Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.: Congressional Ambiguity Allows EPA's Safety Valve to Remain Open

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CHEMICAL MANUFACTURERS ASSOCIATION V.  
NATURAL RESOURCES DEFENSE COUNCIL, INC.: CONGRESSIONAL AMBIGUITY ALLOWS 
EPA’S SAFETY VALVE TO REMAIN OPEN

To remedy the problem of increasingly polluted navigable and drinking waters, Congress enacted the Federal Water Pollution Control Act (FWPCA) of 1948. Due to heightened public environmental awareness Congress subsequently passed several amendments that empowered the federal government to play a more substantial role in creating and enforcing stringent uniform standards of performance for dischargers. In the 1972 amendments, known as the Clean Water Act (CWA), Congress delegated the responsibility of promulgating national effluent limitations and pretreat-

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2. See infra notes 51-93 and accompanying text.

3. Congress defined "standard of performance" as a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.


4. "Direct dischargers" are parties that discharge waste water directly into navigable waters of the United States; "indirect dischargers" are parties that introduce pollutants into publicly owned treatment works. Telephone interview with Gary Hudiburgh, Jr., Attorney in Technical Support Branch of the EPA Office of Water (July 26, 1985).


6. "The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." Clean Water Act, § 502(11), 33 U.S.C. § 1362(11) (1982). "Effluent limitations" and "effluent standards" will be used interchangeably to mean the national guidelines for dischargers promulgated by the EPA.
ment standards\textsuperscript{7} for categories of pollutants\textsuperscript{8} and point sources\textsuperscript{9} to the Environmental Protection Agency (EPA).\textsuperscript{10} Congress passed additional amendments in 1977\textsuperscript{11} that directed the EPA to place still greater restrictions on the discharge of toxic pollutants.\textsuperscript{12}

Because of unclear statutory language and ambiguity in the legislative history of many CWA provisions,\textsuperscript{13} the EPA frequently has had to defend its discretionary actions in court.\textsuperscript{14} In addressing these CWA statutory construction disputes, federal courts' interpretations often conflict.\textsuperscript{15}

The most challenged provision is the "Fundamentally Different Factor" variance (FDF variance).\textsuperscript{16} The EPA included this variance in the regulations as a safety valve to allow alteration of individual limitations or standards when an atypical discharger is fundamentally different from those considered in establishing the national effluent limitations or pretreatment

\begin{itemize}
\item \textsuperscript{7} Pretreatment standards apply to indirect dischargers on an industry-by-industry basis. Their purpose is to prevent pollutants that cannot be treated or that would interfere with treatment operations from entering publicly owned treatment works or passing through to navigable waters untreated. Clean Water Act, § 307(b)(1), 33 U.S.C. § 1317(b)(1) (1982). Direct and indirect dischargers are covered by different provisions in the Clean Water Act, but the two groups' standards are generally comparable. See infra note 127 and accompanying text.
\item \textsuperscript{8} "The term 'pollutant' means dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water." Clean Water Act, § 502(6), 33 U.S.C. § 1362(6) (1982).
\item \textsuperscript{9} "Point source" refers to: "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." Clean Water Act, § 502(4), 33 U.S.C. § 1362(14) (1982).
\item \textsuperscript{10} Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970). Prior to the creation of the EPA, several federal agencies were responsible for water pollution control, including the Federal Water Pollution Control Administration. S. REP. NO. 414, 92d Cong., 1st Sess. 2 (1971).
\item \textsuperscript{12} The term "toxic pollutant" includes:
\begin{itemize}
\item those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organism or their offspring.
\end{itemize}
\item \textsuperscript{13} See infra notes 111-36 and accompanying text.
\item \textsuperscript{14} See infra notes 102-07, 134, 151-80, and accompanying text.
\item \textsuperscript{15} See infra notes 151-64 and accompanying text.
\end{itemize}
Disputes arose prior to the 1977 amendments in relation to FDF variances for direct dischargers. The issue of variance for direct dischargers was temporarily resolved in *E. I. du Pont de Nemours & Co. v. Train* when the United States Supreme Court held that the EPA had authority under section 301 of the CWA to limit discharges by existing plants through industry-wide regulations. The EPA was to base these regulations on classes and categories of pollutants and point sources, establishing uniform effluent limitations for both the 1977 and 1983 deadlines. However, the Court stipulated that the EPA must include a procedure for taking into consideration variation in individual plants.

The Supreme Court, unwilling to define the limits of the FDF variance in *du Pont*, gave the Natural Resources Defense Council, Inc. (NRDC) the opportunity recently to question the scope of such a variance in light of section 301(1). The NRDC asserted that Congress did not intend for the EPA to issue any variances, waivers, or modifications from the prescribed standards for toxic pollutant dischargers. In response, the EPA contended that “modification” was a term of art in the CWA, and that FDF variances were not modifications of standards, but rather were the creation of a more appropriate standard based on unique characteristics previously overlooked by the EPA. In addition, the EPA interpreted section 301(1) only to pro-

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18. See infra notes 151-80 and accompanying text.
20. 430 U.S. at 128.
21. In the 1972 amendments Congress set deadlines by which direct dischargers were to meet the technologically based standards created by the EPA. By 1977 dischargers were to have achieved the “best practicable control technology currently available” (BPT). Clean Water Act, § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (1982). By 1983 direct dischargers were required to achieve the “best available technology economically achievable” (BAT). Clean Water Act, § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A) (1982). In the 1977 amendments, the deadline for BAT was changed.

The implementation of BPT standards was the first stage in reducing pollutants through installation by 1977 of pollution-control devices at the point of discharge or end of the plants’ processes. BAT standards were instead aimed at reducing the amount of pollutants ultimately discharged throughout the plants’ production processes by 1983. See infra notes 72-80, 96, and accompanying text.
22. 430 U.S. at 128.
23. Id.
24. Clean Water Act, § 301(l), 33 U.S.C. § 1311(l) (1982). This section states: “The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.” Id.
hibit modifying “best available technology economically achievable” (BAT) under sections 301(c)\textsuperscript{27} and (g)\textsuperscript{28} of the CWA.\textsuperscript{29}

Two United States Circuit Courts of Appeal have interpreted section 301(l) in relation to FDF variances, and have differed in their conclusions. In \textit{Appalachian Power Co. v. Train}\textsuperscript{30} the United States Court of Appeals for the Fourth Circuit, addressing only “best practicable technology” (BPT)\textsuperscript{31} FDF variances, held that the EPA Administrator was not precluded from modifying requirements as they apply to substances on the toxic pollutants list.\textsuperscript{32} Conversely, the United States Court of Appeals for the Third Circuit in \textit{National Association of Metal Finishers v. Environmental Protection

\textsuperscript{27} Section 301(c) of the Clean Water Act states: The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants. Clean Air Act, § 301(c), 33 U.S.C. § 1311(c) (1982).

\textsuperscript{28} Section 301(g) of the Clean Water Act provides in part: The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that — (A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable; (B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and (C) such modification will interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities. Clean Water Act, § 301(g), 33 U.S.C. § 1311(g)(1) (1982).

\textsuperscript{29} Congress realized that some dischargers may have difficulty in meeting the costs of installing new pollution control devices, so in 1972 they enacted § 301(c), enabling certain dischargers to operate under less strict effluent limitations, so long as progress was still being made towards eliminating the discharge of pollutants. Clean Water Act, § 301(c), 33 U.S.C. § 1311(c) (1982). Similarly, in 1977 Congress enacted § 301(g) to take into consideration those point sources whose discharge has no effect or an insubstantial effect on the water quality of the receiving body of water. \textit{Id.} § 301(g), 33 U.S.C. § 1311(g) (1982). \textit{See supra} notes 27-28.

\textsuperscript{30} 620 F.2d 1040 (4th Cir. 1980).

\textsuperscript{31} \textit{See supra} note 21.

\textsuperscript{32} 620 F.2d at 1048.
Agency concluded that the EPA Administrator does not have the authority to issue FDF variances for any toxic pollutants. Both courts based their reasoning on interpretations of the statutory language and legislative history of section 301(l) and other sections of the CWA. In compliance with the Third Circuit decision, the EPA withdrew the FDF variance procedure from the pretreatment regulations involving toxic pollutants.

In a five-to-four decision, the United States Supreme Court reversed the Third Circuit's decision in Chemical Manufacturers Association v. Natural Resources Defense Council, Inc. The Court held that Congress did not intend absolutely to prohibit the EPA from granting FDF variances for toxic pollutants. Rather, the Court accepted the EPA's interpretation that Congress intended only to forbid modification through the variance provisions, sections 301(c) and (g), that were already included in the section with respect to toxic materials. Writing for the majority, Justice White maintained that neither the statutory language nor the legislative history evinced an unambiguous congressional intent to forbid toxic pollutant FDF variances. Moreover, the Court was not convinced that FDF variances were inconsistent with the CWA's goals and operations.

Writing for the dissent, Justice Marshall, joined by Justices Blackmun, Stevens, and O'Connor, asserted that the majority's interpretation was "inconsistent with the clear intent of Congress, as evidenced by the statutory language, legislative history, and purpose" of the CWA. Justice Marshall asserted that the words "modification" and "variance" were synonymous according to both the legislative history of section 301(l) and past congressional prohibitions against exceptions to rules. The dissent maintained that congressional silence on FDF variances in the 1977 amendments was not indicative of any intent to permit variances because Congress was not aware of the Supreme Court's approval of variances in du Pont prior to the amendments. Justice Marshall also emphasized Congress' specific intent to strengthen the regulation of toxic pollutants as found throughout the 1977

33. 719 F.2d 624 (3rd Cir. 1983).
34. Id. at 646.
35. Id. at 643-46; see also Appalachian, 620 F.2d at 1046-48.
38. Id. at 1112.
39. Id. at 1108-10.
40. Id.
41. Id. at 1110-12.
42. Id. at 1113.
43. Id. at 1114-15, 1127.
44. Id. at 1118-19.
amendments' legislative history.\textsuperscript{45}

This Note will trace the evolution of federal involvement in water pollution control starting with the enactment of the Federal Water Pollution Control Act of 1948 through the EPA's implementation of the latest amendments to the Act. The Note will focus on the ambiguities existing throughout the Clean Water Act and its attendant legislative history. In particular, the discussion will highlight the difficulties encountered by the EPA in implementing the CWA effluent limitation provisions according to congressional intent. It will also examine the EPA's "Fundamentally Different Factor" (FDF) variance for dischargers from industry-wide regulations and the criticisms with which this variance has been met. Further, this Note will provide an overview of lower court decisions that addressed the CWA and effluent limitation issuance, specifically those cases that lead to \textit{E.I. du Pont de Nemours & Co. v. Train}. It will also analyze the most recent Supreme Court pronouncement construing the Clean Water Act. An examination of \textit{Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.} will show that the Court correctly deferred to the EPA's statutory interpretation that allowed FDF variances. The Note will conclude with an overview of Congress' reaction to the \textit{Chemical Manufacturers Association} decision.

