Denver Law Review

Volume 63
Issue 3 *Natural Resources Law Symposium*

Article 7

February 2021

Chemical Manufacturers Association: The Fundamentally Different Factor Variance - A Necessary Evil

Alison L. Taylor

Chemical Manufacturers Association: The Fundamentally Different Factor Variance—A Necessary Evil

Introduction

In *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*,[1] the Supreme Court held that fundamentally different factor variances may be granted for toxic pollutants. This decision allows the Environmental Protection Agency (EPA) to continue to grant variances from categorical regulations for dischargers of toxic pollutants who demonstrate that they are fundamentally different from the other dischargers in their category.

This comment will outline the development of these variance provisions as well as the development of the Federal Water Pollution Control Act (hereinafter referred to as the FWPCA), which governs those provisions. Previous judicial interpretations of the variance provisions will be analyzed and the policy issues raised by the decision will be discussed. This comment takes the position that the variance provisions are necessary for effective enforcement of the FWPCA.

I. Background

A. *Legislative Background*

In October 1972, the FWPCA was amended by Congress to set a national goal of eliminating the discharge of pollutants into navigable waters by 1985.[2] Prior to 1972, regulations were aimed at aiding the states to provide for enforcement of specific water quality standards.[3] Taking a new approach, the 1972 amendments emphasized regulations based on discharges instead of regulations based solely on water quality.

The nature and extent of the administrative problems that the FWPCA would provoke were not fully recognized in 1972. To provide guidance on the character and scope of corrections that might be necessary during the first years of implementation, Congress created a National Commission on Water Quality.[4] Based on the final report of the Commission and testimony from industry representatives, the EPA, environmental groups, scientists, and federal, state, and local officials, Congress amended the FWPCA in the Clean Water Act of 1977.[5] The

1. 105 S. Ct. 1102 (1985).
2. 33 U.S.C. § 1251(a)(1) (1976).
3. 1 F. Grad, Treatise on Environmental Law 3-80 (1973).
4. 33 U.S.C. § 1325 (1976).
5. The House passed H.R. 3199 on April 5, 1977, and shortly thereafter the EPA submitted to both Houses a package of amendments approved by the Carter Administration. After further hearings in both Houses, the Senate passed S. 1952 on August 4, 1977. At the same time, it passed H.R. 3199, completely rewritten to reflect the substance of S.

purpose of most of the 1977 amendments[6] was to correct specific implementation problems, especially those that were raised by the provisions dealing with toxic pollutants,[7] in order to better regulate pollution at the point of discharge.

Congressman Ray Roberts described the amendments to Title III of the FWPCA and its provisions dealing with toxic pollutants as "the most important and far-reaching amendments."[8] Indeed, to Congress, the public and the many industries involved, these amendments were of great concern. The principal mechanism designated for regulating the discharge of toxic pollutants, § 307 of the FWPCA,[9] had been more difficult for the EPA to implement than Congress had expected in 1972. Congress was unaware of the lack of information on toxicity, persistence, and bioaccumulation of pollutants. Moreover, the period of time within which the EPA was to publish a list of toxic pollutants and promulgate regulations was unrealistically short. The promulgated standards could not be met within the time allowed for compliance and thus posed a threat of severe economic hardship on individual plants. The pollutant-by-pollutant regulatory approach made long-range planning impossible for industry because standards were to be issued for pollutants that would likely require different control technologies. Faced with these problems and concerns, the EPA was slow to implement § 307.[10] This delay, however, upset environmental action groups, who brought four lawsuits to compel the EPA to regulate toxics promptly and to issue pretreatment regulations.[11] In 1975 and 1976, the EPA developed a strategy designed both to reduce the burden on industry and to regulate the discharge of toxic pollutants. This strategy, which provided the basis for the settlement of the four lawsuits, was approved in a consent decree issued by Judge Flannery of the United States District Court for the District of Columbia in 1976.[12]

The consent decree strategy was essentially adopted by Congress in the 1977 amendments to correct the numerous problems of § 307 im-

1952. The bill agreed upon after further hearings, H.R. 3199, was printed on December 6, accompanied by the Conference Report, H.R. REP. No. 830, 95th Cong., 1st Sess. (1977). Both Houses passed the bill by substantial majorities on December 15. Hall, *The Clean Water Act of 1977*, 11 NAT. RESOURCES LAW. 343-72 (1978).

6. Although the amendments themselves are entitled the "Clean Water Act of 1977," § 2 of the Clean Water Act amends FWPCA § 518 to read: "This Act may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act)." Throughout this comment, references to the "amendments" refer to the 1977 amendments and references to the FWPCA refer to the Federal Water Pollution Control Act. The corresponding U.S.C. cite will be given in the footnote the first time a section of the FWPCA is cited.

7. Toxic pollutants are defined in § 502 of the FWPCA, 33 U.S.C. § 1512 (1982).

8. 123 CONG. REC. H12926 (1977).

9. 33 U.S.C. § 1317 (1976), *amended by* 33 U.S.C. § 1317 (1982).

10. 41 Fed. Reg. 23576-23578 (1976) (codified at 40 C.F.R. pt. 129 (1985)). A history of the specific problems faced by the EPA is provided by Hall, *supra* note 5.

11. NRDC v. Train, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), *modified sub nom.* NRDC v. Costle, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979), *modified sub nom.* NRDC v. Gorsuch, 17 Env't Rep. Cas. (BNA) 2013 (D.D.C. 1982), *modified sub nom.* NRDC v. Ruckelshaus, Consol. No. 2153-73 et. al. (Jan. 6, 1984).

