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The Exception that Approves the Rule: FDF Variances Under the Clean Water Act

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Recently, in Chemical Manufacturers Association v. NRDC, the Supreme Court addressed once again the applicability and scope of the so-called "fundamentally different factors variance" from the effluent limitations of the Clean Water Act. Specifically, the Court held that the statutory prohibition against the Administrator of the Environmental Protection Agency (EPA) "modifying" any toxic effluent limitation did not prohibit FDF variances from toxic effluent limitations. Thus, toxic polluters may seek variances from the generally applicable toxic effluent limitations based upon their particular circumstances. In practical effect this can only lead to less stringent controls on toxic water pollution. This conclusion and the Court's analysis which led to it are notable for several reasons. First, it marks the continuation of a judicial reconstruction of the Clean Water Act.

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* Associate Professor, Lewis and Clark Law School; B.A. 1967, Harvard; J.D. 1973, Columbia. The author would like to thank Michael C. Blumm for helpful comments on an earlier draft.

1 105 S. Ct. 1102 (1985).

2 40 C.F.R. §§ 125.30–.32, 403.13 (1984) [hereinafter referred to as FDF variance].


4 "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 1307(a)(1) of this Act." C.W.A. § 301(l), 33 U.S.C. § 1311(l) (1982).

5 Chemical Mfrs., 105 S. Ct. at 1112.
Water Act with regard to variances. Second, it constitutes the Supreme Court's first substantial application of the rule enunciated in *Chevron, U.S.A. v. NRDC*,\(^6\) governing the proper scope of judicial review of an agency's construction of its own statute. Third, its analysis appears to be inconsistent with an analysis used by the Court in its first Clean Water Act variance case,\(^7\) in which the appropriate circumstances for variances were set forth. Fourth, although there had been considerable question about the issue, the Court's analysis suggests that FDF variances should be available from certain other effluent limitations.

Initially, to appreciate the significance of, as well as merely to understand, *Chemical Manufacturers*, it is necessary to retrace some of the tortuous history of the Clean Water Act and its interpretation. The first section of the article, therefore, describes the 1972 Act and implementing regulations. It then discusses industry's objections to those regulations and the resulting litigation. In the *du Pont* case,\(^8\) the Supreme Court resolved that litigation by upholding all of EPA's effluent limitation regulations. Its decision, however, also invented an undefined variance requirement with respect to one set of regulations and a prohibition against variances with respect to another set. This section concludes that the *du Pont* opinion left the scope and applicability of variances under the Act hopelessly confused.

The second section of the article addresses the litigation that resulted from the confusion regarding the scope of the variance the Court had said in *du Pont* was required. Again the Court ruled against industry and upheld EPA's regulation. This section concludes that the Court's decision, which clarified the narrow scope of the variance the Court in *du Pont* had required, did nothing to clarify the underlying justification for the variance. Indeed, what rationale was provided was at odds with the Court's analysis in *du Pont*, where it had held variances prohibited in certain circumstances.

The third section of the article discusses the *Chemical Manufacturers* case at length and concludes that the Court erred in finding that the statutory prohibition against modifications did not apply to FDF variances. This section of the article argues that this error derived from the Court's earlier confusion regarding the rationale for the nonstatutory variance as well as from the Court's overly

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*\(^6\) 104 S. Ct. 2778 (1984).*

*\(^7\) See E.I. du Pont de Nemours v. Train, 430 U.S. 112 (1977).*

*\(^8\) *Id.*
strict application of the rule stated in *Chevron*. This section also argues that such a strict application of the *Chevron* rule seriously undermines the judicial function in reviewing agency action.

The fourth section of the article assesses the state of the law in light of *Chemical Manufacturers* with respect to the permissibility of FDF variances from various Clean Water Act limitations and standards. It concludes that, in all the circumstances where EPA has currently provided for them, FDF variances are permissible under *Chemical Manufacturers*. In other possible circumstances, however, the ruling in *Chemical Manufacturers* does not provide much support for the permissibility of FDF variances.

Finally, the article assesses the impact of *Chemical Manufacturers* on environmental quality, concluding that institutional considerations lead EPA to construe narrowly the FDF variance provisions in its regulations. This, in turn, suggests that *Chemical Manufacturers* will not have important environmental consequences.

I. EFFLUENT LIMITATIONS AND THE *DU PONT* CASE

A. The Act

In 1972, Congress enacted comprehensive amendments to the Federal Water Pollution Control Act,\(^9\) and thereby created the current regulatory structure addressing the problem of water pollution. Central to the new scheme was a shift of responsibility from the states to the federal government\(^10\) and a shift of control technique, from one focusing on receiving water quality to one focusing on technology-based effluent limitations. The new system, with the ambitious and unrealistic goal of eliminating all pollution discharges into the waters of the United States by 1985,\(^11\) was to be phased in over a number of years. With respect to existing sources of water pollution,

\(^9\) See supra note 3.

\(^10\) Section 101(b) of the 1972 Act — the statement of goals and policy — stated that:
   
   It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.

the first step was to require polluters to utilize the “best practicable control technology currently available” (BPT) by July 1, 1977;12 the second step was to require these same dischargers to meet the expectedly stricter requirement of using the “best available technology economically achievable” (BAT) by July 1, 1983.13 New sources, those sources not yet under construction at the time proposed standards were published, were to be required to use the “best available demonstrated control technology, processes, operating methods, or other alternatives” (BADT).14 All polluters would be required to obtain a permit from either EPA or a state whose permit program was approved by EPA.15

Unfortunately, the amendments were unclear exactly as to how this scheme would be put in place. It was clear that, as a first step, EPA was to promulgate regulations to be used as guidelines for determining the BPT and BAT effluent limitations.16 Indeed, section 304(b) required these guidelines “for the purpose of adopting or revising effluent limitations.” These guidelines were to identify the degree of effluent reduction attainable through use of BPT and BAT for classes and categories of point sources. They were also to specify “factors to be taken into account in determining the . . . measures and practices to be applicable to point sources . . . within such categories or classes.” Some of the factors were identified in the statute. With respect to BPT limitations, the factors to be considered included the total cost of technology’s application in relation to its effluent reduction benefits; the age of the equipment and facilities involved; the process employed; the engineering aspects of various control techniques; process changes; non-water quality environmental impact; and such other factors as the Administrator deemed appropriate.19 With respect to BAT limitations, the factors were identical, except that, instead of considering the total cost in relation

15 C.W.A. § 402, 33 U.S.C. § 1342 (1976). Permits issued under this section are known as NPDES permits, after the National Pollution Discharge Elimination System. See id.
17 Id.
to effluent reduction benefits, the cost of achieving BAT limitations was just another factor to be taken into account.\textsuperscript{20} These guidelines were clearly not to constitute the effluent limitations themselves or, apparently, to have any direct legal effect.\textsuperscript{21}

The use of these guidelines in “adopting or revising effluent limitations” remained unclear. Section 301 of the Act, entitled “Effluent Limitations,” used the passive voice to describe the achievement of the BPT limitations by 1977 and the BAT limitations by 1983.\textsuperscript{22} Moreover, the existence of the permitting process, by which each

\textsuperscript{20} C.W.A. § 304(b)(2)(B), 33 U.S.C. § 1314(b)(2)(B) (1976). As one court explained it, section 304(b)(10) required BPT to be determined by balancing the total costs against effluent reduction benefits (the “comparison factors”), while all the other factors, e.g., age, process employed, non-water quality environmental impact, etc., were merely to be considered (the “consideration factors”). To determine BAT, under section 304(b)(2), however, all the factors, including the cost, were merely to be consideration factors, with no factors separated out for direct comparison. Thus, the court concluded, “Congress mandated a particular structure and weight for the comparison factors, . . . [but] did not mandate any particular structure or weight for the many consideration factors.” Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1045 (D.C. Cir. 1978).

\textsuperscript{21} Dischargers were not to be liable for violation of the guidelines. See C.W.A. § 301(a), 33 U.S.C. § 1311(a) (1976). Persons seeking federal permits that might result in water pollution were not required to certify their compliance with the guidelines. See C.W.A. § 401, 33 U.S.C. § 1341(a)(1) (1976). Moreover, while the Act specifically provided for judicial review in the courts of appeals of a laundry list of EPA actions, C.W.A. § 509(b)(1), 33 U.S.C. § 1369(b)(1) (1976), there was no specific provision for judicial review of the section 304 guidelines. This left open the possibility that the guidelines were not to be judicially reviewable, so that review of the process would not be available until the section 301 effluent limitations were promulgated. However, the Eighth Circuit held that section 304 guidelines were reviewable in the district court, apparently under the Administrative Procedure Act. CPC Int'l, Inc. v. Train, 515 F.2d 1032, 1038 (8th Cir. 1975). See also du Pont, 430 U.S. at 123-25 & nn.11-14.

\textsuperscript{22} Subsection (b) of this section provides:

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act . . . and

(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act . . . .

C.W.A. § 301(b), 33 U.S.C. § 1311(b) (1976).
polluter was required to obtain a permit,23 suggested at least the possibility that any actual BPT or BAT limitation applicable to a particular polluter would be determined in the permit proceeding for that polluter. In other words, the statute was unclear about whether EPA could set BPT and BAT effluent limitations applicable to categories and classes of polluters by regulation, or whether each individual polluter would have its BPT and BAT limitations set by adjudication in a permit proceeding based on the guidelines applicable to his class or category.

B. The Regulations

Whatever Congress had contemplated, practical difficulties soon became a more significant determinant of EPA's course of action. The various deadlines imposed by the statute24 were "too ambitious for [EPA] to meet,"25 and the result was that EPA failed altogether to issue the separate guidelines.26 In addition, EPA decided to issue

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24 Within sixty days of the enactment of the 1972 Act, the Administrator was to publish information on the amount of effluent reduction possible through secondary treatment, C.W.A. § 304(d)(1), 33 U.S.C. § 1314(d)(1) (1976); and promulgate guidelines for forms for the acquisition of information from owners and operators of point sources of pollution, C.W.A. § 304(h), 33 U.S.C. § 1314(h) (1976). Within ninety days of the enactment of the Act, the Administrator was to publish a list of categories of sources, and propose and publish within a year after a category is listed (either originally or in a revision), new source performance standards for that category, C.W.A. § 306(b), 33 U.S.C. § 1316(b) (1976). Within 120 days of the enactment of the Act, the Administrator was to publish pretreatment guidelines, C.W.A. § 304(f), 33 U.S.C. § 1314(f) (1976). Within 180 days of the enactment of the Act, the Administrator was to promulgate guidelines for test procedures for analysis of pollutants for section 401 certification of section 404 permits, C.W.A. § 304(g), 33 U.S.C. § 1314(g) (1976). Within six months of the enactment of the Act, the Administrator was to enter into agreements with the Secretaries of Agriculture, Army, and Interior on the use of various programs to achieve and maintain water quality, C.W.A. § 304(i), 33 U.S.C. § 1314(i)(1) (1976). Within 270 days of the enactment of the Act, the Administrator was to issue information to pollution control agencies on operating methods which eliminate or reduce discharge of pollution to implement the C.W.A. § 306 standards of performance, C.W.A. § 304(c), 33 U.S.C. § 1314(c) (1976); and issue information on methods to restore and enhance quality in publicly owned fresh water lakes, C.W.A. § 304(i), 33 U.S.C. § 1314(i) (1976). Within nine months of the enactment of the Act, the Administrator was to publish information on available alternative waste treatment systems, C.W.A. § 304(d)(2), 33 U.S.C. § 1314(d)(2) (1976). Within one year of the enactment of the Act, the Administrator was to publish criteria for water quality reflecting the latest scientific knowledge on the effects of pollutants; and to publish information on the factors necessary to reduce the effects of pollution and on measurement and classification of pollutants, C.W.A. § 304(a), 33 U.S.C. § 1314(a) (1976); and was to issue regulations providing guidelines for effluent limitations, C.W.A. § 304(b), 33 U.S.C. § 1314(b) (1976).
25 du Pont, 430 U.S. at 122.
26 The failure of EPA to issue the section 304(b)(1) guideline regulations on time resulted in a citizen suit to compel their issuance. See NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1975).
the effluent limitations by means of regulations. EPA issued so-called “effluent limitation guideline” regulations, which established for each industry subcategory a single number limitation on the pollutants that could be released by an existing source. Thus, the regulation determined the permissible pollution authorized for each existing polluter, and every existing polluter within each subcategory was subject to the same limitation. This left the permitting proceeding with little to do other than decide to which subcategory a polluter belonged, virtually a ministerial decision.

In establishing the BPT and BAT limitations regulations, EPA purported to make the determinations and to consider the factors identified in section 304(b), but EPA recognized that data may have been unavailable or overlooked in the collection of information relating to these factors. The lack of such data could result in an inappropriate limitation for a particular class or category of polluter. Consequently, EPA provided a mechanism whereby any interested person could submit new or additional information to EPA. EPA then could determine whether such information rose to the level that the factors applicable to a given discharger in fact were fundamentally different from the factors that had been considered in establishing the limitations for the category or class in which that discharger was categorized. If such fundamentally different factors

While the decision upheld a district court injunction compelling issuance of certain of these guideline regulations on a set timetable, it expressly avoided determining whether such guideline regulations had to be separate from or could be combined within a regulation setting a BPT or BAT limitation. See id. at 710 n.101.


31 See, e.g., id.

32 Where a state had qualified to implement the section 402 permit system, a person seeking an FDF variance would submit his information to the state as permitting authority; the state
were found to exist, EPA would then set an individually based BPT effluent limitation for that discharger. Depending upon consideration of the factors with respect to that discharger, the limitation could be either more or less stringent than the one applicable to the discharger's category or class.

Industry objected to EPA's failure to issue the section 304(b) guidelines, and also to EPA's setting of the individual effluent limitations by regulation. The absence of the guidelines, according to industry, was patently illegal, and deprived it of a meaningful opportunity to affect the methodology by which effluent limitations were set. Of course, industry was well aware that bifurcating the effluent limitation decision, by requiring guidelines initially, would substantially delay the date any limitation would become enforceable. Moreover, because mention of the section 304(b) guidelines was pointedly absent from the judicial review provision in the Act (which lodged exclusive review of virtually every other EPA determination in the courts of appeals), industry believed that, when guidelines were issued, it should be able to challenge the guidelines in the district courts. EPA rightfully saw this view as the basis for litigation that would sap its resources and further delay the date when effluent limitations would be effective.

Even more important to industry was its objection to the categorical effluent limitation regulations. In its view, the statute required EPA to issue a range of limitations as guidelines for each
class or category. The permitting authority would then consider the factors, specified in the guidelines, to choose a particular limitation from that range to apply to the permit applicant. EPA found this interpretation of the Act unacceptable for two reasons. First, EPA feared that if the permit proceeding was to engage in such substantial decisional tasks, the processing of the approximately 42,000 permit applications would become virtually impossible. Second, the Act provided for EPA to delegate permitting authority to the states if they fulfilled certain conditions, and most states had applied for, and received, that authority. If the permitting authority retained substantial discretionary powers in the permit proceeding, allowing it to weigh the factors to choose a specific limitation from the range in the guidelines, states would be in the position they were before the Act, when, for fear of losing industry, they competed with one another for the weakest limitations. Industry's argument that EPA's proposed permitting procedure displaced the important role of the states under the Act reinforced EPA's fears.

Industry's objections also extended to EPA's promulgation of new source standards, which accompanied the effluent limitation regulations for existing sources. Unlike the statutory provisions applicable to existing sources, the section requiring new source standards expressly required these standards to be adopted by regulation applicable to classes or categories of polluters. Moreover, the section 304(b) guidelines were not to guide the promulgation of the standards. Here it was clear that the permitting authority would have virtually no discretion. Nonetheless, industry asserted that EPA was required to provide a variance provision in its regulations to take account of exceptional circumstances.