I. LEGISLATIVE EVOLUTION OF THE FEDERAL WATER POLLUTION CONTROL ACT OF 1948

A. Federal Involvement in Water Pollution Control: 1948-1972

Congress enacted the Federal Water Pollution Control Act (FWPCA) in 1948 as a five-year experiment.\textsuperscript{46} This, however, was not the federal government's first involvement in water pollution control.\textsuperscript{47} The purposes of this legislation included federal support to the states for technical research and

\textsuperscript{45} Id. at 1115.


\textsuperscript{47} The Federal government's first attempt to curtail water pollution occurred in response to the Supreme Court's decision in \textit{Williamette Iron Bridge Co. v. Hatch}, 125 U.S. 1 (1888). The Court held that there was no common law rule regulating obstructions to navigation. \textit{Id.} at 8. Congress subsequently passed section 13 of the River and Harbor Act of 1899, also known as the Refuse Act, prohibiting discharge of "refuse matter of any kind or description whatever other than that flowing from streets and sewers . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float . . . into such navigable water." \textit{Refuse Act of 1899}, ch. 425, § 13, 30 Stat. 1152 (codified as amended at 33 U.S.C. § 407 (1982)). For a more in-depth analysis, see Comment, \textit{The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution}, 58 \textit{Cal. L. Rev.} 1444 (1970).
limited loans for the construction of treatment plants.\textsuperscript{48} Enforcement powers in water pollution control were delegated to state governors.\textsuperscript{49} Federal authorities could only sue interstate violators for abatement of a public nuisance, an ineffective, time-consuming administrative procedure.\textsuperscript{50}

Realizing the drawbacks in constraining federal involvement in water pollution control, as well as the ineffectiveness of local enforcement of state regulations,\textsuperscript{51} Congress revised the FWPCA five times between 1948 and 1972.\textsuperscript{52} In 1956, Congress established the FWPCA as permanent legislation, created a federal-state cooperative policy to control pollution,\textsuperscript{53} and increased federal grants for the construction of local waste treatment works and expansions of state water pollution control projects.\textsuperscript{54} The amendments of 1961 modified federal enforcement authority to encompass navigable, interstate, and intrastate waters.\textsuperscript{55}

With the enactment of the Water Quality Act of 1965, the principal water

\begin{itemize}
\item \textsuperscript{48} S. REP. NO. 414, 92d Cong., 1st Sess. 2 (1971).
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Barry, \textit{The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation}, 68 MICH. L. REV. 1103, 1104-07 (1970). One commentator has stated:
\begin{quote}
The early version of the Act provided for an enforcement conference which could only be convened at the request of the affected state. The federal enforcement power was diluted because of a prodigious amount of bureaucratic procedure which included a hearing in the location of the disputed discharge, a recommendation to the appropriate federal administrator, followed by attempted judicial enforcement if the affected state or states so agreed.
\end{quote}


\item \textsuperscript{51} The FWPCA and its subsequent amendments until 1972 failed to protect the waters because of "the failure of the individual states to exercise their own water pollution control authority . . . the absence of uniform national standards to provide a minimum level of protection" and "the use of water quality standards as a regulatory device proving ineffective." Parenteau & Tauman, \textit{The Effluent Limitations Controversy: Will Careless Draftsmanship Foil the Objectives of the Federal Water Pollution Control Act Amendments of 1972?}, 6 ECOLOGY L.Q. 1, 9 (1976).

\item \textsuperscript{52} See Note, supra note 50, at 260.

\item \textsuperscript{53} Positive commentary was made about the 1956 amendments: "Though the 1956 legislation added little in the way of substantive protection, it did recognize as a matter of policy that a broader national effort, with better federal-state cooperation, was needed to combat the increasing pressures of population and economic growth upon the nation's natural resources." Parenteau & Tauman, supra note 51, at 9 (footnotes omitted).


\end{itemize}
pollution control mechanism became state water quality standards (WQS). States were responsible for the formulation of water quality criteria and implementation plans, designation of uses for bodies of water and enforcement of pollution standards. Although only the states could create implementation plans, the newly established Federal Water Pollution Control Administration had the authority to set water quality standards if a state refused or did not set adequate standards. However, the procedure for setting quality standards was cumbersome, many states were encountering difficulties in establishing relationships between pollutants and water usage, and the awkward division of enforcement authority stunted any progress in preventing continued deterioration of the waters. Despite additional legislative efforts in 1966 and 1970, these defects in the Water Quality

57. Id. § 5(c)(1), 33 U.S.C. § 466(g) (1965) (eliminated 1972). The Water Quality Act did not actually list the designation of uses for bodies of water as part of the states' responsibilities.
58. Id. According to one commentator, [a] designated use (such as recreation or fishing) describes how a state wants to use a water segment. Water-quality criteria ensure that the water is clean enough to support the designated use. Typical criteria include specific requirements for dissolved oxygen (which fish breathe), specific limits on fecal-coliform bacteria (sewage bacteria), and general restrictions on unpleasant sights, smells, and tastes. Implementation plans describe how the pollution-control agencies intend to bring waters into compliance with the WQS [Water Quality Standards].

60. The enforcement procedure created in the FWPCA of 1948 remained the same throughout these amendments. Parenteau & Tauman, supra note 51, at 10; see also Hall, The Control of Toxic Pollutants Under the Federal Water Pollution Control Act Amendments of 1972, 63 Iowa L. Rev. 609, 611 (1978); see generally Parenteau & Tauman, supra note 51.
61. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 704, 1254 (1973) [hereinafter cited as 1972 LEGISLATIVE HISTORY]. See supra note 51 and accompanying text.

Prior to 1970, dischargers were not required to obtain permits that would monitor and limit
Act were not fully remedied. An increase in social, political, and environmental awareness stemming from activist movements in the 1960's motivated Congress to restructure drastically the entire water pollution control program.65

B. The 1972 Amendments: "End of the Pipe" Regulations

Congress took a major step in centralizing water pollution control management through enactment of the 1972 amendments to the FWPCA, referred to as the Clean Water Act (CWA).66 The EPA was charged with carrying out the primary goals of the CWA in three stages: determination of point source discharge effluent limitations by 1977;67 installation of pollution control devices by 1983;68 and total elimination of pollutant discharges by 1985.69

The initial step in pollution control to be completed by 1977 was directed toward treatment at the point of discharge or point source. The inefficient prior method of monitoring water quality standards70 was replaced by "end of the pipe" effluent limitations.71 After a period of research and testing, the amount of waste discharged into navigable waters. President Nixon addressed this void in the regulatory scheme by creating a federal permit program, Exec. Order No. 11,574, 3 C.F.R. 188 (1970), reprinted in 33 U.S.C. § 407 (1982), under § 13 of the Rivers and Harbors Act of 1899. The program, however, that was to be under the authority of the Army Corps of Engineers, did not withstand district court scrutiny. See Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971) (holding that the program did not require applicants to submit environmental impact statements prior to issuance of permits). Congress salvaged this enforcement mechanism when it established the National Pollutant Discharge Elimination System (NPDES) in the 1972 Amendments. See infra note 81 and accompanying text.

67. See infra notes 70-76 and accompanying text.
68. See infra notes 77-83 and accompanying text.
69. See infra notes 88-90 and accompanying text.
70. Administrative agencies responsible for monitoring water quality standards encountered immense difficulties in pinpointing violators from a group located proximately to one another. In addition, the agencies found it difficult to calculate the amount of waste water which could be discharged while maintaining the proper water quality standard. Parenteau & Tauman, supra note 51, at 12; Comment, supra note 58, at 1253-55.
71. Clean Water Act, § 304(b), 33 U.S.C. § 1314(b) (1982). This section states:
EPA was to define guidelines\textsuperscript{72} for technology-based effluent limits for each category of point sources.\textsuperscript{73} Existing\textsuperscript{74} nonmunicipal point sources were to achieve the "best practicable control technology currently available" (BPT) in end of the process technology by 1977.\textsuperscript{75} Publicly owned treatment works were to achieve secondary treatment by that date as well.\textsuperscript{76}

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitation, and, at least annually thereafter, revise, if appropriate, such regulations.

Israel.

However, water quality standards were kept in the Act as a supplement to effluent limitations. Clean Water Act, § 303, 33 U.S.C. § 1313 (1982).

However, Congress was unclear as to who was responsible for setting and enforcing the effluent limitations:

As is invariably the case with legislative standards, these are vague, general, and in need of administrative, even litigative, clarification. Unfortunately, Congress was less clear than it could have been in designating the administrative official responsible for giving content to the 1977 and 1983 standards by means of effluent limitations. Rather than expressly directing the Administrator, the logical choice to perform this task, [§ 301(b)] merely states that the prescribed effluent limitations "shall be achieved."

Parenteau & Tauman, supra note 51, at 16. See also infra notes 151-80 and accompanying text.

The EPA was directed by Congress to set national effluent limitations, uniform categories and subcategories of dischargers based on the availability and cost of pollution removal technology, along with other factors specified in § 304 of the CWA. Clean Water Act, § 301, 33 U.S.C. § 1311 (1982 & Supp. I 1983).

Existing sources are those which were already built when the EPA proposed or promulgated the effluent limitation or pretreatment standards. Telephone interview with Gary Hudiburgh, Jr., Attorney in Technical Support Branch of the EPA Office of Water (July 26, 1985). New sources are those which have been constructed since the EPA issued standards of performance under § 306 of the CWA applicable to such sources. Id. Consequently, the new source performance standards are more strict and are not eligible for modification through §§ 301(c), 301(g), or FDF variances. See infra note 179 and accompanying text.

Clean Water Act, § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (1982). The EPA defined BPT as "the average of the best existing performance by plants of various sizes, ages and unit processes within each industrial category or subcategory." 40 C.F.R. § 125 (1985). Rather than looking at a broad range of plants, the EPA based the average on the performance levels of exemplary plants. Id. The term "practicable" refers to "the consideration of total internal and external costs of applying the technology weighed against the effluent reduction benefits derived from applying the technology." Note, supra note 50, at 261 n.21.

Representative Jones defined total cost as "those internal, or plant costs sustained by owner or operator and those external costs such as potential unemployment, dislocation, and rural area economic development sustained by the community, area, or region." 1972 Legislative History, supra note 61, at 231.

Clean Water Act, § 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B) (1982). Publicly owned treatment works refer to those under the control of municipalities. A "municipality," as defined in the CWA, is "a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sew-
During the 1983 stage, in order to achieve the "fishable-swimmable" goal, dischargers were to have begun installing pollution control devices to treat pollutants throughout the entire manufacturing process of a plant. For existing nonmunicipal point sources, the "best available technology economically achievable" (BAT) standard was to be in use by 1983. Publicly owned treatment works also had to have the "best practicable waste treatment technology" (BPWTT) standard in place by that date.

In order to enforce these deadlines, Congress created the National Pollutant Discharge Elimination System (NPDES). Under this system, dischargers who discharged pollutants into the navigable waters without having first obtained an NPDES permit would violate the law. Thereafter, the discharger was under a legal obligation to meet with effluent limitation requirements by the specified dates. The EPA was also given authority to issue age, industrial wastes, or other wastes. . . ." Clean Water Act, § 502(4), 33 U.S.C. § 1362(14) (1982). Many municipalities have "treatment works" for "preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste. . . ." Clean Water Act, § 212(2)(B), 33 U.S.C. § 1292(2)(B) (1982). See infra note 84 and accompanying text. Nonmunicipal sources include any others who discharge directly into navigable waters.