12. NRDC v. Train, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976).

plementation.[13] The EPA was to develop and issue effluent guidelines, pretreatment standards, and new source performance standards for twenty-one major industries covering sixty-five groups of pollutants by December 31, 1979.[14] These guidelines were to be implemented in accordance with §§ 301, 304, 306, and 307.[15] No point source[16] was to discharge without a permit issued by the EPA or by a state with an approved permit program under the National Pollutant Discharge Elimination System (NPDES), which is set forth in § 402 of the Act.[17]

Pretreatment standards are set forth in § 307(b) of the FWPCA.[18] Under this section, the EPA is required to designate the category or categories of dischargers to which these standards apply. Pursuant to the consent decree and legislative intent, effluent limitations for dischargers that expel pollutants not susceptible to treatment by sewage systems or that interfere with the operation of those systems are regulated under the two-phase approach applied to direct dischargers in § 301(b)[19] of the FWPCA.[20] This approach requires that dischargers comply with the best practicable control technology currently available (BPT) by July 1, 1977[21] and subsequently meet more stringent effluent standards consistent with the best available technology economically achievable (BAT). For toxic pollutants, the BAT standard must be met by July 1, 1984. As control technology, processes, operating methods, or other alternatives change, the EPA is required by § 307(b)(2) to revise the pretreatment standards following the procedure established by § 307(b).

The special provision for revising pretreatment standards is one of the few provisions in the FWPCA allowing for the revision or modification of standards. Prior to 1972, only § 301(c),[22] which permits the plant-by-plant modification of BAT standards on the grounds of eco-

13. Congress sanctioned the consent decree approach to establishing pretreatment standards for indirect dischargers. *See* Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229, 1244 (D.C. Cir. 1980).

14. All of the pollutants listed are carcinogens, suspect carcinogens, or seriously toxic at low concentrations and are discharged by one or more of the industries. These 21 industries discharge substantial quantities of at least some of the listed pollutants.

15. 33 U.S.C. §§ 1314, 1317 (1982) and §§ 1311, 1316 (1982 & Supp. I 1983).

16. "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stack, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1982).

17. 33 U.S.C. § 1412 (1982).

18. 33 U.S.C. § 1317(b) (1982).

19. 33 U.S.C. § 1311(b) (1982).

20. *See* NRDC v. Train, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976); H.R. REP. No. 830, 95th Cong., 1st Sess. 87, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4326, 4462.

21. BPT is defined as "the establishment of a range of best practicable levels, to be based on: the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." SENATE COMM. ON PUB. WORKS, 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 169 (1973). Although the deadline for BPT passed in 1977, the EPA is required to issue BPT level standards as an interim measure pending development of more stringent standards. The electroplating BPT-level pretreatment standards are such standards.

22. 33 U.S.C. § 1311(c) (1976).

nomic hardship, existed as an express statutory authority for relaxing a limitation. The 1977 amendments, however, added § 301(g)[23] which allows modification of BAT standards if a discharger can show that the modification will not degrade water quality, nor result in the discharge of pollutants that may endanger humans or the environment. The section, however, expressly provides that these modifications do not apply to toxic pollutants.[24]

Central to the controversy surrounding *Chemical Manufacturers Association* is another provision prohibiting modifications of provisions dealing with toxic pollutants. Section 1311(*l*),[25] added by the 1977 amendments, provides that the EPA may not modify any requirement of § 1311 as it applies to any toxic pollutant. The EPA's treatment of this provision will be examined in the next section.

B. *Administrative Background*

The EPA has developed BPT, BAT, and pretreatment regulations,[26] which cover twenty-one major industry categories and sixty-five toxic pollutants or groups of pollutants, through a series of extensive rulemaking proceedings set out in § 307 of the FWPCA. In developing these regulations, the EPA must take into account certain factors in § 304(b), such as age of equipment, age and type of facilities, and the process employed.[27] The EPA compiles extensive data, including scientific information on the pollutants discharged by an industry, and establishes subcategories within the industry to reflect any differences identified by the data among segments of the industry.

The EPA realized early in the rulemaking process that data for each statutory factor for every discharger in an industry category could not be obtained. Thus, establishment of accurate subcategories was not always possible. The EPA also recognized that, if the § 304(b) factors were to be considered in the establishment of limitations and standards applicable to a plant, a procedure for considering those factors in an individual proceeding for plants that demonstrated that they were fundamentally different from the plants that the EPA examined in developing the regulations was needed. With this scheme in mind, the EPA developed "fundamentally different factor" variance provisions (hereinafter referred to as the "FDF variance provision").[28]

Section 403.13 of the General Pretreatment Regulations for Existing and New Sources of Pollution,[29] challenged in *Chemical Manufac-*

23. 33 U.S.C. § 1311(g) (1982) (amending 33 U.S.C. § 1311 (1976)).

24. Noticeably absent from the statutory scheme of the FWPCA is a BPT variance provision. *See infra* notes 32 & 33 and accompanying text.

25. 33 U.S.C. § 1311(*l*) (1982) (amending 33 U.S.C. § 1311 (1976)).

26. *See supra* notes 18-21 and accompanying text.

27. 33 U.S.C. § 1314(b) (1982).

