EPA v. National Crushed Stone Association

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EPA v. National Crushed Stone Association

449 U.S. 64 (1980)

INTRODUCTION

The stated objective of the Federal Water Pollution Control Act1 is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."2 The Environmental Protection Agency (EPA), charged with primary responsibility for administering the Act, has promulgated nationwide effluent limitations specifying maximum allowable discharges of pollutants for categories of pollution sources.3 The Act requires that under the first set of effluent limitations, which took effect in 1977,4 dischargers must use the "best practicable control technology currently available" (BPT)5 in controlling pollution discharges into navigable waters. EPA has interpreted the Act to allow variances from the industry-wide BPT limitations, but only under limited circumstances.6 Specifically, the agency has refused to grant variances on the grounds of a discharger's inability to pay for the required pollution control technology.7 In EPA v. National Crushed Stone Association,8 the Supreme Court upheld EPA's restrictive variance provision against an industry attack.9 The Court's unanimous opinion was grounded in a careful examination of the language and legislative history of the Act. It upheld an important policy choice made by Con-

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1. 33 U.S.C. §§ 1251-1376 (1976) [hereinafter FWPCA]. Enacted in 1948, the Act underwent extensive revision in 1972. Pub. L. No. 92-500, 86 Stat. 816 (1972); see text accompanying notes 11-15 infra. It has not been significantly modified since then. The Act as amended is often referred to as the “Clean Water Act” or “FWPCA.”
3. See, e.g., 40 C.F.R. § 434.22 (1981). The statutory scheme under which these regulations are issued is described in more detail at text accompanying notes 14-26 infra.
6. See text accompanying notes 32-38 infra.
7. See note 34 infra.
9. The court reversed two decisions of the Court of Appeals for the Fourth Circuit. See text accompanying notes 39-55 infra. Justice White delivered the Court's opinion, in which all other members joined except Justice Powell, who took no part in the consideration or decision of the case.
gress: that the price of adequate water pollution control includes closing those plants that cannot afford to comply with nationwide effluent limitations.

This Note considers the Supreme Court's decision in *National Crushed Stone* against a background of the relevant portions of the Act and the appellate court's holdings. It examines the weaknesses in the appellate court's decision invalidating EPA's variance provision and evaluates an alternative argument for invalidation tendered by the industries challenging the provision. The Note concludes with an examination of the potential impact of the *National Crushed Stone* decision on future water pollution control efforts, as well as with some observations on the role of the judiciary when reviewing agency interpretation of a statute it administers.

I

BACKGROUND OF THE CASE

A. The Statutory Scheme

Before the Act was amended in 1972, it relied principally on a set of water quality standards. These standards specified acceptable maximum levels of pollution in navigable waters. By 1972 this approach was recognized as ineffective, largely because of the difficulty of translating water quality goals into reliable and enforceable effluent limitations to guide dischargers.

The 1972 amendments abandoned water quality standards in favor of effluent limitations to be administered through a permit system. The Act now provides that "the discharge of any pollutant by..."

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10. See note 32 infra and accompanying text.
12. Id.
14. See note 1 supra.
15. Section 402, 33 U.S.C. § 1342 (1976), authorizes the establishment of the National Pollutant Discharge Elimination System (NPDES), under which every discharger of pollutants is required to obtain a permit. The permit requires the discharger to meet all the applicable requirements specified in the regulations issued under section 301, 33 U.S.C. § 1311 (1976 & Supp. III 1979). NPDES permits are issued by EPA or by state agencies that EPA has authorized to administer the permit program within a state. *FWPCA*, § 402(a)-(d), 33 U.S.C. § 1342(a)-(d) (1976 & Supp. III 1979). In the latter case, the permits must comply with EPA's effluent limitations and all other requirements of the Act, and may be modified by the EPA Administrator if they fail to do so. *FWPCA*, § 402(d), 33 U.S.C. § 1342(d) (1976 & Supp. III 1979).
any person shall be unlawful” unless it complies with the applicable effluent limitations and is authorized by a discharge permit. Section 301 of the Act directs EPA to promulgate effluent limitations applicable to all existing point sources of water pollution. Section 301(b) of the Act establishes two stages of effluent limitations for existing point sources. An examination and comparison of these types of limitations is essential to an understanding of the National Crushed Stone controversy. The first set of limitations, to be met by July 1, 1977, requires “application of the best practicable control technology [BPT] currently available as defined by the [EPA] Administrator.” The second set of limitations, to be met by July 1, 1987, requires for most types of pollutants “application of the best available technology [BAT] economically achievable . . . , which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants.”

The factors that EPA is to consider in setting the BPT and BAT limitations are enumerated in section 304. For BPT limitations, the Act provides as follows:

Factors relating to the assessment of best practicable control technology currently available . . . shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

The factors to be considered in determining BAT are identical to those used for BPT, with two exceptions. First, for BPT, EPA is to balance “the total cost of application of technology [against] the benefits to be achieved from such application”; for BAT, however, EPA is to consider simply “the cost of achieving [the contemplated degree of] effluent reduction.” Thus, while both types of limitations are based partly on

19. The Act defines “point source” as “any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged.” FWPCA, § 502(14), 33 U.S.C. § 1362(14) (1976).
cost considerations, the role played by such considerations differs according to the type of limitation. In setting BPT, EPA is to perform a cost-benefit analysis. For BAT the cost-effectiveness of a limitation is not relevant, but its economic impact is.