C. The Litigation

In a series of court cases, various industries challenged EPA's method of proceeding. In 1976, the Supreme Court granted cer-
tiorari in *E.I. du Pont de Nemours v. Train*. There the controversy reflected the three substantive concerns of industry: (1) whether EPA could avoid promulgation of separate section 304(b) guidelines; (2) whether EPA could set BPT and BAT effluent limitations by category or subcategory of industry in generally applicable regulations, or must instead set them individually in section 402 permit proceedings guided by the section 304 guidelines; and (3) whether EPA’s standards for new sources of pollution must provide for a variance, exception, or modification where the circumstances of an individual new source justified a departure from the general rule.

With respect to the first two issues, the Court decided that section 301 was the key to the puzzle. By its terms, section 301 did not indicate that the BPT or BAT effluent limitations were to be set by regulation. Indeed, section 301 did not indicate who was to set the effluent limitations or how they were to be set. Nevertheless, while the BPT limitations were referred to as “effluent limitations for point sources,” the BAT limitations were referred to as “effluent limitations for categories and classes of point sources.” Nowhere in the legislative history is there any indication as to the purpose for this distinction.

The Court seized on the reference to effluent limitations “for categories and classes of point sources,” stating that this language “leaves no doubt” that the BAT limitations were to be set by regulation. Section 301(b)(2)(A) also provided that “for a category or class of point sources,” the BAT limitations should require elimination of discharges of all pollutants. Due to its focus on classwide

but the regulations were only presumptively applicable to an individual source), *cert. denied*, 430 U.S. 953 (1977); *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027 (3d Cir. 1975) (EPA had the authority to issue effluent limitation regulations that contain a range of limitations within which the permit issuer has discretion to set specific limitations as to individual plants); *American Meat Inst. v. EPA*, 526 F.2d 442 (7th Cir. 1975) (EPA has the authority to issue the effluent limitation regulations which apply to individual plants); *American Frozen Food Inst. v. Train*, 539 F.2d 107 (D.C. Cir. 1976) (EPA has the authority to issue the effluent limitation regulations which apply to individual plants); *Hooker Chemical & Plastics Corp. v. Train*, 537 F.2d 620 (2d Cir. 1976) (EPA has the authority to issue the effluent limitation regulations which apply to individual plants). *See generally du Pont*, 430 U.S. at 125 n.15.


41 *du Pont*, 430 U.S. at 125.

42 *Id.* at 126.

43 *Id.* at 121.


46 *du Pont*, 430 U.S. at 126.

47 *Id.*
determinations, the statute reflected the methodology of regulation, rather than the individualized determinations of permit proceedings.48

This analysis might resolve the issue for the BAT limitation, but it left unresolved the BPT limitation. Here the language of section 301 did not support a regulation-based effluent limitation. To the contrary, the reference in subsection (b)(1)(A) was to effluent limitations “for point sources,” which suggested individualized limitations.49 The Court, however, noted that nothing in the Act “suggests any radical difference in the mechanism used to impose limitations for the 1977 [BPT] and 1983 [BAT] deadlines.”50

The Court also assayed the legislative history. In so doing, it emphasized Senator Muskie’s explanation of the Conference Report.51 His explanation of section 304, to which the Conference Committee had made modifications, stressed the need for uniformity within classes or categories of point sources, as well as the desire to avoid consideration of factors at the time an effluent limitation was applied to an individual point source.52 The Court found that Senator

48 That the language noted by the court in section 301(b)(2)(A) should reflect a class-wide determination consistent with a regulation is not surprising if one continues to read section 301(b)(2)(A). In each instance, following the reference to a category or class of point sources, is the language “as determined in accordance with the regulations issued by the Administrator pursuant to section 304(b)(2).” Thus, the contemplated regulation reflected in the class-wide reference to “category or class of point sources” may well have been the guideline regulation, rather than any effluent limitation regulation under section 301.


50 du Pont, 430 U.S. at 127.

51 The Court’s reliance on lengthy quotations from Senator Muskie’s prepared statement is not inconsistent with traditional concepts of interpreting legislative history. After all, Senator Muskie was the Senate floor manager and, as the Court noted, “perhaps the Act’s primary author.” du Pont at 129. Nevertheless, Senator Muskie was not the sole author. Some observers thought that he utilized his prepared statement to create a false legislative history, one which reflected his personal views with respect to which he had been unable to prevail in committee. See e.g., 118 Cong. Rec. 33,711 (1972) (remarks of Senator Jackson decrying use of floor statements to manufacture false legislative history). With respect to the particular issue of whether categorical effluent limitations were to be adopted by regulation or whether particularized limitations were to be adopted in permit proceedings, Senator Muskie’s remarks not only went beyond the Conference Report, but were somewhat inconsistent with it. For example, the Conference Report speaks of the effluent limitations within a class or category being “as uniform as possible,” S. Rep. No. 92–1236, 92d Cong., 2d Sess. 126 (1972), and the guidelines assuring that “similar point sources . . . will meet similar effluent limitations.” Id. Both comments suggest that point sources within the same class or category would not necessarily have the identical effluent limitations, as would be the case if they were set by regulation. Senator Muskie’s statement, while including the statements from the Conference Report, went further and suggested that no consideration of the section 304(b) factors be made with respect to particular point sources. See 118 Cong. Rec. 33,696, 33,697 (1972).

52 du Pont, 430 U.S. at 130.
Muskie's language supported the setting of effluent limitations by regulation. It raised, however, the question of what purpose the section 304 guideline regulations were to serve, if not to guide the discretion of the section 402 permit issuers. The Court concluded that, in essence, the guidelines were to guide the EPA in its adoption of effluent limitation regulations under section 301.53

The Court also considered the effect of not accepting EPA's position. Quoting Justice Harlan, the Court said "[c]onsiderations of feasibility and practicability are certainly germane to the issue before us . . . . We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted."54 Industry's view, according to the Court, would place an impossible burden on EPA, because EPA would have to give individual consideration to each of the 42,000 existing dischargers who had applied for permits. EPA would also have to issue or approve all these permits well in advance of the 1977 deadline for the BPT limitation.55 Finally, the Court acknowledged that the interpretation it was affirming had been adopted by the agency charged with the administration of the Act; and therefore it deserved substantial deference. The Court also noted that most of the circuit courts which had considered the issue had adopted a similar interpretation.56

Accordingly, the Court concluded that the statute authorizes the 1977 [BPT] limitations as well as the 1983 [BAT] limitations to be set by regulation, so long as some allowance is made for variations in individual plants, as

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53 The Court brushed aside the fact that EPA had not adopted guidelines even for this purpose. It noted simply that the function of the guidelines had been served by the Development Document and supporting materials for the effluent limitation regulations. These materials had been subject to public inspection and comment. Therefore, any procedural error in not publishing separate guidelines was harmless. du Pont, 430 U.S. at 131-33.

54 Id. at 132, quoting Permian Basin Area Rate Cases, 390 U.S. 747, 777 (1968).

55 du Pont, 430 U.S. at 132-33. In fact, EPA had to give individual consideration to virtually every discharger because of the delay in promulgating categorical effluent limitations. Pursuant to section 402, EPA (or an authorized state) in the absence of an effluent limitation is to grant a permit to a discharger imposing "such conditions as the Administrator determines are necessary . . . ." C.W.A. § 402(a)(1), 33 U.S.C. § 1342(a) (1976). This necessitated consideration of the particular circumstances of virtually every discharger. Of course, the result was that EPA was practically forced to accept whatever the individual discharger alleged should be the necessary conditions.

The Supreme Court's fear that a requirement for individualized consideration would make attainment of BPT impossible by 1977 was obviously well-founded. The Court could also have noted that even with categorical effluent limitation regulations that goal was impossible for numerous industries because of EPA's delay or inability to promulgate the regulations on time.

56 du Pont, 430 U.S. at 134-35. See supra note 39.
EPA has done by including a variance clause in its 1977 [BPT] limitations.\textsuperscript{57}

The inclusion in this statement of the need for a variance mechanism as a \textit{sine qua non} of setting the 1977 [BPT] limitations by regulation is completely unexplained in the opinion. Indeed, later in the opinion when the court restates its holding, no mention is made of the need for a variance mechanism.\textsuperscript{58} Moreover, not one of the several briefs before the Court had suggested such a requirement.\textsuperscript{59} In fact, the brief on behalf of EPA represented that EPA did not interpret the Act to require an FDF variance for existing polluters,\textsuperscript{60} and the NRDC amicus brief went so far as to argue that the FDF variance was not permitted under the Act.\textsuperscript{61} The lack of explanation for requiring a variance for the adoption of BPT limitations by regulation becomes especially frustrating in light of the Court's response to industry's third claim.

As indicated above,\textsuperscript{62} in addition to challenging the EPA's setting of effluent limitations by regulations, industry had also challenged EPA's failure to include a variance mechanism for its new source performance standards under section 306. Section 306 by its terms required EPA to promulgate "regulations establishing Federal standards of performance for new sources . . . ."\textsuperscript{63} The court below had held that EPA should provide for the possibility of variances for new sources in individual cases because "[p]rovisions for variances, modifications, and exceptions are appropriate to the regulatory process."\textsuperscript{64} The Supreme Court, however, rejected this justification with the curt: "[t]he question . . . is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations."\textsuperscript{65}

\textsuperscript{57} \textit{du Pont}, 430 U.S. at 128.

\textsuperscript{58} See id. at 136 ("Consequently, we hold that EPA has the authority to issue regulations setting forth uniform effluent limitations for categories of plants.").

\textsuperscript{59} In addition to the briefs filed by \textit{du Pont} and by the Solicitor General's office, \textit{amicus} briefs were filed by the American Paper Institute, the American Petroleum Institute, Appalachian Power Company, American Iron and Steel Institute, and the Natural Resources Defense Council (NRDC).

\textsuperscript{60} See Brief of Administrator, EPA, in Docket Number 75–1473 and 75–1705, at 11 n.9, E.I. du Pont de Nemours v. Train, 430 U.S. 112 (1977) [hereinafter cited as Brief of Administrator, EPA].


\textsuperscript{62} See supra text accompanying note 41.


\textsuperscript{65} \textit{du Pont}, 430 U.S. at 138 (emphasis in original).
The Court found that Congress intended the new source regulations to be absolute prohibitions. This intent was to be inferred from: (1) the use of the word "standards" itself, which it was said implies an absolute prohibition; (2) the description of the preferred standard as one "permitting no discharge of pollutants"; (3) making unlawful the violation of the standard by "any" operator of "any" new source; (4) the absence of any statutory provision for a variance, in contrast to the section 301(c) variance; and (5) the inappropriateness of a variance in a standard intended to achieve national uniformity and maximum feasible control of new sources. These explanations for the inappropriateness of a variance mechanism for new sources are not only weak, but they also seem to apply equally to the variance mechanism from the 1977 BPT limitation. For example, the Court had gone to great lengths to show how the legislative history's emphasis on national uniformity for BPT effluent limitations supported their adoption by regulation. Nevertheless, the Court had found a variance mechanism not only appropriate but necessary with respect to BPT limitations. Just as section 306 did not contain any provision for a variance from the new source standards, section 301 did not provide for any variance from the BPT limitation. Indeed, the express restriction of the section 301(c) variance to a BAT limitation could be read to imply that variances were not intended for BPT limitations. Similarly, as was true for violations of the new source standards, "the discharge of any pollutant by any person" in violation of the BPT limitation was unlawful. That the preferred new source standard was one permitting no discharge seems of little relevance to the question of whether a variance is allowable in particular circumstances. Furthermore, it would seem to have no weight where the no-discharge standard is expressly preferred only "where practicable."

The Court ignored the most obvious basis for upholding EPA's failure to provide a variance mechanism for new source standards.

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66 Id.
67 Id.
70 See supra note 33.
71 du Pont, 430 U.S. at 138.
72 du Pont, 430 U.S. at 129-30.
73 See supra text at note 51.
This basis, which EPA presented to the Court,\textsuperscript{76} is that an FDF variance is implicitly authorized but not mandated by the Act, and that EPA's determination not to provide a variance for new source standards was reasonable. EPA explained that there was a need for a variance mechanism where it was making class-wide determinations of the effluent limitations for existing plants because of the potential for putting existing plants out of business. Where, however, the plant was not yet built, the construction of the new plant could always be altered or designed in light of the standards.\textsuperscript{77} This argument was not adopted by the Court. The Court apparently preferred its determination that Congress intended the new source standards to be absolute standards, without exception. Nevertheless, whatever the merits of the Court's explanation for forbidding variances from new source standards, the explanation (and especially its tacit rejection of EPA's argument) further clouds its justification for requiring variances for existing sources.

If one adopts a legal realist's view, and looks beyond the text of the opinion, one can suggest an explanation for the Court's \textit{ipse dixit} requiring a variance from the BPT regulations. One could describe the battle over the lawfulness of BPT regulations as a struggle between industry presenting the better argument based on the text and legislative history of the statute,\textsuperscript{78} and environmentalists (both EPA and environmental groups) presenting an argument based on necessity and public policy.\textsuperscript{79} This latter argument flows from EPA's two major objections to industry's claim that effluent limitations were to be set in the individual permit proceedings: (1) the impossibility of processing the 42,000 permit applications if each had to be individually assessed; and (2) the loss of national uniformity if states had the discretion to set effluent limitations pursuant to their deleg-...
gated permit authority. One way to mediate this conflict is the Solomonic splitting of the baby, which would give something to each side. Viewed in this way, the Court’s decision in *du Pont* gives environmentalists nationally uniform effluent limitation regulations, and gives to industry at least the figleaf of an individualized permit proceeding by requiring “some allowance . . . for variations in individual plants.” 80 While the Court’s analysis of the statute appears to justify BPT regulations without variance procedures, the decision itself imposes a variance procedure clearly absent from the statute. It might be said that the Court reconstructed the Act to accommodate the needs of EPA, but preserved for industry the potential for some individualized consideration in the permit proceeding.

The Court’s opinion in *du Pont* slammed the doors on industry’s attempt to derail EPA’s control of effluent limitations by regulation rather than by individualized adjudication. Nonetheless, the Court’s undefined requirement for some allowances for variations in individual plants sowed the seed for further litigation. Moreover, the absence of any analytical basis for the requirement, combined with a weak and somewhat contradictory justification for a prohibition on variances from the new source standards, provided no guidance to lower courts faced with that litigation. Thus, the opinion in *du Pont* made the return of variances to the Supreme Court inevitable.

II. THE SCOPE OF THE VARIANCE AND CRUSHED STONE

The Court’s next brush with Clean Water Act variances occurred three years later in *EPA v. National Crushed Stone Ass’n*. 81 There the Court was faced with the issue it had explicitly avoided in *du Pont*: 82 the scope of the variance from the 1977 BPT limitations. The Fourth Circuit had held that EPA’s variance provision was too restrictive. 83 As indicated earlier, 84 EPA included in each BPT limitation a variance provision allowing dischargers to obtain a variance by demonstrating that “the factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors con-

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80 *du Pont*, 430 U.S. at 128.
81 449 U.S. 64 (1980).
82 *du Pont*, 430 U.S. at 128 n.19.
84 See supra text accompanying notes 30–33.
sidered in the establishment of the guidelines. The "factors" were to be those specified by the EPA in its guidelines under section 304(b)(1)(B).

The industry plaintiffs challenged this variance provision on the grounds that it failed to provide for a variance provision where a discharger was financially unable to meet the costs of implementing the BPT standard. They based their claim on the language of section 301(c), the statutory variance provision applicable to BAT limitations, which expressly included the discharger's economic capability to meet the costs of effluent reductions as a consideration in the section 301(c) variance decision. The challengers relied on the Supreme Court's statement in *du Pont* that a BPT variance mechanism was a necessary corollary to the implementation of BPT effluent limitations by regulation, and suggested that in order to set BPT limitations by regulation, EPA treat BPT limitations like BAT limitations, and include a comparable variance provision. Stated another way, since the Court found clear statutory intent to set the BAT limitations by regulation, and no clear statutory basis for treating BPT limitations differently, then it follows that the terms of any BPT variances should not differ from those applicable to BAT limitations.