28. 40 C.F.R. § 403.13 (1983) is the FDF variance provision that applies to indirect dischargers who discharge wastes into publicly owned treatment works. 40 C.F.R. § 125.30 (1985) is the FDF variance provision that applies to direct dischargers who discharge wastes directly into navigable waters.

29. 40 C.F.R. § 403.13 (1985).

turers Association, applies to indirect dischargers. The section provides, in relevant part, that a request for the establishment of pretreatment standards less stringent than those required by the statute shall only be approved if the requester[30] can demonstrate that it is fundamentally different in ways corresponding to § 304 factors.[31] In addition, the discharger must show that compliance with the regulations promulgated for its category would result in costs out of proportion to the costs considered by the EPA or, in the alternative, that compliance results in a non-water quality environmental impact more adverse than the impact considered during development of the pretreatment standards. Section 403.13 also provides for public notice of the FDF application and a public hearing.

Noticeably absent from the statutory scheme of the FWPCA is a BPT variance provision.[32] Section 403.13 makes no distinction between BPT and BAT in its variance provisions. Thus, the EPA has provided BPT variance provisions for every category and subcategory of industrial point sources for which it has promulgated regulations. All BPT variance provisions are similar in form, allowing for a variance from BPT standards upon a showing that factors in existence at the individual point source are fundamentally different from those considered by the EPA in promulgating regulations for the point source's category. The EPA has stated that, because § 301(c) of the FWPCA expressly provides for modifications of only BAT standards based on economic factors, only non-economic technological and engineering factors will be considered in granting a BPT variance to avoid violations of § 301(c).[33] The courts have struggled with FDF variances for BPT standards and toxic pollutants. Pursuant to the decision of the Court of Appeals for the Third Circuit in *National Association of Metal Finishers v. EPA*,[34] the EPA

30. A "requester" is defined as an industrial user or other interested person seeking a variance from the limits specified in a categorical pretreatment standard. 40 C.F.R. § 403.13(a) (1985).

31. Factors considered fundamentally different include the nature, quality, and volume of pollutants contained in the raw waste load of the user's process wastewater; the energy requirements of the application of control and treatment technology; the age, size, and land configuration as they relate to the user's facilities; and the cost of compliance with required control technology. 40 C.F.R. § 403.13(d) (1985). Factors not considered fundamentally different include the feasibility of installing the required equipment within the statutory deadline and the user's ability to pay for the required equipment. 40 C.F.R. § 403.13(e) (1985).

32. This absence may be explained by the fact that BPT standards, designed to require the best practicable technology to be used, are not strict standards. If the technology is not practicable, then the technology is not required for compliance. BAT standards, designed to require the best available technology to be used, are more strict. If the technology is not practicable under the BAT standards, the discharger has no alternative but to apply for a variance stating that compliance is not practicable. Also missing from the statutory scheme is any reference to "categories and classes of point sources" for BPT standards. *See* 33 U.S.C. § 1311(b)(1) (1982). This omission has resulted in litigation as to whether EPA has authority to issue regulations for BPT or whether BPT must be decided on a plant-by-plant basis. *See* American Iron and Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975).

33. 30 Fed. Reg. 30,073 (1974) (memorandum of Assistant Administrator for Enforcement and General Counsel).

34. *See infra* note 59.

amended § 403.13 to prohibit variances for toxic pollutants.[35] The following section examines that decision and prior decisions interpreting the FDF variance provisions and the FWPCA.

C. *Judicial Background*

The contours of the "fundamentally different factor" variance provisions will be an active subject for future litigation over BPT.[36] The few district courts that have reviewed the variance provisions have rendered ambiguous and vague decisions. Consequently, appellate courts have struggled with the precedential value and meaning of these decisions.

The first challenge to the BPT variance provisions was in *NRDC v. EPA*,[37] in which the NRDC argued that variance provisions violate the congressional goal of uniformity and the goal that subcategories be the only means of dealing with variations among dischargers. The court disagreed and held that Congress intended uniform treatment only for similar plants. The court based its decision on the fear that, in formulating requirements for thousands of plants, the EPA would overlook the distinguishing characteristics of individual plants. Emphasizing this rationale, the majority stated that "without variance flexibility, the program might well founder on the rocks of illegality."[38]

In 1976, the Fourth Circuit struck down the EPA's interpretation of the BPT variances. In *Appalachian Power Co. v. Train*,[39] the court held that the BPT variance provision for steam-electric generating plants should have included the consideration of the economic effects on individual point sources. The court held that a discharger's "economic capability" should be considered in deciding whether to grant a BPT variance because it must be considered under § 301(c), the variance provision for BAT.[40] The court reasoned that because BPT standards were not meant to be more stringent than BAT standards and because BAT variances were permitted for economic reasons, variances should also be allowed from BPT standards for economic reasons.[41]

In 1976, the Fourth Circuit also decided *E. I. DuPont de Nemours & Co. v. Train*,[42] criticizing just as it did in *Appalachian Power*, the EPA's failure to consider economic factors in granting BPT variances. In *E. I. DuPont de Nemours & Co. v. Train*,[43] the Supreme Court granted certiorari to consider the issue of BPT variances. DuPont had challenged the EPA's authority under § 301 of the FWPCA to issue industry-wide regu-

35. 49 Fed. Reg. 5131, 5132 (1984) (codified at 40 C.F.R. pt. 403).

36. Note, *Annual Water Quality Committee Review of Significant Legislative, Judicial, and Administrative Developments in 1979: Clean Water Act*, 13 NAT. RESOURCES LAW. 231, 238 (1980).