Second, section 301(c) of the Act authorizes EPA to modify the standard BAT limitations with respect to a particular discharger, where the discharger demonstrates that a less stringent standard "will represent the maximum use of technology within [its] economic capability" and "will result in reasonable further progress toward the elimination of the discharge of pollutants."26 The Act contains no such "variance" provision for the BPT limitations.

Congress clearly intended the BAT limitations to be implemented by nationally uniform regulations applying to "categories and classes of point sources."27 In the case of the BPT limitations, however, the Act was less specific. Congress did not specify that BPT limitations were to be set for classes and categories of point sources, as in the case of BAT limitations, but neither did it give any indication that a different mechanism was to be used in establishing BPT limitations.28 In E.I. du Pont de Nemours & Co. v. Train,29 the Supreme Court held that EPA could set BPT effluent limitations for whole industries via nationally uniform regulations, but only "so long as some allowance is made for variations in individual plants."30 The Court thus required, as a consequence of EPA's choosing to set BPT by nationally uniform regulation, that the agency insert a variance clause into the regulations.31 Not until National Crushed Stone, however, did the Court address the question of what factors should be taken into account in ruling on variance applications.

B. EPA's Variance Clause

EPA has included a standard variance clause in all its BPT regula-

26. Id. § 301(c), 33 U.S.C. § 1311(c) (1976).
30. Id. at 128.
31. Id. Even prior to the du Pont decision, EPA had included variance clauses in its BPT regulations. On the basis of public comments, the agency concluded early that BPT regulations without a variance provision "were too inflexible and did not sufficiently account for the great amount of variation between individual dischargers within each industrial category with respect to factors influencing practicability of control technology." 39 Fed. Reg. 28,926 (1974). The standard variance clause that EPA then adopted is reproduced infra at note 32. It has been argued that because Congress strove for uniformity under the BPT limitations, it did not intend to allow variances from BPT under any circumstances. See Kalur, Will Judicial Error Allow Industrial Point Sources to Avoid BPT and Perhaps BAT Later? A Story of Good Intentions, Bad Dictum, and Ugly Consequence, 7 ECOLOGY L.Q. 955 (1979). The du Pont case, however, rejected this position. 430 U.S. at 128.
The clause provides that in order to obtain a variance from the uniform BPT limitations, a discharger must show 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 considered in the establishment of the guidelines." EPA has recently explained that under this clause an individual plant's unusually high costs of compliance may be taken into account, but a plant's inability to meet such costs is not grounds for a variance.

EPA's variance clause amounts in essence to an admission that the agency may be unable to account for all individual plant variations in setting uniform BPT limitations. EPA recognizes that if a discharger can show its circumstances to be materially different from those relied on in setting the nationwide limitations, then in effect EPA has failed to take into account, as to that discharger, the factors it must consider under section 304. The agency must therefore modify as to that discharger its general determination of what is the best practicable tech-

32. See 39 Fed. Reg. 28,926 (1974). The standard variance clause reads as follows:

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that 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 considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations.


33. The full text of the variance provision is given at note 32 supra.

34. The agency states its position as follows:

[A] plant may be able to secure a BPT variance by showing that the plant's own compliance costs with the national guideline limitation would be x times greater than the compliance costs of the plants EPA considered in setting the national BPT limitation. A plant may not, however, secure a BPT variance by alleging that the plant's own financial status is such that it cannot afford to comply with the national BPT limitation.


ology, to account for the unique circumstances presented by the particular case.

At the same time, EPA's variance clause follows the apparent intent of the Act by sharply limiting the consideration of economic factors in BPT variance rulings. The Act provides that cost of compliance is relevant to BPT determinations only "in relation to the effluent reduction benefits to be achieved." Thus if a stricter standard would achieve minimal additional effluent reductions at a very high cost, it is not to be considered "practicable." EPA's variance clause seems consistent with this mandate: it takes into account high costs of compliance insofar as they affect the comparison of cost with effluent reduction, but it does not directly take into account the effect of these costs on a plant's financial status. Cost is relevant only to the extent that it affects "practicability" of a standard as defined in the statute.

II
THE PROCEEDINGS BELOW

*National Crushed Stone* arose when several mineral mining industries in two separate cases (*National Crushed Stone v. EPA* and *Consolidation Coal Co. v. Costle*) challenged the BPT regulations EPA had promulgated for those industries. As well as attacking the substantive standards themselves, the industries argued that the variance clause was unduly restrictive in that it excluded consideration of the economic capability of individual point sources to comply with the industry-wide limitations. The Court of Appeals for the Fourth Cir-

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37. See 1 LEGISLATIVE HISTORY, supra note 13, at 170 (statement of Sen. Muskie).
38. See note 34 supra and accompanying text.
39. In *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111 (4th Cir. 1979), three crushed stone manufacturers and an industry association challenged BPT limitations applicable to the crushed stone and construction sand and gravel industries. In *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979), the plaintiffs were 17 coal producers, their trade association, 5 citizens' environmental groups, and the Commonwealth of Pennsylvania. The cases were consolidated on appeal to the Supreme Court.
40. 601 F.2d 111 (4th Cir. 1979).
41. 604 F.2d 239 (4th Cir. 1979).
42. The regulations were published at 42 Fed. Reg. 21,380-90 (1977) (coal) and 42 Fed. Reg. 35,850-51 (1977) (construction sand and gravel), and are codified at 40 C.F.R. pts. 434 & 436 (1981), respectively.
43. 449 U.S. at 67. The substantive regulations were upheld in *Consolidation Coal Co. v. Costle*, and remanded in *National Crushed Stone Ass'n v. EPA*. Only the variance provisions were before the Supreme Court. 449 U.S. at 68 n.4.
44. EPA had included its standard variance clause, set forth in note 32 supra, in the BPT regulations. See 40 CFR § 434.22 (1980) (coal preparation plants); § 434.32 (acid mine drainage); § 434.42 (alkaline mine drainage); § 436.22 (crushed stone) and § 436.32 (construction sand and gravel).
cuit vacated the variance provisions and remanded them to EPA. Relying on its previous decision in Appalachian Power Co. v. Train, which struck down identical variance clauses in BPT regulations, the court held that if [a discharger] is doing all that the maximum use of technology within its economic capability will permit and if such use will result in reasonable further progress toward the elimination of the discharge of pollutants... no reason appears why [it] should not be able to secure such a variance should it comply with any other requirements of the variance.