In response, the Court noted that, by its terms, section 301(c) only applied to BAT effluent limitations, so "only if the factors listed in section 301(c) bore a substantial relationship to the considerations underlying the 1977 [BPT] limitations as they do to those controlling the [BAT] regulations" would the affordability of the BPT limitations be relevant to the need for a BPT variance. The substantial

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85 *Crushed Stone*, 449 U.S. at 66 n.2.
86 EPA had explained that while cost is a "factor" to be considered in setting the BPT for a category or class, cost for a particular discharger could be a fundamentally different factor, perhaps justifying a variance, only if the cost to that discharger were "x times" the cost to the plants which EPA did consider. Whether that discharger could or could not afford those costs was irrelevant to the determination. See 43 FED. REG. 44,847-48, 50,042 (1978). See also *Crushed Stone*, 449 U.S. at 68 n.5.
87 Section 301(c) provided:
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.
C.W.A. § 301(c), 33 U.S.C. § 1311(c) (1976).
88 *Crushed Stone*, 449 U.S. at 74.
relationship between section 301(c) and the BAT limitations arose out of the similarity between the requirements for the variance and the requirements for BAT limitations. The latter mirrored on "class or category" basis the requirements of the former. The applicant for a section 301(c) variance had to show that it would use the maximum technology within its economic capability, and that it would make reasonable further progress toward the elimination of all discharges.\(^89\) BAT was defined as the "application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward ... eliminating the discharge of all pollutants ... ."\(^90\) Thus, the Court found that the section 301(c) variance merely allowed for an individualized determination of a BAT limitation on the basis of the same factors which determined the BAT standard for the class.

No similar connection was found between section 301(c) and the BPT limitations. First, section 301(c) required a showing that a variance would still result in "reasonable further progress,"\(^91\) which implied that some progress had already been achieved. Indeed, applicants seeking a section 301(c) variance would already have had to meet the BPT standard, which would not be true of applicants seeking a variance from the BPT limitations.\(^92\) Second, the requirement in section 301(c) for the variance to mandate "maximum use of technology within the economic capability of the owner" was not an individualized restatement of the BPT limitation. Consequently, to apply such a concept to a variance from BPT would be inappropriate.\(^93\)

However, these were not the most important distinctions.\(^94\) The Court was most persuaded by the argument that to allow variances from BPT based on affordability "would undercut the purpose and function of BPT limitations."\(^95\) Since BPT limitations forbade any

\(^{89}\) See C.W.A. § 301(c)(1), (2), 33 U.S.C. § 1311(c)(1), (2) (1976).


\(^{91}\) C.W.A. § 301(c)(2), 33 U.S.C. § 1311(c)(2) (1976) (emphasis supplied).

\(^{92}\) Crushed Stone, 449 U.S. at 75.

\(^{93}\) Id.

\(^{94}\) Nor are they very persuasive. The challengers had never asserted that every jot-and-tittle of section 301(c) should be carried over to a BPT variance provision. They claimed simply that economic affordability should be relevant to a BPT variance request, not irrelevant as EPA had determined. Moreover, it could be argued that to consider the best control technology economically affordable by an individual owner was the particularized equivalent of determining the best *practicable* control technology currently *available* as to the class, which is the definition of BPT. That is, if a technology is not affordable, it may be neither "practicable" nor "available."

\(^{95}\) Crushed Stone, 449 U.S. at 75.
level of pollution which was produced by discharges below "the average of the best existing performance,"96 the BPT limitations were designed to require dischargers either to achieve the limitations or to cease production. To allow variances based on considerations of affordability, thereby allowing use of technology below "the average of the best," would be to permit the use of technological controls rejected as inadequate when the BPT limitations were set.97 Stripped of its verbiage, the Court's rationale was simply that variances based on the affordability of the control technology to the owner would result in less pollution control than would occur in the absence of the variance. Or, as the Court concluded:

[B]ecause the 1977 limitations were intended to reduce the total pollution produced by an industry, requiring compliance with BPT standards necessarily imposed additional costs on the segment of the industry with the least effective technology. If the statutory goal is to be achieved, these costs must be borne or the point source eliminated. In our view, requiring variances from otherwise valid regulations where dischargers cannot afford normal costs of compliance would undermine the purpose and the intended operative effect of the 1977 regulations.98

The primary difficulty with the Court's response to industry is that one could make the identical statement with respect to the BAT limitations and the 1983 deadline. The BAT limitations were also intended to reduce the total pollution produced by an industry, and the stricter BAT limitations would necessarily impose higher costs on the most polluting plants in the industry. In the absence of a variance, the costs must be borne or the plant must be closed. When variances are granted, greater pollution necessarily results, interfering with the Act's goal of eliminating all pollution by 1985. Indeed, the only distinguishing feature in this regard between the BPT and BAT limitations is the existence of section 301(c) as an express indication that Congress intended to provide a limited safety valve from the BAT standards. Such a difference might well suggest that Congress intended no safety valve for BPT limitations. However, once the Court decided in du Pont that a variance from the BPT limitations was necessary, the effect of that variance — on whatever basis it would be granted — would be to increase the level of pol-

97 Crushed Stone, 449 U.S. at 76.
98 Id. at 78.
lution. This fact alone should not slam the door on affordability as a basis for the variance.

The Court looked to the legislative history to confirm its distinction between section 301(c) variances and variances from BPT limitations. The Court found "no indication that Congress intended section 301(c) to reach further than the limitations of its plain language."99 Yet, how could Congress have expressed any intent with respect to a variance it had neither provided for nor anticipated? The idea that a BPT variance mechanism was a necessary condition for setting BPT limitations by regulation first appeared in du Pont. This idea was an invention by the Court, adopted without explanation. Consequently, the Court is, at the least, disingenuous when it concludes from the legislative history that Congress did not intend the section 301(c) variance to apply to the BPT limitations.

The Court is more convincing, however, when it recites the various indications in the legislative history that Congress expected plants to be shut as a result of the costs imposed by pollution controls.100 The Court inferred from this expectation that affordability should not be a basis for an exception. Nevertheless, many of the statements in the legislative history are not specific as to which limitations would have the effect of closing plants; would they be BPT, BAT, or both?101 Certainly, even with the section 301(c) variance provision, a plant might be closed rather than meet its requirements.102 Similarly, a BPT variance mechanism that included consideration of affordability would not necessarily eliminate plant closings because of BPT limitations.

Having concluded that the BPT variance mechanism was not required to include any consideration of affordability, the Court was

99 Id. at 79.
100 See id. at 80–83.
101 Perhaps the most striking comment was made by Senator Nelson when he rejected the alternative of variances where economic hardship was shown. He suggested a small business loan fund instead. See id. at 80–81. His comment was directed at the effluent limitations generally — not specifically the BPT limitations — and was made before the Conference Committee added the section 301(c) variance provision. The adoption of section 301(c) in the Conference Committee, after Nelson's speech, undermines to a certain extent the validity of using his rejection of variances as a general expression of congressional intent.
102 Technology "within the economic capability of the owner or operator" might still not justify to the owner the costs necessary to apply this technology. For example, technology within the economic capability of General Motors still might be too expensive to justify General Motors using it on a particular, old plant owned and operated by General Motors. Moreover, because section 301(c) in all cases requires reasonable further progress toward elimination of all discharges, such progress might be beyond the economic capability of an owner and thus lead to a closing.
still left with the question of whether EPA's variance provision satisfied _du Pont's_ requirements. In answering this question, the Court relied heavily on the judicial review doctrine that it must show "great deference to the interpretation given the statute by the officers or agency charged with its administration."\(^\text{103}\) Here, "in the absence of any other specific direction to provide for variances . . .,"\(^\text{104}\) the Court held that EPA had adopted a reasonable construction of the statutory mandate.\(^\text{105}\) While the doctrine of deferring to agencies' construction of their own statutes is solidly based,\(^\text{106}\) and is one from which EPA has obtained substantial benefit,\(^\text{107}\) here its use seems somewhat unusual. After all, the Court, and not the statute, had required variances from BPT limitations. Moreover, EPA's FDF variance had been adopted under its own interpretation of the statute as allowing, but not requiring, a variance from BPT limitations, an interpretation the Court in _du Pont_ had not accepted.

In its deference to EPA, the Court shed no light on its view of the justification for the FDF variance, nor on the reasons why the Court believed it to be required. The Court came close to an explanation earlier in the opinion where, in contrasting EPA's FDF variance with what the industry challengers sought, the Court stated:

> the variance is an acknowledgment that the uniform BPT limitation was set without reference to the full range of current practices, to which the administrator was to refer. Insofar as a BPT limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete.\(^\text{108}\)

One may infer from this statement, which merely reflects EPA's various justifications for the FDF variance,\(^\text{109}\) that the variance is

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\(^\text{103}\) _Crushed Stone_, 449 U.S. at 83, _quoting_ Udall v. Tallman, 308 U.S. 1, 16 (1965).

\(^\text{104}\) _Crushed Stone_, 449 U.S. at 84.

\(^\text{105}\) _Id._

\(^\text{106}\) _See_, e.g., R. Pierce, S. Shapiro, P. Verkuil, _Administrative Law and Process_ § 7.4.3 (1985); 5 K.C. Davis, _Administrative Law Treatise_ § 29:16 (2d ed. 1984); and B. Schwartz, _Administrative Law_ § 10.1 (2d ed. 1984).


\(^\text{108}\) _Crushed Stone_, 449 U.S. at 77-78.

\(^\text{109}\) _See_, e.g., 44 Fed. Reg. 32,893-94 (1979). The regulation for FDF variances for direct dischargers states:

> In some cases . . . data which could affect these national limits as they apply to a particular discharger may not be available or may not be considered during their development. As a result, it may be necessary on a case-by-case basis to adjust the
available solely to correct an error in the BPT rulemaking, a failure to consider all the necessary information with respect to one or more factors. The correction would be made, however, not to the BPT effluent limitation regulation, but rather to the particular discharger with respect to whom the fundamentally different factor or information related. Depending upon how the fundamentally different factor compared to those that EPA had considered in setting the BPT limitation, the effluent limitation applicable to the particular discharger might be made higher or lower than the limitation in the regulation.\footnote{This rationale for a variance or exception seems entirely reasonable as a general matter.\footnote{Each of EPA's FDF variance provisions has always provided that any person, not just a person subject to an effluent limitation, could petition for an FDF variance to be applied to a particular discharger. See infra note 29. Theoretically, an environmental group could petition for a discharger's limitation to be made stricter on the basis of that discharger's particularized factors being both fundamentally different from those of others in its category and supportive of stricter standards. As a practical matter, however, it seems unlikely that an outside group would be in a position to know the particularized circumstances of a particular discharger, and apparently all of the 2000 petitions for an FDF variance have been filed by the discharger seeking the variance. The courts in discussing the FDF variance have invariably ignored its potential for a stricter standard.}}

What remains lacking, however, is any explanation as to why such a variance would be \textit{required} as a necessary condition to having BPT limitations set by regulation. In \textit{Crushed Stone},\footnote{See United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972). See also Aman, \textit{Administrative Equity: An Analysis of Exceptions to Administrative Rules}, 1982 DUKE L.J. 277, 293–94; Shapiro, \textit{Administrative Discretion: The Next Stage}, 92 YALE L.J. 1487, 1504 (1983); Schuck, \textit{When the Exception Becomes the Rule: Regulatory Equity and the Formation of Energy Policy Through an Exception Process}, 1984 DUKE L.J. 163, 283–89.} it would have been easy for the Court to have disavowed, or at least deemphasized, the necessity for a variance from the BPT limitation regulation, but the Court did not. Instead, it restated it with full force,\footnote{449 U.S. at 64.} if with no more justification.

In approving the rationale adopted by EPA, the Court again seemed to act inconsistently with the rationale it articulated in \textit{du Pont} for rejecting variances from new source performance standards. There, the lower court had required EPA to provide a vari-
VARIANCES

The court reasoned that the nature of the standards setting process — by rulemaking — left open the possibility that EPA would omit consideration of an essential factor. For example, section 306(b)(1)(B) expressly directs that when the Administrator sets new performance standards, both the cost of achieving the effluent reduction and any non-water quality environmental impact or energy requirements be considered. Section 306(b)(2) requires the Administrator to consider the type of manufacturing process employed by the discharger. Certainly, in establishing new source standards, EPA could overlook, or not discover, information with respect to one or more types of sources. In such cases, "that data which would affect these limitations [would] have not been available and, as a result, these limitations should be adjusted for certain plants in the industry." Yet it was just this "limited escape" mechanism, required by the court of appeals in du Pont, that the Supreme Court rejected in du Pont: "[T]he question, however, is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations." Thus, the rationale for the FDF variance accepted by the Court in Crushed Stone is directly at odds with the Court's justification for banning variances from new source standards.

The Court's decision in Crushed Stone clarified the scope of the variance which the Court in du Pont had required. What it did not do was explain why that variance had been required. Moreover, the Court's explanation of the rationale for the FDF variance runs counter to its rationale in du Pont for rejecting variances from new source standards. This uncertainty in the legal foundation of the FDF variance provides the background for the Court's next encounter with the FDF variance, where the question became whether an FDF variance was a modification of section 301's requirements.

III. CHEMICAL MANUFACTURERS

Subsequent to the du Pont case, EPA expanded the range of effluent limitations subject to a possible FDF variance. In 1978, a generic FDF variance provision was adopted with respect to pre-

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114 du Pont, 541 F.2d at 1018.
116 See du Pont, 541 F.2d at 1018.
117 du Pont, 430 U.S. at 138.
treatment standards, and in 1979 a similar generic provision was adopted with respect to all BPT, BAT, and BCT limitations. In 1977, however, the Clean Water Act had been amended to include section 301(l), which expressly prohibits the Administrator from

118 43 Fed. Reg. 27,736–73 (1978) (codified at 40 C.F.R. § 403.13 (1984)). The “pre-treatment” standards govern sources that discharge into publicly-owned treatment works (POTW), as opposed to navigable waters. These standards are “to prevent the discharge of any pollutant through . . . [a POTW], which pollutant interferes with, passes through, or otherwise is incompatible with such works.” C.W.A. § 307(b)(1), 33 U.S.C. § 1317(b)(1) (1982). This is to be accomplished by regulation. Id.

As a result of EPA’s desuetude in promulgating pretreatment standards of any kind, NRDC sued EPA. This desuetude related to standards for toxic pollutants generally, of which the pretreatment standards were a subpart under the 1972 Act. The EPA was stymied due to the difficulty of the substantive criteria to govern the toxic standard (health-based determinations with respect to each toxic pollutant) and the procedure to be employed (formal rulemaking). NRDC’s suit was fortuitous because it “forced” EPA to proceed in a manner it might not otherwise have been able.