77. Clean Water Act, § 101(a)(2), 33 U.S.C. § 1251(a)(2) (1982). This goal provides that "it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983. . . ." Id.

78. Note, supra note 50, at 261.


In lieu of performing a cost/benefit analysis to establish BAT limitations, the EPA is required to consider "the cost of achieving such effluent reduction." Therefore, BAT permits less flexibility than BPT. According to the BAT standard, "best" means the best performer in the industrial category; "available" means demonstrative technological and economic viability; "technology" means the entire plant process. Note, supra note 50, at 261 n.21. See also supra notes 21, 75, and accompanying text.


81. Id. §§ 301(a), 402(a), 33 U.S.C. §§ 1311(a), 1342(a) (1982). To date, 36 states and 1 territory (the Virgin Islands), have EPA-approved NPDES programs for issuance of permits for direct dischargers. Only 22 states presently have been authorized to run the pretreatment programs. 50 Fed. Reg. 42,089 (Oct. 17, 1985). Under this program the localities can impose restrictions on indirect dischargers in whatever manner they prefer. Rather than issuing specific permits, the localities may, for example, choose to make a contract with the discharger or issue a general ordinance. Telephone interview with Gary Hudiburgh, Jr., Attorney in Technical Support Branch of the EPA Office of Water (July 25, 1985). See generally Davis & Glasser, The Discharge Permit Program Under The Federal Water Pollution Control Act of 1972—Improvement of Water Quality Through the Regulation of Dischargers From Industrial Facilities, 2 FORDHAM URBAN L.J. 179 (1974).

82. Clean Water Act, §§ 301(a), 402(a), 33 U.S.C. §§ 1311(a), 1342(a) (1982).
permits, to establish state permit programs, and to veto permits when necessary.  

In addition to these first two stages, Congress initiated supplemental steps to reach the necessary goals. For those indirectly discharging into publicly owned treatment works (POTWs), Congress requested the development of pretreatment standards. Moreover, it designated eighteen billion dollars for the construction of POTWs across the country. Further, with the intent of making elimination of toxic pollutants a high priority, Congress instructed the EPA to publish a list of toxic pollutants for which special effluent limitations would have to be established.

Anticipating success in these programs and regulations, Congress set the 1985 goal to be one of “zero discharge.” Although it was not immediately feasible, proponents of this goal believed that, through the BPT and BAT deadlines, industries would rapidly develop technological advances in pollution control. Although new sources would be able to incorporate these advanced pollution control devices, existing plants found this task more difficult.

83. Id. § 402(b)-(d), 33 U.S.C. § 1342(b)-(d) (1982).
84. Id. § 307(b)(1), 33 U.S.C. § 1317(b)(1) (1982). This section provides that:
the Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards.

85. Id. §§ 106, 207, 208(f), 33 U.S.C. §§ 1256, 1287, 1288(f) (1982). POTWs, or municipal sewer systems, are designed to treat simultaneously the combined waste of the municipality, both domestic and indirect, to the point where the end product may be discharged into navigable waters in compliance with appropriate standards as well as without any effect on water quality. Indirect dischargers must generally treat their waste water in accordance with federal, state and local regulations before discharging into the POTW. Id.
88. Id. § 101(a)(1), 33 U.S.C. § 1251(a)(1) (1982). This section declares that “it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.” Id. For further discussion of “zero discharge” see generally Comment, supra note 58.
difficult.\footnote{90} At the time the 1972 amendments were enacted, conflicts that might arise due to the complexity of the provisions "were only dimly perceived."\footnote{91} Congress established the National Commission on Water Quality (the Commission) to report on any needed corrections based on observations of the first few years of the CWA's implementation.\footnote{92} After evaluating the conclusions of the Commission,\footnote{93} as well as testimony from the EPA, federal, state and local administrators, environmental groups, and industries, Congress deemed it necessary to enact further amendments to the CWA in 1977.


1. Toxic Pollutants and the NRDC Consent Decree

The main thrust of the 1977 amendments focused on the elimination of toxic pollutants.\footnote{94} However, in the process of "fine tuning"\footnote{95} the 1972 amendments, Congress also created provisions for extension of deadlines,\footnote{96} change in the levels of treatment,\footnote{97} and development of more options for modification of standards.\footnote{98}

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\footnote{90} See \textit{1972 Legislative History, supra} note 61, at 413-15, 705, 1116, 1262-63. Opponents also contended that elimination of all point sources would not be sufficient because of pollution attributed to nonpoint sources. \textit{Id.} at 354, 430; see also \textit{supra} note 9.


\footnote{93} See Hall, \textit{Clean Water Act, supra} note 91, at 344-45.


\footnote{97} New levels of treatment were created by Congress for conventional and nonconventional pollutants. By July 1, 1984 industrial dischargers were to attain the "best conventional pollutant control technology" (BCT). Clean Water Act, § 301(b)(2)(E), 33 U.S.C. § 1311(b)(2)(E) (1982). Nonconventional pollutants were to meet effluent limitations based on BAT no later than July 1, 1987. \textit{Id.} § 301(b)(2)(F), 33 U.S.C. § 1311(b)(3)(F) (1982). For a detailed explanation of conventional and nonconventional pollutants see Note, \textit{supra} note 95, at 874-78.

\footnote{98} Congress added a new option for modification of the secondary treatment requirement for POTW discharges into deep marine waters and for modification from BAT effluent limi-
In implementing section 307(a) of the 1972 amendments, the EPA encountered more obstacles than Congress had foreseen. The EPA lacked adequate resources and manpower to make a list of toxic pollutants within the time constraints set by Congress. The original list of nine toxic pollutants promulgated by the EPA met with opposition from both industries and environmental groups. The Natural Resources Defense Council (NRDC) filed suit in federal court to expand the list of toxic pollutants and to create a strict schedule by which the EPA would be required to promulgate CWA regulations. This litigation ended with the signing of a settlement agreement based upon a new strategy proposed by the EPA for toxic pollutants. The main elements of the NRDC consent decree pertained to the commitment made by the EPA to investigate and promulgate effluent limitations and pretreatment standards for sixty-five toxic pollutants discharged by the twenty-one industrial categories on a fixed, court-appointed basis for nonconventional pollutants based on water quality. Clean Water Act, §§ 301(g)-301(h), 33 U.S.C. §§ 1311(g)-1311(h) (1982).

99. Clean Water Act, § 307(a)(1), 33 U.S.C. § 1317(a)(1) (1982). In the 1972 amendments Congress plainly directed the EPA to make a list of toxic pollutants. The 1977 amendments provide for revisions to the list, and established criteria that the Administrator was required to consider. In adding or removing a pollutant from the list the Administrator should take into account the toxicity of the pollutants, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollution on such organisms. See generally Hall, Clean Water Act, supra note 28.

100. Congress did not anticipate the magnitude and complexity involved in implementing this section. Problems arose due to the volume of information needed to identify toxics, the realistic time frames set by Congress, the lack of explicit authority to consider criteria such as economic or technological feasibility, and the disruptive pollutant-by-pollutant regulatory approach. See Hall, Clean Water Act, supra note 91, at 352. See generally Hall, The Evolution and Implementation of EPA’s Regulatory Program To Control the Discharge of Toxic Pollutants to the Nation’s Waters, 10 Nat. Resources L. 507, 513-15 (1977) [hereinafter cited as Hall, Evolution and Implementation].


102. The list consisted of mercury, cadmium, benzidine, polychlorinated biphenyls (PCBs), and four pesticides (aldrin-dieldrin, DDT, endrin, and toxaphene). 38 Fed. Reg. 24,344 (1973). Final effluent standards for these toxics were proposed by the EPA in December 1973. 40 C.F.R. § 129.4 (1985).


105. Id. For extensive analysis of the NRDC consent decree, see generally Hall, supra note 60; see also generally Hall, Evolution and Implementation, supra note 100.

106. Rather than setting national effluent standards for each pollutant, the EPA was directed to establish standards on an industry-by-industry basis. NRDC v. Train, 8 Env’t Rep. Cas. (BNA) at 2125, 2128. The pollutant-by-pollutant approach would have disrupted indus-
proved schedule.\textsuperscript{107} Essentially, Congress based its 1977 revisions to the toxic pollutant CWA provisions on the new toxic strategy that was the result of the NRDC consent decree.\textsuperscript{108} This and other litigation served to magnify the need for Congress to define more clearly its intentions concerning "the increasingly evident toxic hazard."\textsuperscript{109} The destruction attributed to toxic pollution, brought to the attention of legislators, further amplified the consequences of unmonitored toxic waste disposal.\textsuperscript{110}

2. Section 301(1): Ambiguity in the Translation

While Congress may have explicitly communicated its concern about toxic waste, a vague legislative history and conflicting language clouded the precise meaning of certain accompanying provisions in the 1977 amendments.\textsuperscript{111} In particular, the scope of the word "modify" as used in section 301(1) has been construed both broadly and narrowly. On one side, environ-

\begin{itemize}
\item \textsuperscript{107} See NRDC v. Train, 8 Env't Rep. Cas. (BNA) at 2125, 2128.
\item \textsuperscript{110} For example, Senator Muskie, commented:
\begin{quote}
The seriousness of the toxics problem is just beginning to be understood. New cases are reported each day of unacceptable concentrations of materials in the aquatic environment, in fish and shellfish, and even in mother’s milk. Empirical evidence has shown a statistical correlation between material in New Orleans’ drinking water and cancer mortality rates; Kepone has destroyed the James River, one of America’s most productive, and most historic rivers; PCBs are pervasive and have ruined the fishing in the Hudson River and the Great Lakes; carbon tetrachloride is only the most recent material to contaminate the Ohio River; the pesticide enfrin has been found in Mississippi; perhaps the worst of all, are the ones we do not know yet. The more we find out, the more cause there is for concern. It is imperative that these materials be controlled.
\end{quote}
\textit{Id.} at 454. Speaking in terms of the everyday effects of toxic pollutants, Representative Roberts commented: “[T]oxics have not only polluted drinking water and destroyed both commercial and sport fishing, but in many major water bodies they also constitute a hazard to aquatic environment and public health that has yet to be fully recognized.” \textit{Id.} at 327.
\item \textsuperscript{111} As one commentator projected:
\begin{quote}
The 1977 amendments have eased a number of burdens, and clarified many of the uncertainties of the prior legislation. . . . It would be unrealistic to expect that these amendments, given their multifaceted nature and far-reaching impact will not
\end{quote}
\end{itemize}
mentalists have asserted that "modify" was meant to encompass all forms of modification, including those in section 301. On the other side, industries and the EPA, taking a more narrow interpretation, have contended that "modify" only refers to the specific congressionally created provisions in section 301, namely sections 301(c) and (g).

Both of these positions find some support in the legislative history. In general, members of Congress advocated implementing "new regulations more restrictive than any previously contemplated" for toxic pollutants. However, Congress failed to take an unequivocal stand in phrasing section 301(l), a provision that was intended to be a major step against toxic pollution. No language in the provision precisely delineated the intended meaning of the term "modify".