In Appalachian Power, the courts reached its holding by comparing the BPT standards with the BAT requirements. It reasoned that the second-phase BAT standards were to be more stringent than the first-phase BPT standards, yet noted that the Act provided for a variance from the BAT standards in cases of economic hardship. The court found that the more lenient BPT standards “were not intended to be applied any less flexibly than the [BAT] requirements,” and that “if such factors as the economic capacity of the owner or operator of a particular point source is [sic] relevant in determining whether a variance from the [BAT] standards should be permitted, they should be equally relevant when applied to the less stringent [BPT] standards.”

The court noted further that the Act requires that total cost of technology be considered in setting BPT standards, and concluded that at least the same factors should be considered in ruling on variances as were taken into account in setting the industry-wide standards. In Appalachian Power, and later in National Crushed Stone and Consolidation Coal, the court remanded the variance provisions to EPA with instructions to consider the same factors in ruling on BPT variance requests that it considered in ruling on BAT variances under section 301(c).

46. The Act gives the courts of appeals original jurisdiction to review effluent limitations. FWPCA, § 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E) (1976). The petitions for review were filed in several courts of appeals, and all were transferred to the Fourth Circuit. 449 U.S. at 66-67.

47. Consolidation Coal Co. v. Costle, 604 F.2d at 244; National Crushed Stone Ass’n v. EPA, 601 F.2d at 124.

48. 545 F.2d 1351 (4th Cir. 1976).

49. National Crushed Stone Ass’n v. EPA, 601 F.2d at 123-24 (quoting Appalachian Power Co. v. Train, 545 F.2d 1351, 1378 (4th Cir. 1976)) (emphasis in original); see also Consolidation Coal Co. v. Costle, 604 F.2d at 244.

50. See text accompanying notes 22-26 supra.

51. 545 F.2d at 1359.

52. Id.

53. Id.

54. Id. at 1359-60.

55. National Crushed Stone v. EPA, 604 F.2d at 243-44; Consolidation Coal Co. Costle, 601 F.2d at 123-24; Appalachian Power Co. v. Train, 545 F.2d at 1359-60.
III
THE SUPREME COURT'S OPINION

The Fourth Circuit's holdings in National Crushed Stone and Consolidation Coal contradicted the holding of Weyerhaeuser Co. v. Costle,\(^56\) decided a year earlier by the Court of Appeals for the District of Columbia Circuit. In Weyerhaeuser, the court upheld an identical variance provision contained in other BPT regulations.\(^57\) The Supreme Court granted certiorari to resolve the conflict between the circuits and thereby allow EPA to implement the Act with certainty.\(^58\)

Justice White's opinion for the Court was in two parts. If first examined the Act to determine whether Congress intended either explicitly or implicitly that a plant's economic capability be considered in setting BPT limitations or ruling on BPT variance applications.\(^59\) Finding no evidence on the face of the Act that this was so, and noting that consideration of affordability in fact seemed contrary to the purposes of the relevant statutory provisions, the Court then looked to the legislative history.\(^60\) Finding extensive evidence of a congressional intent to foreclose BPT variances based on affordability, the Court reversed the Fourth Circuit and upheld EPA's variance provision.\(^61\)

A. The Language and Intent of the Act

The Court first considered the Court of Appeals' view that the BAT variance provision contained in section 301(c) was applicable to BPT variances as well. The language of section 301(c) provides only for variances from BAT\(^62\) so if that provision is to be extended to BPT limitations, it must be by implication.\(^63\) To determine if

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56. 590 F.2d 1011 (D.C. Cir. 1978).
57.  Id. at 1040-41.
58. 449 U.S. at 69.
59.  Id. at 73-78.
60.  Id. at 79-83.
61.  Id. at 85.
62.  Although the Court did not make this argument, the specific inclusion of cost-based variance provisions in two separate places in the Act, FWPCA, § 301(c), 33 U.S.C. § 1311(c) (1976) and FWPCA, § 302(b)(2), 33 U.S.C. § 1312(b)(2) (1976) (dealing with water quality-related effluent limitations), implies that Congress did not intend such a variance to be generally available. See Parenteau & Tauman, The Effluent Limitations Controversy: Will Careless Draftsmanship Foil the Objectives of the Federal Water Pollution Control Act Amendments of 1972? 6 Ecology L.Q. 1, 55 (1976).
63.  At first blush there seems to be no reason thus to extend application of the variance provision. A justification of sorts can be found, however, in the difference between the language providing for promulgation of BAT limitations and that providing for BPT standards. While BAT standards were to be set by nationally uniform regulation for classes and categories of point sources, Congress did not specify whether BPT limitations were to be set at the individual or national level. See text accompanying notes 27-29 supra. The Supreme Court held in du Pont that if EPA chose to implement BPT limitations by uniform regulation, it must insert a variance provision. See text accompanying notes 29-31 supra. The question then arises as to what factors go into the variance decision, and to those with a less than
such an implication existed, the Court compared the objectives of the two sorts of limitations with the apparent objectives of the section 301(c) variance provision.