37. 537 F.2d 642 (2d Cir. 1976).

38. *Id.* at 647.

39. 545 F.2d 1351 (4th Cir. 1976).

40. The EPA has stated that consideration of economic factors in granting BPT variances violates § 301(c) of the FWPCA. *See supra* note 33 and accompanying text.

41. *Appalachian Power*, 545 F.2d at 1359.

42. 541 F.2d 1018 (4th Cir. 1976).

43. 430 U.S. 112 (1977).

lations limiting discharges by existing plants. The Court held that "the FWPCA authorizes the 1977 limitations (BPT) as well as the 1983 limitations (BAT) to be set by regulation [instead of on a plant-by-plant basis at the permit-issuing stage], so long as some allowance is made for variations in individual plants, as the EPA has done by including a variance clause in its 1977 limitations."[44] The Court, however, also held that the EPA may withhold variances from individual plants that are unable to comply with the new source standards.[45]

The rationale of *DuPont* is particularly difficult to understand. First, the Court concluded that the FWPCA authorizes BPT limitations to be set by regulation so long as some allowance is made for variations in individual plants. The Court does not cite to any portion of the FWPCA that expressly or impliedly makes such a statement. Thus, it appears that the Court's reasoning is the sole basis for its conclusion. Second, by upholding the EPA's decision to prohibit variances for plants unable to comply with the new source standards, the Court seems to contradict itself.[46] Finally, the Court's discussion of Congress' intent to set limitations by regulation in order to promote uniformity within a class and category of point sources[47] is not reconciled with the Court's strong statement for the allowance of variances.

The vagueness of *DuPont* leaves much room for differing interpretations of the Court's holding. Subsequent decisions have interpreted *DuPont* as holding that variances are allowable and necessary, although *DuPont* easily may be read as holding just the opposite. For instance, in *Weyerhauser v. Costle*,[48] pulp and paper makers challenged the 1977 regulations promulgated by the EPA. The Court of Appeals for the District of Columbia disagreed with the implication in *Appalachian Power* that those permits that impose requirements beyond a source's economic capability are unacceptable. The court held that the fact that a discharger could not afford to comply need not control the BPT variance decision.[49] In both *Weyerhauser* and *Kennecott Copper Corp. v. EPA*,[50] challenged regulations were upheld because the "crucial" variance mechanism provided the necessary flexibility.[51] The Fourth Circuit again considered BPT variances in *Consolidation Coal Co. v. Costle*[52] and,

44. *Id.* at 128.

45. *Id.* at 138.

46. There is contradiction by allowing variances from BPT requirements to account for differences in plants but not allowing variances unless there is statutory authority for them. There is no statutory authority allowing BPT variances (§ 301(e) and § 301(g) only apply to modifications of the § 301(b)(2) BAT limitations). Perhaps the contradiction can be resolved by reasoning that new sources are more flexible than existing sources and that existing sources vary greatly and are not easily changed to fit rigid classifications. Thus, the Court would rather force flexible new sources into compliance with standards that may be impossible for misclassified existing plants to attain.

47. *DuPont*, 541 F.2d at 128-33.

48. 590 F.2d 1011, 1036 (D.C. Cir. 1978).

49. *Id.* at 1035-36.

50. 612 F.2d 1232 (10th Cir. 1979).

51. *Weyerhauser*, 590 F.2d at 1040-41; *Kennecott*, 612 F.2d at 1243-44.

52. 604 F.2d 239 (4th Cir. 1979), *rev'd*, 449 U.S. 64 (1980).

consistent with its decision in *Appalachian Power*, held that a discharger must show both that BPT is beyond its economic capability and that the proposed lesser reductions represented "reasonable further progress" towards the goal of eliminating pollutant discharges.[53] The judicial confusion in interpreting these provisions of the FWPCA is evidenced by the reversal of the decision the following year.

In 1980, NRDC petitioned the Fourth Circuit for review of EPA's compliance with the 1976 *Appalachian Power* decision. In a case also entitled *Appalachian Power Co. v. Train*[54] (*Appalachian Power II*), NRDC argued that Congress' enactment in 1977 of § 301(*l*) barred FDF variances for toxic pollutants. The EPA argued that § 301(*l*) of the Act applied only to the § 301(c) and § 301(g) modifications. The Fourth Circuit agreed and held that an FDF variance is not a modification of applicable limitations, but instead an individual determination of the appropriate limitations.[55] Thus, the court held that § 301(*l*) did not apply to BPT variances and thereby, reflected a change in thinking after *DuPont*. It is evident that courts have encountered great difficulty in making consistent decisions in the face of changing statutory regulations.

In a case resembling the 1976 *Appalachian Power* decision, the BPT variance question once again reached the Supreme Court from the Fourth Circuit. In *EPA v. National Crushed Stone Association*,[56] the Court held that the EPA may withhold variances from individual polluters who are economically unable to comply with the BPT limitations.[57] The Court reasoned that Congress intended to force polluters to comply with minimal standards or shut down.[58] Implicit in the holding was an acknowledgment that variances from the BPT limitations for those economically *able* to comply are permitted.

