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Environmental Law - The Role of FDF Variances in Implementing the Clean Water Act's Toxic Pollutant Discharge Provisions - Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.

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ENVIRONMENTAL LAW—The Role of FDF Variances in Implementing the Clean Water Act's Toxic Pollutant Discharge Provisions. *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 105 S.Ct. 1102 (1985)

In 1977, Congress amended the Clean Water Act[1] by adding section 301(*l*).[2] That section states that "[t]he administrator [of the Environmental Protection Agency] 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."[3] Subsequent to the enactment of section 301(*l*), the Environmental Protection Agency (EPA) issued regulations which set the maximum allowable levels for the discharge of pollutants.[4] The regulations contained a fundamentally different factor (FDF) variance provision[5] for dischargers of toxic pollutants.

The FDF variance ensures that EPA's standards for various categories of industries[6] do not unfairly burden an individual discharger. If obtained, the FDF variance exempts the discharger from the preset national standards. However, the variance is not easily acquired. A mere showing that compliance is difficult or extremely burdensome will not suffice to secure an FDF variance. The discharger must show and EPA must agree[7] that the factors considered by EPA in setting the discharge levels fundamentally differ from those applicable to the discharger seeking the variance. Among the factors considered are plant size and location, land availablity, processing method, and cost of pollution control in relation to the same costs of other dischargers in the category.[8]

The Natural Resources Defense Council (NRDC) immediately challenged the FDF variance provision. Their argument was twofold. First, NRDC claimed that all FDF variances from pretreatment standards were illegal because they were not statutorily authorized. Second, they argued that FDF variances from pretreatment standards violated the newly

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1. Codified at 33 U.S.C. §§ 1251-1376 (1982). The Act was originally known as the Federal Water Pollution Control Act, but, in the 1977 changes, the popular name was officially recognized as "The Clean Water Act of 1977." Congress made many changes and addenda in 1977; only the § 301 changes are considered in this casenote.

2. 33 U.S.C. § 1311(*l*) (1982). The United States Code sections do not correspond to the Clean Water Act sections. For clarity, Clean Water Act sections will be used in the text. For ease of reference, all citations will be to the United States Code.

3. *Id.*

4. 40 C.F.R. § 403.6-.7 (1984). These regulations pertain to indirect dischargers, sources that discharge into a sewage system with treatment plants ultimately processing the waste. Similar regulations for direct dischargers, sources that discharge directly into the navigable waters of the United States, had already been promulgated. *See* 40 C.F.R. part 400-427 (1984), and 22 U.S.C. § 1311(b)(1)(A)-(2)(A) (1982).

5. 40 C.F.R. § 403.13 (1984).

6. Such industries include steel, leather tanning and electroplating.

7. State or regional offices may make recommendations, but ultimate approval or denial of the FDF variance comes from the Administrator. *See* 33 U.S.C. § 1251(d) (1982); 40 C.F.R. § 403.13 (1984).

8. For all factors considered in the FDF process, see 40 C.F.R. § 403.13 (1984). Economic affordability is not considered in the FDF process and should be distinguished from cost of pollution control in relation to costs of other dischargers in the category.

enacted section 301(*l*). EPA maintained that an FDF variance was not a modification. The agency concluded that the 301(*l*) prohibition against toxics applied only to modifications under subsections 301(c) and 301(g).[9]

The Third Circuit agreed that section 301(*l*) barred the variance and decided the case in NRDC's favor without reaching the question of the statutory authorization of FDF variances.[10] In a five to four decision, the United States Supreme Court reversed the Third Circuit and found for petitioners EPA and the Chemical Manufacturers Association (CMA).[11]

The Court held that the statutory language of section 301(*l*) did not foreclose EPA's interpretation of the law, because the Agency's view was sufficiently rational and was set forth in the absence of a clear congressional mandate forbidding FDF variances for dischargers of toxic wastes.[12] The Court found that EPA's construction of section 301(*l*) was consistent with the Clean Water Act's goals and operation.[13]

The previous role of FDF variances as applied to the Clean Water Act and their applicability to the discharge of toxic pollutants are examined in this casenote. The relatively scant legislative history of section 301(*l*)[14] is surveyed and shows that Congress knew little or nothing about FDF variances when the 1977 amendments were enacted. Scrutiny of the relationship between section 301(*l*) and the FDF variance clause indicates that section 301(*l*) was intended to preclude such modifications. First, a look at previous caselaw and the legislative background is in order.