The factors listed in section 301(c) as grounds for a variance parallel closely the considerations EPA is to take into account in setting the initial BAT standards. Thus the general BAT limitations are based on "the best available technology economically achievable . . . , which will result in reasonable further progress toward" eliminating water pollution, and the criteria for a BAT variance are similarly "maximum use of technology within the economic capability of the owner or operator" and "reasonable further progress toward the elimination of the discharge of pollutants." The Court observed that the variance provision "creates for a particular point source a BAT standard that represents for it the same sort of economic and technological commitment as the general BAT standard creates for the class."

The Court noted that the objectives of the BPT limitations, by contrast, are not compatible with those of section 301(c). Since the definition of BPT makes no reference to the affordability of control measures, section 301(c)'s consideration of the "maximum use of technology within the economic capability of the owner or operator" is "inapposite in the BPT context." Furthermore, the other factor in section 301(c), achievement of "reasonable further progress toward the elimination of the discharge of pollutants," apparently refers to some prior level of pollution control. This language is easily applied to BAT limitations, which constitute the second step of a two-step process, but cannot apply to the first step, BPT standards.

Going beyond the language of the Act, the Court also considered whether applying the section 301(c) factors to grant a BPT variance would be consistent with the role of BPT limitations in the Act's pollution control scheme. Under section 304, BPT limitations are to be based in part on a balancing of pollution control costs against expected complete understanding of the Act's intricacies, the BAT variance provision might seem the obvious place to look for an answer to this question.

64. 449 U.S. at 74.
66. Id. § 301(c), 33 U.S.C. § 1311(c) (1976) (emphasis added).
67. 449 U.S. at 74.
68. As the Court pointed out, BPT limitations, unlike BAT limitations, "do not require an industrial category to commit the maximum economic resources possible to pollution control, even if affordable. Those point sources already using a satisfactory pollution control technology need take no additional steps at all." Id. at 75.
69. Id.
70. FWPCA, § 301(c), 33 U.S.C. § 1311(c) (1976) (emphasis added).
71. 449 U.S. at 75. The Court stated: "BPT serves as the prior standard with respect to BAT. There is, however, no comparable, prior standard with respect to BPT limitations." Id.
72. Id. at 75-78.
pollution reduction,\textsuperscript{73} and a BPT standard therefore reflects EPA's determination that its benefits justify the costs it will impose. Granting a variance based on fundamentally different technological or engineering factors amounts in essence to a recalculation of the costs for a certain discharger. The increased costs affect the balancing of costs and benefits required by section 304, and adjusting the standards accordingly is therefore consistent with that section.\textsuperscript{74} To grant a variance based simply on an owner or operator's inability to meet the normal costs of compliance, on the other hand, finds no such justification in section 304.\textsuperscript{75} "It would force a displacement of calculations already performed, not because those calculations were incomplete or had unexpected effects, but only because the costs happened to fall on one particular operator, rather than on another who might be economically better off."\textsuperscript{76}

\textbf{B. The Legislative History}

Looking to the extensive legislative history of the 1972 amendments, the Court cited three kinds of evidence supporting its view.\textsuperscript{77} The legislative history showed, first, that Congress intended section 301(c)'s provision for an economic capability variance to apply only to BAT standards;\textsuperscript{78} second, that Congress anticipated that the BPT standards would close down some plants;\textsuperscript{79} and third, that instead of weakening the BPT requirements by providing for variances, Congress adopted other measures to address the economic threat posed by BPT limitations.\textsuperscript{80}

The Court stated that the House, Senate, and Conference Reports all evince an intent to make BPT the minimum level of pollution control and to apply the section 301(c) variance provision only after BPT standards have been met—that is, only to BAT limitations.\textsuperscript{81} The House managers stated, for example, that section 301(c) "is not intended to justify modifications which would not represent an upgrading over the [BPT] requirements,"\textsuperscript{82} and the Senate Report on the Conference action revealed an intent "to avoid imposing on the Administrator any requirement . . . to determine the economic impact of controls on
any individual plant in a single community.”

The legislative history also shows that Congress did not intend the Act’s pollution control scheme to be without its attendant financial hardships. Congress was aware of studies predicting that the BPT limitation would force 200 to 300 plants to close, and speeches by supporters of the legislation during both House and Senate debate discussed openly and frankly the Act’s likely effect of putting many companies out of business. That Congress contemplated numerous plant closings indicates that it did not intend the use of BPT variances to avert closings.

The legislative history and the text of the 1972 amendments show that Congress was concerned with this economic impact. The remedy Congress chose, however, was not to weaken the BPT guidelines, but rather to add other provisions designed to minimize the impact of the strict BPT regulations. The Supreme Court interpreted these actions as reinforcing the conclusion that the BPT requirements were not intended to be adjusted for economic hardship, and this interpretation is supported by the legislative history.