Thereafter, in a consent decree, EPA agreed to a regulatory strategy for “indirect” dischargers (dischargers into POTW’s) that would, in part, parallel the direct discharger regulatory system. EPA would first impose BPT and then BAT on existing indirect dischargers, and would impose comparable technological requirements on new indirect dischargers as were imposed on new direct dischargers under section 306. The other part of the strategy was simply to prohibit discharges that interfered with or passed through a POTW. See National Pretreatment Strategy, 43 Fed. Reg. 27,759 (1978). See also NRDC v. Train, 8 Env’t. Rep. Cas. (BNA) 2110 (D.D.C. 1976), modified sub nom. NRDC v. Costle, 12 Env’t. Rep. Cas. (BNA) 1833 (D.D.C. 1979), aff’d in part sub nom. EDF v. Costle, 636 F.2d 1229 (D.C. Cir. 1980), modified on remand sub nom. NRDC v. Gorsuch, 16 Env’t. Rep. Cas. (BNA) 2084 (D.D.C. 1982). See generally National Ass’n of Metal Finishers v. EPA, 719 F.2d 624, 634–36 (3d Cir. 1983), rev’d in part sub nom. Chemical Mfrs. Ass’n v. NRDC, 105 S. Ct. 1102 (1985) (describing the history and substance of the General and Categorical Pretreatment Regulations). While under section 307(b) pretreatment standards are not by definition limited to toxic pollutants, those are the only pollutants for which EPA has currently issued pretreatment standards. See id. at 645 n.25. Under section 301(b), the pretreatment limitations were to be achieved either by 1977, or by 1984, depending upon the POTW into which the polluter discharged. See C.W.A. § 301(b)(1)(A)(ii) & (b)(2)(A)(ii), 33 U.S.C. § 1311(b)(1)(A)(ii) & (b)(2)(A)(ii) (1982).

modifying any section 301 effluent limitation requirement with re­
spect to toxic pollutants. 120

Thereafter, the NRDC petitioned for review of the 1978 general 
pretreatment regulations on the ground that: first, FDF variances 
from the pretreatment standards were not authorized by the Act; 
and second, the FDF variance was prohibited to the extent it would 
apply to toxic pollutants under the pretreatment standards. The 
Third Circuit agreed with the latter point, and therefore declined to 
reach the first. 121 The Supreme Court reversed by a narrow 5–4 
split. 122

The question before the Supreme Court was whether “§ 
301(l) forbids the issuance of FDF variances for toxic pollutants.” 123 The 
Court noted that NRDC had also challenged the authority of EPA 
to issue FDF variances from BAT or pretreatment standards, even 
where toxic pollutants were not involved. The Court found, however, 
that it need not address this issue. It assumed for the purposes of 
argument that such authority did exist. 124 The first hurdle, therefore, 
was the plain language of the statute. On its face, the statute appears 
to bar any variances for toxic standards because it prohibits the 
Administrator from “modify[ing] any requirement” of the section 301 
with respect to a toxic pollutant. 125 The majority, however, cleared 
this hurdle with ease, pointing out that a literal interpretation would 
forbid any change to a toxic effluent limitation. 126 Such a construction 
would not only forbid EPA from correcting an error, or imposing a 
stricter standard, but it would also bar EPA from revising the 
pretreatment standards from time to time as required by section 
307(b)(2). The Court therefore concluded that “[t]he word ‘modify’ 
. . . has no plain meaning as used in section 301(l).” 127 EPA’s position 
was that the term “modify” in section 301(l) is a term of art, not to 
be interpreted according to everyday concepts, but rather in light

120 See supra note 4.
121 See National Ass’n of Metal Finishers, 719 F.2d at 624. Earlier, the Fourth Circuit had 
rejected a similar challenge. See Appalachian Power Co. v. Train, 620 F.2d 1010 (4th Cir. 
1980).
122 Both du Pont and Crushed Stone were decided by 8–0 votes; Justice Powell did not 
participate. Justice Powell was, however, one of the five members of the majority in Chemical 
Mfrs.
123 Chemical Mfrs., 105 S. Ct. at 1107.
124 Id. at n.13.
125 See supra note 4.
126 See Chemical Mfrs., 105 S. Ct. at 1108.
127 Chemical Mfrs., 105 S. Ct. at 1108.
of the specialized setting in which it is found. EPA pointed out that section 301 contains a number of provisions authorizing or directing the Administrator to "modify" one or more requirements of that section.\footnote{See C.W.A. §§ 301(c), (g), 33 U.S.C. §§ 1311(c), (g) (1982). Section 301(g) requires the Administrator, with the concurrence of the state, to "modify" BAT limitations (except for toxic, conventional, and thermal pollutants) if a discharger shows that the lesser limitation will comply with BPT and any state standard, will not result in any greater requirements for other sources, and will not interfere with attainment and maintenance of safe and healthy water quality. For the text of section 301(c), see supra note 87.} It was these "modifications" at which the section 301(l) prohibition was aimed, EPA asserted, not the FDF "variance." The Court concluded this was a reasonable construction of the statutory language, and, therefore, the Court should defer to the agency, unless the legislative history or purpose and structure of the Act clearly revealed a contrary intent.

\section*{A. Congress' Specific Intent}

The Court embarked upon its search for legislative intent by seeking evidence whether Congress intended to affect FDF variances by its enactment of section 301(l). In \textit{Crushed Stone}, the Court's search for legislative intent regarding the variance it had required in \textit{du Pont} had been ludicrous; the variance had not existed in the 1972 Act. Here, however, the 1977 amendments had been enacted after EPA invented the FDF variance and after several courts, including the Supreme Court, had at least noted it. Consequently, it was at least possible that Congress could have addressed the variance. Nonetheless, the Court found no conclusive evidence that Congress had intended the section 301(l) prohibition to affect FDF variances.

It is clear that the modifications authorized by section 301(c) and (g) were intended to be subject to the prohibition.\footnote{EPA has likewise not been consistent in its denomination of the section 301(c) "modification." In its regulations, EPA refers to all the various statutory modifications and extensions, as well as FDF variances, by the generic term "variances." See 40 C.F.R. § 124.62 (1984) (decision on variances). Moreover, in its brief in \textit{du Pont}, EPA did not distinguish its FDF variances from the section 301(c) modification, referring to them as "analogous variances." See Brief of Administrator, EPA, \textit{supra} note 60, at 6 n.7.} However, in describing the section 301(l) prohibition, legislators did not restrict themselves to the use of the term "modification;" instead, they often used the terms "modification," "waiver," and "variance" without apparent distinction.\footnote{See \textit{Chemical Mfrs.}, 105 S. Ct. at 1109 (quoting remarks of Representative Roberts).} This might be read as reflecting an intent that changes to a section 301 limitation on toxic pollutants were
forbidden, however denominated. The Court, nevertheless, found that “many” of these statements were in the context of the section 301(c) and (g) modifications. Therefore, the fact that the members referred to these “modifications” as waivers or variances did not necessarily mean that these same members would have meant FDF “variances” to be considered “modifications.”

The Court found further evidence of a lack of Congressional intent to affect FDF variances in the path by which section 301(l) developed. In the Senate version of the bill, there was no section 301(l). Rather, a prohibition against modifications relating to toxic pollutants was added to the preexisting section 301(c). A new subsection was also added authorizing certain modifications, which became section 301(g), but which also prohibited such modifications with respect to toxic pollutants. The House version had no comparable provisions to section 301(g) or (l), and no change to section 301(c). Thus, as the bills passed the House and Senate, it was clear that there was no limitation placed on FDF variances with respect to toxic pollutants.

Section 301(l) was added in the Conference Committee. It prohibited all modifications of toxic effluent limitations, and the prohibition which had been added to section 301(c) was removed. The prohibition in what is now section 301(g), however, was not removed. No explanation for section 301(l) was made in the Conference Report. In the House, however, Congressman Roberts, the House manager, stated:

[D]ue to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this 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.

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131 Chemical Mfrs., 105 S. Ct. at 1110.
134 No one has satisfactorily explained why the prohibition against making a modification under section 301(g) with respect to a toxic pollutant was left in section 301(g), even though section 301(l) contains the same prohibition. Given the substantial reworking of section 301 in the Conference Committee, the most likely explanation would appear to be a drafting oversight during the frenetic Committee Session.
135 123 Cong. Rec. 38,960 (1977). Compare Senator Muskie’s remarks. Id. at 39,183. Senator Muskie equated conventional pollutants and toxic pollutants with respect to “waivers or modifications,” and concluded that “they are not affected by any waivers or modifications, either on the basis of cost or on the basis of attainment and maintenance of water quality . . . .” See also remarks of Senator Muskie. Id. at 39,172.
The absence of any mention of FDF variances was viewed by the Court as especially significant. Had Congress intended to limit FDF variances as well as the specifically mentioned modifications, it would have so stated, because "Congress was undoubtedly aware of *du Pont*, and absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." 136

As far as it goes, 137 the Court's conclusion that Congress did not express any intent with regard to the FDF variance hardly can be faulted. 138 Indeed, except to the extent that Congress was aware of the details of EPA's regulations or the specifics of recent court decisions, it would be slightly short of incredible for Congress to have had a specific intent with respect to the FDF variance, much less to have expressed it. That is, unless Congress was aware of the practice of FDF variances, there would be no reason for it to discuss a variance procedure it had never created. In that regard, the Court's conclusion that "Congress was undoubtedly aware of *du Pont*" takes on special importance.

First, whatever Congress may have known of *du Pont*, it could not have known what the Court states the decision stood for: "[I]n [*du Pont*], we upheld the EPA's class and category limitations, relying on the availability of *FDF waivers*." 139 This is clearly rewriting history; the only mention of FDF variances in *du Pont* occurs in a footnote which quoted the EPA regulation, 140 and the Court expressly declined to determine whether EPA's variance provision (the FDF variance) satisfied the requirement for "some allowance for variations in individual plants." 141 Thus, Congress would have to have been prescient to have known in 1977 that the Court in 1980 in * Crushed Stone* would hold the FDF variance to be the variance required in *du Pont*.

Second, evidence to support a conclusion that Congress was even aware of FDF variances, or of *du Pont*, is scant. The Court refers to two items. The first is that a representative of NRDC testified at

136 *Chemical Mfrs.*, 105 S. Ct. at 1109 (footnotes omitted).
137 See infra text at note 154.
138 The dissent's complaint is directed at the narrowness of the Court's view of the relevant history, rather than with its conclusion that Congress had no specific intent with regard to FDF variances. *Chemical Mfrs.*, 105 S. Ct. at 1113 (Marshall, Blackmun, Stevens, J. dissenting; O'Connor, J., dissenting in part).
139 *Chemical Mfrs.*, 105 S. Ct. at 1109 (emphasis supplied).
140 See *du Pont*, 430 U.S. at 123 n.10.
141 Id. at 128.
a hearing that there was a "fundamental variance provision [sic]."142 This one reference, especially with an incorrect denomination, in the hundreds of pages of hearing testimony, almost suggests the opposite of the Court's conclusion. If in all the oversight hearings and hearings relating to amendments to the Clean Water Act, only one, incorrect reference to FDF variances was made, it almost proves they were so obscure as to be unknown to Congress.

The second evidence of congressional knowledge cited by the Court is a reference made by Representative Clausen, the ranking minority member of the Subcommittee on Water Resources of the House Public Works and Transportation Committee, in the House debate on the Conference Report.143 This reference, however, is not to the FDF variance at all, or even to the du Pont decision, but rather it is to a report submitted to him in September, 1977, by the

142 Chemical Mfrs., 105 S. Ct. at 1109 n.17. The Court actually reports that "[a] representative of NRDC testified before Congress that a 'fundamental variance provision' was integral to the Act's system of 'national, uniform, minimum effluent limitations.'" This, however, is not at all an accurate quotation. The general discussion involved EPA's use of "delayed compliance penalties" to address widespread violation of the 1977 standards (supported by NRDC) instead of changing the 1977 deadlines (supported by industry). An industry representative suggested that, if individually tailored delayed compliance penalties were appropriate, then so were individually tailored effluent limitations in permits. On the other hand, EPA (and NRDC) had supported (in du Pont and elsewhere) across-the-board BPT and BAT effluent limitations. The NRDC representative responded:

The reason for requiring the national, uniform, minimum effluent standards, BPT and BAT, is to pursue principles which Congress found, after extensive hearings on the enactment of this Act, were necessary to achieve effective water pollution control. Congress had experience since 1948 or so with various water pollution control laws, all of which were modeled on water quality standards and also case-by-case analysis. Precious little happened in cleaning up the water.

Not until Congress enacted the 1972 act did we begin to develop the system which has been effective in establishing national, uniform, minimum effluent limitations. It provides discretion to the states to apply higher standards if they wish. It would also actually be implemented, and it takes account of the individual concerns of the various industries. There is a fundamental variance provision. In each and every regulation issued by EPA, industry is involved intensively in the process and in the development of these standards. With those factors involved, it seems to me most unwise to consider anything other than the system developed by Congress and enacted into law.

Federal Water Pollution Control Act Amendments of 1977. Hearings before the Subcommittee on Environmental Pollution, Comm. on Environment and Public Works, 95th Cong., 1st Sess., Serial No. 95 - H25, Part 9, at 36-37 (1977). NRDC nowhere suggested that an FDF variance was integral or even important to the Act, or to national, uniform, minimum effluent standards. In the context, the reference to the variance is unexplained and of no particular note or significance. It is somewhat ironic for the Court to cite NRDC for the proposition that FDF variances were integral to the Act. In du Pont, NRDC had argued that FDF variances were not authorized by the Act. See supra note 61.

143 See Chemical Mfrs., 105 S. Ct. at 1109 n.17.
Congressional Research Service (CRS) entitled "Case Law Under the Federal Water Pollution Control Act Amendments of 1972." Even if this document had been generally available prior to the votes on the Conference Report, and even if members had read it, they would have found little in it concerning FDF variances. The term, "fundamentally different factors," appears only once, in a parenthetical description of American Iron and Steel Institute v. EPA, a pre-du Pont case which held that EPA's single-number BPT effluent limitations were unlawful, because, notwithstanding EPA's FDF variance procedure, they were too inflexible. Moreover, in describing the language in the du Pont case addressing the "allowance . . . for variations in individual plants," which the Court had held was necessary to the 1977 [BPT] limitation regulations, the CRS Report merely states that this was the "only aspect of the Court's decision . . . favorable to industry's position" and "seem[s] to mandate" a variance provision for the 1977 limitations similar to the one expressly provided in section 301(c) for the 1983 standards. Finally, the CRS Report describes: the pre-du Pont disagreements among the courts of appeals over the need for, and scope of, variance provisions; and the failure of du Pont to decide the scope of that variance. While these references indicate that du Pont required "some allowance . . . for variations in individual plants," they indicate that there was no hint, much less any "thrust," that the variance required was an FDF variance. To the contrary, the one hazarded guess was that the variance would be the equivalent of the section 301(c) waiver. In short, the CRS Report provides no evidence that Congress was aware that du Pont called for FDF variances.

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144 See House Public Works and Transportation Comm. Print 95-35, 95th Cong., 1st Sess. (1977) [hereafter referred to as CRS Report]. At the conclusion of Representative Clausen's extensive remarks supporting the bill, he observed that there had been much litigation under the Act, and that a full understanding of the statute could only be achieved by a full understanding of the case law. Consequently, he said, the CRS Report "is being printed" as a committee document. Representative Clausen stated that he believed "this report will prove to be most useful." 123 CONG. REC. 38,976 (1977).

145 There is some question whether the printed CRS report was published before the December 15, 1977 vote. The printed document is dated "November 1977," but such dates on Committee prints do not always reflect the date they are available. Representative Clausen in his remarks, moreover, referred to the CRS report as "being printed," not as having been printed. Id.

146 526 F.2d 1027 (3d Cir. 1975).

147 See CRS Report, supra note 144, at 28.

148 Id. at 20. Of course, in Crushed Stone, the Court later held that the "allowance" referred to in du Pont was not similar to the section 301(c) provision. 449 U.S. at 74-77.

149 See id. at 27-28, 38-39, 73.

150 See id. at 20. Had the CRS Report's guess been accurate, then the express legislative
At best, the evidence marshalled by the Court to establish congressional awareness is miniscule. The question is not whether Congress can be legally charged with knowledge of FDF variances, because publication in the Federal Register constitutes legal notice of governmental regulations. Instead, the question is what Congress in fact knew. In construing section 301(l), the Court is not concerned with the legally operative effect of congressional silence with respect to FDF variances. It is concerned with the historical context in which section 301(l) was enacted, as that context sheds light on the section’s meaning.\textsuperscript{151} Congress’ silence is part of that context. The significance of that silence, however, depends on what Congress knew with regard to FDF variances. As indicated above, the indirectness and insubstantiality of the materials cited by the Court do not support its conclusion that Congress was aware of the FDF variance. Rather, the total silence regarding FDF variances in the legislative history supports the conclusion that Congress was unaware of the practice. Finally, the fact that, by 1977, only 50 of 4,000 major industrial dischargers covered by BPT limitations had even applied for an FDF variance,\textsuperscript{152} and only two had been granted,\textsuperscript{153} suggests that neither industry nor environmentalists would have brought them to Congress’ attention. In short, it is difficult, to say the least, to sustain the Court’s conclusion that Congress was “undoubtedly aware” of the FDF variances. Yet that awareness would be a necessary prerequisite to assigning any significance to Congress’ failure to demonstrate a specific intent to bar such variances with respect to toxic pollutants.