Moreover, the 1977 legislative history of section 301(l) did not narrow the definitional limits of the word "modify" to one plainly intended meaning. Although legislators equated "modification" with a "waiver" during debates, oftentimes these terms were referred to during discussions involving the modification procedures governed by sections 301(c) and (g), but not the prohibition in section 301(l).

Section 301(l) furthermore lacks substantial legislative history because the provision was not formulated until the conference committee stage of the legislative process. The Senate bill contained an amendment to section 301(c) prohibiting waivers for toxic pollutants based solely on economic affordability. In addition, the Senate bill contained section 301(g) which raise new problems of statutory interpretation even as they lay to rest some of the old ones.

Hall, Clean Water Act, supra note 91, at 372.

112. NRDC Brief at 20, Chemical Mfrs. Ass'n.

113. EPA Brief at 24, Chemical Mfrs. Ass'n.

114. The Fourth Circuit remarked: "The two-volume, 1776 page, Legislative History is of little help. In it, statements can be found to uphold almost any position which one cares to take." E.I. du Pont de Nemours & Co. v. Train, 541 F.2d 1018, 1027 (4th Cir. 1976).

115. 1977 LEGISLATIVE HISTORY, supra note 109, at 411 (statement of Rep. Buchanan). Representative Buchanan also remarked that pretreatment standards should preclude toxics "to the maximum extent feasible," from ever entering municipal sewage plants. Id. at 690. Unqualified use of the word "feasible" is another example of the ambiguity found in much of the legislative history surrounding § 301(l).


117. Id. at 458, 461 (statement of Sen. Muskie); id. at 331 (statement of Rep. Roberts); id. at 673-77. Additionally, the EPA used the term "variance" to refer to both §§ 301(c) and 301(h) modification provisions. Id. at 1419, 1438 (statement of Mr. Jorling).

118. Id. at 582-83.

119. See id. at 584, 677. As with § 301(l), § 301(c) had very little direct discussion recorded in the 1972 legislative history because it was created in the Conference Committee. See Kalur, Will Judicial Error Allow Industrial Point Sources To Avoid BPT and Perhaps BAT
allows for new modifications from BAT standards based on water quality, except for toxics. A similar provision, however, was not incorporated into the House bill.

Although neither of the bills contained section 301(l), the prohibitions in both sections 301(c) and (g) were conceptually very similar to that section. In the final draft, the committee deleted the waiver provision from section 301(c), redrafted section 301(g) to prohibit waivers for conventional, thermal, and toxic pollutants, and added section 301(l). A comment made during House of Representatives debates reiterated the idea embodied in section 301(l) that toxic pollutants would not be subject to waivers or modification. Significantly, the same statement made reference only to prohibition of the modifications allowed in sections 301(c) and (g). Thus, based on the unclear statutory language and lack of legislative history for section 301(l), as the EPA undertook its task of promulgating effluent limitations and pretreatment standards after 1977, restrictions against modification seemed limited to sections 301(c) and (g).

D. Implementation of the Clean Water Act by the Environmental Protection Agency

1. The Rulemaking Procedure

Given the magnitude of the task assigned to the EPA, the promulgation of

120. 1977 Legislative History, supra note 109, at 582-83. In creating § 301(g), Congress intended to give the EPA some flexibility in implementing BAT industry standards. Id. at 674.
121. Id. at 1167.
122. It is not clear why the Conference Committee took out the prohibition of modification from § 301(c), kept it in § 301(g), and then created § 301(l). The Chemical Mfrs. Ass'n suggested that the prohibition of modification was left in § 301(g) for the sake of completeness in the list of pollutants excluded from the provision. Brief of Petitioner Chemical Mfrs. Ass'n at 30 n.38, Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 105 S. Ct. 1102 (1985) [hereinafter cited as CMA Brief].
123. 1977 Legislative History, supra note 109, at 328-29.
124. It is interesting to note that one of the commentators had discussed FDF variances throughout his article, and yet still did not mention them in relation to § 301(l). See generally Kalur, supra note 119.
125. 1977 Legislative History, supra note 109, at 328-29.
national standards for effluent limitations proceeded at a slow pace. In order to accelerate the issuance of final regulations, the EPA focused on a few typical plants in each category of dischargers. Congress furnished the EPA with a list of factors to be considered in establishing each set of standards.

Although Congress explicitly stated those elements that the EPA should consider in developing the effluent limitation standards, the procedure for application of these guidelines was indefinite. The legislative history indicates that Congress was uncertain as to the amount of flexibility permitted during the rulemaking procedure. Some members of Congress advocated that the standards be “as uniform as possible,” and that “similar point sources with similar characteristics” be treated the same. The EPA adopted this philosophy in formulating the standards by allowing for some subcategorization when a plant or group of plants was not “similar” to others within the category. However, additional comments during the

125. See generally Kalur, supra note 119, at 957. For a detailed description of rulemaking procedure, see EPA Brief at 4-6, Chemical Mfrs. Ass’n.

126. The EPA must set and revise standards for both direct and indirect dischargers. Due to the stringent deadlines by which the EPA had to promulgate these standards, the EPA examined the most representative plants in each category. See EPA Brief at 5 n.3, Chemical Mfrs. Ass’n.

127. Congress directed the EPA in setting BPT guidelines to consider:

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


Factors considered in setting BAT guidelines include “the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.” Id. § 1314(b)(2)(B). However, Congress did not state whether local state authorities or the EPA would issue the final effluent limitation for each discharger. See supra note 72.

128. See supra note 127 and accompanying text.

129. See infra notes 130-32 and accompanying text.

130. 1977 LEGISLATIVE HISTORY, supra note 109, at 309. Although this concept seemed to “reflect a compromise between the absolute uniformity and absolute individuality positions advocated in the debates,” when the EPA began to establish guidelines “implementation of the ‘as uniform as possible’ standard involve[d] practical problems.” Parenteau & Tauman, supra note 51, at 15.

131. The EPA attempted to take into account the diversity within each category by creating subcategories. However, industries still found the effluent limitations in the subcategories to be too stringent and not individualized enough. See McKinnon, The Federal Water Pollution Control Act—Industrial Challenges to Effluent Limitations, 7 ENVTL. AFF. 545, 562-63
debates suggested that Congress did not intend standards to be set on an individual, plant-by-plant basis.\textsuperscript{132}

Further, Congress did not provide the EPA with any direction in determining the guidelines for pretreatment standards. The EPA adopted the technology-based criteria designated for direct dischargers as the basis for setting standards for indirect dischargers.\textsuperscript{133} Delays in promulgation of these guidelines, however, led to the litigation that generated the NRDC consent decree which included a court-ordered schedule and approval of technology-based pretreatment standards.\textsuperscript{134} In the 1977 amendments, Congress endorsed the EPA's use of direct discharger criteria in setting pretreatment standards.\textsuperscript{135} Final regulations were issued for indirect dischargers in 1978.\textsuperscript{136}

2. \textit{FDF Variances As Safety Valves: The EPA's Interpretation of Congressional Directive and Resulting Criticism}

Congress' failure to specify clearly the extent to which the EPA was required to consider differences among dischargers within a subcategory gave the EPA great latitude in promulgating effluent limitation guidelines and

\footnotesize{(1979).} Although industries have challenged subcategories, the NRDC and other environmental groups have accepted this part of the rulemaking procedure. At oral argument, the NRDC asserted:

\begin{quote}
We have never contended either in the consent decree or in the context of specific effluent guidelines that EPA does not have considerable discretion in the creation of subcategories. EPA, for example, is considering a subcategory for only one discharger in the context of the ore mining category. And similarly the agency has created a category for only three inorganic chemical companies. These examples are given only to demonstrate that we accept the fact that EPA will in the context of the effluent guidelines themselves, in some cases have to address specific significant differentiating factors between dischargers consistent with the criteria in section 304(b).
\end{quote}

Transcript at 252, \textit{Chemical Mfrs. Ass'n}, 105 S. Ct. 1102 (1985). Further, the NRDC stated that the EPA would have flexibility in setting up pretreatment standards through subcategorization. \textit{Id.} at 247. \textit{But see Kalur, supra} note 119, at 967 (criticism of subcategories).\textsuperscript{132}

During the debates, Senator Muskie commented: "The Conferees intend that the factors described in section 304(b) be considered only within classes or categories 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." 1972 \textit{LEGISLATIVE HISTORY, supra} note 61, at 172. Remarks such as this appear to conflict with subcategorization and the "uniform as possible" directive, because no allowance is made for variation in the factors among the point sources.

\textsuperscript{133} 40 C.F.R. pt. 403 (1985).

\textsuperscript{134} \textit{See supra} note 104 and accompanying text.

\textsuperscript{135} \textit{See 1977 LEGISLATIVE HISTORY, supra} note 109, at 271; \textit{see also} Environmental Defense Fund, Inc. \textit{v. Costle}, 636 F.2d 1229, 1243 (D.C. Cir. 1980).

standards. However, the enormous amount of discretion delegated to the EPA also left the agency's regulations open to challenges from industries, particularly because of improper subcategorization. Recognizing the inadequacy of subcategorization and the effluent guidelines development process in assuring procedural and substantive due process, the EPA created the "Fundamentally Different Factor" (FDF) variance procedure. The FDF variance allows for differentiation among plants in the same category or subcategory. Plants may vary in the types or quantities of pollutants, the required methods of pollutant control, and the costs of complying with promulgated effluent limitation. By providing for the availability of this type of variance, the EPA compensated for the possible oversight of an atypical plant within a subcategory.

Currently, fifty-eight requests for FDF variances have been submitted to

137. See McKinnon, supra note 131, at 560, 562-63. The EPA's actions have also been challenged due to faults in the general rulemaking methodology, and the improper choice of pollution control technology. Id. at 560-65. Examples of successful challenges include: American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975), modified, 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978); FMC Corp. v. Train, 539 F.2d 973 (4th Cir. 1976); Tanners' Council of Am. v. Train, 540 F.2d 1188 (4th Cir. 1976).

138. Between the volumes of information the EPA had to gather and the short amount of time allowed under the NRDC decree, categories could not be broken down as much as possible. CMA Brief at 35 n.51, Chemical Mfrs. Ass'n.

139. The FDF variance is an administrative mechanism to provide an opportunity for relief from the application of national effluent limitation guidelines and standards for existing sources if an individual's facilities are fundamentally different from the factors considered in establishing the guideline or standard. Formal communication with Gary Hudiburgh, Jr., Attorney in Technical support Branch of the EPA Office of Water (Dec. 3, 1985). The EPA found the authority to promulgate effluent limitations with FDF variance provisions in § 501(a) of the CWA, which states: "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter." Clean Water Act, § 501(a), 33 U.S.C. § 1361(a) (1982). Procedural regulations for direct discharger FDF variance requests are in 40 C.F.R. pt. 124 (1985), and substantive regulations are in 40 C.F.R. pt. 125, subpt. D (1985). Substantive and procedural regulations for indirect discharger FDF variance requests are in 40 C.F.R. § 403.13 (1985).


141. Id. One commentator has stated:

EPA has an affirmative duty to develop effluent limitations that can withstand all possible procedural, statutory and substantive challenges. EPA, being a government agency, has as its primary function the duty to serve the public. . . . Industry is also a part of the public, so that it too has a right to fair regulations.