As the Court noted, two provisions in the 1972 amendments indicate that Congress intended to apply the BPT limitations even if their application would close some plants. First, the 1972 legislation was amended during Senate consideration to provide for low-interest loans to small businesses that could not otherwise afford to comply with EPA’s standards under the Act. Senator Nelson, who offered the amendment, as well as several other members of both Houses of Congress, saw the loans as an escape from the dilemma of either granting economic capability variances or forcing plants to close. That Congress adopted this measure to mitigate the economic impact of BPT limitations is evidence of its intent to preclude granting of BPT variances based on plants’ inability to afford compliance technology. A second amendment, added during House consideration of the Act, authorizes EPA to investigate “threatened plant closures or reductions in

83. Id. at 170 (remarks of Sen. Muskie).
84. Id. at 156 (Letter from EPA Administrator William Ruckelshaus); cf. id. at 523 (remarks of Rep. Harsha, discussing resulting loss of jobs). See 449 U.S. at 80.
85. See 449 U.S. at 80 (quoting 2 LEGISLATIVE HISTORY, supra note 13, at 1282 (remarks of Sen. Bentsen), 231 (statement of House managers on Conference Report)). The Court cited only the testimony of the Act’s supporters. Opponents of the bill also foresaw plant closures, and argued against the BPT provisions on the grounds that they lacked economic flexibility. See 1 LEGISLATIVE HISTORY, supra note 13, at 738 (remarks of Rep. Crane), 740 (remarks of Rep. Sikes).
86. See 449 U.S. at 81-83; see text accompanying notes 89-94 infra.
87. See 449 U.S. at 80-83 and legislative history quoted therein; see text accompanying notes 89-94 infra.
88. 449 U.S. at 81.
89. See 2 LEGISLATIVE HISTORY, supra note 13, at 1350; 449 U.S. at 81.
90. See 449 U.S. at 81 & n.22 and legislative history quoted therein.
employment allegedly resulting from [an effluent] limitation or order" issued under the Act.91 While not in any real sense a substitute for a BPT affordability variance, this provision demonstrates that Congress expected plants to close if they could not comply with BPT standards.92 Instead of allowing cost-based BPT variances, Congress resigned itself to some plant closings, and attempted with this amendment to monitor the degree of economic disruption, as well as to "undercut economic threats by industry that would create pressure to relax effluent limitation rules."93 The amendment's limited reach is made clear by its language: "Nothing in this subsection shall be construed to require or authorize the [EPA] Administrator to modify or withdraw any effluent limitation or order issued under this chapter."94

C. Deference to EPA's Interpretation

The Court closed with a reminder that an agency such as EPA is to be accorded considerable deference in interpreting a statute it administers.95 The Court found EPA's construction of the Act to be both reasonable and consistent96 and thus entitled to judicial deference.

IV
OBSERVATIONS & CRITIQUE

The Fourth Circuit's opinions on BPT variances were fatally flawed in three respects. First, the court ignored legislative history that runs counter to its findings.97 Although the framers of the Act did not refer to BPT variances at all,98 the legislative history is replete with evidence that economic impact on individual plants was not to be a factor in setting BPT standards.99 As discussed in Part III of this Note, the Supreme Court realized that a proper interpretation of a complicated legislative scheme such as this one required close examination of the legislative history, and the Supreme Court's opinion relied heavily

92. 449 U.S. at 82-83.
93. Id. at 82.
95. 449 U.S. at 83 (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965)).
96. The Court rejected as unfounded the industries' argument that EPA had been inconsistent in its interpretation of the BPT variance requirements. It found that EPA had stated in only one instance that it would consider economic capability, and this was under the Fourth Circuit's order in Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976). 449 U.S. at 83 n.25. Even in that case, EPA's capitulation was limited to steam electric power plants, the subject of Appalachian Power. Id.
97. In none of the three cases did the court cite to any part of the legislative history in discussing the variance provisions.
98. See text accompanying notes 27-31 supra.
99. See notes 76-94 supra and accompanying text.
on that history.\textsuperscript{100}

The Court of Appeals also erred in assuming that, because BAT limitations were generally more stringent than BPT limitations, Congress could not have intended the BPT limitations to be less flexible than the BAT limitations. In fact, the legislative history demonstrates that this was just what Congress intended. The Act reduces water pollution through a two-step process. The first step, implemented by BPT limitations, is to ensure that all dischargers meet certain minimum standards.\textsuperscript{101} The importance Congress attached to achieving this first level of pollution reduction is evidenced by frequent statements in the legislative history to the effect that the Act was expected to result in the closing of plants that could not afford to meet the standards.\textsuperscript{102} The second step of the process, taking the form of BAT regulations, is less essential. It presumes attainment of the BPT standards,\textsuperscript{103} and goes on to require further reductions, but only where economically feasible. Because of the lesser importance of BAT standards, as well as their greater stringency, Congress was more willing to make exceptions to those standards so as not to impose unnecessary financial hardship.\textsuperscript{104}

Finally, the court of appeals incorrectly interpreted the statutory factors to be considered under section 304 in setting BPT limitations. Section 304 requires EPA to consider “the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application.”\textsuperscript{105} In considering the requirements for BPT, the court quoted only the first half of the phrase, “total cost of application of technology.”\textsuperscript{106} Standing alone, the language quoted by the court implies that cost is to be considered in the absolute and thus that “affordability” of a standard is a relevant factor.\textsuperscript{107} When the clause is