In 1983, the Third Circuit considered the BPT variance provision. In *National Association of Metal Finishers v. EPA*,[59] NRDC argued that § 301(*l*) prohibits BPT variances for toxic pollutants. Reminiscent of its argument in *Appalachian Power II*, the EPA argued that § 301(*l*) applies only to § 301(c) and § 301(g) modifications. The Third Circuit agreed with NRDC and held that § 301(*l*) applies to BPT variances. The court disagreed with the *Appalachian Power II* decision and distinguished the *DuPont* decision as applying only to BPT variances and not to BAT or pretreatment standards.[60]

In 1984, the Supreme Court addressed the validity of EPA regulations promulgated pursuant to the Clean Air Act Amendments of 1977.[61] In *Chevron, U.S.A. v. NRDC*,[62] environmental groups filed a pe-

53. *Id.* at 244.
54. 620 F.2d 1040 (4th Cir. 1980).
55. *Id.* at 1047.
56. 449 U.S. 64 (1980).
57. The 1976 *Appalachian Power* decision was not overruled on the specific point that *National Crushed Stone* addressed—withholding variances for economic reasons.
58. *National Crushed Stone*, 449 U.S. at 77-78.
59. 719 F.2d 624 (3d Cir. 1983).
60. *Id.* at 644-46.
61. 42 U.S.C. § 7502(b)(6) (1982).

tition to review EPA regulations[63] that allowed states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble."[64] The regulations were promulgated to implement § 172(b)(6) of the Clean Air Act. The amendments, much like sections of the Clean Water Act Amendments, require states that have not achieved the national air quality standards to establish a permit program regulating new or modified major stationary sources of air pollution. Under these regulations, an existing plant that contained several pollution-emitting devices could install or modify one piece of equipment without meeting the permit conditions if the alteration would not increase the total emissions from the plant. Justice Stevens, expressing the unanimous view of the Court, held that the EPA regulations allowing states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" were based on a reasonable construction of the term "stationary source" in § 172(b)(6). The Court stated that Congress did not have a specific intent as to the applicability of the "bubble concept" and that the EPA's use of that concept was a reasonable policychoice for the agency to make.

In 1985, the Supreme Court again granted certiorari to address the variance issue and the EPA's interpretation of congressional intent. In *Chemical Manufacturers Association*, the Court addressed many of the unresolved problems and ambiguities spawned by the complex legislative and judicial history of the BPT variance provisions.[65]

II. FACTS OF *CHEMICAL MANUFACTURERS ASSOCIATION V. NATURAL RESOURCES DEFENSE COUNCIL, INC.*

In *National Association of Metal Finishers*,[66] the National Association of Metal Finishers, the Institute for Interconnecting and Packaging Electronic Circuits and Ford Motor Company filed petitions in the Court of Appeals for the Third Circuit for review of the BPT-level pretreatment[67] standards for the electroplating point source category.[68] In the same action, NRDC and other petitioners sought review of the electroplating standards and of the general pretreatment regulations promulgated and amended by the EPA.[69]

---

62. 467 U.S. 837 (1984).

63. 40 C.F.R. § 51.18(j)(10) (1985).

64. Hence, this method of categorization is often referred to as "the bubble concept."

65. The Supreme Court has previously upheld regulations because the provision for exception or variance helped assure the parties of due process. *See* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972); FPC v. Texaco, Inc., 377 U.S. 33, 40-41 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). *Chemical Mfrs. Ass'n*, 105 S. Ct. at 1112 n.25.

66. 791 F.2d 624 (3d Cir. 1983).

67. *See supra* note 21 and accompanying text.

68. Promulgated on September 7, 1979 in 44 Fed. Reg. 52,590 (1979) and amended in 46 Fed. Reg. 9462 (1981) (codified at 40 C.F.R. §§ 413.01-84 (1985)).

69. Promulgated in 43 Fed. Reg. 27,736 (1978) and amended in 46 Fed. Reg. 9404 (1981) (codified at 40 C.F.R. pt. 403 (1985)).

Among the disputed provisions of the pretreatment regulations was the FDF variance provision set forth in § 403.13 of the General Pretreatment Regulations for New and Existing Sources of Pollution.[70] NRDC and other petitioners sought a declaration that § 301(*l*)[71] of the FWPCA prohibited the EPA from issuing FDF variances for pollutants, listed as toxic under the FWPCA, including those from electroplating operations.[72] The EPA and the Chemical Manufacturers Association (CMA) argued otherwise. The Third Circuit invalidated the FDF variance provision and remanded the provision to the EPA. Subsequently, the EPA amended § 403.13 to clarify that "the pretreatment FDF variance provision is not available for toxic pollutants."[73] The CMA and other respondents appealed to the Supreme Court, contending that the EPA may issue an FDF variance from toxic pollutant effluent limitations promulgated under the FWPCA.

III. *CHEMICAL MANUFACTURERS ASSOCIATION V. NATURAL RESOURCES DEFENSE COUNCIL, INC.*

In a five-to-four decision,[74] the United States Supreme Court reversed the Third Circuit and held that neither legislative intent, nor the objectives of the FWPCA precluded EPA's statutory interpretation. The majority and dissent addressed three questions central to the FDF variance provision controversy. First, the Court considered whether the Third Circuit was correct in ruling that § 301(*l*) precludes the granting of variances for toxic pollutants to plants that can show the existence of a factor not considered by the EPA in establishing national regulations. Second, the Court considered whether the Third Circuit's decision was contrary to the Court's holding in *DuPont*. Finally, the Court asked if the decision below improperly removed the EPA's discretion to deal with atypical regulatory situations and to interpret the statute governing its regulations.