BACKGROUND

In 1972, Congress responded to growing environmental consciousness with sweeping amendments to the Federal Water Pollution Control Act. These amendments became known as the Clean Water Act because of their ambitious goal of eliminating all pollution discharged into U.S. waters by 1985.[15]

The 1972 Clean Water Act placed an onerous burden on EPA. EPA was required to prescribe regulations setting permissible pollutant discharge levels for industry. With some prodding,[16] EPA began to pro-

9. National Ass'n of Metal Finishers v. Environmental Protection Agency, 719 F.2d 624, 645 (3rd Cir. 1983), *rev'd sub nom.* Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 105 S.Ct. 1102 (1985). Subsections 301(c) and 301(g) are codified at 33 U.S.C. §§ 1311(c) and 1311(g) (1982). *See infra* notes 35, 48 for an explanation of these provisions.

10. *National Ass'n of Metal Finishers,* 719 F.2d at 646.

11. The original suit brought by NRDC was against the EPA, with CMA intervening on behalf of the EPA. *Id.* at 636.

12. Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 105 S.Ct. 1102, 1112 (1985).

13. *Id.*

14. The legislative history of section 301 is extensive, but as to this particular subsection, Congress was generally silent.

15. 33 U.S.C. § 1251(a)(1) (1982).

16. NRDC sued the EPA for delinquency in setting the nationwide standards. A consent decree came out of this litigation which placed EPA on a rigid timetable to promulgate standards for 21 categories of industries. A list of 65 toxic pollutants were also placed on the timetable in this decree. *See* NRDC v. Train, 8 Env't. Rep. Cas. (BNA) 2120 (D.D.C.

mulgate the regulations. The first two steps required direct dischargers[17] to meet standards set according to the "best practicable technology available" (BPT)[18] by July 1, 1977. By July 1, 1983,[19] dischargers were required to meet more stringent standards which were set according to the "best available technology" (BAT).[20]

In the 1977 amendments, Congress sanctioned a similar two tiered scheme for indirect dischargers.[21] They also ordered a "major redirection and refinement"[22] of the regulatory program to focus on the control of toxic pollutants.[23] At this time, section 301(*l*) was added to the Clean Water Act. Although FDF variances had been applied to the earlier BPT standards, EPA did not include an FDF variance clause for the pretreatment standards of indirect dischargers until 1978.[24]

The first United States Supreme Court case that dealt at least peripherally with FDF variances was *E.I. du Pont de Nemours & Co. v. Train*,[25] decided shortly before the passage of section 301(*l*). The main issue in *du Pont* was whether or not section 301 authorized EPA to limit waste discharges by existing plants through industry wide regulation, rather than on a plant-by-plant basis (as the chemical industry desired). The Court[26] held that EPA does have the authority to set uniform effluent limitations for classes and categories of industry.[27] The Court added that industry wide regulations were appropriate "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 [BPT] limitations."[28] In dictum the Court said that "consideration of whether EPA's variance provision has the proper scope would be premature."[29] The only other mention of variances is the Court's declaration that EPA's variance clause is applicable only to the 1977 BPT limitations.[30] In a related issue, the Court also held that for the "new source" standards (those set for plants not yet built), FDF

1976), *modified sub nom.* NRDC v. Costle, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979), *modified sub. nom.* NRDC v. Gorsuch, 17 Env't Rep. Cas. (BNA) 2013 (D.D.C. 1982), *modified sub nom.* NRDC v. Ruckleshaus, 19 Env't Rep. Cas. (BNA) 1953 (D.D.C. 1984).

17. *See supra* note 4 and accompanying text.

18. 33 U.S.C. § 1311(b)(1)(A) (1982).

19. For certain categories of industry this deadline was again extended anywhere from one to three years. *See* 33 U.S.C. § 1311(b)(2)(A) (1982).

20. 33 U.S.C. § 1311(b)(2)(A) (1982). BAT requirements are the industry wide standards set according to the "best available technology economically achievable." In every category, BAT limitations are stricter than the earlier BPT requirements.

21. H.R. REP. No. 830, 95th Cong., 1st Sess. 81-90 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS, 4356-65. *See supra* note 4.

22. COMM. ON ENVIRONMENT AND PUBLIC WORKS, 95TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 326-27 (Comm. Print No. 14, 1978) [hereinafter LEGIS. HISTORY].

23. *See supra* note 16 and accomanying text.