\textsuperscript{100} See 449 U.S. at 79-83.
\textsuperscript{101} See text accompanying notes 81-83 supra.
\textsuperscript{102} See notes 83-85 supra and accompanying text.
\textsuperscript{103} Section 301(c), 33 U.S.C. § 1311(c) (1976), allows a BAT variance only where a revised standard will still “result in reasonable further progress toward the elimination of the discharge of pollutants.” As the Supreme Court pointed out in \textit{National Crushed Stone}, this implies that a prior standard (namely BPT) has already been met. 449 U.S. at 75. \textit{See also Legislative History, supra} note 13, at 170, 232.
\textsuperscript{104} This is demonstrated both by Congress’s explicit inclusion of a variance provision for BAT standards, see text accompanying note 26 supra, and by the stronger role given cost considerations in determining BAT as opposed to BPT, see text accompanying notes 23-26 supra.
\textsuperscript{105} Section 304(b)(1)(B) reads in relevant part: “Factors relating to the assessment of best practicable control technology currently available . . . shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application . . . .” 33 U.S.C. § 1314(b)(1)(B) (1976).
\textsuperscript{106} Appalachian Power Co. v. Train, 545 F.2d at 1359.
\textsuperscript{107} In the BAT criteria, the words “cost of achieving such effluent reduction” are not modified by any requirement that cost be considered in relation to benefits. As shown by section 301(c), 33 U.S.C. § 1311(c) (1976), “affordability” is indeed a relevant factor in determining BAT.
read as a whole, however, it becomes clear that cost is explicitly made relevant only in the narrower context of a cost-benefit analysis.\textsuperscript{108} Nothing in the Act implies that cost considerations are to influence BPT determinations except in this limited context.

In fairness to the Fourth Circuit, it should be noted that EPA may have led that court into a misunderstanding of the variance provision.\textsuperscript{109} EPA initially took the position in interpreting its BPT variance clause that “the cost of control is not an element in granting” variances,\textsuperscript{110} that “economic factors” were never to be considered in ruling on BPT variances,\textsuperscript{111} and that BAT variances under section 301(c) were “the exclusive procedure for an economic variance.”\textsuperscript{112} This was a misleading if not incorrect interpretation of the Act and of the variance clause. Certain economic factors must play a role in the variance determination; when EPA rules that a plant is entitled to a variance because of “fundamentally different factors,” the true reason behind the ruling is that these factors make compliance more expensive for that plant, so that the cost-benefit balancing performed on an industry-wide basis under section 304 is inaccurate with respect to the particular plant in question.\textsuperscript{113} In 1978, EPA finally acknowledged that economic factors were relevant in this sense, and that it was only “the discharger’s ability to pay” that was to be excluded from the variance decision.\textsuperscript{114} In the meantime, however, Appalachian Power had been decided. In that case the Fourth Circuit disapproved EPA’s initial, overly-restrictive interpretation of the variance clause. The court held that the factors giving rise to a variance “ought ordinarily to be at least as broad as the factors relied on in establishing the limitation.”\textsuperscript{115} Had EPA’s initial interpretation of the variance provision been broader, the court might not have been tempted into its faulty reliance on the BAT variance provision,\textsuperscript{116} which it followed without further examination in National Crushed Stone and Consolidation Coal.\textsuperscript{117}

Although the Supreme Court successfully refuted the Fourth Circuit’s holding that the section 301(c) variance factors were applicable to BPT as well as BAT limitations, it slighted a stronger argument pressed by the industries for considering affordability in BPT variance determinations. In their brief, the industries cited decisions of the Fourth and

\begin{itemize}
  \item \textsuperscript{108} See text accompanying notes 36-38 & 105 \textit{supra}.
  \item \textsuperscript{110} 39 Fed. Reg. 28,926, 28,927 (1974).
  \item \textsuperscript{111} 39 Fed. Reg. 30,073 (1974).
  \item \textsuperscript{112} \textit{Id}.
  \item \textsuperscript{113} See text accompanying notes 36-38 \textit{supra}.
  \item \textsuperscript{114} 43 Fed. Reg. 37,132, 37,133 (1978).
  \item \textsuperscript{115} 545 F.2d at 1359.
  \item \textsuperscript{116} See \textit{id} at 1359-69.
  \item \textsuperscript{117} See note 49 and text accompanying notes 48-55 \textit{supra}.
\end{itemize}
District of Columbia Circuits holding that, in ruling on BPT variances, EPA must allow for reevaluation on an individual level of all the factors relevant to the initial BPT determination. These factors include “total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application,” and the legislative history indicates that “total cost” includes “external” costs such as unemployment and dislocation. The industries argued that the cost to the local economy of a plant shutdown must therefore be considered in each variance decision.

The Act does not define “total cost of application of technology.” Although EPA argued that “[t]he phrase ‘total cost of application’ suggests that Congress perhaps was referring only to the financial outlay involved in actually applying the technology,” the sole reference to the phrase in the legislative history states that it is meant to encompass both “internal, or plant, costs sustained by the owner or operator and those external costs such as potential unemployment, dislocation, and rural area economic development sustained by the community, area, or region.” It would seem sound policy to weigh these external costs at some level; such costs of pollution abatement are every bit as real to the laid-off workers as are the increased costs of products, caused by added pollution control expenses, to consumers. In any case, there appears to be little room for debate, since there is no other definition available for “total cost of application of technology.”

A more difficult question is whether, if the agency must consider such external costs when it sets an industry-wide BPT standard, it must also consider them in ruling on a variance application. The industries argued that “[s]ince the function of a BPT variance is to determine BPT at an individual facility, all factors relevant in setting industry-wide BPT limitations must also be relevant under the BPT variance.”

118. The industries cited Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1034-36 (D.C. Cir. 1978) and Appalachian Power Co. v. Train, 545 F.2d 1351, 1359-60 (4th Cir. 1976). They also cited United States Steel Corp. v. Train, 556 F.2d 822, 844-47 (7th Cir. 1977), but that case does not appear to support the industries’ argument.