The majority based its discussion of § 301(*l*) on the plain meaning of the section and the legislative history of the FWPCA. Although the minority also relied on a plain meaning interpretation and the legislative history, its interpretation contrasts sharply with the majority's interpretation.

In examining the meaning of § 301(*l*), the majority and minority reached two different interpretations of the phrase "may not modify any requirement of this section."[75] The majority refused to read the word

70. 40 C.F.R. § 403 (1985).

71. 33 U.S.C. § 1311(1) (1982).

72. The facts of the case do not actually state that a particular variance was applied to a point source in the electroplating category. However, the challenged variance provision, § 403.13 provides for FDF variance from pretreatment standards such as those for the Electroplating Point Source Category.

73. 49 Fed. Reg. 5131, 5132 (1984) (codified at 40 C.F.R. § 403.13(a)(2)(1985)).

74. Justice White wrote the opinion of the Court. Justice Marshall filed the dissenting opinion, joined by Justices Blackmun and Stevens. Justice O'Connor joined in part of the dissent.

75. Section 301(*l*) provides that "the Administrator may not modify any requirement

"modify" broadly to encompass *any* change or alteration in standards. The Court reasoned that it makes no sense to construe the statute to forbid the EPA from amending its own standards, correcting errors, and imposing stricter limitations.[76] The dissent, on the other hand, determined that the phrase proscribes all modifications of the toxic pollutant standards.[77] Both opinions used congressional silence on the issue to support their interpretations. The majority determined that congressional silence clearly proved that the § 301(*l*) prohibition applied only to § 301(c) and § 301(g) modifications because any express intent to apply the section to FDF variances is not found in the legislative history.[78] The minority found that absence of such expressed intent signaled a general, unqualified prohibition of modifications to the toxic pollutant standards, including the prohibition of variances for toxic pollutants.[79]

The majority found that § 301(*l*) applied only to § 30l(c) and § 301(g) modifications for a number of reasons. Turning to legislative history, the Court traced the evolution of § 301(*l*) to its beginnings in the Conference Committee and determined that § 301(*l*) was meant to be a clarification of the statutory language of § 301(c) and § 301(g). The Court reasoned that because § 301(c) was in force prior to the 1977 amendments and contains no language expressly prohibiting modifications for toxic pollutants, Congress intended § 301(*l*), added by the amendments, to apply to § 301(c).[80] The Court further reasoned that because the § 301(*l*) ban on waivers for toxics and the § 301(g) ban are similarly worded, there is little support for the argument that § 301(*l*) forbids anything more than modifications for toxic pollutants.[81] The dissent found this reasoning dubious and unsupported and argued that there was no reason to believe that Congress singled out the § 301(c) and § 301(g) modifications as more pernicious from the standpoint of an effective toxic control program. The dissent found the converse to be true because Congress specifically provided for exemptions in these areas, but not in other areas. According to the dissent, those areas Congress thought most critical to the toxic control program should not contain variance or modification allowances.[82]

The dissent's strongest argument centered on the importance of the toxic control program. Using numerous citations from legislative history, including statements from Senator Muskie (the main proponent of the 1977 amendments), the dissent reasoned that the control of toxic pollutants was of such importance to Congress that it did not intend to allow any modifications of the toxic pollutant provisions.[83] Thus, the

---

of this section as it applies to any specific pollutant which is on the toxic pollutant list under § 1317(a)(1) of this title." 33 U.S.C. 1311(*l*) (1982).

76. *Chemical Mfrs. Ass'n*, 105 S. Ct. at 1108.
77. *Id.* at 1115 (Marshall, J., dissenting).
78. *Id.* at 1109.
79. *Id.* at 1115 (Marshall, J., dissenting).
80. *Id.* at 1108-09.
81. *Id.* at 1109 n.16.
82. *Id.* at 1116 (Marshall, J., dissenting).
83. *Id.* at 1115 (Marshall, J., dissenting).

dissent concluded that § 301(*l*) was drafted and included in the 1977 amendments to expand the scope of prohibition against modifications.[84]

NRDC argued that allowing FDF variances would render meaningless the § 301(*l*) prohibition against modification on the basis of economic and water quality factors. The majority answered this argument by explaining that FDF variances are specifically unavailable for the grounds that would satisfy § 301(c) and § 301(g).[85] The dissent, however, did not address this issue, which had already been resolved by the Court in *National Crushed Stone*.[86]

In its final argument for allowance of variances, the EPA contended that § 307(b)(2) expressly provides for revision of pretreatment standards, such as the electroplating standards,[87] and that an FDF variance is more like a revision permitted by § 307 than like a § 301(c) or § 301(g) modification. Thus, if § 301(*l*) applies only to § 301(c) and § 301(g), the EPA argued, then § 301(*l*) does not apply to variances. The majority agreed with the EPA[88] and added that § 307 also permits the EPA to make a subcategory for a source fundamentally different from other sources. Thus, the majority reasoned that issuing FDF variances is simply a different means of reaching the same end.[89] The dissent credited the majority with a strong argument on the § 307 issue, but used extensive legislative history to argue that Congress intended standards to be set and therefore revised on a categorical basis instead of on an individual basis.[90] The dissent argued that variances are not at all like the subcategories in § 307 because variances are granted on an individual plant-by-plant basis. As the dissent observed, there is no mechanism built into the variance provisions for the EPA to identify similarly situated dischargers.[91] Thus, the variance provisions run contrary to the congressional objective of revision on a categorical basis.

