate that the waste heat discharge will not have an effect on fish, shellfish, and wildlife. And yet Congress specifically intended that the provision should not operate as a "stay" of deadlines, compliance schedules, or effluent limits.

The Agency's proposed guidelines would allow electric power companies
to get an interim permit for whatever time the power company determines necessary to make the biological studies to prove its case. The regulations propose that during the period of the interim permit, no effluent limitations or compliance schedules will apply.

The regulations provide that the power company would only have to show "no appreciable harm" to indigenous species with little or no consideration for the mandate to assure protection and propagation.

The regulations provide for a "mixing zone", a concept which the Senate specifically rejected in 1972 because a "mixing zone" is simply an area for dispersion of effluent which, if defined in a large enough area, can be used to show that effluent discharges will have no effect. (The Gulf of Mexico is a mixing zone for the Mississippi River.)

The regulations suggest that compliance with existing water quality standards may be an adequate base for exemption from the applicable effluent limitation. In other words, what should have been procedural guidelines setting forth (a) the limited basis for consideration of application for exemption from effluent limitations; (b) the nature and scope of that application; and (c) the demonstrable burden on the power companies, the agency has set up regulations which will make virtually impossible any application of thermal effluent limitations for other than the most obvious and egregious of waste heat discharges (those which were already subject to regulations in any event).

The staff is preparing a letter for your signature to Administrator Train on both the impact of the effluent guidelines and the proposed section 316 regulations. Both the majority and the minority staff feel strongly that if these regulations and guidelines are permitted to stand, the fabric of the Act can and will be seriously challenged in the courts, resulting in new assaults on the 1972 Act.

As Barry Meyer noted after meeting with EPA staff, it is appalling that the agency should be so rigorous in pressing technology-based effluent limitations for industries such as steel, feedlots, plastics and so on, and yet, for the one industry with assured financing mechanisms, regional problems and proven technology, there is an almost total abandonment of the Act. One would think that if they were going to take this kind of a position, they would have taken it with an industry that was more marginal, in which technology was more uncertain, and in which the national impact would be far greater.
MEMORANDUM

TO: Senator Edmund S. Muskie

FROM: Leon G. Billings

SUBJECT: Staff Proposal for Revision of S. 3206

The attached staff revision of S. 3206 is designed to eliminate some of the criticisms directed at both the original Administration proposal and the optional approach which you proposed at the last Executive Session on this measure. At the same time the proposed revision does not compromise the Administration's position that local bonds sold to finance the Federal share of public projects should be treated, for the purposes of taxation, the same as Federal bonds.

In essence the staff draft accepts the position of Governor Rockefeller et. al., by dropping any reference to the reimbursement section of the existing Act and accepts the position of the minority by dropping any reference to user charges. The bonding method as envisioned by this draft provides as follows:

1. The Secretary can enter into contract with a contractee (as defined) to repay, over a period not to exceed 30 years, amounts sufficient to cover the Federal share of principal and interest on obligations issued by the contractee.

2. The interest on any obligation used to pay the Federal share of a project's cost would be taxable, and the contract executed would be supported by the full faith and credit of the United States.

3. The Secretary's authority to enter into contracts would be limited to two years, 1969 and 1970.

4. The funds available for the contract program would be allotted on the same basis as funds available for the grant program and the states would determine priority for contracts without regard to the population of participating communities.
Attached to the contract allotment provision is a new subsection which allows the Secretary to re-allocate funds which are not obligated by January 1, 1970. Grant funds, as you know, cannot be re-allocated until six months following the end of the fiscal year for which they were allotted. The purpose of this new provision is to accelerate re-allocation of contract funds and thus make unused contract funds available at an earlier date.

Additionally, the Secretary is required to receive, within 90 days after enactment, a letter from each Governor indicating the intent of that state to participate in the program. Failure to file such a letter within 90 days thereafter will make any contract funds allotted to that state available for re-allocation.

LEON G. BILLINGS
To amend the Federal Water Pollution Control Act, as amended, relating to the construction of waste treatment works, and to the conduct of water pollution control research, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Water Quality Improvement Act of 1968."

SEC. 2. Section 8 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 466e), is amended:

(a) By changing the words "make grants to" in subsection (a) to "make grants to, and enter into contracts with,");

(b) By redesignating subsections (f) and (g) as (h) and (i);

(c) By inserting after the word "appropriated" wherever it appears in the second sentence of subsection (c) the words "for grants";

and

(d) By inserting two new subsections after subsection (e) to read as follows:

"(f)(1) For the purpose of this subsection, the term 'contractee' means a State, municipality, or intermunicipal or interstate agency, or an instrumentality established for the purpose of constructing or financing treatment works.
"(2) Within the limits established from time to time in appropriation Acts for fiscal year 1969 and for fiscal year 1970 the Secretary may enter into contracts, in accordance with the provisions of this subsection, with any contractee to make payments to the contractee or to his designee over a period of not to exceed thirty years to cover the Federal share of principal and interest payments on obligations issued by the contractee to finance the construction costs of treatment works that meet the requirements of paragraph (7) of this subsection.