24. 40 C.F.R. § 403.13 (1984). For a definition of indirect dischargers, see *supra* note 4 and accompanying text.

25. 430 U.S. 112 (1977).

26. This 8-0 decision was delivered by Mr. Justice Stevens.

27. *du Pont*, 430 U.S. at 136.

28. *Id.* at 128.

29. *Id.* n.19.

30. *Id.* at 122-23.

variances were inappropriate and would not be allowed.[31] For reasons that will be seen in the dissent's analysis of the instant case, these last two points are crucial.

DuPont was considered a victory for environmental groups because industry could no longer obtain individual standards but was subject to the nationwide regulations promulgated by EPA. The Court realized that setting standards for every point source[32] would be too cumbersome to implement and would compound already existing water pollution problems.[33]

In 1980, the U.S. Supreme Court again examined variance provisions and their relationship to the Clean Water Act. In *Environmental Protection Agency v. National Crushed Stone Association*,[34] the trade association vigorously argued that the economic capability of a discharger should be considered as an important factor in reviewing requests for FDF variances. Industry pointed to section 301(c)[35] of the Clean Water Act and asked that the same flexibility present in section 301(c) be applied to FDF variances.

Rejecting this notion, the Court looked at the statutory language of section 301(c), which called for "reasonable *further* progress"[36] toward eliminating pollutants. The Court believed this meant that section 301(c) was only intended to apply to the more stringent BAT standards, which anticipated that some progress would already have been made by meeting the BPT standards.[37] The Court concluded that financial capability of the discharger was not to be considered in the FDF process.[38]

These decisions, although validating FDF variances in general, did not address the specific question of whether or not such a variance is permissible in light of section 301(*l*). The Fourth Circuit, in *Appalachian Power Co. v. Train*,[39] was the first court to address this specific question.[40] The court found section 301(*l*) to be ambiguous on the issue of whether

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31. *Id.* at 138.

32. A point source is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1982). A point source is any individual polluter.

33. *du Pont*, 430 U.S. at 132-33.

34. 449 U.S. 64 (1980).

35. 33 U.S.C. § 1311(c) (1982). Subsection (c) allows the Administrator (of EPA) to modify the standards for particular dischargers who can show that the best pollution control within economic capability is being employed. Subsection (c) was enacted in 1972, and it is an effort to protect business interests experiencing great difficulty in legitimately trying to comply with the law.

36. *Id.* (emphasis added).

37. Environmental Protection Agency v. National Crushed Stone Association, 449 U.S. 64, 75 (1980). Applications for a section 301(c) modification were not even fileable until after July 1, 1977, the date by which BPT limitations were to have been met. This also suggests that section 301(c) was only applicable to BAT standards.

38. *Id.* at 85. This 8-0 decision was delivered by Mr. Justice White.

39. 620 F.2d 1040 (4th Cir. 1980).

40. The Clean Water Act calls for direct review of its provision in the United States Court of Appeals and not the Federal District Courts. *See* 33 U.S.C. § 1369(b)(1) (1982).

or not it applied to FDF variances. The court therefore deferred to EPA's interpretation that FDF variances were permissible for dischargers of toxics.[41]

The instant case was the next litigation in this controversy.[42] In a direct clash with the Fourth Circuit, the Third Circuit held that:

> Because we find that § 301(*l*) is clear, we must disagree [with the Fourth Circuit]. Section 301(*l*) forbids modifications and FDF variances are no less modifications than those provisions indisputably prohibited by that section. Given the clear Congressional concern throughout the 1977 Amendments for discharges of toxic pollutants, we hold that FDF variances for toxic pollutant discharges are forbidden by the Act.[43]

The United States Supreme Court granted certiorari "to resolve this conflict between the Courts of Appeals and to decide this important question of environmental law."[44]

THE PRINCIPAL CASE

The Court considered the possible ramifications of a literal reading of section 301(*l*) and expressed its fear that a verbatim interpretation would prohibit EPA from amending its own standards or from correcting an error made in calculating the technology based requirements.[45] The Court concluded from this that the word "modify" lacks plain meaning in section 301(*l*) and that the statute was the proper subject of construction by EPA and the Court.[46]

The Court then examined the relatively sparse legislative history of section 301(*l*) in relation to two companion amendments, sections 301(c)[47] and 301(g).[48] The Court observed that the Senate proposed amending section 301(c), to prohibit the economic capability waiver for toxic pollutants. The Senate bill also added section 301(g), the water quality waiver, with the same proviso for toxic pollutants as in section 301(c).[49] The Conference Committee, without explanation, added section 301(*l*) and deleted the toxics prohibition from section 301(c). This became the final 1977 version of the section 301 amendments.