The second major question considered in *Chemical Manufacturers Association* was whether the decision below contradicted the holding in *DuPont*. The majority simply stated that prohibiting FDF variances for toxic pollutants would overrule the Court's decision in *DuPont* because the regulations upheld in *DuPont* contained a variance clause that applied to toxic pollutants. The Court stated that Congress was obviously aware of the *DuPont* decision and that, in the absence of express congressional intent, the Court should not infer that Congress meant to

84. *Id.* at 1117 (Marshall, J., dissenting).

85. *Id.* at 1111.

86. *National Crushed Stone*, 449 U.S. at 78.

87. *Supra* note 18 and accompanying text.

88. *Chemical Mfrs. Ass'n*, 105 S. Ct. at 1108.

89. *Id.* at 1111.

90. *Id.* at 1122-23. Senator Muskie stated that "[t]he Conferees intend that factors described in § 304(b) be considered only within categories and classes of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class." 118 CONG. REC. 33697 (1972). Senator Muskie did not distinguish between BAT and BPT factors, which are to be promulgated for point sources and not for categories of point sources.

91. *Chemical Mfrs. Ass'n*, 105 S. Ct. at 1123 (Marshall, J., dissenting).

amend the FWPCA to overrule *DuPont*.[92] The minority disagreed with the majority's treatment of *DuPont* and stated that the case did not authorize the issuance of variances in any context relevant to *Chemical Manufacturers Association*.[93] The minority reasoned that the holding in *DuPont* was limited to granting variances only when BPT standards were set by regulation.[94] Thus, the dissent stated that Congress would not have considered *DuPont* or necessarily have been aware of the decision in determining whether § 301(*l*) applied to FDF variances.

Finally, the Court considered whether the EPA's interpretation of the FWPCA was entitled to deference. The majority stated that the agency charged with administration of the statute is entitled to considerable deference and that the Court need only determine that the interpretation is a rational one. The Court held that only where Congress has clearly expressed an intent contrary to the agency's interpretation of the statute will the Court not defer to the agency's interpretation. Where provisions of the statute have no plain meaning, as in § 301(*l*), the majority determined that such provisions are a proper subject for agency interpretation.[95] The dissent disagreed with the majority, arguing that only when congressional intent cannot be discerned is deference required.[96]

The dissent strongly criticized the majority for incorporating policy considerations into its opinion. In policy matters, the dissent asserted, the courts should defer to Congress in the first instance and then to the administrative agency in the absence of a clear congressional mandate.[97]

IV. ANALYSIS

Courts have struggled with the issue of BPT variances and no doubt will continue to struggle with the issue after *Chemical Manufacturers Association*. Although the Supreme Court firmly stated that BPT variances will be allowed for toxic pollutants, the split within the Court indicates differences on many points of the issue. Moreover, neither the legislative history, nor prior case law are of much help in resolving those differences.[98]

---

92. *Id.* at 1109.

93. *Id.* at 1118 (Marshall, J., dissenting). Interestingly, Justice Stevens authored the majority opinion in *DuPont*, but joined the dissent in *Chemical Mfrs. Ass'n*. Although the majority and minority opinions in *Chemical Mfrs. Ass'n* are sharply divided over *DuPont*, the dissent may be the better indication of how the majority in *DuPont* wished the case to be interpreted.

94. *Id.* at 1119 (Marshall, J., dissenting).

95. *Id.* at 1108.

96. *Id.* at 1121 (Marshall, J., dissenting).

97. *Id.* at 1114 (Marshall, J., dissenting).

98. Indeed, perhaps the strongest indicator of the outcome was the fact that Justice White authored the majority opinion. In the last Supreme Court decision on this issue, *National Crushed Stone*, Justice White, also writing for the majority, deferred to the EPA's interpretation of the statute. In *DuPont*, Justice White sided with the majority in allowing the EPA to issue industry-wide regulations. Moreover, in a recent case, Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983), Justice White devoted a large portion of his dissent to the present-day trend of deferring to administrative agency interpreta-

Both the majority and minority in *Chemical Manufacturers Association* agreed that the Administrator is entitled to deference when congressional intent cannot be discerned.[99] Both opinions made various attempts to point to legislative history to prove that § 301(*l*) was or was not intended to apply to FDF variances. Neither the majority nor minority, however, could find specific history to support their views. For instance, the majority's determination that § 301(*l*) applies only to § 301(c) and § 301(g) is unsupported by the legislative history. The dissent argued that Congress would have no reason to draft § 301(*l*) to apply to § 301(c) and § 301(g) when Congress could have instead amended § 301(c) and § 301(g) in 1977. Moreover, there was no reason expressed or implied by Congress for adding § 301(*l*) only a few subsections after § 301(c) and § 301(g) to merely restate § 301(g).[100] The minority may have gotten closer to discerning the true congressional intent by arguing that toxic pollutants were a major concern in the debates and concluding that § 301(*l*) was meant to expand the prohibition of modifications for toxic pollutants. Yet, the minority could not find any evidence of an express congressional intent to apply § 301(*l*) to FDF variances, which are, as the Court had decided in *National Crushed Stone*, different from § 301(c) and § 301(g) modifications. If the decision in *DuPont* had been clearer, Congress may have addressed this specific issue. The confusion over *DuPont* in *Chemical Manufacturers Association* reveals the differences in the Court about the precise holding of the case; differences that, not surprisingly, are reflective of those in Congress. In view of the lack of conclusive legislative history, the majority made the correct decision because, as both the majority and dissent recognized, where no clear congressional intent can be discerned, the Court must defer to the administrative agency.