"(3) The interest on any obligation which is secured by a contract under paragraph (2) of this subsection shall not be exempt from Federal income taxation, and no payment shall be made by the Secretary for any portion of the principal or interest on any obligation the interest on which is so exempt.

"(4) The Federal share of such principal and interest costs shall be determined in the same manner as such share is determined under subsections (b) and (h) of this section for grants for such works.

"(5) Each contract shall include such reasonable conditions as the Secretary deems appropriate. Each contract shall provide that the obligation shall bear interest at not to exceed such per centum per annum as the Secretary deems reasonable, taking into account the range of interest rates prevailing in the private market for similar obligations and the risks assumed."
"(6) Any contract executed by the Secretary under this subsection shall be an obligation supported by the full faith and credit of the United States and shall be incontestable except for fraud or misrepresentation of which the holder or the related bond or other instrument has actual knowledge, and may be pledged as security for such bond or other instrument.

"(7) Prior to entering into each contract under this subsection, the Secretary must first determine:

"(A) That the treatment works are included in any comprehensive water quality control and abatement plan developed under this Act or under development, and that such works are consistent with a program, meeting criteria established by the Secretary, for a unified or coordinated areawide waste treatment system as part of the comprehensively planned development of the area;

"(B) That such works have been approved by the appropriate State water pollution control agency;

"(C) That such works have been certified by the appropriate State water pollution control agency as entitled to priority over all other treatment works in the State otherwise eligible for contracts under this subsection determined on the basis of the following criteria:

"(1) The extent to which such treatment works will achieve applicable water quality standards;
"(iii) The extent to which provisions for training, surveillance, and adequate project planning and design will assure effective management of the works; and

"(iv) The extent to which the project is part of an effective river basin pollution control plan or management program developed or under development.

"(b) That there is reasonable assurance of repayment by the contractee of his share of any obligation issued for costs of construction of the treatment works

"(b)(a) Funds appropriated to the Secretary for the purpose of liquidating contracts entered into under this subsection shall be subject to the allotment provisions of subsection (c) of this section:

Provided. That such funds shall not be available to make reimbursements under the sixth and seventh sentences of subsection (c) of this section.

"(b) Sums allotted to a State under this subsection which are not obligated by January 1, 1970 because of a lack of projects which have been approved by the State water pollution control agency under subsection (b)(1) of this section and certified as entitled to priority under subsection (b)(4) of this section, shall be reallocated by the Secretary, on such basis as he determines to be reasonable and equitable in accordance with regulations promulgated by him, to States having projects approved under this section for which contracts have not been entered into because of lack of funds. Notwithstanding the preceding the
Secretary shall, within 90 days after enactment of this Act, receive from the Governor of a state a letter of intent to participate in this program. Failure to file such a letter of intent within 90 days thereafter will make funds allotted to such state immediately available for reallocation.

SEC. 3. Section 8(d) of the Federal Water Pollution Control Act, as amended, is amended to read as follows:

"(d) For the purposes of making grants under subsection (b) of this section, there is authorized to be appropriated $700,000,000 for the fiscal year ending June 30, 1969; $1,000,000,000 for the fiscal year ending June 30, 1970; and $1,250,000,000 for the fiscal year ending June 30, 1971. For the purposes of liquidating contracts entered into under subsection (f) of this section, there is authorized to be appropriated such sums as may be necessary for those fiscal years and for each fiscal year thereafter: Provided, That the limits on total principal payments for contracts under this subsection established in Appropriation Acts for fiscal year 1969 and for fiscal year 1970, shall not exceed an amount adequate to make periodic payments of the principal sums authorized in the preceding sentence less any sum appropriated each fiscal year for grants under subsection (b) of this section. Sums appropriated pursuant to this subsection shall remain available until expended. At least 50 per centum of the first $100,000,000 appropriated to make grants under subsection (b) of this section shall be used to make grants for the construction of treatment works servicing municipalities of less than one hundred and twenty-five thousand population."
MEMORANDUM

TO: Senator Edmund S. Muskie

FROM: Leon G. Billings

SUBJECT: Proposed Revision of Section 11

The staff has prepared draft language to broaden the ability of Federal agencies to deal with pollution which is an indirect result of Federal activities. This language appears to be fully justified on the basis of hearings on thermal pollution.

Existing law now requires Federal agencies to cooperate with the Secretary of Interior to control pollution from Federal installations; however, the Administration has interpreted this language as confining such pollution control activities only to direct Federal operations.

The language proposed broadens the concept of Sec. 11 of the Act by declaring that "any Federal department or agency... which carries out, or issues any lease, license, or permit or enters into any contract for, any activity,..." shall cooperate with the Secretary and other pollution control agencies to insure compliance with applicable water quality standards.

The proposed revision of the Act does not give the Secretary certification authority but it does place an additional burden on other Federal agencies to consider water quality standards prior to entering into a contract or granting a lease, license or permit--thus the ABC would be required to "cooperate with the Secretary...to insure compliance with applicable water quality standards and the purposes of this Act."

This provision has been discussed with Bill and he approves.