The dissent does not appear to argue that the Conference Committee had any specific knowledge of or intent with regard to FDF variances, but it does argue that there was a specific legislative intent in section 301(l) to bar any changes in toxic standards, not just the modifications in section 301(c) and (g).\textsuperscript{154} Evidence of this intent is found in the Conference Committee’s creation of section 301(l). As the bill passed the Senate, section 301(c) and the predecessor of section 301(g) each contained its own toxics exception. Unless the Conference Committee meant section 301(l) to apply to

\textsuperscript{151} See generally Tribe, Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence, 57 Ind. L.J. 515, 529 (1982).

\textsuperscript{152} See Chemical Mfrs., 105 S. Ct. at 1107.

\textsuperscript{153} Id.

\textsuperscript{154} See id. at 1117–18 (Marshall, J., dissenting).
more than the sections 301(c) and (g) modifications, there would have been no need to adopt section 301(l) at all. More importantly, the language of section 301(l) bars the modification of "any requirement of this section." Subsections (c) and (g), however, only modify subsection (b)(3)(A) [the BAT limitation]. Thus, according to the dissent, Congress intended section 301(l) to apply to more than just modifications under sections 301(c) and (g).

One can accept the dissent's argument on this point without reaching the dissent's conclusion that section 301(l) must apply to FDF variances. The dissent, as well as the majority, ignores the fact that section 301 authorizes additional modifications to its requirements beyond those in sections 301(c) and (g). For example, subsections (h), (i), and (k)\textsuperscript{155} provide for modifications of various effluent limitations, which should be subject to section 301(l)'s prohibition if they affected a toxic pollutant.\textsuperscript{156} Although the legislative history is as silent regarding any link between these modifications and section 301(l) as it is regarding any link between FDF variances and section 301(l), these other statutory "modifications" were also adopted by the Conference Committee. Their adoption suggests that the creation of section 301(l) was as a generic prohibition to modifications of section 301 requirements.

What emerges from this resounding silence in the legislative history regarding FDF variances is a confident conclusion that Congress was not aware of FDF variances to a degree necessary to have any specific intent as to their treatment under section 301(l). Under \textit{Chevron, U.S.A. v. NRDC},\textsuperscript{157} the absence of a specific congressional intent answers the first of the two questions a court should ask when

\textsuperscript{155} 33 U.S.C. § 1311(h), (i), (k) (1982).
\textsuperscript{156} Section 301(h) provides a modification procedure by which POTW's could have their secondary treatment requirements under subsection (b)(1)(B) modified with respect to discharges into marine waters. 33 U.S.C. § 1311(h) (1982). Section 301(i) allows for a modification to obtain an extension of the 1977 deadline imposed by sections 301(b)(1)(A)(ii), (B) and (C) (pretreatment standards for point sources discharging into POTW and secondary treatment for POTW), where failure to meet the deadline is caused by the inability of the POTW to complete necessary construction. 33 U.S.C. § 1311(i) (1982). Given the nature of these two modifications, which are aimed mainly at POTW's, it is unlikely that the modifications would affect toxic pollutants. Although the unlikelihood of their applicability may explain their not being mentioned, it does not vitiate the legal possibility of their application. More importantly, section 301(k) provides for an extension of the 1984 BAT deadline for a discharger who will undertake the use of innovative production processes or control techniques which have the potential for industry-wide application. 33 U.S.C. § 1311(k) (1982). While section 301(k) does not use the term "modification" or "modify," as do sections 301(c), (g), (h), and (i), this purely semantic distinction should be no reason to exempt section 301(k) from the prohibition of section 301(l).

\textsuperscript{157} 104 S. Ct. 2778 (1984).
reviewing an agency’s construction of a statute. The next question is whether the agency’s construction of its statute is a permissible one.

**B. Consistency With the Statutory Scheme**

To determine the permissibility of an agency's interpretation of its statute, the majority in *Chemical Manufacturers* looks to “the goals and operation of the statutory scheme” to determine if they would be frustrated by the possibility of FDF variances for toxic pollutants. The Court’s analysis is based on the question of whether the FDF variance is more like an exception to an otherwise uniform rule, or whether it is more like a rule that merely happens to apply to a universe of one. The Court found that EPA consistently characterized the variance as “an individualized . . . standard,” and not a waiver of the Act’s requirements. Moreover, NRDC conceded that EPA could promulgate a rule creating a subcategory for an individual source “fundamentally different” from the other sources in the basic category. This would have the “same result” as issuing an FDF variance. Consequently, the Court found that the FDF variances were not inconsistent with the Act’s goal of uniform effluent limitations. Furthermore, because the grounds for an FDF

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158 The Court in *Chevron* sets forth the two questions:

> [w]hen a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue . . . ? If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute

159 *Chemical Mfrs.*, 105 S. Ct. at 1110.

160 44 Fed. Reg. 32,854, 32,893 (1979). Actually, EPA was not so consistent. In its brief in *du Pont*, EPA had characterized the FDF variance as similar to the section 301(c) “variance.” See Brief of Administrator, EPA, supra note 60.

161 See *Chemical Mfrs.*, 105 S. Ct. at 1111.

162 *Chemical Mfrs.*, 105 S. Ct. at 1111–12. In reaching this conclusion, the Court leaned heavily on the equivalency between an FDF variance, which NRDC denied could be issued with respect to toxic effluents, and a rule applicable to only one source as a special subcategory. The Court wrote that “an FDF variance . . . represents an acknowledgment that . . . those relevant factors, properly considered, would have justified — indeed, required — the creation of a subcategory for the discharger in question.” *Id.* at 1110. While there are some grounds
variance were completely different from the grounds for a section 301(c) or section 301(g) modification, the section 301(l) legislative policy against those modifications did not necessarily apply to FDF variances.

Finally, the Court invoked the "enormous burden" and the "stringent timetables" under which EPA labored to set the effluent limitations. The Court was sensitive as well to the "large amounts of technical information" that needed to be analyzed. EPA might "understandably" therefore fail to consider unique factors applicable to atypical plants, and thus the flexibility provided by the FDF variance was "important." Such flexibility, the Court hypothesized, might even have been intended by Congress in order to assure the validity of the categorical regulations. Such a possibility is reasonable, the Court implied, because Congress might have believed that variances were required by due process, or that variances increased the likelihood that categorical regulations would be upheld.

for this statement by the Court, e.g., the similarity of the factors to be considered in granting an FDF variance and the factors described in section 304(b), they are not unassailable. Apparently, EPA has never directly made such an assertion. Moreover, nothing in the Act suggests that different subcategories can be established only if their factors are "fundamentally different." More importantly, the Court ignored the procedural differences between the two different alternatives. As the dissent suggests, the choice of procedural mode might have substantive impacts. See 105 S. Ct. at 1123–24. Instead, the Court concluded that, because the argument was reduced to one over the means by which the decision was reached, rather than the power to achieve the end, it was particularly appropriate to defer to the agency choice. See Chemical Mfrs., 105 S. Ct. at 1111, (citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978), and NLRB v. Bell Aerospace Co., 416 U.S. 267, 293 (1974)).

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163 See supra notes 90–93 and accompanying text.
164 Chemical Mfrs., 105 S. Ct. at 1111.
165 Id.
166 Id.
167 Id. at 1112.
168 Id. at 1112 n.25.
170 Chemical Mfrs., 105 S. Ct. at 1112 n.25. The Court cited two cases for the proposition that some courts had found the FDF variance critical to the promulgation of treatment requirements. Kennecott Copper Corp. v. EPA, 612 F.2d 1232, 1243–44 (10th Cir. 1979); Weyerhaeuser, 590 F.2d at 1040–41. However, both cases post-date the 1977 amendments and, therefore, could not have been considered by Congress.
The Court’s analysis of the goals and operation of the statute is simplistic at best; at worst, it is disingenuous. It is difficult to find a single statement by the Court regarding any of the Act’s goals or operation, other than the “goal of uniform effluent limitations under the Act.” Indeed, the Court in its discussion of goals and operations of the Act, nowhere even mentions toxic materials, the very focus of section 301(l), much less discusses the purpose of that provision. One may concede that Congress, in enacting section 301(l), did not specifically intend to affect FDF variances. However, the necessary next question must be whether, by the enactment of section 301(l), Congress clearly expressed an intent that was inconsistent with granting FDF variances. This question simply cannot be answered without addressing the purpose of section 301(l).

The dissent in Chemical Manufacturers does address this question. Justice Marshall notes that the control of toxic pollutants was one of the highest priorities of the 1977 amendments. Section 301(l), at the least, imposed restrictions on certain modifications applicable to toxic effluents that had not existed prior to its passage. Moreover, the statutory scheme clearly indicated that, where toxic effluents were involved, neither the economic affordability nor the quality of receiving water were relevant considerations. The dissent continues:

If these two modifications [sections 301(c) and (g)] are the only ones now prohibited, the result is wholly counterintuitive. EPA is in effect contending that economic and water quality factors present the most compelling case for modification of the standard in the nontoxic context — as they are explicitly authorized by statute — but the least compelling case for modification in the toxic context — as they are the only modifications prohibited by § 301(l).

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171 Chemical Mfrs., 105 S. Ct. at 1110. It is arguable whether the uniformity of effluent limitations is a goal of the statute or only an important means to accomplishing the statute’s goals.

172 Given the Court’s references to Chevron, 104 S. Ct. at 2778, one could interpret the Court’s failure even to attempt a determination of section 301(l)’s general intent on the grounds that such a judicial reading of the legislative tea leaves is inappropriate — that, in the absence of a specific legislative intent with respect to FDF variances, the agency’s determination is binding if rational. Id. at 2783. The fact that the Court purports to address whether the FDF variance frustrated the “goals and operation of the statutory scheme” suggests, however, that the Court was not willing to go so far. Thus, the question whether an agency’s construction is “permissible” depends in part upon its consistency with the goals of the statutory scheme.


174 Id. at 1116.

175 Id. at 1117.
In short, according to the dissent, because toxic effluents "cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations," it would be inconsistent with the purpose of the 1977 amendments to weaken categorical standards applicable to toxic effluents.

The central purpose of the 1977 amendments, which tightened the statutory scheme with respect to toxics, provides the context for the legislative comments regarding section 301(l). These comments indicated that no waivers were available for toxics. The Court is undoubtedly right in its conclusion that the speakers did not have a clear distinction in their minds between variances, waivers, and modifications. Often these comments specifically addressed sections 301(c) and (g) modifications. Nonetheless, in light of the purpose and goals of the 1977 amendments with respect to toxics, Congress' consistent, categorical denial of any individualized exceptions from the toxic effluent limitations is necessarily inconsistent with FDF variances for toxics.

This inconsistency is the strongest argument against the Court's decision. It should be sufficient to rebut the Court's conclusion, even under its own criteria for decision. The Court's own analysis was based on the question of whether an FDF variance for toxic pollutants would be inconsistent with the goals and operation of the statutory scheme. However, EPA argues that whatever intent Congress may have had with respect to "exceptions" for toxics, it did not intend to limit EPA's ability to tailor its rules to subcategories of dischargers of toxic effluents in light of the statutory factors. Thus, according to EPA, the FDF variance is not inconsistent with the statutory scheme because it is functionally indistinguishable from such tailoring. The dissent denies that particularized rules, which all concede are allowed, are equivalent to FDF variances.

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177 In general, the 1977 amendments tightened the statutory scheme with respect to toxics; however, in certain respects, the amendments may be viewed as loosening it. For example, the amendments allowed BAT limitations for toxic pollutants as an alternative to health-based effluent standards. While this facilitated the creation of toxic pollutant limitations, it authorized a potentially lower level of protection. Also, the standard for pretreatment of toxic waste from sources discharging into POTW's was relaxed in those instances where the POTW removes all or part of the toxics. Pub. L. No. 95-217, § 54, 91 Stat. 1566, 1591 (codified at 33 U.S.C. § 1317(b)(1) (1982)).
178 See supra note 135.
179 See supra text accompanying note 131. Apparently, EPA itself was sometimes subject to such verbal lapses. See Chemical Mfrs., 105 S. Ct. at 1127 n.22 (Marshall, J., dissenting). See also supra note 130.
The most readily apparent distinction is in the procedure applicable to a permit proceeding, in which the FDF variance is granted, and a rulemaking. While acknowledging that normally a choice between proceeding by adjudication or by rulemaking is left to the discretion of an agency, here, the dissent stated, “Congress attached great substantive significance to the method used for establishing pollution control requirements.” Thus, according to the dissent, Congress intentionally chose rulemaking to set an effluent limitation for a subcategory in order to further particular purposes. To allow the effluent limitation to be set by adjudication, even for a subcategory of one, would be inconsistent with that intent and purpose.

To support this claim, the dissent uses both legislative history and a structural analysis. Its legislative history, however, consists of little more than generalized congressional statements regarding the need or desirability for the Administrator to consider the various section 304(b) factors, and especially economic impacts on plants, only in terms of classes and categories of point sources, not on a plant-by-plant basis. This history, much of which had been used by the Court in *du Pont* to justify setting effluent limitations by regulation, is not a strong argument in rebuttal to the supposed equivalency between an FDF variance and a particularized rulemaking. First, none of the cited history distinguishes between rulemaking and adjudication in terms of procedure; the entire thrust is that the Administrator should deal with classes and categories rather than individual plants. Thus, the history is simply non-responsive to the argument that an FDF variance granted in a permit proceeding is functionally the same as an effluent limitation established by rulemaking for a subcategory of one plant, which the dissent concedes is possible under the Act. Second, the legislative history, even if accepted for the purpose suggested by the dissent, simply proves too much. If the various statements cited by the dissent intended to indicate a congressional intent to prohibit EPA from setting or revising standards on an individual basis, then the statements are directly at odds, not only with sections 301(c) and (g)’s express modification procedures, but also with the variance required by the Court in *du Pont* as a condition for setting BPT standards by regulation. Rather, the statements are more correctly read to reflect the normal method of proceeding, not the exceptional.

180 *Chemical Mfrs.*, 105 S. Ct. at 1122 (Marshall, J., dissenting) (emphasis in original).
181 *Id.* at 1122–23.
The dissent’s structural analysis fares no better. The dissent begins by noting that Congress intended EPA to set the BPT and BAT levels by reference to “the average of the best existing performance by plants . . . within each industrial category” and “the best performer in an industrial category,” respectively.\(^3\) If a polluter is granted an FDF variance, it receives an effluent limitation based on its peculiar situation, not based on the “average of the best” or the “best” performer. The result is less protection of the environment and, because the limitation is less demanding of the polluter, less incentive to technological innovation.\(^4\) This analysis and conclusion again, however, apply equally to an FDF variance and a rulemaking for a subcategory of one. The dissent recognizes this,\(^5\) but suggests that in a rulemaking EPA would at least have established that the discharger was indeed uniquely situated. If, instead, there were other dischargers similarly situated with lower compliance costs, then the limitation would be set based on their circumstances (as the “average of the best” or the “best”), rather than on the one, high-cost discharger. In this regard, the dissent states that, under the FDF variance procedure, “there is no mechanism for EPA to ascertain whether there are any other dischargers in [the same] position.”\(^6\) Indeed, because initial determinations are usually made by states,\(^7\) the dissent says the procedure “is unlikely to lead to the identification of new subcategories.”\(^8\)

This theoretical analysis suffers from several weaknesses. First, there is no particular “mechanism” in rulemaking to assure, or even to induce, similarly situated dischargers with lower compliance costs to come forward. While rulemaking assures public notice through the Federal Register, if EPA were proposing a subcategory defined in a manner applicable equally to the known high-cost polluter and unknown low-cost polluters, the low-cost polluters might well lay low and obtain the benefit of an effluent limitation set on the basis of the high-cost polluter.\(^9\) Second, the procedures governing FDF

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\(^{4}\) Chemical Mfrs., 105 S. Ct. at 1123-24 (Marshall, J., dissenting). By requiring the “average of the best” and the “best” technology, the Act “forces” technology. Id.

