September 1986


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105 S. Ct. 1102 (1985)

INTRODUCTION

The Clean Water Act requires the United States Environmental Protection Agency (EPA) to promulgate standards that limit the discharge of pollutants into American waters. In carrying out this task, EPA has divided industry into various classes, collected data on each class, and promulgated standards based on various degrees of technology for that industrial category. Due to the imprecision of the general categorical approach used, EPA has granted variances to individual industrial dischargers who can show that their industrial processes involve "fundamentally different factors" than those considered by EPA in formulating the categorical standards.

The 1977 amendments to the Act included a provision that ostensibly prohibits any modifications of the standards set by EPA with respect to toxic effluents. Based on that provision, the Natural Resources Defense Council (NRDC) challenged EPA’s practice of granting variances to certain types of polluters when such variances allow modification of the standards regulating the discharge of toxic chemicals. In Chemical

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2. The objectives of the Clean Water Act (CWA) are "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a) (1982). The statutory scheme enacted to achieve these objectives is described in detail below. See infra text accompanying notes 13-25.


4. See infra text accompanying notes 29-35.

5. CWA § 301(l), 33 U.S.C. § 1311(l).

6. The Act requires the Administrator to determine which chemicals are toxic and place those chemicals on a list. CWA § 307(a)(1), 33 U.S.C. § 1317(a)(1).

7. NRDC actually challenged both the inherent authority of EPA to grant such vari-
Manufacturers Association v. Natural Resources Defense Council, Inc., the United States Supreme Court rejected the NRDC challenge and held that EPA may issue variances from toxic pollutant effluent limitations promulgated under the Clean Water Act. The five-to-four majority decision relied on a close examination of the legislative history of the 1977 provision as well as on the deferential standard of judicial review set out in the Court's 1984 decision Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. The dissenting opinion also closely examined the legislative history of the 1977 amendments but applied the analysis of Chevron to conclude that variances are forbidden by the Act. Although Chemical Manufacturers will not have a significant impact on the environment, the decision does indicate uncertainty among members of the Court as to how Chevron should be interpreted and how much discretion should be accorded to administrative agencies in the absence of a clear legislative pronouncement.

In sections I and II, this Note considers the Supreme Court's decision in Chemical Manufacturers against the background of the relevant portions of the Act and the lower court proceedings. Section III examines the majority and dissenting opinions. Finally, section IV concludes with an examination of the potential significance of Chemical Manufacturers.

I

BACKGROUND

The precursor of the Clean Water Act was enacted in 1948. Until the 1972 amendments were added, the Act principally consisted of a set of water quality standards. By 1972, commentators recognized that this approach was ineffective, largely due to the difficulty of translating water quality goals into uniform and enforceable effluent limitations to guide dischargers.

The 1972 amendments altered this approach and established the basic structure of the law as it currently operates. Instead of relying on general water quality standards, the Act as amended requires EPA to

10. See infra text accompanying notes 100-04.
regulate effluent dischargers by enforcing maximum levels of effluent discharges. The Agency carries out this task by dividing the dischargers into classes and promulgating binding standards based on specific degrees of technology.

The Act recognizes two types of dischargers: “direct dischargers” (those who discharge their waste water directly into navigable waters)\(^\text{15}\) and “indirect dischargers” (those who discharge their waste water into publicly owned sewage treatment plants).\(^\text{16}\) For direct dischargers, the Act calls for a two-phase program whereby increasingly stringent technology-based limitations are promulgated for each industrial category. The first phase of the program requires direct dischargers to meet standards based on the “best practical control technology” (BPT) methods available by July 1, 1977.\(^\text{17}\) In the second phase of the program, direct dischargers must meet even more stringent effluent standards promulgated by July 1, 1984 consistent with the “best available technology economically achievable” (BAT).\(^\text{18}\)