123. Reply Brief for Petitioners at 3 n.4.


125. In Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1036 n.35 (1978), the D.C. Circuit accepted the definition contained in the legislative history, apparently for want of any other.

addition to citing the Fourth Circuit’s *Appalachian Power* decision,\(^{127}\) the industries relied on language in the D.C. Circuit’s *Weyerhaeuser* opinion\(^{128}\) supporting their assertion.\(^{129}\) Indeed, as the industries pointed out in their brief,\(^{130}\) EPA had apparently agreed with them on this point in its opening brief before the Supreme Court.\(^{131}\)

There is considerable logic in the industries’ point of view. Since the Act does not specify that BPT is to be set for whole industries as opposed to individual plants,\(^{132}\) and since the Supreme Court in *du Pont* required EPA to consider individual plants’ circumstances,\(^{133}\) it appears sensible at first blush to consider each of the factors set forth in section 304(b)(1)(B)\(^{134}\) when evaluating a discharger’s variance request. This reasoning fails for three reasons, however.

First, although Congress was generally silent as to whether the BPT determinants applied on an individual or industry-wide level,\(^{135}\) the Conference Report states: “The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination.”\(^{136}\)

Individual legislators supporting the bill made similar

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127. See text accompanying note 54 *supra*.
128. See text accompanying notes 56-57 *supra*. In *Weyerhaeuser*, EPA’s BPT variance provision was upheld. 590 F.2d at 1040-41.
129. Brief for Respondents at 17.
130. *Id* at 18.
131. The agency had stated in its brief:

> EPA may grant a variance to an individual discharger based on the agency’s reconsideration of the factors enumerated in Section 304(b)(1)(b)—that is, the same factors that EPA must evaluate in setting the 1977 limitation in the first instance. In other words, an individual point source may be permitted to operate under modified effluent limitations, if it can demonstrate that it is fundamentally different from other more typical members of the same industry with respect to one or more of the factors listed in Section 304(b)(1)(B). See, e.g., 40 C.F.R. 434.22; *In re Louisiana-Pacific Corp.*, 10 E.R.C. 1841 (1977) (decision of the Administrator).

132. See text accompanying note 27-28 *supra*.
133. See text accompanying notes 29-31 *supra*.
135. See text accompanying notes 27-28 *supra*.
136. 1 *LEGISLATIVE HISTORY*, *supra* note 13, at 304. Although the quoted passage does

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The Conference Report statement alone may not be dispositive since it did not refer specifically to BPT limitations. Further evidence of an intent to exclude economic considerations from the variance decision is found, however, in Congress's concern that the Act's standards would force some plants to close. If for each plant the local permit-issuing agency balanced the economic and social costs of a potential shutdown against the benefits of an incremental decrease in effluent from that plant, it is likely that most variance applications would be approved—from both a political and evidentiary point of view, the agency would be hard pressed to argue, for example, that an imperceptible improvement in the quality of a heavily polluted river outweighed the loss of jobs, tax base, and services provided by the polluter to the local community.

Second, consideration of indirect costs at the variance stage would not comport with EPA's method of administering the Act. The scheme chosen by EPA and approved by the Supreme Court in *du Pont* called for uniform, nationwide BPT standards supplemented by variances where necessary. The variance provision was an acknowledgment by EPA that it would not always be able to account for all the different equipment and processes employed at different plants. The agency, as stated in the variance provision, would modify the standards if a discharger could show "that 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 considered in the establishment of the guidelines." In other words, EPA was forced to make certain assumptions regarding such things as the technology used by plants in a given industrial category. If a discharger can show that it does not conform to those assumptions, and that its costs of compliance are greater than similarly situated plants as a result, then EPA may adjust the BPT limitations accordingly for that discharger. EPA has already taken into account, however, the

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137. One of the bill's sponsors stated that "a plant-by-plant determination of the economic impact of an effluent limitation is neither expected, nor desired, and, in fact, it should be avoided." *Id.* at 255 (remarks of Rep. Dirgell). *See also id.* at 170, 172 (written statement of Sen. Muskie in presenting the Conference Report to the Senate).

138. *See text accompanying notes 83-85 supra.*

139. *If such variance applications were approved, however, the minimum level of water quality sought through BPT would not be attained. In addition, EPA would be saddled with heavy, possibly unbearable administrative burdens. See text accompanying notes 155-62 infra.*


141. *See text accompanying notes 27-31 supra.*

142. *See note 32 supra.*


144. 43 Fed. Reg. 50,042 (1978). This aspect of the agency's approach was approved by
economic costs associated with plant shutdowns. It has balanced, at the industry-wide level, the costs and benefits of each BPT standard. Unlike the situation where a plant’s technology differs from the norm, EPA has not made any assumptions that are incorrect with respect to a particular plant. Both EPA and Congress anticipated that some businesses would not be able to afford compliance; the financial situation of such a business is thus not a “fundamentally different factor” that must be reconsidered at the variance stage.

Finally, from a policy standpoint as well, consideration of economic impact is something best done on an aggregate rather than individual level. In the aggregate, EPA should be able to arrive at a rough estimate of how many plants would be forced to close by a specific standard. The agency would be hard pressed, however, to determine just which plants would close and which ones would be able to survive through loans or reserved profits. Even if it succeeded in making this determination, it would have to compare at the individual plant level the benefits of effluent reduction with the costs of closure. Because of the political pressures involved in such a determination, it is unlikely that this comparison would result in a decision not to grant a variance.