McKinnon, supra note 131, at 565.
EPA headquarters for action by direct dischargers, and forty-nine requests have been made by indirect dischargers. Of the direct discharger requests, four have been approved, thirty-nine have been either denied, withdrawn, or returned to the regional offices, and fifteen are still pending. Few, if any, of the indirect discharger requests have been decided.

142. U.S. Environmental Protection Agency, Memorandum on Fundamentally Different Factors Variance Status for Direct Dischargers from Martha G. Prothro, Director, Permits Division (September 30, 1985) [hereinafter cited as Memorandum on FDF Variance Status], updated by formal communication with Gary Hudiburgh, Jr., Attorney in Technical Support Branch of the EPA Office of Water (December 3, 1985).


144. Memorandum on FDF Variance Status, supra note 142. The EPA approved the four FDF variances based on the process and equipment of each facility being fundamentally different than those of the typical plants observed during the rulemaking procedure. For instance, the Birdsall Sand and Gravel Company, in the mineral, mining, and processing point source category, construction sand and gravel subcategory, qualified for a variance because the elevation and distance of the plant from the point of discharge was unique in comparison to others in the subcategory. Final Decision of the Administrator, FDF 77-18, Birdsall Sand and Gravel Company, Washed Sand and Gravel Plant, Oral, South Dakota, NPDES Number SD 000183 (July 10, 1978). In meeting the recycling requirements of the effluent limitations, the company would incur greater expense in piping and pumping than had been projected during the development of the guidelines. Id.

145. Memorandum on FDF Variance Status, supra note 142. The EPA denied 15 variance requests for six major reasons including: (1) limitations being withdrawn by the EPA (C.F. Industries, May 25, 1977); (2) process employed by plant not fundamentally different from others in same category (Allied Chemical, June 21, 1976; Martin Marietta (OR) and (WA), Oct. 3, 1977; Van Camp Seafood, Oct. 19, 1978; Georgia-Pacific, Aug 21, 1980; Alaska Pulp, Sept. 21, 1984; Louisiana-Pacific Corp., Sept. 21 1984); (3) applicable guidelines remanded or withdrawn by court order (Kaiser Aluminum, Nov. 12, 1976); (4) request for variance already resolved by the EPA in equitable manner and upheld by federal courts (Shell Oil, June 30, 1978); (5) factor in question not one to be considered (Crown Simpson Pulp, Sept. 15, 1977; Louisiana-Pacific Corp., Sept. 15, 1977); and (6) facility shutdown with no plans for reopening (Hecla Mining, April 8, 1983).

Reason for withdrawals include: (1) installation of necessary equipment during pendency of request (City of Los Angeles-3 plants, June 11, 1985); (2) modified individual permit, not industry-wide standards, allowed according to regulations (Aluminum Refining, June 8, 1981; Textile Chemicals, July 27, 1977; City of Burbank, Sept. 9, 1977; Consolidated Edison, Nov. 6, 1978); (3) revisions in effluent limitation guideline regulations after FDF variance application filed (Pacific G&E-Contra Costa, Nov. 10, 1983; (Pacific G & E—Potrero, June 21, 1984); (4) regulations being remanded to the EPA by federal court (Dixie Sand and Gravel, Nov. 15, 1979); and (5) plants closing permanently (Kerr-McGee Chemical, Jan. 15, 1981).

146. Telephone interview with Gary Hudiburgh, Jr., Attorney in Technical Support Branch of the EPA Office of Water (July 26, 1985). The reason that few, if any, FDF variance requests for indirect dischargers have been decided is that most of the regulations were only issued in the last two years. In addition, the EPA repealed FDF variance provisions for toxic pollutants for indirect dischargers in response to National Ass'n of Metal Finishers v. Environmental Protection Agency, 719 F.2d 624 (2d Cir. 1983). Id. These provisions were reestablished by the EPA in response to the Supreme Court's decision in Chemical Mfrs. Ass'n on September 25, 1985. Id.
Despite the limited number of FDF variances granted by the EPA, environmental groups, such as the NRDC, have strongly criticized the FDF procedure and its potential negative consequences. The major criticisms include: recognition of the economic inability of a plant to comply with the uniform regulations as a factor in the FDF variance decision;\(^{147}\) the long length of time for the issuance of a final decision and lack of a stay provision;\(^{148}\) the ineffectiveness of the option to request that effluent limitations be made

\(^{147}\) Although the EPA has not granted many variances, several opponents, including various commentators and environmental groups, still find flaws in both the procedure and potential consequences of FDF variances. A major criticism involves the inclusion of the economic inability of the plant to comply with the uniform effluent limitation as a factor in the FDF decision. The NRDC asserts that economic ability should not be considered in granting variances. NRDC Brief at 34-35, Chemical Mfrs. Ass'n. However, the EPA does not base its decision on the overall financial weakness of a facility. EPA Brief at 15, Chemical Mfrs. Ass'n. Rather, the EPA determines whether the cost to the plant is wholly out of proportion to the cost estimate based on typical plants during the rulemaking procedure. See 40 C.F.R. § 403.13(c)(2)(iv)(A) (1985); 40 C.F.R. § 125.31(b)(3)(i) (1985). See also EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 78 (1980). Without allowing for such variances, the EPA would be charged with allowing inequities to exist within each subcategory, and the regulations might be overturned. Congress has not precisely outlined how much industries must spend in carrying out the directives of the CWA. “Until Congress is willing to state in the law itself, and not just in the legislative history, that dischargers must comply with the established limits or go out of business, this country’s water quality will remain burdened with the ugly consequences of the Administration’s pressured discretion.” Kalur, supra note 119, at 988.

One of the approved FDF variances provides a clear example of the potential for high costs. In order for the Freeport Chemical Company plant in Uncle Sam, Louisiana to have complied with the regulations assigned to its subcategory, it would have initially cost $27 million, with annual operating costs of $13 million. Final Decision of the Administrator, FDF 78-01, Freeport Chemical Company, Uncle Sam, Louisiana, NPDES LA0004847 (June 3, 1981) at 5-6. However, the EPA only projected that the cost to plants in that subcategory would be $500,000 initially, and $40,000 annually. \(\text{id.}\) Other factors which the EPA will not consider in the determination of granting an FDF variance include infeasibility to install equipment within statutory time limits, 40 C.F.R. § 125.31(e)(1) (1985); inability to achieve limits with appropriate treatment, 40 C.F.R. § 125.31(e)(2) (1985); discharger's ability to pay for treatment, 40 C.F.R. § 125.31(e)(3) (1985); and local receiving water quality, 40 C.F.R. § 125.31(e)(4) (1985). Similar provisions exist for indirect dischargers. See 40 C.F.R. § 403.13(e) (1985).

\(^{148}\) The NRDC also criticized the EPA for the length of time it takes until a final decision is released by the Administration. NRDC Brief at 35-36, 42, Chemical Mfrs. Ass'n. The EPA, however, asserts that three factors make the decisionmaking procedure time-consuming. The first factor involves the collection of technically complicated data and information on the applicant. Some data must be collected over long periods of time to assure accuracy. Secondly, manpower is limited due to competing interests in the different offices within the EPA. Thirdly, to research thoroughly and evaluate the request for modification properly from a national standard, the EPA proceeds in a slow and methodical manner. Telephone interview with Gary Hudiburgh, Jr., Attorney in Technical Support Branch of the EPA Office of Water (July 26, 1985).

In addition, FDF variance provisions lack a stay provision, instructing plants to continue to install the required pollutant control devices until notification of the decision. NRDC Brief at 42, Chemical Mfrs. Ass'n. Congress addressed these issues in recent proposed legislation by
II. **Judicial Interpretation of the EPA's FDF Variance for Direct and Indirect Dischargers and Authority To Promulgate Uniform Effluent Limitations**

A. **Early Judicial Interpretations of Effluent Limitations**

Prior to *E.I. du Pont de Nemours & Co. v. Train*, several circuit courts had examined the scope of the EPA's authority to establish national effluent limitations containing FDF variance provisions under the CWA. These decisions raised two primary questions: whether the EPA Administrator had the authority under section 301 to promulgate effluent limitation regulations for direct dischargers or if the authority was to be reserved by the individual permit issuer; and, if the EPA was found to have statutory authority to promulgate such regulations, whether they should be enforced uniformly or cover a range of limitations from which a permit issuer could choose in granting individual limitations for dischargers.

In addressing the first issue, each court examined the language of section 301, its legislative history, and the actions taken by the EPA in implementing this section. The decisions of the courts were sharply divided. In *CPC International, Inc. v. Train*, the United States Court of Appeals for the Eighth Circuit held that the EPA did not have the authority to promulgate time limits on the decision-making procedure. See *infra* notes 277-79 and accompanying text.

Additionally, one commentator does not give much validity to the option of requesting stricter effluent limitations through an FDF variance. He does not believe that citizens or environmental groups possess the knowledge or capability to pursue this type of litigation. See Kalur, *supra* note 119, at 962 n.33.

Lastly, some commentators observe that allowing for FDF variances could create a situation where "no rational basis for limitation will exist." *Id.* at 967 n.66. For further discussion of the negative ramifications of administrative agencies' employment of the exceptions process, see generally Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formation of Energy Policy Through an Exceptions Process*, 1984 Duke L.J. 163. But see Note, *Regulatory Values and the Exceptions Process*, 93 Yale L.J. 938 (1984) (in order for administrators to perform their tasks properly they must be allowed to use their discretion in promulgating rules); see also Aman, *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 Duke L.J. 227 (the broad problems addressed by agencies call for a mechanism to bridge the gap between the collectively determined rules and the realities of each case).

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150. *See infra* notes 153-64 and accompanying text. For more detailed analysis of the cases leading to *du Pont*, see generally Parenteau & Tauman, *supra* note 51.

151. 515 F.2d 1032 (8th Cir. 1975).
section 301(b) industry-wide effluent limitations. On the other end of the spectrum, the Second, Third, Seventh and D.C. Circuit Courts held that the EPA did have such authority under section 301(b).

The circuit courts also split as to the uniformity of the effluent limitations promulgated by the EPA. The Eighth Circuit, in CPC International, Inc. v. Train, concluded that the EPA was to promulgate only ranges of effluent limitations for permit issuers to use in setting individual limitations for point sources. The District of Columbia Circuit in American Frozen Food Institute v. Train and the Second Circuit in Hooker Chemicals and Plas-

154. Id. at 1037. The court examined the conflicting mandates in the CWA where, on the one hand, § 306 and § 307 directly authorized the EPA Administrator to issue regulations, while § 301 merely stated that the effluent limitations should be achieved without specifying who should enforce the limitations. The court, however, held that the Administrator lacked the authority under § 402 to issue actual permits, indicating that the Administrator was only to set guidelines to which the permit issuers could refer. Id. at 1038-39. Additionally, the court found that the legislative history supported the position that individual permit issuers were authorized to set effluent limitations. Id. at 1039-43.

155. Hooker Chemicals & Plastics Corp. v. Train, 537 F.2d 620 (2d Cir. 1976). The Second Circuit's analysis relied on the legislative history in holding that the Administrator could promulgate regulations. Id. at 627-28.

156. American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975). The court looked to the entire statutory scheme and legislative history, which it found unclear, but inferred that the Administrator had the authority to promulgate effluent limitations. Id. at 1036-37.