LEON G. BILLINGS
AGENCIES TO CONTROL POLLUTION

"SEC. 11. (a) It is hereby declared to be the intent of the Congress that any Federal department or agency--

"(1) having jurisdiction over any building, installation, or other property, or

"(2) which carries out, or issues any lease, license, or permit or enters into any contract for, any activity, shall, insofar as practicable and consistent with the interests of the United States and, where applicable, within any available appropriations, cooperate with the Secretary, and with any State or interstate agency or municipality having jurisdiction over waters into which any matter is discharged from such property, or which is affected by such activity, to insure compliance with applicable water quality standards and the purposes of this Act.

"(b) In his summary of any conference pursuant to section 10(d)(4) of this Act, the Secretary shall include references to any discharges allegedly contributing to pollution from any Federal property. Notice of any hearing pursuant to section 10(f) involving any pollution alleged to be affected by any such discharges shall also be given to the Federal agency having jurisdiction over the property involved and the findings and recommendations of the Hearing Board conducting such hearing shall also include references to any such discharges which are contributing to the pollution found by such Hearing Board."
Honorable Russell E. Train
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Administrator:

On March 4, 1974, the Environmental Protection Agency published the proposed effluent guidelines for the "Steam Electric Power Generating Point Source Category". Subsequently, EPA provided the Public Works Committee staff with draft copies of proposed rulemaking relating to modification of effluent limits applicable to thermal discharges on the basis of evidence assuring protection and propagation of fish, shellfish and wildlife.

I have reviewed these two documents and am concerned that, taken together, they provide loopholes for sources of thermal pollution to avoid the requirements of the Federal Water Pollution Control Act of 1972.

EPA's decision to include in the proposed regulations discussion of and, in effect, the suspension of the timetables of compliance required for the application of best practicable technology is improper. Congress established the timetables for compliance and such timetables are not matters for Administrative discretion. The law established precisely that "practicability" and "availability" are a function of what technology can deliver in the form of reduced discharges. Once these limits are identified, each industrial category is required to achieve the applicable limits within the statutory deadlines.

EPA's "Proposed Procedures for the Imposition of Alternative Effluent Limitations" for sources of thermal pollution also constitute a major departure from the provisions of the Act. The proposed regulations would place the burden of requesting a challenging hearing on individuals other than the owner or operator. In so doing, the burden of proof in determining the adequacy of alternative effluent limits has been transferred from the owner to the Administrator and the public. This is totally contrary to what Congress intended. In all aspects, procedural as well as substantive, Congress intended that the burden of demonstrating that the
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Protection and propagation of a balanced, indigenous population of fish, shellfish, and wildlife will be assured by a level of performance other than best practicable technology was to rest on the person applying for such modification.

Further, the law specifically requires the applicant to demonstrate to the satisfaction of the Administrator that protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife in the receiving waters will be assured after a modified effluent limit has been imposed. The two tests proposed do not meet this criterion.

Your regulations propose mere appearance of tests which the applicant must meet to provide such assurance. They do not satisfy the rigorous requirement intended by the Act.

First, the "absence of prior harm" test proposed in the regulations assumes that no future harm will occur to the balanced indigenous population if an applicant can show that no appreciable harm has previously resulted from the thermal component of discharges from existing sources. This is an unwarranted assumption.

The second element of this test, "Protection of Representative Important Species", which requires an applicant to demonstrate that the discharge will assure the protection and propagation of one or more representative, important species is also improper. This test relies on the viability of an indicator species rather than an analysis of the aquatic ecosystem affected by the thermal discharge.

I am disturbed by the introduction of the concept of "mixing zones". This concept was rejected by Congress when it enacted P.L. 92-500. A mixing zone is not authorized in the definition of effluent limitations. It is unenforceable. It represents still another effort on the part of the Agency to reinstate the fiction of ambient water quality standard enforcement and is unlawful.

Finally, P.L. 92-500 requires that any modification of effluent limits applicable to thermal sources occur prior to issuance of a Section 402 permit and after a clear demonstration by the applicant of protection of fish, shellfish and wildlife. Thus, an applicant must seek a modification of thermal effluent limits when applying for the first permit in 1974 or when new permits establishing new requirements are imposed.

In summary, Russell, it appears that the effluent guidelines have been delayed to permit thermal sources to escape regulation through the loopholes provided in the Section 316 regulations. Your agency has only converted an intended narrow exception into a gaping escape hatch. Not
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...all have deadlines been abandoned but the controls to be achieved have also been sacrificed, and because of your lateness, you are saying the timetables cannot be achieved.

I hope that you will re-evaluate the proposed regulations to assure compliance with the law. To await citizen actions to enforce compliance with the law is unwise. But your Agency invites that course with these regulations. If the regulations are not revised, there will be interminable delay in dealing with thermal pollution, administrative confusion associated with an immense number of applicants, and worst of all, adverse long term impact on aquatic ecosystems as a result of waste heat discharges.

Sincerely,

EDMUND S. HUSKIE, U.S.S.
Chairman, Subcommittee on Environmental Pollution