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41. Appalachian Power Co. v. Train, 620 F.2d 1040, 1048 (4th Cir. 1980).
42. National Ass'n of Metal Finishers v. Environmental Protection Agency, 719 F.2d 624, 646 (3rd Cir. 1983), *rev'd sub nom.* Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 105 S.Ct. 1102 (1985).
43. *Id.* at 646.
44. *Chemical Manufacturers,* 105 S.Ct. 1102, 1107 (1985).
45. *Id.* at 1108.
46. *Id.* at 1110.
47. 33 U.S.C. § 1311(c) (1982). *See supra* note 35 and accompanying text.
48. 33 U.S.C. § 1311(g) (1982). Subsection (g), added in 1977, calls for a modification if the modified discharge level will not adversely affect receiving water quality and will not place any additional requirements on downstream dischargers or treatment plants.
49. *Id.*

Relying heavily on a House floor statement made by Representative Roberts,[50] the Court believed these changes indicated an intent only to forbid section 301(c) and 301(g) modifications.[51] The Court also stated that *du Pont* notified Congress of the FDF variance process.[52] The Court concluded from this that congressional silence on the full scope of section 301(*l*) showed that Congress did not intend to preclude FDF variances.[53]

The Court echoed CMA's argument that an FDF variance does not excuse compliance but is merely an individual standard for a point source whose relevant factors were not sufficiently considered when establishing the discharge levels.[54] The Court pointed out that the FDF variance mechanism eases EPA's burden and allows it to promulgate nationwide standards, while addressing individual, atypical dischargers at a later date.[55]

Part of the Court's holding is a restatement of the holding in *Chevron, Inc., U.S.A. v. Natural Resources Defense Council, Inc.*,[56] which calls for considerable deference to an administrative agency's statutory interpretation, if Congress has not clearly spoken to the issue.[57] The agency's view need not be the only permissible one but must be "sufficiently rational . . . to preclude a court from substituting its own judgment for that of [the agency]."[58] Since the majority found congressional intent to be lacking, they deferred to EPA's interpretation of section 301(*l*) and reversed the Court of Appeals.

ANALYSIS

NRDC argued that the language of the statute clearly and explicitly precludes FDF variances. Section 301(*l*) states that "[t]he administrator may not modify *any* requirement of this section. . . ."[59] The majority's analysis failed to confront the statutory language. The Court's focus was extremely selective when analyzing the congressional intent behind section 301(*l*).

The legislative history shows that both House and Senate members used the words "waiver," "variance," and "modification" interchangeably. Representative Roberts, for example, used the word "waiver" when speak-

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50. Representative Roberts, the house floor leader for the bill, said:
> Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under the section, specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.

Chemical Manufacturers, 105 S.Ct. at 1109.
51. *Id.* at 1109.
52. *Id.*
53. *Id.*
54. *Id.* at 1111-12.
55. *Id.* at 1112.
56. 104 S.Ct. 2778, 2782 (1984), *cited in Chemical Manufacturers*, 105 S.Ct. at 1108.
57. *Chevron*, 104 S.Ct. at 2782.
58. *Chemical Manufacturers*, 105 S.Ct. at 1108.
59. 33 U.S.C. § 1311(*l*) (1982) (emphasis added).

ing of both toxic and conventional pollution control.[60] The Senate report on the 1977 amendments stated that "[i]n order to re-emphasize that modifications to BAT are intended for non-toxic pollutants only, the bill prohibits *variances* for toxic pollutants."[61] Senator Muskie, the Senate floor leader for the bill, stated in a Conference Committee hearing that "[for] toxic pollutants . . . there are no waivers or modifications. . . ."[62] The synonomous use of these words indicates that Congress did not understand EPA's distinction between modifications and FDF variances. It may also suggest that Congress was not totally aware of FDF variances when debating the 1977 amendments.

The *du Pont* decision, which the Court says must have put Congress on notice of FDF variances,[63] supports this conclusion. The dispute in *du Pont* centered on the 1977 BPT limitations, and the words "fundamentally different factor" only appeared in a footnote to the opinion.[64] Only after *du Pont* did EPA draft FDF clauses for BAT and pretreatment standards. Even if Congress was aware of FDF variances after *du Pont*, it knew of them only to the extent that they applied to the earlier BPT limitations. The drafters of the 1977 Amendments would have had to be clairvoyant to anticipate that FDF variances would be promulgated for the later and stricter BAT and pretreatment standards.