157. American Meat Inst. v. EPA, 526 F.2d 442 (7th Cir. 1975). The court accepted the EPA's interpretation that the Administrator had the power to issue effluent limitations. After reviewing § 301 and the legislative history, the court found the EPA view to be "reasonable." Id. at 452. The Seventh Circuit used the same approach as the Supreme Court did in Chemical Mfrs. Ass'n. The court asserted: "Our inquiry then is not whether the agency's interpretation of § 301 is the only permissible one, but rather whether it is sufficiently reasonable to preclude us from substituting our judgment for that of the agency." Id. at 450. See infra note 218 and accompanying text.

158. American Frozen Food Inst. v. Train, 539 F.2d 107 (D.C. Cir. 1976). The D.C. Circuit added a new argument in favor of the Administrator's authority under § 301. The court questioned the result that would occur if permit issuers had the discretion to set their own effluent limitations. Id. at 129. The court predicted:

The plainly expressed purpose of Congress to require nationally uniform interim limitations upon like sources of pollution would be defeated. States would be motivated to compete for industry by establishing minimal standards in their individual permit programs. Enforcement would proceed on an individual point source basis with the courts inundated with litigation. The elimination of all discharge of pollutants by 1985 would become the impossible dream.

Id.

159. Compare CPC Int'l v. Train, 515 F.2d 1032 (8th Cir. 1975) (EPA to set ranges as guides for permit issuers), with American Frozen Food Inst. v. Train, 539 F.2d (D.C. Cir. 1976) (holding that EPA sets uniform national effluent standards).

160. 515 F.2d 1032 (8th Cir. 1975).

161. CPC Int'l, 515 F.2d at 1032; see also Grain Processing Corp. v. Train, 407 F. Supp. 96, 103 (S.D. Iowa 1976).

162. 539 F.2d 107 (D.C. Cir. 1976).
tics Corp. v. Train,163 however, held that the EPA should set uniform national effluent limitations with the FDF variance procedure taking into account atypical dischargers.164 The courts in these conflicting holdings used the same statutory construction analysis, yet each differed in their interpretations and conclusions.

B. E.I. du Pont de Nemours & Co. v. Train: FDF Variances for Direct Dischargers

In 1974, eight chemical companies brought an action in the United States District Court for the Western District of Virginia in an attempt to clarify the ambiguous statutory language concerning promulgation of effluent limitations for point sources.165 Under section 301, Congress directed that effluent limitations "shall be achieved" in accordance with the detailed accompanying provisions.166 Moreover, in section 402, Congress authorized the EPA to issue permits and to approve state permit issuance programs.167 The chemical companies construed these provisions together to mean that the EPA was to promulgate "guidelines," not regulations, for the numerous permit issuers to use in setting individual point source effluent limitations.168

The EPA, on the other hand, asserted that Congress intended the EPA Administrator to issue uniform national effluent limitation regulations for the various classes and categories.169 The uniform regulations would provide a ceiling for permit issuers as to the maximum amount of discharge to be allowed.170

The district court held that, in view of other provisions included in the CWA, Congress authorized the EPA Administrator to promulgate section 301(b) effluent limitation regulations separate from section 402 permit issuance.171 Subsequently, the chemical companies brought two separate actions in the United States Court of Appeals for the Fourth Circuit. The first action challenged the district court's jurisdiction to review effluent limitation regulations issued by the EPA.172 In the second action, the companies peti-

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163. 537 F.2d 620 (2d Cir. 1976).
164. Id. at 630; American Frozen Food, 539 F.2d at 131.
169. Id. at 1249-50.
170. Id. at 1250.
171. Id. at 1256.
tioned for review of EPA regulations based on the EPA's alleged lack of authority under the CWA. The Fourth Circuit held that the CWA authorized the EPA to issue "presumptively applicable" effluent limitation regulations, and that a variance procedure was required for new sources.

The Supreme Court granted certiorari to review the Fourth Circuit decision in *E. I. du Pont de Nemours & Co. v. Train*. In its analysis, the Court reconciled the discrepancies among the CWA provisions, particularly sections 301, 304, and 402. The Court found that based on the use of the terms "categories and classes" throughout section 301, Congress intended that the regulations be based on categories and classes of dischargers rather than on individual point sources. Therefore, the *du Pont* Court concluded that Congress intended the EPA to set industry-wide regulations to be applied uniformly with allowance for variances. Rejecting the Fourth Circuit's holding, the Court pointed to legislative history indicating that the EPA was meant to issue more than mere guidelines and that variance from new source performance standards would be inappropriate. However, the Supreme Court was unwilling to evaluate the scope of the EPA's FDF vari-

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176. 430 U.S. at 126-28.

177. *Id.* at 128. In drawing this conclusion the Supreme Court extensively analyzed the cases discussed *supra* notes 153-64 throughout the opinion. Vis-à-vis a statutory construction analysis, the Court held that the EPA Administrator has the authority to adopt 1977 and 1983 uniform effluent limitation regulations, "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations." *Id.* (emphasis added). In addition, the Court rejected the Fourth Circuit's holding that the EPA should be allowed to grant FDF variances from new source performance standards. *Id.* at 139.

178. 430 U.S. at 129-30. In addition, the Court discussed the impracticality of the EPA being required to set individual effluent limitations for the thousands of potential point sources. *Id.* at 132-33.

179. *Id.* at 137-39. *See supra* note 74 and accompanying text.
Congressional Ambiguity

C. Congressional Intent in the 1977 Amendments for FDF Variances

Congress did not explicitly authorize the EPA to issue any variances from effluent limitations other than those based on economic inability, section 301(c) of the 1972 amendments, and those based on water quality, section 301(g) of the 1977 amendments. The EPA and proponents of FDF variances have presented evidence that Congress was aware of these variances even though it did not directly approve of them in the 1977 amendments. However, opponents of FDF variances have produced contradictory facts that cast doubt upon Congress' awareness or condonation of the EPA's variance procedure.

During the 1977 amendments debate a representative on the Subcommittee on Water Resources emphasized the importance of understanding case law that interpreted the CWA, and referred to a Library of Congress report that specifically included a discussion of du Pont and Appalachian Power Co. v. Train, which upheld FDF variances. Moreover, a representative of the NRDC brought FDF variances to the attention of Congress while testifying before the Subcommittee on Environmental Pollution.

Although the Supreme Court approved of "best practicable control technology currently available" (BPT) variances in the du Pont decision, the propriety of FDF variances from other effluent limitations and pretreatment standards, particularly for indirect dischargers, was uncertain. Opponents of FDF variances have refuted evidence concerning du Pont and pretreatment standards based on the release time of each. The Supreme Court decided du Pont only a short time before the enactment of the 1977

180. 430 U.S. at 128 n.19. The Court stated that "consideration of whether EPA's variance provision has the proper scope would be premature." Id.

181. 1977 LEGISLATIVE HISTORY, supra note 109, at 374. Representative Clausen stated that "[a] full understanding of Public Law 92-500 [1972 Amendments] can only be achieved by having an understanding of the case law interpreting the public law." Id.

182. COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION, 95TH CONG., 1ST SESS., CASE LAW UNDER THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 20, 28 (Comm. Print 1977) [hereinafter cited as CASE LAW UNDER THE FWPCA AMENDMENTS OF 1972].

183. 545 F.2d 1351 (4th Cir. 1976).

184. Id. at 1358-59; CASE LAW UNDER THE FWPCA AMENDMENTS OF 1972, supra note 182, at 20, 28.


186. See supra note 180 and accompanying text.

187. NRDC Brief at 14, 21, Chemical Mfrs. Ass'n.
amendments. In 1978, the EPA promulgated final general pretreatment regulations, which included FDF variance provisions, after enactment of the 1977 amendments. Opponents argue that Congress had little or no opportunity to review these factors in order to address specifically FDF variances in the 1977 amendments.

In addition, referring to Congress' ban of toxic pollutant variances in section 301(l), the EPA highlighted two events of which Congress made no mention in the 1977 amendments or the legislative history. First, BPT variances approved in *du Pont* applied to pollutants that Congress declared toxic in 1977. Second, in February of 1977, prior to enactment of the amendments, the EPA granted a BPT variance to a steam electric generating plant for the discharge of copper, a toxic pollutant. Consequently, the EPA argued that Congress specifically would have addressed the prohibition of FDF variances in relation to toxic pollutants if it had so intended.

Nevertheless, opponents have asserted that infrequent occurrences such as these, and lower court decisions such as *Appalachian*, would not be of significance regarding Congress' intent given the extensive material to be evaluated prior to the 1977 amendments.

Lastly, FDF variance opponents claim that courts may not infer a non-statutory exception, such as FDF variances, where Congress has already provided specific statutory exceptions, such as sections 301(c) and (g). The EPA, however, has refuted this allegation by noting that the Supreme Court approved BPT variances even though Congress had included section 301(c) as an exception outlet in the 1972 amendments.

**D. FDF Variances and Toxic Pollutants: Conflicting Decisions in Appalachian Power Co. v. Train and National Association of Metal Finishers v. EPA**

In *Appalachian Power Co. v. Train*, the United States Court of Appeals for the Fourth Circuit was the first court to address the discordant evidence surrounding the actual intent of Congress in creating section 301(l) in the

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188. *Id.* at 26-27.
189. *Id.* at 30.
190. *Id.*
191. EPA Brief at 30, *Chemical Mfrs. Ass'n*.
192. *Id.*
193. *Id.; see also* Reply Brief for Petitioner Chemical Mfrs. Ass'n at 13-16, *Chemical Mfrs. Ass'n*.
194. NRDC Brief at 27, *Chemical Mfrs. Ass'n*.
195. *Id.*
196. EPA Brief at 28-29, *Chemical Mfrs. Ass'n*.
197. 620 F.2d 1040 (4th Cir. 1980).
1977 amendments. In *Appalachian*, the NRDC contended that all FDF variance provisions in BPT effluent limitation regulations should be eliminated in accordance with the congressional mandate in section 301(l) prohibiting variances for toxic pollutants. The EPA and the petitioner utility company asserted that Congress limited its prohibition to variance provisions already included. In addition, they argued that FDF variances do not excuse dischargers from complying with BPT effluent limitations. Rather, the EPA gave dischargers different limitations with which to comply based on unique characteristics which were not found in the exemplary plants that the EPA examined during the rulemaking procedure.

The Fourth Circuit held that section 301(l) did not apply to BPT variances. Relying on the Supreme Court's approval of FDF variances from BPT effluent limitations in *du Pont*, the court found that applying section 301(l) retroactively, without a specific mandate from Congress, would be inappropriate. While emphasizing the lack of clarity in section 301(l), the court deferred to the administrative judgment of the EPA in interpreting this provision. However, the court declined to assess the relationship between sections 301(c) and 301(l) because the variance issue under its scrutiny did not concern BAT effluent limitations.