\(^{5}\) Id. at 1124.

\(^{6}\) Id. at 1123.

\(^{7}\) The FDF variance proceeding is initially conducted by the state, if it has been delegated the authority to implement the permit system. Most states have been delegated such authority. If the state proposes to grant the variance, it is then reviewed by EPA. See supra note 32.

\(^{8}\) Chemical Mfrs., 105 S. Ct. at 1123 (Marshall, J., dissenting).

\(^{9}\) It is, however, entirely possible that, if they were competitors with the high cost pollu-
variances themselves provide for public notice to potentially interested persons, as well as an opportunity for them to comment. 190 Thus, to the extent that notice-and-comment is a "mechanism" in rulemaking to ascertain if there are similarly situated dischargers, it also exists in the FDF variance procedure. 191 Third, it is highly unlikely that similarly situated dischargers would be overlooked by EPA, even if they did not identify themselves. 192 Since all FDF variance requests must be made within a relatively narrow time period, 193 the identification of like requestors is facilitated. Moreover, the specific information contained in the request identifies similar plants to EPA specialists. 194 Fourth, even though the FDF procedure lacks a mechanism to group like dischargers, and thereby "force technology" within that group, EPA is not denied the ability to establish such a subcategory. Categorical effluent limitations would then apply to such subcategories, rather than individual FDF variances. Finally, and most significantly, the possibility that a number of plants in a category would all have fundamentally different factors from the plants considered by EPA in that category, and yet still be

ters, they would seek to have the effluent limitations set at levels acceptable to them but not to the high-cost polluter. Such a factual possibility, however, hardly seems to rise to the level of a mechanism to assure identification of similar plants.


191 National organizations, such as the NRDC, Sierra Club, and National Wildlife Federation, usually prefer agency rulemaking to establish rules of behavior rather than particularized adjudications. Their limited resources can best be used when targeted against broadscale agency action. The more atomized and localized the action, the less able such groups are to monitor them or to justify the expenditure of scarce resources. On the other hand, local groups seem more likely to be involved and to make input where the issue is local rather than national. Thus, it would seem that it is not the procedure as much as the narrow scope of the action that determines the relative interests of national or local groups. If this is so, the choice of individual permit proceedings or rulemakings for subclasses of one would not appear to bear on the extent of public participation.

192 While states may make the initial review of FDF variances, the state determination, if favorable to the requester, is forwarded to EPA as a recommendation. See, e.g., 40 C.F.R. § 403.13(k) (1984).

193 E.g., 40 C.F.R. § 403.13(g) (1984) generally requires all requests to be made within 180 days of the effective date of the categorical pretreatment standards. 40 C.F.R. § 122.21(b)(1) generally requires that all requests for FDF variances from NPDES permits be made by the close of the public comment period under 40 C.F.R. § 124.10, which is "at least 30 days after" the issuance of a draft EIS. 40 C.F.R. § 124.10(b). In the case of a decision not to issue an EIS, FDF variance requests must be made "at least 30 days" after public notice of the draft permit. 40 C.F.R. § 124.10(b). On September 25, 1985, EPA adopted a rule reinstating the FDF variance declared unlawful by the Third Circuit, in light of the Supreme Court's decision in Chemical Mfrs. See 50 Fed. Reg. 38,809 (1985) (to be codified at 40 C.F.R. § 403.13). This rule specifies the new time limits for seeking FDF variances for those persons whose deadline for filing a variance request expired after the Third Circuit's decision. See id. at 38,810.

similarly situated to each other, seems so remote that the general possibility of FDF variances should not turn on it. Indeed, there is no indication that such a situation has ever arisen in the past.

In addition to its argument based on the legislative history and structure of the Act, the dissent also used a theoretical approach to deny that the FDF variance is equivalent to a particularized rule. The approach drew heavily on a number of scholarly works analyzing the nature of exceptions to regulatory rules. The dissent intended to present a functional definition of an exception in order to label the FDF variance as necessarily an “exception” for legal purposes. By so categorizing the FDF variance, the dissent intended to bring the FDF variance within the umbrella of the “modifications” prohibited by section 301(l), which would analytically be categorized as “exceptions.” This argument was also responsive to the majority’s emphasis, if not reliance, on the FDF variance being more like a rule applicable to a category of one than it is an exception from a generally applicable rule.

The dissent discussed two functional types of exceptions identified by the commentators: hardship exceptions and fairness exceptions. The modification in section 301(c) is an example of a hardship exception, because it relieves a single plant from compliance when the general rule would create an economic hardship. The FDF variance is a fairness exception because it relieves an obligation that would otherwise involve a disproportionate share of the regulatory burden. Thus, according to the dissent, because the FDF variance fits within the typology of exceptions, it is an exception to a rule, not a particularized rule. At one level, this argument is nothing but semantics — if it is an exception to a rule, it cannot be a rule. At this level, the argument

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195 Chemical Mfrs., 105 S. Ct. at 1124–28 (Marshall, J., dissenting). Justice O’Connor did not join the dissent on this approach, saying that it was not necessary because the language and history of the Act were sufficient to indicate the error of the Court’s interpretation. Id. at 1128 (O’Connor, J., dissenting).


197 See supra notes 160–62 and accompanying text.

198 Chemical Mfrs., 105 S. Ct. at 1126 n.21 (Marshall, J., dissenting).

199 Several statutes provide for exceptions based on “special hardship, inequity, or unfair distribution of burdens,” reflecting a congressional understanding of these different types of exceptions. See, e.g., Department of Energy Reorganization Act, 41 U.S.C. § 7194(a).

200 Chemical Mfrs., 105 S. Ct. at 1127 (Marshall, J., dissenting).
is no more than an *ipse dixit*. On another level, the argument provides a framework or vocabulary for describing and thinking about regulatory activity. However, it does not further the dissent’s case, because it does not distinguish “exceptions” from “rules,” either in terms of their procedure, or in terms of their definition under the Administrative Procedure Act.\(^{201}\) At this level, even a particularized rule would be considered an “exception.” The dissent and NRDC conceded that a bona fide revision of a toxic effluent standard to create a new subcategory applicable to one discharger would be valid under the Act. Consequently, while the dissent’s theoretical attack on the equivalence between an FDF variance and a particularized rule was perhaps more sophisticated than its other attacks, it ultimately fails as well.

In the midst of its other arguments, the dissent loses sight of perhaps its best argument on this point. No doubt, where Congress has granted authority to an agency to proceed either by adjudication or by rulemaking, the determination of the proper method of proceeding is left to the judgment of the agency, perhaps subject to review for abuse of discretion. This is certainly the teaching of *NLRB v. Bell Aerospace Co.*,\(^{202}\) which was cited by the Court.\(^{203}\) The Clean Water Act, however, does not authorize EPA to set or revise pretreatment standards for toxic effluents by adjudication. To the contrary, the Act provides that they are to be set by regulation.\(^{204}\) Not only is there no express authority to proceed by adjudication, there is an express prohibition against “modifications” of requirements pertaining to toxic pollutants.\(^{205}\) Thus, the case law supporting deference to an agency’s choice between equally available means of proceeding\(^{206}\) is simply inapplicable here. The power to proceed by adjudication was not granted to the agency,\(^{207}\) and the power to grant exceptions to toxic standards was expressly denied.

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\(^{203}\) *Chemical Mfrs.*, 105 S. Ct. at 1111. The Court also cites Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978), for the same point. See 105 S. Ct. at 1111. There, however, the issue was not whether a court should review the choice between rulemaking and adjudication, but whether a court should determine what procedures should be applicable to rulemaking, beyond those required by statute. The Court held that, so long as the agency complied with the procedural requirements imposed by statute, it was for the agency and not the courts to impose or not to impose any additional procedures.


\(^{205}\) See C.W.A. § 301(l), 33 U.S.C. § 1311(l)(1982).

\(^{206}\) See supra note 202.

\(^{207}\) See supra text accompanying notes 67–70. The dissent notes that all the arguments used
The deference recognized in *Bell Aerospace, Chenery, Wyman-Gordon*, and *Vermont Yankee* is not unlike the deference recognized in *Chevron, U.S.A. v. NRDC*. The deference accorded an agency decision depends on the explicit or implicit delegation by Congress to the agency. In the first line of cases a delegation of power is made with respect to the type of proceeding and procedure to be used. In *Chevron*, the delegation is to determine the substantive scope of the statutory language. In the circumstances of *Chemical Manufacturers*, it is difficult to find any similar delegation with respect to setting pretreatment standards for toxic effluents by adjudication. The statute expressly provides for categorical rulemaking for pretreatment standards and toxic effluent limitations, not for limitations set by adjudication. In fact, the express prohibition on modifications in section 301(l) reinforces the legislative intent to deny particularized adjudications that weaken standards for toxic effluents. That a functionally similar result — a toxic effluent limitation applicable to one plant — might be achieved by rulemaking, as well as by adjudication, is not a basis for recognizing a power, or for deferring to an agency’s claim of power, to proceed in a manner clearly not authorized by Congress.

The dissent’s last argument deserves mention because it directly relates to the underlying justification for all FDF variances. The Court found that Congress’ silence with respect to the variances was evidence that Congress did not intend to affect them when enacting section 301(l). The dissent attacks that analysis on the grounds that the variance the Court required in *du Pont* was premised on the agency adopting categorical standards when the statutory scheme called for regulation of individual point sources. Moreover in *du Pont*, the Court had found that a variance was not authorized with respect to the new source standards, which under the statutory scheme were to be adopted in categorical regulations. The dissent synthesizes these decisions and concludes that: variances are required only where the statute calls for regulation by adjudication but the agency proceeds by rule; and variances are prohibited where

by the Court in *du Pont* for denying the possibility of a variance from the new source standards would apply here as well. *Chemical Mfrs.*, 105 S. Ct. at 1126 (Marshall, J., dissenting).

See supra note 202.

See supra note 202.


211 “Both the facts and the rationale of this portion of *du Pont* are of relevance only to cases in which EPA issues categorical standards in the face of a statutory scheme that calls for regulation of ‘point sources.’” *Chemical Mfrs.*, 105 S. Ct. at 1119 (Marshall, J., dissenting).
the statute requires categorical limitations by rulemaking. Thus, by enacting section 301(l), Congress would have had no reason to address the variances required in du Pont, because section 301(l) was applicable only to requirements involving toxic pollutants, which were in all cases to be categorical regulations applicable to "a class or category of point sources." Given du Pont's conclusion with respect to new source standards, variances from limitations with respect to toxic effluents would be similarly inappropriate.

As an argument for why Congress did not address the du Pont variances when it enacted section 301(l), the dissent's analysis suffers from the same weaknesses as the Court's. They both assume congressional knowledge and awareness of the du Pont variance — knowledge and awareness for which there is virtually no evidence. In fact, the dissent's speculation as to congressional knowledge is even more unlikely because it presumes that Congress understood the underlying rationale for, and the scope of, the du Pont variance. The former, however, was not addressed by the Court in du Pont. Furthermore, the latter was not known until Crushed Stone was decided, and that decision came after the adoption of section 301(l).

Nevertheless, if the dissent is correct in its interpretation of the rationale for the du Pont variance requirement, it suggests that FDF variances from BAT, BCT, or pretreatment standards generally are not authorized, even if the variances are not specifically prohibited with respect to toxic pollutants by section 301(l). This is

212 Under the Act, effluent limitations applicable to toxic pollutants for existing point sources other than POTW's may be set either under section 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A); or section 307(a)(2), 33 U.S.C. § 1317(a)(2) (1982). In either case, the statutory language describes the effluent limitations as applicable to a "category or class of point sources" or "categories and classes of point sources." Under section 301(b)(2)(A), the limitation is based on technological factors, i.e., "best available technology economically achievable" as determined in accordance with section 304(b)(2), 33 U.S.C. § 1314(b)(2) (1982). Under section 307(a)(2), EPA may set a stricter limitation for toxic pollutants than the one which would apply under section 301(b)(2)(A). This limitation, which may be a prohibition, is set based on the particular characteristics of the particular toxic pollutant and the characteristics of the particular organisms affected by it, rather than on technological considerations.

In Chemical Mfrs., the toxic limitation did not arise under either of these provisions. These provisions are only applicable to discharges by point sources into navigable waters. The toxic limitation arose under section 307(b), which requires pretreatment standards for discharges into POTW's. 105 S. Ct. at 1105. This section expressly states that the standards are to be set by regulation applicable to categories of sources. As the dissent notes, while EPA set the pretreatment standards at BPT and BAT levels pursuant to a consent decree, see supra note 118, it did so by regulation pursuant to section 307(b), not a statutory scheme that called for individualized determinations. 105 S. Ct. at 1120 n.13.

213 See supra text accompanying notes 142–52.

214 See supra text accompanying notes 136–41.
so, because under the Act, BAT, BCT, and pretreatment standards are applicable by their terms to a class or category of point sources or are expressly set by regulation. They do not apply directly to "point sources," as is the case with BPT limitations.

C. Applying Chevron

The Court's conclusion that section 301(l) does not prohibit FDF variances from toxic effluent limitations turns on the fact that EPA had reached that conclusion in promulgating its FDF variance regulation. A long line of Supreme Court cases stands for the principle that when a court is called upon to review an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation. In a sense, Chevron was just the latest in that line of cases. However, Chevron went further, by specifying two questions courts should ask in applying the principle. The first question is whether Congress directly spoke to the precise question at issue. If it did, that intent is given effect without regard to the agency's interpretation. If, however, Congress was silent or ambiguous on the issue, then the question for the court is only whether the agency's interpretation is permissible. Here deference comes into play. A potential danger of this two question approach is that courts will insist too strictly on unambiguous expressions of legislative intent as to the precise issue, with the result that otherwise clear expressions of the intent of Congress may be ignored. If courts will not police agencies in their fidelity to the intent of Congress, an important check in the separation of powers will be lost.

The dissent in Chemical Manufacturers purports to agree with the majority in its reading of Chevron's standard for judicial review of an agency's construction of its statute. The dissent says that it disagrees instead with the majority's analysis of section 301(l) and its legislative history. However, it is not clear that the dissent and the majority do in fact read Chevron in the same manner. The majority focuses on the issue of whether Congress had a specific,
particular intent to prohibit FDF variances in enacting section 301(l). The dissent does not seriously contest the conclusion that Congress did not have such an intent since Congress’ ignorance of FDF variances in general, and their relationship to the variance required in du Pont in particular, makes a specific intent on the subject simply impossible. The difference between the majority and dissent, however, arises from the fact that, at this point, the majority ends its analysis of the legislative intent, whereas the dissent continues by assessing the general intent behind section 301(l). For the majority, the absence of specific intent with respect to FDF variances answers the first question that Chevron says the Court is to ask;223 for the dissent it does not. For the dissent, the clear intent of Congress generally with respect to section 301(l), even if Congress had no specific knowledge of FDF variances, suffices under Chevron to answer positively the question of whether Congress had “directly spoken to the precise question at issue.”224

After Chevron, some commentators questioned whether full effect would be given to its emphasis on specific intent and precise questions, which made Chevron stand out from the long line of otherwise similar cases involving judicial deference to agency constructions of their own statutes.225 Certainly, the decision in Chemical Manufacturers indicates that the Court’s emphasis in Chevron bore fruit. Indeed, Chemical Manufacturers may go a step further. In Chevron, the Court found that the general legislative intent of the Clean Air Act Amendments was of two minds: to clean the air and to allow reasonable economic growth. The Court found these to be “manifestly competing interests.”226 One commentator writing about the specific legislative intent noted that “[i]t is difficult to imagine that anyone who is not paid to take the advocate’s role could review the Clean Air Act and its history and declare that Congress intended anything regarding the [particular] definition [in question].”227 The Court in Chevron noted several possible explanations for the lack of such a specific intent,228 but concluded that “[f]or judicial purposes,

223 See supra note 158.
224 Chevron, 104 S. Ct. at 2781.
226 Chevron, 104 S. Ct. at 2783.
228 The Court noted that “[p]erhaps that body consciously desired the Administrator to strike the balance at this level . . . ; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question . . . .” Chevron, 104 S. Ct. at 2783.
it matters not which of these things occurred." In the context of the law at issue in *Chevron*, such a conclusion may have been well taken, because there was not only an absence of specific intent, but a confusion as to the general intent. Thus, one could not answer with any confidence the question — if Congress had thought of this issue, what would have been its intent. In *Chemical Manufacturers*, however, the Court simply fails to address the issue of the general intent of section 301(l) or of the 1977 Amendments with respect to toxic pollutants. In the Court’s view, the absence of a specific intent eliminates the need for further analysis of intent. If the Court in *Chemical Manufacturers* correctly applies (or extends) *Chevron* by ignoring general intent whenever there is an absence of specific congressional intent, meaningful judicial review of agencies’ construction of their statutes will be significantly decreased. This is because there are few meaningful legal disputes where Congress has “directly addressed the precise question at issue” in a statute or its legislative history. If it had, the disputants would probably not waste time in court. While there are circumstances when it is appropriate to defer to an agency’s construction of its statute, deference whenever Congress has not specifically foreclosed or required agency action would be a virtual abandonment of the judicial function in reviewing agency action.