The Court's decision to defer to the agency's interpretation was consistent with the Court's earlier unanimous decision to defer to the EPA's use of the "bubble concept" in *Chevron* one year earlier. Justice Stevens expressed the Court's inclination towards deference by noting that

> [w]hen a court reviews an agency's construction of the statute which it administers . . . [and] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[101]

The Court's difficulties in finding a precise indication of congressional intent in *Chevron* is not unlike the difficulties it later faced in *Chemical Manufacturers Association*. The *Chevron* Court could find no specific refer-

---

tions. Justice White stated that "[w]hen agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded 'legislative effect.'" *Chadha*, 462 U.S. at 986.

99. *Supra* notes 95 & 96 and accompanying text.

100. Section 301(g), not § 301(c), states that modifications will not be allowed for toxics. However, there was no reason for Congress to draft § 301(*l*) to cover the inadequacy in § 301(c) when Congress could simply have amended § 301(c).

101. *Chevron*, 467 U.S. at 842-43.

ence to the controversial "bubble concept," nor a specific definition of the term "stationary source" in the legislative history.[102] Yet, the Court concluded that the absence of any express congressional language on the issue did not foreclose the EPA from basing its implementation of the Act's proscriptions on a reasonable interpretation of the "stationary source" designation.[103] Similarly, the Court in *Chemical Manufacturers Association* could find no specific reference to variance provisions in the legislative history. Congress had no specific knowledge of FDF variances and, therefore, never specifically addressed the issue. The majority, finding no precise language about variances, deferred to the EPA. The minority, however, reasoned that the general intent of Congress was to regulate and almost fully curtail the discharge of toxic pollutants into the environment. Thus, the minority concluded that this general intent was so precise as to obviate the possibility of deference and cast reasonable doubts upon the correctness of the EPA's interpretation.

The controversy between the majority and minority in *Chemical Manufacturers Association* stems from differing interpretations of the holding in *Chevron*. Stated simply, the disagreement between the sides revolves around the question of "How precise is 'precise'?" In *Chevron*, Justice Stevens set the standard for deference, "whether Congress has directly spoken to the precise question at issue,"[104] but failed to define "precise." However, after considering the general intent expressed in the statements of Senator Muskie,[105] Justice Stevens concluded that the intent was not sufficiently clear and deferred to the agency's interpretation. Although Justice Stevens joined the minority in *Chemical Manufacturers Association*, the minority failed to reconcile its opinion with Justice Stevens' conclusion in *Chevron*. Thus, the question of precise intent is still somewhat unclear. The majority, on the other hand, followed *Chevron* by deferring to the agency.

The minority criticized the majority for including policy issues in its decision. Indeed, the majority was concerned with the EPA's inability to adequately classify dischargers given the number of dischargers subject to classification and the time constraints imposed upon the EPA. The minority stated that such policy issues should be deferred to Congress in the first instance and to the administrative agency in the absence of congressional mandate.[106] However, both opinions conceded that there was no congressional mandate.

The EPA has promulgated its regulations relying on the variance provisions to provide a feasible way for fundamentally different dis-

102. *Id.* at 851.

103. *Id.* at 861-62. The Court explained that it was not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress. "We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation."
Id.

104. *Id.* at 842.

105. *Id.* at 853.

106. *Chemical Mfrs. Ass'n*, 105 S. Ct. at 1114 (Marshall, J., dissenting).

chargers to comply. The variance provisions not only allow the fundamentally different discharger to stay in business, but more importantly reduce the chances of such a discharger turning to "midnight dumpers" for disposal of wastes or polluting waterways by simply not complying with the regulations. The variances are not an exemption from the regulations, but instead simply provide a feasible means of compliance for fundamentally different dischargers.[107]

CONCLUSION

The legislative history of the FWPCA and its amendments do not specifically discuss variances for toxic pollutants. In the absence of discernible congressional intent, both the majority and minority in *Chemical Manufacturers Association* agreed that deference is owed to the administrative agency. By deferring to the EPA's interpretation of the FWPCA, the Court placed the difficult decision of granting variances for toxic effluent limitations in the bailiwick of the most competent interested party. The variance policy provides a feasible way for misclassified plants to comply with regulations and reduces the chances of misclassified plants being forced into "midnight dumping," non-compliance, or bankruptcy. It would be both unreasonable and unjust to force the closure of a misclassified plant where it can be demonstrated that the plant is economically incapable of achieving compliance. Furthermore, if the EPA's program of water pollution control is "[w]ithout variance flexibility, the program might well founder on the rocks of illegality."[108]

Alison L. Taylor

107. For instance, the example of Freeport Chemical Co. is evidence of the necessity of variances. The EPA found that the Freeport plant design differed so fundamentally from the other phosphoric acid plants in its category that the regulations when applied to Freeport allowed no discharge whatsoever. Freeport would have had to have spent $27 million to retrofit their plant to comply with the regulations, as compared to the $500,000 spent by the other plants in its category. Other than Freeport, only one variance has been granted. Thus, the EPA is not granting variances indiscriminately or with any regularity. Petitioner's Brief at 8, *Chemical Mfrs. Ass'n v. NRDC*, 105 S. Ct. 1102 (1985).

108. NRDC v. EPA, 537 F.2d at 647.