In *National Association of Metal Finishers v. Environmental Protection Agency*, however, the United States Court of Appeals for the Third Circuit held that FDF variances for toxic pollutants for indirect dischargers were prohibited by section 301(l) of the CWA. The NRDC and the EPA asserted the same arguments here as in *Appalachian*, with some additions because the FDF variances in question involved pretreatment standards. The NRDC pointed out that unlike direct discharger limitations, the CWA does not contain explicit variance provisions from pretreatment standards. The EPA based its counterargument in favor of pretreatment FDF variances on the Supreme Court's approval of FDF variances for direct dis-

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198. Id. at 1047.
199. Id.
200. Id.
201. Id.
202. Id. at 1047-48.
203. Id. at 1048. The court commented, "the best that can be said for 301(l) is that it is not clear." Id.
204. Id. at 1048.
205. 719 F.2d 624 (3d Cir. 1983).
206. Id. at 646.
207. Id. at 644. The Court referred to §§ 301(c), 301(g)-(h), 33 U.S.C. §§ 1311(c), 1311(g)-(h) (1976 & Supp. V 1981) (current version at 33 U.S.C. §§ 1311(c), 1311(g)-(h) (1982)); § 301(m), 33 U.S.C.A. 1311(m) (West Supp. 1983) (current version at 33 U.S.C. § 1311(m) (1982)).
chargers in *du Pont*.\(^{208}\)

The Third Circuit did not address the broad issue of the EPA’s “inherent authority” to grant FDF variances from pretreatment standards, but instead the court briefly examined FDF variances in relation to section 301(l) and toxic pollutants.\(^{209}\) Based on legislative history, the court construed the word “modify” in section 301(l) to encompass FDF variance provisions.\(^{210}\) Conclusively rejecting the *Appalachian* court’s contention that section 301(l) is unclear, the Third Circuit held that Congress meant to prohibit all modifications for toxic pollutants, including FDF variances.\(^{211}\)

In response to the Third Circuit decision in *National Metal Finishers*, the EPA withdrew all FDF variance provisions from the pretreatment regulations involving the discharge of toxic pollutants.\(^{212}\) Moreover, both the EPA and the Chemical Manufacturers Association, a representative of an industry drastically affected by *National Metal Finishers*, petitioned the Supreme Court to review the Third Circuit decision given the split between the courts.

### III. Chemical Manufacturers Association v. NRDC: The Realities of the EPA’s Implementation of Congress’ Ambiguous Mandate in the Clean Water Act

In *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*,\(^{213}\) the United States Supreme Court, in a five-to-four decision, held that the EPA’s creation of FDF variances is consistent with the goals of the CWA, and therefore, their exemption from pretreatment standards is not prohibited.\(^{214}\) Writing for the majority, Justice White examined various aspects of section 301(l) in determining whether the Court should defer to the judgment of the EPA in administering the statute.\(^{215}\) A three-part analysis was used to identify congressional intent. This included a study of statutory language, legislative history, and the EPA’s application of section 301(l). Due to the ambiguity of the test utilized by the majority, the dissent found evidence sufficient to support invalidation of FDF variances for pollu-

\(^{208}\) 719 F.2d at 644.

\(^{209}\) Id. at 644-45; see also *supra* notes 88-124 and accompanying text. The court cited many portions of the 1977 legislative history discussing congressional emphasis of toxic pollutant discharges. *Id.*

\(^{210}\) Id. at 645-46.

\(^{211}\) Id. at 646.

\(^{212}\) *See supra* note 36 and accompanying text.

\(^{213}\) 105 S. Ct. 1102 (1985).

\(^{214}\) Id. at 1112.

\(^{215}\) Id. at 1108. *See supra* note 157 and accompanying text.
tants. Justice Marshall, writing for the dissent, argued that FDF variances frustrated congressional intent and should have been invalidated by the Court. However, the majority deferred to the EPA’s judgment based on a recent test enunciated by the Supreme Court that enjoins courts from substituting their own view for that of an agency that rationally and justifiably implements a complex and ambiguous statute.

A. Statutory Language: To Modify or Not To Modify

The Court in Chemical Manufacturers Association focused on pinpointing with certainty the intended meaning of the word “modify” as used in section 301(l). Justice White examined both the language in section 301(l) and other sections in the CWA that allowed the EPA to alter standards in regulations. Relying on sections of the CWA authorizing the EPA “to revise” pretreatment standards from time to time, and the NRDC’s concession that such revisions are necessary even as applied to toxic standards, the Court found no plain meaning of “modify.” Specifically, the Court questioned whether “modify,” if broadly construed as suggested by the NRDC, encompassed the EPA’s statutory option “to revise CWA standards.”

Justice White reasoned that if this broad construction were adopted, sections of the CWA allowing revisions, such as 307(b)(2), would become meaningless. Consequently, Justice White encountered difficulty in discerning one particular definition of “modify” designated by Congress that would include FDF variances, yet exclude the statutorily authorized revisions. Therefore, the majority deferred to and accepted the EPA’s assertion that FDF variances

216. 105 S. Ct. at 1113.
217. Id.
218. Id. at 1108. The Supreme Court stated the test for courts to apply when reviewing agency decisions in Chevron v. Natural Resources Defense Council, 104 S. Ct. 2778 (1984). Specifically, the Court set forth two questions: (1) whether Congress has spoken on the exact issue in question and (2) whether the agency’s action is based on a permissible construction of a statute in the case of congressional silence on the issue. Id. at 2781-82. Lastly, the Court emphasized that a reviewing court must defer to an agency’s “reasonable interpretation” of a statutory provision when the congressional directive is implicit rather than explicit. Id. at 2782. See supra note 157 and accompanying text.
220. 105 S. Ct. at 1108. During the oral argument the NRDC conceded that § 301(l) could not be read to prohibit every type of alteration in toxic standards. Id.
221. Id. at 1108.
222. Id.
223. Id. Justice White remarked: “But it makes little sense to construe the section to forbid EPA to amend its own standards, even to correct an error or to impose stricter requirements. Id. This particular factor persuaded the Court to reject the NRDC’s broad meaning of “modify” because it contradicted the congressional mandate in other CWA provisions. Id.
224. Id.
are more like the revisions authorized in section 307(b)(2), than those in
section 301(c) and (g).225

The dissent, on the other hand, asserted that "modify" is an unqualified
prohibition, universal in scope, against altering limitations for toxic pollu-
tants.226 Justice Marshall made reference to several separate statutes using
"exceptions," "variances," "modifications," "adjustments," or "exemp-
tions" interchangeably to mean "individual departures from general
rules." 227 The evidence applied by the dissent, however, did not altogether
advance its argument.228 In fact, the dissent's assertions support the major-
ity's conclusion. If "modify" is read in its broadest sense, then even the
pretreatment standard revisions, to be made at the discretion of the EPA and
explicitly authorized in the CWA, would be prohibited. This would clearly
frustrate Congressional intent. Given the ambiguity as to whether "modify"
was intended to encompass Congress' authorization for the EPA "to revise"
pretreatment standards under section 307(b)(2), the majority properly con-
cluded that the statutory language in the relevant CWA provisions did not
invalidate the EPA's interpretation of section 301(l).

B. Legislative History: Evolution of 301(l) and Congressional Awareness
of FDF Variances

Both the majority opinion and the dissenting opinion devoted a significant
amount of time to analyzing the CWA legislative history regarding congres-
sional intent as to the creation of section 301(l). The majority began its
examination of the legislative history by tracing the evolution of section
301(l).229 Recognizing the overall ambiguity of the legislative history, the
majority justifiably gave considerable weight and deference to two major
points the EPA claimed would support upholding FDF variances for toxic
pollutants.230 First, the Court noted that the discussion concerning "modifi-
cations" referred to sections 301(c) and (g), and made mention of FDF vari-

225. Id.
226. Id. at 1115.
227. Id. at 1127 n.22.
228. Other evidence offered by the dissent included the interchangeable use during the de-
bates of the terms "variance," "waiver," and "modification." The dissent only vaguely men-
tioned that the words were used to "describe statutory 'modifications.'" Id. at 1127 n.22.
However, in fact, these terms were used specifically in reference to §§ 301(c) and 301(g), not
§ 301(l). See infra notes 237-38 and accompanying text.

In addition, Justice Marshall inferred that the EPA's past use of "modification" to describe
FDF variances indicated that they are included in § 301(l). However, due to the conflict
between the directives in §§ 307(b) and 301(l), the EPA's use of "modification" is permissible
under the majority's more narrow application of the term "modify." Id. at 1127 n.22.
229. Id. at 1108-10. See supra notes 111-24 and accompanying text.
230. 105 S. Ct. at 1108-10.
Secondly, it found significance in the fact that Congress did not specifically mention FDF variances in relation to section 301(1), particularly in light of the evidence indicating Congress’ awareness of the du Pont approval of variances. Therefore, the Court held that “the legislative history itself does not evince an unambiguous Congressional intention to forbid all FDF waivers with respect to toxic materials.”

Despite the evidence found in the legislative record that judicial approval of variances in du Pont was brought to the attention of Congress during the 1977 amendment debates, the dissent did not believe that Congress’ silence constituted approval of FDF variances. Rather, it asserted that congressional silence was attributable to the timing of the release of the du Pont decision, which was shortly before enactment of the 1977 amendments, together with the small number of variances granted by the EPA prior to 1977. However, the dissent once again reinforced the majority’s view because it can not be asserted definitively that Congress meant, in enacting 301(1), to include FDF variances within the scope of “modify” if it was not made aware of the du Pont Court’s approval of variances. Additionally, Justice Marshall noted the interchangeable use during the debates of the words “modification,” “variance,” and “waiver.” However, it appears that these words were taken out of context, in that they were spoken during discussion of sections 301(c) and (g).

C. The EPA’s Application of Section 301(1)

After an extensive analysis of the EPA’s subcategorization method of establishing nationally applicable discharger regulations, the Court appropriately concluded that the EPA’s construction of section 301(1) as allowing

231. Id. at 1109.
232. Id. at 1109 n.17. See supra notes 111-24 and accompanying text.
233. 105 S. Ct. at 1110.
234. Id. at 1118.
235. Id. at 1120 n.12. In addition the dissent argued that du Pont only addressed BPT standards, and not BAT or pretreatment standards. Therefore, Justice Marshall asserted that Congress had no reason to follow this decision even if it had been aware of it. Id. at 1119-20. The dissent, however, failed to consider that Congress, in the 1977 amendments, approved of the EPA setting of pretreatment standards for both BPT and BAT effluent limitations. Therefore, the Supreme Court’s approval of variance in BPT limitations could also be construed as Congress’ acceptance of variance in BAT and pretreatment standards. See supra note 135 and accompanying text.
236. If Congress did not know of the du Pont decision and the approval of variance in BPT limitations then it would not have been considering FDF variances at all, particularly since no mention was made of them while enacting § 301(1). See supra note 231 and accompanying text.
237. 105 S. Ct. at 1127 n.22.
238. See supra notes 116-24 and accompanying text.
FDF variances was consistent with the CWA's goals and operations. Justice White discussed several factors that justified the EPA's implementation of regulations allowing FDF variance provisions, including the congressional "uniform as possible" mandate. The Court identified conflicting directions from Congress that the EPA had to construe in order to promulgate CWA regulations correctly. Congress instructed the EPA to ensure that "similar point sources with similar characteristics . . . meet similar effluent limitations" while taking into consideration the variety among plants within each category.