In *Marbury v. Madison*, Chief Justice Marshall made the famous statement that it is the province and duty of the courts to say what the law is, notwithstanding the fact that the case involved a review of an administrative action. Nevertheless, it is appropriate for courts to defer to an agency’s interpretation of its own statute when Congress has delegated that authority to the agency. If Congress has by statute delegated lawmaking authority to an agency, that dele-
gation may include the authority to define or construe the terms of that statute. The role of the courts is not to second-guess such a definition or construction, anymore than it is to second-guess any exercise of the agency's delegated authority. Rather, the role of the courts is to determine what authority Congress delegated. In making this determination, courts should not readily defer to an agency's interpretation. The essence of the separation of powers is that one branch cannot itself define the scope of its powers. In Chemical Manufacturers, the Court should have assessed Congress' general intent with respect to section 301(l), as well as to toxics generally. The Court would have found a clear congressional intent to eliminate any basis upon which EPA could grant special or extraordinary consideration to toxic polluters. Therefore, unlike the situation in Chevron, one can with confidence answer the question, what would Congress have intended had it thought of the issue. It would have prohibited FDF variances for toxic pollutants.

Ultimately, the holding of Chemical Manufacturers is narrow: section 301(l) does not prohibit FDF variances. The Court pointedly did not address the validity of the actual FDF variance regulations applicable to pretreatment standards. Thus, the possibility remains that even though section 301(l) does not prohibit variances, they simply are unauthorized with respect to these standards. It is to this issue that we now turn.

IV. STATUS OF THE VARIANCES

In Chemical Manufacturers, the variance procedure in question applied to pretreatment standards, and as discussed earlier, pretreatment standards are expressly required to be set by regulation. In fact, the statutory provision even specifies some of the rulemaking procedures. If the dissent's analysis of du Pont is correct, the fact that the statutory scheme calls for categorical regulations rather than particularized determinations, might be of critical importance. In du Pont, despite what the Court said, it might be argued that the only real distinction between the BPT limitations and the new source standards was that the former were to apply to

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236 Id. A proposed rule must be published; opportunity for public hearing must be provided; within ninety days of the proposed rule's publication, the final rule must be published.
237 See supra text accompanying notes 62–75.
"point sources," indicating particularized determinations, whereas the latter were expressly categorical regulations. With respect to the former, the Court held that variances were required; with respect to the latter, where the statute provided for limitations by categorical regulation, the Court stated that a variance would be "inappropriate." Thus, FDF variances should also be inappropriate with respect to the pretreatment standards, which are to be set by categorical regulations. Moreover, while Chemical Manufacturers directly involved only pretreatment standards, EPA has by regulation also provided for FDF variances from both BAT and BCT limitations. These limitations are also set by categorical regulations pursuant to statutory provisions that require regulations and not particularized determinations. Consequently, if the dissent's analysis of du Pont is correct, these variance provisions would also be "inappropriate.”

There are, however, problems with using the dissent's analysis in this way. First, the Court has never acknowledged that the du Pont variance requirement turned on the presence of a statutory scheme calling for individualized regulation through particularized permits, rather than for categorical rules applicable to all subject to their terms. Indeed, the Court in du Pont justified the setting of BPT limitations by categorical rules precisely because the statutory scheme envisioned such rules and not individualized determinations.

Second, to read the du Pont prohibition against variances with respect to new source standards so broadly as to apply generally whenever categorical regulations are called for by a statutory scheme is inconsistent with judicial opinions as well as scholarly commentary. While there are certainly statutes the particular hist-

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239 See id.
240 du Pont, 430 U.S. at 138.
242 While neither section 301(b)(2)(A) nor section 301(b)(2)(E) by its terms requires a regulation, each is phrased in terms of applying to "categories and classes of point sources." In du Pont, the Court found this language to provide "unambiguously" for the use of regulations. See du Pont, 430 U.S. at 126.
243 "In sum, the language of the statute supports the view that § 301 limitations are to be adopted by the Administrator, that they are to be based primarily on classes and categories, and that they are to take the form of regulations." du Pont, 430 U.S. at 129.
244 See in addition to the cases listed infra notes 243–49, United States v. Allegheny–Ludlum Steel Corp., 406 U.S. 742 (1972) (agency can create exceptions to its own rules). See also in addition to the commentators listed supra note 196, E. BARDACH & R. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982). Cf. ARISTOTLE, NICOMACHEAN ETHICS 315–17 (H. Rackman trans. 1926) ("[W]hen . . . the law lays down a
tory of which compel a conclusion that Congress intended no exceptions to the general regulation,\textsuperscript{245} the Court has stated the general rule that "an agency's authority to proceed in a complex area . . . by means of rules of general application entails a concomitant authority to provide exception procedures in order to allow for special circumstances."\textsuperscript{246}

Third, the dissent's analysis of \textit{du Pont} only reaches the question of when a variance procedure is \textit{required}, not when a variance is merely \textit{authorized}. The importance in \textit{du Pont} of applying the BPT limitations to "point sources" is the possible inference that the agency was to consider the section 304(b)(1) factors in relation to each individual point source, rather than merely generically in relation to categories and classes of point sources. Proceeding solely by individual adjudications is one way to accomplish individual consideration. However, in an earlier line of regulatory cases, decided at a time when traditional regulatory agencies were shifting from adjudication to informal rulemaking as a means of making policy,\textsuperscript{247} the Court established that individual adjudication was not the only way to achieve this goal. Instead, where an agency had general rulemaking power, although the particular regulatory scheme called for decision by adjudication, the Court found that the agency could use rulemaking to decide generically issues that might arise in the adjudications. These rules would then be binding in subsequent adjudications where these issues were relevant. For example, in \textit{United States v. Storer Broadcasting Co.},\textsuperscript{248} the FCC adopted a rule providing that television broadcast licenses would not be granted to

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\item general rule and thereafter a case arises which is an exception to the rule, it is then right . . . to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion."; H.L.A. HART, \textsc{The Concept of Law} 155 (1961) ("Hence justice is traditionally thought of as maintaining or restoring a \textit{balance} or \textit{proportion}, and its leading precept is often formulated as 'Treat like cases alike;' though we need to add to the latter 'and treat different cases differently.'"). In fairness to the dissent, to read \textit{du Pont} for the proposition that variances are inappropriate whenever the statutory scheme calls for regulations would also be broader than what the dissent suggests. Its analysis was not that all regulations of general application were incompatible with exceptions, but rather that the statutory provision governing the new source standards was, like the Endangered Species Act, among those few statutes that admitted of no exception. See \textit{Chemical Mfrs.}, 105 S. Ct. at 1125–26 (Marshall, J., dissenting).
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\textsuperscript{246} Allegheny-Ludlum Steel Corp., 406 U.S. at 755.


\textsuperscript{248} 351 U.S. 192 (1956).
persons already owning five television stations. Since the statute required that an application for a license could only be denied after an adjudicatory hearing, Storer, which already owned five stations, asserted that the FCC could not determine the “public interest, convenience, or necessity” by categorical rule because in effect, the FCC would deny its application without the particularized adjudication. In upholding the FCC’s rule, the Court made clear that the agency could decide such issues by categorical rules. Having made such a rule, however, the agency had not abandoned its continuing obligation to determine the “public interest, convenience, or necessity” in the adjudication as required by the statute. The agency had also promulgated a rule enabling applicants to demonstrate why the multiple ownership regulation should be waived or amended. The FCC had therefore provided an exception procedure.249 The Court held that this exception procedure in which the applicant seeking exception bears the burden, satisfied the requirement for an adjudication.250

In du Pont, the Court faced a similar situation. The statutory scheme required each discharger to obtain a permit, and the statutory requirement (BPT) had been specified by the agency in regu-

249 See also National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (FCC regulations prohibiting exclusive contracts between radio stations and national networks contrary to the public interest not arbitrary and capricious, because the FCC did not bind itself inflexibly to the regulations, but would still exercise its judgment in determining whether the grant of the license would serve the public interest); Federal Power Comm'n v. Texaco Inc., 377 U.S. 33, 39–44 (1964) (the statutory requirement for a hearing under the Natural Gas Act did not preclude the Federal Power Commission from particularizing statutory standards through the rulemaking process and barring at the threshold those who neither measure up to the rules nor show reasons why the rule should be waived); American Airlines, Inc. v. Civil Aeronautics Bd., 359 F.2d 624 (D.C. Cir.) (en banc) (the Civil Aeronautics Board’s use of rulemaking to decide that only all-cargo carriers could reserve blocks of space for customers was sufficiently fair without the use of an adjudicatory hearing, since the regulation was intended to be subject to periodic reexamination), cert. denied, 385 U.S. 843 (1966). Note, The Agency Use of Rulemaking to Deny Adjudication Apparently Required by Statute, 54 IOWA L. REV. 1086 (1969).

250 Neither in this case nor in others did the Court expressly require an exception proceeding as a condition for regulating by rule rather than by adjudication. Moreover, the exception procedure itself was not necessarily the equivalent of the adjudicatory proceeding for which the rule substituted. Rather, it was either expressly or apparently the same as a petition for rulemaking. If a procedure for a petition for rulemaking would satisfy the “requirement” for an exception procedure, then the requirement would be meaningless, because the Administrative Procedure Act requires that agencies provide for petitions for rulemaking. See 5 U.S.C. § 553(3) (1982). This may explain why later lower court cases in the Storer line simply ignore the issue of the presence or absence of an exception or variance procedure. See, e.g., National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973) (upholding power of FTC to issue Trade Regulation rules under the general rulemaking powers rather than having to determine unfair trade practices only in the formal adjudications specifically provided for enforcing the Act), cert. denied, 515 U.S. 961 (1974).
lation. Thus, the language of *du Pont* stresses the support in the statute for proceeding by rule as opposed to adjudication, and thereby establishes the necessary authority for EPA to adopt a BPT limitation by regulation. In contrast, the requirement for a variance procedure could arise from an unstated but implicit recognition by the Court that the statutory scheme was similar to that in *Storer* and the other earlier cases.\(^{251}\) If this were a correct understanding of *du Pont*, however, the *du Pont* requirement for a variance procedure is simply irrelevant to a statutory scheme that does not envision particularized determinations of effluent limitations. This interpretation of *du Pont* would thus be irrelevant to BAT, BCT, or pretreatment standards.\(^{252}\) While this analysis of *du Pont* suggests an FDF variance is not required for BAT, BCT, and pretreatment standards, it simply does not address the question of whether an FDF variance is permitted. Thus, if one focuses on the dissent's requirement for a variance, there is no support for or against the permissibility of variances from BAT, BCT, or pretreatment standards.

As discussed earlier,\(^ {253}\) the Court in *du Pont* held that variances from new source standards were “inappropriate” because it was “clear that Congress intended these regulations to be absolute prohibitions.”\(^ {254}\) Congress exhibited this intent in several ways: by “the use of the word ‘standards,’”\(^ {255}\) by setting the preferred standard at a zero discharge limitation; by making illegal the operation of any new source by any owner in violation of the standard; by the absence of a statutory variance provision; and by the inappropriateness of a variance in a standard that was to ensure national uniformity and “maximum feasible control” of new sources.\(^ {256}\)

\(^{251}\) While the Court did not cite *Storer et al.* in its opinion and none of the parties cited them in the briefs relating to the BPT and BAT effluent limitations, *du Pont* utilized these cases in its brief to support the circuit court’s requirement for a variance from the new source standards. *See* Reply brief of E.I. du Pont de Nemours, Docket Number 75-1473 and 75-1705, at 6–7, E.I. du Pont de Nemours v. Train, 430 U.S. 112 (1977). EPA responded by interpreting the cases as permitting, not requiring, exceptions from the general rules. *See* Brief of Administrator, EPA, *supra* note 60.

\(^{252}\) While an NPDES permit is required for all dischargers into “waters of the United States,” because the statute expressly indicates that BAT and BCT limitations apply to classes or categories of sources, they are held not to be conceived as the result of particularized determinations. Thus, the *Storer* similarity does not obtain. Also, the pretreatment standards are expressly regulations and apply directly as regulations without any NPDES permit, because these dischargers discharge into a POTW, not waters of the United States.

\(^{253}\) *See* *supra* text accompanying notes 62–75.

\(^{254}\) *du Pont*, 430 U.S. at 138.

\(^{255}\) Id.

\(^{256}\) Id.
If one uses this type of analysis, variances from the pretreatment standards would not appear appropriate. The word "standards," used in section 307(b), was found by the Court in *du Pont* to imply that the limitations were to be absolute prohibitions. Moreover, section 307(b) is phrased in terms of preventing "the discharge of any pollutant . . . ." This language is similar to the provision applicable to new sources, "permitting discharge of no pollutants," which the Court found important in *du Pont*. There is no statutory provision in section 307(b) for a variance, which was also a factor the Court found notable in *du Pont*. In addition, the legislative history refers to the pretreatment standards as "national" standards, identical to the characterization of the new source standards, which the Court in *du Pont* interpreted as reflecting an intent "to insure national uniformity." Finally, as with new source standards, it is unlawful for any owner of any source to operate any source in violation of a pretreatment standard. Consequently, on virtually every point, the pretreatment standards at issue in *Chemical Manufacturers* match the indicia used by the Court in *du Pont* to indicate a clear congressional intent against variances.

The similarity between the statutory scheme for the BAT and BCT limitations and for the new source standards provision is not as complete as that for the pretreatment standards. There is, however, a substantial similarity. The preferred BAT effluent limitation is almost identically worded to that of the new source standards.

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257 Id.
258 Id. Section 307(d) also makes it "unlawful for any owner or operator of any source to operate any source in violation of any . . . pretreatment standard," language virtually identical to that quoted in *du Pont* from section 306(e). See 33 U.S.C. § 1317(d) (1982).
259 There is, however, one possible way for a source to have its pretreatment standard altered. If the discharger discharges a toxic pollutant which is wholly or partially removed by the POTW, without affecting the POTW's sludge use or disposal, so that the amount of toxic discharge from the POTW would not violate the toxic effluent limitation applicable to the discharger, had it discharged into waters of the United States, then the pretreatment standards applicable to that discharger may be revised to reflect the POTW's removal of toxic effluents. See C.W.A. § 307(b)(1), 33 U.S.C. § 1317(b)(1) (1982). This "revision" mechanism was added by the Conference Committee to the 1977 amendments. See H.R. REP. No. 95-830, 95th Cong., 1st Sess. 86-87 (1977). If this revision mechanism is considered a variance, it is unclear how this would affect the *du Pont* analysis. Having specified one possible variance, Congress may have intended to exclude others.
260 *du Pont*, 430 U.S. at 138.
262 *du Pont*, 430 U.S. at 138.
264 Compare § 301(b)(2)(A) ("shall require the elimination of discharges of all pollutants if . . . such elimination is technologically and economically achievable . . . .") with § 306(a)(1)
For both BAT and BCT, it is unlawful for "any person" to discharge "any pollutant" in violation of the effluent limitations. For BCT and for BAT, with respect to toxic pollutants, there is no statutory variance provision. Moreover, both BAT and BCT are supposed to be nationally uniform standards within each class or category. Thus, whatever the difference between the statutory provisions for BAT and BCT, and new source standards, they pale beside the similarities.