For indirect dischargers, the Act is somewhat less precise. Rather than requiring the two-phase program mandated for direct dischargers, the Act requires that indirect dischargers comply with pretreatment standards\(^\text{19}\) promulgated by EPA which regulate pollutants that either are not susceptible to treatment by the publicly owned treatment plants or that interfere with the operation of those systems.\(^\text{20}\) The Act does not tell EPA how to set pretreatment standards. Based on legislative history that seemed to support a similar two-phase approach\(^\text{21}\) and on a consent decree between EPA and NRDC,\(^\text{22}\) EPA promulgated technology-based pretreatment standards for indirect dischargers comparable to the BPT and BAT standards.\(^\text{23}\)

\(^{15}\) The Act never uses the term “direct dischargers” but refers to them when it calls for standards for “point sources.” See, e.g., CWA § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A).

\(^{16}\) As with the term “direct dischargers,” the Act does not explicitly use the term “indirect dischargers.” The Act refers to the term when it specifies standards for the pretreatment of pollutants prior to their introduction into publicly owned treatment works. See CWA § 307(b), 33 U.S.C. § 1317(b). For a more complete definition of pretreatment standards see infra text accompanying notes 19-20.

\(^{17}\) CWA § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A).


\(^{19}\) Pretreatment standards apply to waste water before it is discharged by industrial sources to publicly owned treatment plants.

\(^{20}\) CWA § 307(b), 33 U.S.C. § 1317(b).


EPA uses the same methodology in developing regulations for both types of dischargers. The Agency first collects information on each class of discharger and then formalizes its findings into binding regulations. It accomplishes this task by sending out questionnaires to dischargers within each industrial category inquiring into the cost of various control techniques. The Agency then makes its own investigation into the costs of treatment techniques already in use and the feasibility and effectiveness of other potential technologies.

Promulgating effluent limitations for each category of industry was by itself an enormous task. That task was made more burdensome by the numerous deadlines imposed by the Act. When EPA failed to meet those deadlines, environmental organizations brought suit to compel it to do so. In recognition of both the complexity of the national rulemaking efforts and the tight judicial deadlines imposed upon it, EPA included in its BPT regulations a variance provision to ensure that facilities with

24. See CWA § 304(a)-(c), 33 U.S.C. § 1314(a)(1)(a-c). The Act directs the Administrator to consult with any interested persons, as well as various state and federal agencies, to set criteria for the control of a particular effluent. After consultation with those parties, EPA must publish proposed guidelines followed by binding regulations. EPA was unable to promulgate guidelines and binding regulations within the time constraints called for by the Act. Ultimately, the guidelines and the standards mandated by the Act were treated as one in order to avoid the time required by two steps. The Supreme Court approved of this method in E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 126-31 (1977).


26. The enormity of the task is illustrated by the procedures followed by EPA in developing BPT level standards for the electrolyting pretreatment standards involved in Chemical Manufacturers.

EPA initially sent out questionnaires to 500 plants that it identified as possibly falling within the proposed category. Approximately 200 supplied the requested information. From that information, EPA visited 82 plants to take samples of raw and treated water over several days, to inspect treatment technology in place, and to collect first-hand information. On the basis of this information, EPA determined that 25 of the plants were representative in terms of treatment technology, character of raw waste water, and other factors. Using a combination of statistical methodologies and engineering judgments, the data from these plants was used to formulate the achievable effluent limitations. Brief for EPA at 5 n.3.

27. The most onerous deadlines were those by which the agency was to have promulgated the BPT and BAT standards—July 1, 1977 and July 1, 1984, respectively. See supra text accompanying notes 17-18.