The Court also concluded that Congress was put on notice of FDF variances by an NRDC spokesman's testimony before a Congressional subcommittee.[65] The spokesman said that a " 'fundamental variance provision' was integral to the Act's system of 'national, uniform minimum effluent limitations'."[66] This single misnomered reference to FDF variances constitutes minimal notice to Congress. Considering the many people who testify before congressional committees, and the many pages of transcripts that the committee members review, it stretches the bounds of reason to say that one incorrect reference to FDF variances puts Congress on notice that the variance will be applied to BAT and pretreatment standards. Congressional silence on whether or not section 301(*l*) applies to FDF variances reflects Congress's ignorance of FDF's rather than demonstrating its knowledge and awareness of the provision.

Surprisingly, the Court agreed with EPA that a literal interpretation of 301(*l*) would lead to problems in correcting errors or promulgating stricter standards.[67] EPA had claimed that a literal interpretation of section 301(*l*) would render the administrator "powerless"[68] to amend the standards. The Court could have easily reached the same result without

60. LEGIS. HISTORY, *supra* note 22, at 305.
61. *Id.* at 676-77.
62. *Id.* at 458.
63. *Chemical Manufacturers*, 105 S.Ct. at 1109.
64. *du Pont*, 430 U.S. at 123 n.10.
65. *Chemical Manufacturers*, 105 S.Ct. at 1109 n.17.
66. *Id.*
67. *Id.* at 1108.
68. Brief for United States Environmental Protection Agency at 16, Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 105 S.Ct. 1102 (1985) [hereinafter EPA's Brief].

accepting this specious argument. Section 501(a)[69] of the Clean Water Act grants the administrator authority to prescribe "such regulations as are necessary to carry out his functions under this chapter."[70] This overall proviso indicates that the Adminstrator is not powerless in his rulemaking authority. Merely to advance its own untenable position, EPA has manufactured a conflict where no conflict exists.

The legislative history disposes of this issue. Nowhere, when speaking of modifications, waivers, or variances did any member of Congress question EPA's authority to promulgate the nationwide standards or to revise them periodically.[71] Congress spoke of modifications or waivers for particular dischargers and never questioned EPA's power to amend the regulations in light of improved technology or the discovery of errors. Thus, EPA's argument on this account is superficial and overly dramatic.

The language of the 1977 amendments rebuts EPA's interpretation of section 301 (*l*). The final version of section 301(c) contains no provision as to toxic pollutants. Yet the final revision of section 301(g) contains its own subclause which makes 301(g) modifications unavailable to toxic dischargers.[72] It is logically inconsistent to maintain that the 301(*l*) ban applies only to 301(c) and (g) modifications, when section 301(g) already contains its own toxics prohibition. While this does not necessarily forward NRDC's position, it indicates that EPA's interpretation is incorrect. Just as Congress was silent about the exact scope of 301(*l*), so too was the Court silent in answering this logical fallacy.

Nor does EPA answer this contention. EPA simply says, "[i]n our view, the prohibitions . . . were consolidated into a separate section 301(*l*) for stylistic purposes."[73] One can readily question whether any federal statute is drafted merely for purposes of style. Conciseness and specificity are generally the goals of legislative draftsmanship.

CMA makes a similar argument, saying, "it was decided that, rather than repeating the identical limiting clause at the end of [sections 301(c) and 301(g)] . . . the limitation would be placed into a separate section 301(*l*)."[74] The dissent noted that nothing was decided, but that Congress did not discuss the reasons for the addition of 301(*l*).[75] The dissent pointed out that "if cleaning up the statutory language was in fact the objective of the changes, the Conference Committee was remarkably unsuccessful at doing so."[76]

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69. 33 U.S.C. § 1361(a) (1982).
70. *Id.*
71. *See generally* LEGIS. HISTORY, *supra* note 22.
72. 33 U.S.C. §§ 1311(c), 1311(g) (1982).
73. Reply Brief for United States Environmental Protection Agency at 9, Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 105 S.Ct. 1102 (1985).
74. Brief for Chemical Manufacturers Ass'n at 9, Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 105 S.Ct. 1102 (1985).
75. *Chemical Manufacturers*, 105 S.Ct. at 1117 (Marshall, J., dissenting). Justice Marshall was joined by Justices Stevens, Blackmun, and O'Connor.
76. *Id.*