EPA v. National Crushed Stone Association reinforces the now well-established administrative law doctrine that the courts should defer to an agency’s reasonable and long standing interpretation of a statute it administers, especially where the statute is of a complex and scientific nature. In addition, it provides a good example of the reasons for and importance of this doctrine. The Fourth Circuit’s opinions in Appalachian Power, National Crushed Stone, and Consolidation Coal exemplify a danger of modern administrative law: faced with extremely complex statutory schemes controlling regulatory activities, courts do not always have the time, resources, and expertise to examine the nature of the regulatory scheme to the extent necessary for correct

the District of Columbia Circuit Court of Appeals in Weyerhaeuser Co. v. Costle, 590 F.2d at 1036-41.

145. Weyerhaeuser Co. v. Costle, 590 F.2d at 1037.
146. Id.
147. See text accompanying notes 83-85 supra.
149. This point was very well made by Senator Nelson during the Senate debate on the 1972 amendments, see text accompanying note 155 infra, and by the D.C. Circuit in Weyerhaeuser Co. v. Costle, see text accompanying note 156 infra.
150. See notes 95-96 supra and accompanying text.
resolution of questions of statutory interpretation. The Fourth Circuit's decision was logical, but the premises of its logic were faulty. Because the Court of Appeals did not adequately explore the intricacies of the Act's language and, especially, legislative history, and instead "relied on a mistaken conception of the relation between BPT and BAT standards," it reached the wrong result. By contrast, EPA's system of administering the BPT requirement had been carefully constructed over a period of years, with careful attention to the language and intent of the Act. Granting the agency's views a presumption of correctness, the Supreme Court found ample support for them in the language, policies, and legislative history of the Act.

CONCLUSION

By reversing the Fourth Circuit's decisions, the Supreme Court forestalled a significant threat to the nation's water pollution control efforts. During the Senate debate on the 1972 amendments, Senator Nelson spelled out some of the dangers of a variance based on affordability:

[T]he approach of giving variances to pollution controls based on economic grounds has long ago shown itself to be a risky course: All too often, the variances become a tool used by powerful political interests to obtain so many exemptions for pollution control standards and timetables on the flimsiest of pretenses that they become meaningless. In short, with variances, exceptions to pollution cleanup can become the rule, meaning further tragic delay in stopping the destruction of our environment.

The Court of Appeals for the District of Columbia Circuit further pointed out that "when faced with the ultimate threat of economic hardship—plant closure, with attendant unemployment and regional economic dislocation—the local permit-granting agency will find it difficult to resist a plea for a variance." An additional undesirable effect would have been the administrative burden placed on EPA and state agencies by requiring them to investigate and respond to every allegation by an NPDES permit applicant that it could not afford to comply with the BPT limitations. Although the 1977 deadline for BPT com-


153. See text accompanying notes 97-109 supra.


155. 2 LEGISLATIVE HISTORY, supra note 13, at 1355.

156. Weyerhaeuser Co. v. Costle, 590 F.2d at 1036.

157. Brief for Natural Resources Defense Council, Inc., as Amicus Curiae, at 18. NRDC cited an example of just such an investigation, conducted under section 507(e) of the
pliance is now past, recurring costs of compliance might motivate companies already in compliance to seek variances. Finally, validation of EPA's variance policies helps assure that a minimum level of water pollution abatement is achieved nationwide. The BAT provisions, although designed to be more stringent than BPT limits, do contain an explicit provision for variances based on affordability. Thus if BPT limitations were also subject to an affordability variance, the BAT requirements as applied to specific sources would not necessarily have achieved even the normal BPT level of pollution control for the category of source in question.

The Federal Water Pollution Control Act, like other recent environmental legislation, recognizes that regulations that force some businesses to close are sometimes necessary in the interests of health, safety, and environmental protection. By upholding EPA's admittedly harsh BPT variance provision, the Supreme Court has both indicated a willingness to allow such legislation and has set a valuable precedent in the interpretation of the Act.

Anthony Ranken

Act, 33 U.S.C. § 1367(e) (1976), see text accompanying notes 90-94 supra. The investigation cost hundreds of thousands of dollars and occupied numerous EPA personnel for over a year. Brief for NRDC at 18-19. But see Brief for Respondents at 36-37, arguing that the burden on EPA is reduced by imposing the burden of proof on the variance applicant, and that EPA's task would be no more significant than its avowed duty to determine the existence of the other, accepted grounds for variances.

158. Reply Brief for the Petitioners on Petition for a Writ of Certiorari at 2. But see Brief for Respondents at 32, predicting that "few BPT variances will be filed in the future because the 1977 BPT deadline is long past." The Supreme Court apparently thought the likelihood of future variance requests significant enough by itself for the case to merit the Court's attention (because the case arose as a general challenge to an EPA regulation, see text accompanying notes 39-45 supra, it had no immediate legal effect on any specific discharger).

159. See 449 U.S. at 75-77.


161. The variance provision was not challenged on constitutional grounds. Nonetheless, the Supreme Court's opinion implicitly confirms the constitutionality of necessary and reasonable regulatory measures in the pollution field, even when such measures deprive a business owner of the ability to stay in business. This principle has been well established in other fields of regulation. See Goldblatt v. Hempstead, 369 U.S. 590 (1962).

162. In Appalachian Power Co. v. EPA, No. 80-1663 (Feb. 8, 1982), the Fourth Circuit held that receiving water quality is not a relevant factor in EPA rulings on BPT variance applications. The court concluded, based on National Crushed Stone, that since the Act "does not require consideration of affordability factors in making [BPT variance] determinations, it cannot in logic require consideration of receiving water quality as a factor."