The Act also imposed a myriad of other time deadlines for EPA to meet. For example, EPA was directed to develop and publish within one year of the enactment of the 1972 amendments criteria for water quality accurately reflecting the latest scientific knowledge on a wide variety of issues. CWA § 304(a)(1), 33 U.S.C. § 1314(a)(1). By that same date, the agency had to publish information on how to protect water quality. CWA § 304(a)(2), 33 U.S.C. § 1314(a)(2). Similarly, 90 days after the enactment of the 1977 amendments, the agency was required to publish information on pollutants classified as biological oxygen demanding, suspended solids, fecal coliform, and pH. CWA § 304(a)(4), 33 U.S.C. § 1314(a)(4). Within six months the agency was required to publish information on how to protect public water supplies. CWA § 304(a)(5), 33 U.S.C. § 1314(a)(5). Additional time deadlines are contained in section 304 of the Act.

28. See supra note 22.

unique features were not treated unfairly.\textsuperscript{30} The variance, known as a "fundamentally different factor" (FDF) variance, applied only to existing facilities\textsuperscript{31} whose production processes were unique among plants within that category.\textsuperscript{32} Prior to Chemical Manufacturers, the Supreme Court had held, at least in the context of BPT limitations, that FDF variances were acceptable.\textsuperscript{33} EPA later allowed existing dischargers to obtain FDF variances from both BPT\textsuperscript{34} and pretreatment standards based on the same criteria.\textsuperscript{35}

The FDF variance scheme is at the heart of the conflict in Chemical Manufacturers because the 1977 amendments prohibit modifications of the standards for toxic pollutants. Section 301(l) of the Act states that "[t]he Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title."\textsuperscript{36} The issue in Chemical Manufacturers was whether the FDF variances EPA granted to indirect dischargers for toxic pollutants "modify a requirement" promulgated under section 301.

NRDC first raised this question in Appalachian Power Co. v. Train.\textsuperscript{37} There, NRDC challenged EPA's amendment of its regulations to allow FDF variances to BPT limitations. NRDC contended that the

\begin{itemize}
  \item [30.] See, e.g., 40 C.F.R. § 415.220 (1976) (variance provision from standards regulating the discharge of certain inorganic chemicals).
  \item [31.] The variance provision only applied to existing plants because the operators of new plants would have had notice of the applicable effluent limitations and designed their plants accordingly. See E.I. du Pont de Nemours & Co. v. Train, 430 U.S. at 137-38.
  \item [32.] See 40 C.F.R. § 415.220 (1976). FDF variances are not easily obtained. Simply demonstrating that the regulation is burdensome is insufficient. The discharger must show, and the EPA must agree, that the factors utilized in setting the limitations were fundamentally different than those concerning the discharger's plant. 39 Fed. Reg. 28,926 (1974) (to be codified at 40 C.F.R. pt. 124). In EPA v. National Crushed Stone Association, 449 U.S. 64 (1980), the Supreme Court rejected an industry challenge that EPA must grant FDF variances to dischargers who were unable to pay for required pollution control technology and held that financial capability should not be considered. Id. at 85.
  \item [33.] The Court affirmed the use of FDF variances in E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977). Du Pont was the first major challenge to the Act to reach the Supreme Court after the 1972 amendments. Among other issues, du Pont raised the question of whether EPA was authorized under the Act to limit waste discharges through industry-wide regulations. The language of section 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (1982), calls on EPA to promulgate BPT limitations based on "point sources." The chemical industry contended that this required EPA to promulgate regulations on a plant-by-plant basis rather than on a national level. The Supreme Court rejected this argument and held that EPA has authority to set uniform effluent limitations for categories of plants. Du Pont, 430 U.S. at 136. In reference to the FDF variance scheme, the Court noted that industry-wide regulations are appropriate "so long as some allowance is made for variations in individual plants." Id. at 128.
  \item [34.] Criteria and Standards for Determining Fundamentally Different Factors under Sections 301(b)(1)(A), 301(b)(2)(A) and (E) of the Act, 40 C.F.R. §§ 125.30-.32 (1985).
  \item [35.] 40 C.F.R. § 403.13 (1985).
  \item [37.] 620 F.2d 1040 (4th Cir. 1980).
\end{itemize}
regulations should have forbidden any variances for pollutants on EPA's toxic chemical list.\textsuperscript{38} The Fourth Circuit Court of Appeals rejected NRDC's argument and accepted EPA's interpretation that section 301(l) does not apply to the BPT standards.\textsuperscript{39}