The dissent identified the distinction between the BPT limitations and the stricter BAT and pretreatment standards. BPT limitations were set for the regulation of "point sources"[77] and not classes or categories of industry. The pretreatment standards pertaining to the present case are set for categories of industry by nationwide regulation. This distinction is crucial because of the *du Pont* holding. *Du Pont* dealt with regulations (the BPT limitations) set for point sources and held the variance applicable only to these standards.[78] The other portion of the *du Pont* holding addressed regulations set by nationwide standards, the so-called "new source" standards. The Court held that FDF variances were not mandated by these standards and were in fact impermissible.[79] This strengthens the argument that FDF variances are not applicable to the nationwide pretreatment standards at issue in *Chemical Manufacturers.*

The majority and dissenting opinions agree on the mandate of *Chevron.* Courts should defer to an agency's construction of a statute where Congress has not clearly expressed its will.[80] The controversy in this case, however, concerns whether or not Congress has sufficiently manifested its intent. Since *Chevron* posed no obstacle to the dissent's analysis of the present case, it will probably not become a touchstone for courts dealing with the administrative construction of a statute. The battle will always rage on the field of congressional intent.

Practicality and necessity are EPA's best arguments for allowing FDF variances. The FDF variance is a useful tool in implementing the industry wide standards, given the rigid timetable of the NRDC consent decree.[81] There would be a critical time problem if EPA evaluated every point source in a given industry. In the vast process of setting national pollution standards, some dischargers will be overlooked. In some cases, fundamentally different factors will not be considered in setting the national standards. This is EPA's basic rationale for the variance. The FDF variance is an effort to avoid placing a disproportionate burden on one discharger.

While these goals are laudable, they only address the question of what constitutes good policy. The central issue, however, is what constitutes the will of Congress. The Court addressed this in *Crushed Stone* and said, "Congress anticipated that the 1977 regulations would cause economic hardships and plant closings. . . ."[82] Speaking specifically of the toxic pollutant problem, Representative Roberts said that Congress realized the 1977 regulations would cost industry "millions of dollars and result only in a little more clean-up of our waters."[83] Congress agreed that there was no room for compromise with toxic pollutants[84] and that dischargers who could not meet the standards would be forced to close, with resulting

77. 33 U.S.C. § 1311(b)(1)(A) (1982).
78. *du Pont,* 430 U.S. at 123.
79. *Id.* at 138.
80. *Chemical Manufacturers,* 105 S.Ct. at 1121 (Marshall, J., dissenting).
81. *See supra* note 16 and accompanying text.
82. *Crushed Stone,* 449 U.S. at 83.
83. LEGIS. HISTORY, *supra* note 22, at 305.
84. *Id.* at 549.

damage to our economy. Water pollution issues invariably pit economic interests against environmental well being. In 1977, Congress intended that industry make serious concessions in addressing the problem of toxic pollutants.

Even though EPA has the power to grant FDF variances, it is exercised sparingly. The variance is only available to plants which fulfill all the fundamentally different factor criteria. By the end of 1977, only 5 of over 4000 major industrial dischargers had applied for FDF variances and only two variances had been granted. At the time of argument in the present case, only two additional variances had been granted. According to EPA estimates, approximately forty FDF requests are still pending.[85] These statistics suggest that water pollution problems may not be seriously exacerbated by the FDF variance process.

CONCLUSION

Considering EPA's limited use of FDF variances, and assuming that FDF variances will not be radically expanded in scope, this decision poses no grave threat to water quality. Despite the Court's error in *Chemical Manufacturers,* the use of this administrative tool will probably not cause widespread environmental degredation.

By allowing EPA's unorthodox and illogical interpretation of section 301(*l*) to stand, however, the United States Supreme Court deferred to an improper statutory construction. Once again, congressional silence on a particular issue allowed an administrative agency to substitute its own judgment for that of the legislature. Had Congress known of EPA's intended expansion of the FDF variance, it would have passed more specific legislation to overcome such an administrative maneuver with respect to toxics.

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85. THESE STATISTICS, NOT IN DISPUTE BY NRDC, ARE DERIVED FROM EPA'S BRIEF, *supra* note 68, at 36. All of these variances have been issued to direct dischargers only. This may be due to the fact that indirect dischargers readily affect treatment plants that process water for human consumption.