The decisions in Crushed Stone and Chemical Manufacturers seem to depart from the clear teaching of du Pont. In both cases, but particularly Chemical Manufacturers, the Court explains that the purpose of the FDF variance "is to remedy categories which were not accurately drawn because information was either not available to or not considered by the Administrator in setting the original categories and limitations." The variance is "an acknowledgment that not all relevant factors were taken sufficiently into account" in framing the effluent limitation. The effect of this failure may redound to the detriment of a particular plant. As a lower court stated after Crushed Stone, "[t]he purpose of the variance is to allow an individual determination . . . where it is clear that the factors considered by EPA in setting the generic . . . limitations are so different for a particular point source as to make the generic . . . limitation unfair.

These statements suggest that the purpose of the variance, and hence the need to which it responds, attaches to the nature of rulemaking itself — or at least rulemaking that is supposed to distinguish between categories and classes of polluters on the basis of specified factors. That is, if, in the course of a generic rulemaking, certain particular circumstances are overlooked, which were supposed to be considered, the resulting generic rule may be inaccurate. A variance procedure provides a means to correct the error as to an aggrieved party whose particular circumstances were overlooked.
In Crushed Stone, such an analysis might be harmonized with du Pont's analysis of new source standards. In Crushed Stone, the only rules at issue were those involving the section 301 BPT limitations, which, unlike the case for new sources, the statute did not require to be categorical regulations. In Chemical Manufacturers, however, even this distinction disappears. In Chemical Manufacturers, the regulations at issue were pretreatment standards promulgated under section 307(b), and this section manifests the same characteristics of a clear congressional intent against a variance that the Court had found in section 306. Nevertheless, in addressing whether the FDF variances might frustrate the goals and operation of the statutory scheme, the Court in Chemical Manufacturers expressly rejected the claim that FDF variances were inconsistent with uniform effluent limitations. The Court found that Congress had only intended for "similar point sources with similar characteristics [to] meet similar effluent limitations." More broadly, the Court in Chemical Manufacturers suggests that FDF variances are appropriate, if not required, whenever EPA must set effluent limitations by categories or classes.

a particular plant's circumstances, especially given the ambitious statutory deadlines for EPA action. See id. at 810-11; American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1049 (3d Cir. 1975). Often the information was simply unavailable to EPA at the time of the rulemaking. Moreover, courts have used the existence of a variance procedure as a justification for not invalidating regulations — the only aggrieved party can obtain relief without upsetting the entire regulatory regime. Association of Pac. Fisheries, 615 F.2d at 816 ("it seems to us that the variance procedures and periodic statutory review mechanisms are adequate vehicles to correct whatever errors the Agency made in its initial, admittedly not completely thorough, effort to formulate effluent guidelines").

270 See supra note 118. Pursuant to the consent decree, EPA promulgated two standard levels: one at BPT and the other at BAT. That one of the standards is substantively based on a BPT level of technology does not suggest any similarity to du Pont. As the dissent in Chemical Mfrs. suggests, the apparent distinguishing feature of the BPT limitations in du Pont was not the level of technology required, but the methodology by which it was to be applied to the industry. See Chemical Mfrs., 105 S. Ct. at 1120 n.13 (Marshall, J., dissenting). With respect to the pretreatment standards involved in Chemical Mfrs., however, there is no question — whatever the level of control required — that the method of application is by generic regulation pursuant to section 307(b). After all, dischargers subject to the pretreatment standards do not even require an NPDES permit. 271 Chemical Mfrs., 105 S. Ct. at 1110 (quoting S. Rep. No. 92-1236, 92d Cong., 2d Sess. 126 (1972)). In du Pont, the Court concluded that "a variance provision would be inappropriate in a standard that was intended to insure national uniformity . . . ." du Pont, 430 U.S. at 138. Indeed, the court of appeals in du Pont explained its reason for requiring variances for both new sources and for existing sources: "[t]he balance of general rule and narrow exceptions assures all possible uniformity without sacrifice of the flexibility needed to adjust for disparate plants in dissimilar circumstances." du Pont, 541 F.2d at 1023.

272 In its discussion of FDF variances, the court noted that

[u]nderstandably, EPA may not be apprised of and will fail to consider unique factors
What then is left of the holding in *du Pont* with respect to new source standards? Did the Court in *Chemical Manufacturers* decide that FDF variances are authorized for pretreatment standards, and by implication for BAT and BCT limitations, notwithstanding the Court's express denial that it was addressing this issue? It is difficult to reconcile the Court's explanation for its conclusion regarding new source variances in *du Pont* with its explanation and conclusion in *Chemical Manufacturers*. However, despite *Chemical Manufacturers*, there remain at least three possible justifications for the Court's actual conclusion in *du Pont*. First, the issue in *du Pont* with respect to new source standards was whether variances were required, as the court below had concluded. The Court's holding, that they were not, is not necessarily at odds with an expansive view of an agency's permissive authority to provide a variance procedure. While the language of *du Pont* suggests that variances from the new source standards are prohibited, and the language in *Chemical Manufacturers* suggests variances in similar situations are advisable, neither characterization is necessary for the decisions in these cases. Second, as suggested earlier, the opinions in *du Pont* and *Chemical Manufacturers* do not attach importance to the distinction between standards to govern already existing plants and standards to govern plants not yet under construction. Nevertheless, since new plants can be built in light of a standard, it is certainly a grounds for distinction. In fact, in *du Pont* the EPA relied on this distinction to argue against the court of appeals' requirement for a new source variance. Third, the nature of the variance was not

273 Id. at 1107 n.13.
274 See supra text accompanying note 76.
275 EPA clearly makes this distinction. Thus, its FDF variance is available with respect to all limitations placed on classes or categories of existing dischargers, including dischargers into POTW's. 40 C.F.R. § 403.13(b) (1984). On the other hand, no FDF variance is available to any new discharger, including a new discharger into a POTW. The different treatment of new and existing dischargers into POTW's is decisive, because the statute makes no substantive distinction between them. Compare C.W.A. § 307(b), 33 U.S.C. §§ 1317(b), (1982). (“Pretreatment standards . . . shall be established to prevent the discharge of any pollutant through [a POTW], which pollutant interferes with, passes through, or otherwise is incompatible with such works.”) with C.W.A. § 307(c), 33 U.S.C. § 1317(c) (1982) (“Pretreatment standards shall prevent the discharge of any pollutant into [a POTW], which pollutant may interfere with, pass through, or otherwise be incompatible with such works.”).
276 See Brief of Administrator, EPA, supra note 60, at 8, 13-14.
before the Court in *du Pont*. Thus, it is possible that the seeming rejection of a variance from the new source standards is a rejection of the “exception” variance, rather than a “correcting” variance.\(^{277}\)

While there is nothing in the *du Pont* decision to suggest such a distinction,\(^278\) support for such a distinction might be found in *Chemical Manufacturers*, where the Court goes to great lengths to distinguish the FDF variance from an “exception.”\(^279\)

Thus, despite the statement in *Chemical Manufacturers* that the Court need not and would not address the authority of EPA to grant FDF variances from BAT limitations or pretreatment standards,\(^{280}\) the Court seems to have provided the answer for every relevant question, except the way to distinguish *du Pont*. Moreover, the Court has seemingly authorized FDF variances whenever the regulatory scheme specifies that limitations shall be set for classes and categories of existing sources. Consequently, although unmentioned by the Court, the analysis clearly supports FDF variances for BCT limitations.

The Court left unanswered, as well as unaddressed, the status of variances from other of the effluent limitations,\(^{281}\) such as secondary treatment for POTW,\(^{282}\) limitations based on water quality standards,\(^{283}\) and health-based toxic effluent standards.\(^{284}\) EPA has not provided a variance procedure for them, just as it has never provided a variance from standards applicable to new sources. Has the Court in *Chemical Manufacturers* extended to EPA an invitation to provide even greater regulatory flexibility? It appears unlikely. Of these additional effluent limitations, only the health-based standards for toxic pollutants, which can be set under section 307(a)(2) as a stricter alternative to BAT, are to be set for a “category or categories” of dischargers.\(^{285}\) Thus, an FDF variance would seem inept for the other limitations since *miscategorization* due to fundamentally dif-

\(^{277}\) In *Chemical Mfrs.*, the Court took pains to characterize the FDF variance as the setting of particularized standards, rather than as an exemption from the standards. See *Chemical Mfrs.*, 105 S. Ct. at 1110–11.

\(^{278}\) Indeed, the thrust of the decision of the court below was in terms of a procedure that would enable particularized standards where “disparate plants in dissimilar circumstances” were inappropriately subsumed under the categorical regulation. See *du Pont*, 541 F.2d at 1028. Moreover, the variance EPA provided for BPT was the FDF variance.

\(^{279}\) *Chemical Mfrs.*, 105 S. Ct. at 1107 n.13.

\(^{280}\) Id.

\(^{281}\) Currently, EPA has not provided for any variances from them.


\(^{283}\) See C.W.A. §§ 301(b)(1)(C), 302, 303(d), 33 U.S.C. §§ 1311(b)(1)(C), 1312, 1313(d) (1982).


ferent factors simply would not be possible. Even if EPA failed to consider some fundamental factor that was different for one plant, since the limitations are not set by classes or categories of dischargers, the plant would not have been placed in the *wrong* category. The correction, if one were to be made, would have to be to the underlying regulation. Otherwise, only a hardship exception would be possible. However, the Court in *Chemical Manufacturers* gave no indication that hardship exceptions would be treated the same as FDF variances. Indeed, the Court's effort to distinguish FDF variances from hardship exceptions suggests the contrary. Even with respect to the health-based toxic effluent limitations, it is difficult for an FDF variance ever to apply, because none of the listed factors to be taken into account in setting the health-based limitations relate to the plant or plants involved. Thus, the question is whether fundamentally different factors could ever be involved. Consequently, it is not probable that the EPA's expansive authority to adopt FDF variance procedures, which was supported by the Court in *Chemical Manufacturers*, will have repercussions beyond the variance procedures EPA has already adopted.

V. CONCLUSION

In *du Pont*, the Court without explanation required a variance procedure for section 301(a) BPT effluent limitations. The Court proceeded, with an intrinsically weak analysis, to prohibit variances for new source standards. Neither the requirement nor the prohibition were necessary for decision of the case. In fact, both were mere inventions of the Court. As a result, however, these almost gratuitous declarations forced the Court to address the necessary scope of

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286 Arguably, two matters might be more or less site specific: one relates to the "usual" presence of an affected organism; the other relates to the extent effective control may be achieved under other regulatory authority. As to the first, the provision states that EPA is to consider the "usual" presence of the organism in "any waters." This suggests that this consideration need not be site specific. The second matter is less clear, especially if "other regulatory authority" refers to a governmental jurisdiction as opposed to other generally applicable laws or regulations.

287 There is a possibility in section 307(a)(6). This subsection requires that any health-based limitation under this section take effect within one year of its promulgation, unless such a date is "technologically infeasible for a category of sources," in which case the limitation is to be effective as soon as feasible after one year, but no later than after three years. Thus, it is possible that a plant in a category required to be in compliance within one year might assert that fundamentally different factors applicable to it indicate it should be considered in a category that has up to three years to comply. C.W.A. § 307(a)(6), 33 U.S.C. § 1317(a)(6) (1982).
the "required" variance. Moreover, in Chemical Manufacturers, the Court virtually stood the Clean Water Act on its head to find that a statutory prohibition against any modifications was only a prohibition against two specific modifications. This is a twisted result that the Court could justify only by reaffirming the necessity of an FDF variance procedure as "recognized" in du Pont. It is even possible that the Court will be forced to address the FDF variance a fourth time, if a party raises the unanswered question of the general permissibility of FDF variances for pretreatment standards. 288

Why have litigants and the Court made such a fuss over a variance that EPA has granted only twice since the procedure was created? Before the Court's decision in Crushed Stone, industry had hopes that the variance would be available in more circumstances than only when fundamentally different factors were present. If it had been, then industry's goal of individualized effluent limitations might have been realized. Even with a standard conditioned on the presence of fundamentally different factors, industry could hope that EPA would apply those terms in a liberal manner. This, however, has not been EPA's approach. Rather, as one court described the FDF variance, EPA has treated the FDF variance as a "pin-hole safety valve."289 Changes in administrations did not affect EPA's niggardly approach.

A 1982 internal EPA memorandum recommending the denial of FDF variances to two Alaskan paper mills provides a rare glimpse into the bureaucratic realities that underlie EPA's reluctance to grant FDF variances.290 The two paper mills applied for NPDES permits that would grant FDF variances to their BOD and TSS discharges.291 The EPA regional administrator issued a tentative decision to grant the variance because the land availability, energy constraints, and costs were fundamentally different for these two plants than for the other plants in the dissolving sulphite subcategory

288 On remand, the Third Circuit did not address the question of the general permissibility of FDF variances from pretreatment standards, and NRDC did not raise the issue. Telephone discussion with attorney in Lands and Natural Resources Division of the United States Department of Justice.
289 Weyerhaeuser, 590 F.2d at 1040.
290 Memorandum to Bruce Barrett, Acting Assistant Administrator for Water, from Martha Prothro, Acting Director of the Office of Water Enforcement and Permits, Stephen Schatzow, Director of the Office of Water Regulations and Standards, and Bruce Diamond, Acting Director of the Water and Solid Waste Division of the Office of General Counsel (February 3, 1982) (on file with author) [hereinafter referred to as Memorandum to Bruce Barrett].
291 BOD refers to units of biochemical oxygen demand. It is a measure of the amount of oxygen in water needed to decompose organic wastes in the water. Because oxygen is necessary for aquatic life, organic wastes discharged into water can use that oxygen up, killing fish and plants. TSS refers to total suspended solids.
of kraft paper manufacturers. In Washington, D.C., however, mid-level staff from the Office of Water Enforcement and Permits, the Office of Water Regulations and Standards, and the Office of General Counsel opposed the granting of the variance. Despite the fact that the costs were conceded to be 1.4 to 2.0 times greater than the plant upon which the BPT effluent limitation had been based, and the energy and land considerations had not been "clearly considered," the staff warned that "a large number of dischargers possibly could qualify for relief," and "the number of variance requests would increase significantly" if these requests were granted. They further warned that variance requests are "highly resource intensive, and a significant increase in the number of variances would serve to upset permitting priorities and ability to reduce the backlog of expired industrial permits." Moreover, the staff suggested that if the variance was granted the NRDC might challenge it, because NRDC had been following one of the permits closely. Such a challenge, the staff counselled, would render the EPA "legally vulnerable" because "the courts will tend to require that variances be granted only in compelling circumstances." The staff, however, recommended giving the Alaskan plants relief through another mechanism, which, in the staff's eyes, was both less resource intensive and less vulnerable to legal challenge. The staff's analysis reflects the institutional reasons why even arguably meritorious FDF variance requests are unlikely to be granted. When there is any doubt, deny.

If this analysis of EPA's institutional behavior is accurate, Chemical Manufacturers is not likely to have important environmental consequences, notwithstanding the fact that the Court broadened the range of effluent limitations and standards for which an FDF
variance could be granted. The Court's application of the *Chevron* doctrine in *Chemical Manufacturers* is potentially significant. The *Chevron* doctrine requires that, in the absence of a specific congressional intent on the precise issue, courts must uphold an agency's reasonable construction of this statute. Here, though, the 5–4 split with Justice Stevens, *Chevron*’s author in the minority, suggests that *Chemical Manufacturers*’ strict application of that doctrine is less than fully secure. Finally, *Chemical Manufacturers* is like a chapter in a legal morality play, showing how the Court, once it departed from the law and began to construct new creations, ever had to keep patching that creation, reconstructing the law.