The majority noted the enormous burden placed on the EPA to collect adequate information and promulgate uniform effluent limitations within the strict time constraints. The nature and purpose of FDF variances, Justice White asserted, is to fine-tune the rulemaking procedure by making certain that the "necessarily rough-hewn categories do not unfairly burden atypical plants." Accordingly, the Court found that the variances did not excuse the discharger from compliance with the uniform standards, but rather assured that the diversity of dischargers is truly taken into account as Congress mandated.

The Court acknowledged that the EPA could achieve the same results by granting similar relief during the rulemaking procedure. However, when the means used by an agency such as the EPA are under question, deference by courts to the agency interpretation is deemed appropriate. Justice White noted that only a small number of variances were granted by the EPA, and potential due process problems were avoided by including the

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239. 105 S. Ct. at 1110-12.
240. See 1977 LEGISLATIVE HISTORY, supra note 109, at 305. A member of Congress indicated that the EPA should make the regulations "as uniform as possible." Id.
241. See supra notes 128-32 and accompanying text.
242. 105 S. Ct. at 1110-11.
243. Id.
244. Id. See supra notes 128-32 and accompanying text.
245. 105 S. Ct. at 1105, 1110.
246. Id. at 1105.
247. Id. at 1110.
248. Id. The Court stated: "As we have recognized, the FDF variance is a laudable corrective mechanism, 'an acknowledgement that the uniform . . . limitation was set without reference to the full range of current practices, to which the Administrator was to refer.' " Id. (citing EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 77-78 (1980)). See supra note 131 and accompanying text.
249. 105 S. Ct. at 1111.
250. Id. When the means an agency employs to promulgate a congressional statutory mandate are in dispute, generally courts will defer to that agency's interpretation. Id. See supra note 157 and accompanying text.
251. 105 S. Ct. at 1107 n.12. Even the NRDC admits that FDF variances are infrequently granted. Id.
FDF variance provisions in regulations. Additionally, the Court pointed out the difference between sections 301(c) and (g) and section 301(f) based on the dissimilarity in statutory factors considered by the EPA. Modifications under section 301(c) are granted on the basis of a direct discharger's economic inability to meet the foreseen costs of pollution control devices required under the CWA. Section 301(g) allows direct dischargers to obtain modified standards if the quality of the water at the point of discharge is not substantially affected by the pollutants. In contrast, FDF variances cannot be granted due to either economic inability or effects of discharges on water quality.

Justice Marshall's dissent strongly criticized the EPA's application of a supplemental mechanism to the rulemaking procedure. The dissent pointed to legislative history that demonstrated Congress did not intend "plant by plant" determinations of standards and questioned the EPA's ability to determine whether a plant is truly unique, compared to others, after the rulemaking procedure is completed. However, as emphasized by the majority, while some members of Congress may have indicated that the EPA was not authorized to make this type of case-by-case judgment, other members clearly recognized the need for taking into account differentiation within each category. Thus, the procedure that Congress established for the EPA to follow in fact did not have the distinct boundaries of limitation as suggested by the dissent.

Finally, the dissent highlighted ways in which FDF variances are different from statutory revisions under section 307(b). First, by individually setting limitations, the environment is less protected because those plants are not compared to other plants that are the "best" performers. Justice Marshall illustrated this proposition in a hypothetical, based on the EPA granting an FDF variance to an atypical plant. The new effluent limita-

252. Id. at 1112 n.25. See supra notes 137-41 and accompanying text.
253. 105 S. Ct. at 1111.
254. Id.
255. Id. FDF variances are unavailable on the basis of either discharger's inability to pay for the treatment, 40 C.F.R. § 125.31(e)(3) (1985), or local receiving water quality, 40 C.F.R. § 125.31(e)(4) (1985). Similar provisions for indirect dischargers are contained at 40 C.F.R. § 403.13(e) (1985). See supra note 148 and accompanying text.
256. 105 S. Ct. at 1111.
257. Id. at 1122-23.
258. Id. at 1122.
259. See supra note 132 and accompanying text.
260. See supra notes 129-31 and accompanying text.
262. Id. at 1123.
263. Id. at 1123-24.
tion obtained through the variance only applies to that one plant. The dissent contended that another plant in the same category that is also atypical may be utilizing more cost efficient or advanced equipment, unbeknownst to the EPA or the first plant. In order to eliminate this oversight of the "best" performer among the atypical plants, Justice Marshall postulated that the EPA should take into account all the production processes in a category, thus allowing for more stringent and accurate limitations to be formulated at the outset.

The dissent's remedy, however, is flawed due to the number of plants and factors to be considered and the deadlines the EPA must meet. The number of plants the EPA must examine within each category creates a substantial burden, particularly in view of the small staff and long list of factors Congress directed the EPA to investigate and to evaluate. More significantly, Justice Marshall neglected to contemplate the length of time the rulemaking procedure would take if every single plant were examined. In complying with the time schedule set by Congress, the courts, and the NRDC, the EPA would be unrealistically burdened due to the complexity of the rulemaking procedure. Rulemaking would become such a lengthy process, that dischargers would continue to pollute waters, with no limitation, while awaiting the EPA's issuance of the specific regulations for their category.

Secondly, the dissent argued that FDF variances may not spur the same technological progress as statutory revisions. Employing the same hypothesis as before, Justice Marshall concluded that rather than obtaining the FDF variance, the atypical plant would be forced to purchase the advanced equipment used by the hypothetical "best" performer in the category. Therefore, the dissent maintained that such situations would induce rapid technological advancements in pollution control for production processes. Although Congress intended for section 301(l) and other restrictive CWA provisions to encourage developments in pollution control, Congress itself placed restrictions on the extent to which this was feasible. Specifically, in

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264. Id.
265. Id. at 1123-24.
266. See supra note 148 and accompanying text.
267. See supra note 127 and accompanying text.
269. Specifically, the NRDC Consent Decree set strict time limits on the EPA for the purpose of promulgating CWA regulations and a list of toxic pollutants. See supra notes 104-07 and accompanying text.
270. 105 S. Ct. at 1124.
271. Id.
272. Id.
the revision authority of section 307(b) Congress identified situations in which the standards may need alteration. Therefore, dischargers might not be forced to install new advanced pollution control devices.273

IV. Ramifications of Chemical Manufacturers Association and Congress’ Reaction

In the summer of 1985, each house of Congress statutorily endorsed the Supreme Court’s decision to defer to the EPA’s interpretation of the CWA with respect to the use of FDF variances for toxic pollutants through passage of differing provisions relating to FDF variances. Both the Senate274 and the House275 passed bills that added provisions to section 301 authorizing the EPA to grant FDF variances for both direct and indirect dischargers of all pollutants, including toxic pollutants.276 The two bills, in addition to approving of FDF variances, primarily addressed the aspects of the FDF variance procedure that were subject to the most criticism. These included time limits for applications, time limits for decisionmaking, limitations on applicability of the new subsection, and cost used as a factor.

Both the Senate and House addressed the issue of the length of time within which an application for an FDF variance may be filed. Generally, both limited the amount of time to under one hundred and eighty days.277 Congress also addressed time constraints on the EPA in issuing a final decision on an FDF variance. Prior to the 1985 bills, the EPA had no set time schedule within which to make a decision.278 The House and Senate, however, differed with respect to the amount of time needed for the EPA to evaluate an application.279

Both bills also conflicted over when the new CWA subsection should take

273. In addition, Congress identified situations where toxic pollutant dischargers did not necessarily have to meet the stringent standards of the “best” performer by obtaining advanced equipment based on economic ability and water quality standards. See Clean Water Act §§ 301(c), 301(g), 33 U.S.C. §§ 1311(c), 1311(g) (1982).
276. Congress approved of FDF variances, despite its refusal in 1983 to address the National Metal Finisher Court’s decision to invalidate the variance. See Hearings on Possible Amendments to the Federal Water Pollution Control Act before the Subcommittee on Water Resources of the House Comm. on Public Transportation, 98th Cong., 1st Sess., 2705-06, 2724-26, 2740-41, 2747-48 (1983). However, the eventual language of the final statutory provision is unknown. A conference is expected during the second session of the 99th Congress.
277. The Senate bill only gave dischargers 120 days within which to apply. S. 1128, supra note 274, at 10-11. The House set the time limit at 180 days. H.R. 8, supra note 275, at 55.
278. See supra note 148 and accompanying text.
279. The Senate indicated that if the EPA does not act within 240 days, an application is deemed denied. S. 1128, supra note 274, at 11. The House allotted 180 days for the EPA to make a decision. H.R. 8, supra note 275, at 55.
effect. The Senate intended for the subsection and its restrictions to apply retroactively to applications still pending, whereas the House bill limited the applicability of the new subsection to current or new applications for FDF variances.

Lastly, the Senate addressed the major criticism of cost being considered as a factor in the FDF variance decision, while the House did not. The Senate bill approved of the use of all fundamentally different factors as established by the EPA, excluding cost.

Although Congress may make revisions to the FDF procedure previously followed by the EPA, in essence, the Supreme Court’s decision in *Chemical Manufacturers Association* was approved. The Court’s deference to the EPA was proper, even in light of the changes contemplated by Congress in the 1985 legislation, because the Court was not asked to review the EPA’s choice of procedure in granting FDF variances. Rather the Court searched for Congress’ intent in enacting section 301(l) through an examination of statutory language, legislative history, and the rationality of the EPA’s interpretation of the section. The Court found that Congress intended to implement its policy on the elimination of toxic pollutants solely by prohibiting statutory modifications under sections 301(c) and (g). The Supreme Court’s deferral to the interpretations of administrative agencies, such as the EPA, on ambiguous congressional statutory mandates will promote the agencies’ efficacy, while spurring Congress on to be more specific with its intentions.

### V. Conclusion

Congress’ initial efforts at controlling pollution, beginning with the enactment of the Federal Water Pollution Control Act of 1948, were decentralized and ineffective. Although Congress significantly expanded the role of the federal government in pollution control through amendments in 1972 and 1977, numerous ambiguities, specifically in section 301(l), in both the statutory language and legislative history, produced an unnecessary burden for the EPA in promulgating CWA regulations. These ambiguities stemmed from Congress’ reluctance to unequivocally express its intent to eliminate the discharge pollutants in the legislation itself, regardless of the consequences to dischargers. Out of necessity, the EPA created the FDF variance procedure as a safety valve to provide an administrative remedy as well as to prevent regulations from being judicially invalidated.

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Council, Inc., the Supreme Court appropriately deferred to the EPA's interpretation of section 301(l) as not prohibiting FDF variances for dischargers of toxic pollutants. The Court recognized that Congress did not clearly convey to the EPA what was meant by "modify" in section 301(l), due to the lack of legislative history and the conflict between the mandates in sections 301(l) and 307(b). Moreover, the dissent's argument for invalidating FDF variances for toxic pollutants was substantially flawed because of its failure to consider the time-consuming complexities of the rulemaking procedure with which the EPA was charged. Finally, the Supreme Court's decision in Chemical Manufacturers Association reflects the trend of judicial deference when conflict arises over an agency's interpretation of a highly technical and intricate statute. As the judiciary properly defers to agency interpretation, Congress will be prodded to eliminate the ambiguities in its legislation, as it is contemplating doing in response to Chemical Manufacturers Association through the 1985 amendments, rather than relying on the courts to redefine its intentions.

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