II
THE PROCEEDINGS BELOW

Chemical Manufacturers began in the Third Circuit Court of Appeals as National Association of Metal Finishers \textit{v.} EPA\textsuperscript{40} when that court consolidated a number of petitions for review of the pretreatment regulations. NRDC, one of the petitioners, contended both that the Act did not grant authority to issue FDF variances and that it specifically prohibited the issuance of such variances for toxic pollutants.\textsuperscript{41}

Without deciding the first question, the Third Circuit agreed with NRDC that EPA could not issue such variances for toxic pollutants.\textsuperscript{42} The court began by examining \textit{E.I. du Pont de Nemours \& Co. v. Train},\textsuperscript{43} noting that in that case the Supreme Court permitted FDF variances in the context of BPT limitations because those standards were to be formulated based on individual "point source dischargers."\textsuperscript{44} In contrast, section 307(b) of the Act states that the pretreatment standards apply to "categories of sources."\textsuperscript{45} The difference between the two sections is that Congress expected EPA to set individual standards under the BPT regu-

\textsuperscript{38} Id. at 1047.

\textsuperscript{39} Id. at 1047-48. EPA's position was that section 301(l) applied only to those subsections that by their own terms permit modification. Those subsections are §§ 301(c) \& (g), 33 U.S.C. §§ 1311(c) \& (g) (1982). Subsection (c) allows for variances to dischargers that have made "the maximum use of technology within the economic capability of the owner" and that will result in reasonable further progress toward the elimination of the discharge of pollutants. 33 U.S.C. § 1311(c). The subsection allows firms that can make reasonable pollution control progress to avoid being driven into bankruptcy by their inability to meet higher pollution control standards. Subsection (g) allows firms to avoid expending additional resources on pollution control when modification of the standards would not interfere with the attainment or maintenance of the water quality goals of the Act.

EPA argued that section 301(l) only served to limit the modifications allowed under these subsections as they related to the discharge of toxic pollutants. FDF variances were not explicitly mentioned in section 301; thus, section 301(l) did not literally prevent a variance.

After concluding that the Act was unclear on the issue, the Fourth Circuit Court of Appeals noted that the agency was entitled to deference and that its interpretation should prevail. Appalachian Power Co., 620 F.2d at 1047.

\textsuperscript{40} 719 F.2d 624 (3d Cir. 1983).

\textsuperscript{41} Id. at 643.

\textsuperscript{42} Id.

\textsuperscript{43} 430 U.S. 112 (1977). \textit{See supra} note 33.

\textsuperscript{44} Id. This is in contrast to the requirement that BAT limitations be formulated based on categories and classes of point sources. CWA § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A). The Court in \textit{du Pont} relied on this distinction in concluding that categorical limitations based on representative single point sources within broad groups of industry justified FDF variances. 430 U.S. at 126.

\textsuperscript{45} 33 U.S.C. § 1317(b)(3).
lations, something EPA had been unable to do.\footnote{See supra note 33.} Congress expected the pretreatment standards, however, to be set by groups. Therefore, the Third Circuit held that FDF variances for toxic pollutants were inappropriate and that \textit{du Pont} did not allow the Administrator to grant such variances.

The court next examined EPA's argument that section 301(l) applied only to modifications that might otherwise be allowed under sections 301(c) and (g).\footnote{See supra note 39.} The court noted that, while the legislative history seemed to provide some support for this view, the prohibition was also used in its broadest sense and, therefore, included FDF variances.\footnote{719 F.2d at 645-46.}

Finally, the court examined the Fourth Circuit's \textit{Appalachian Power Co.} decision and took issue with its conclusion that the legislative history was sufficiently ambiguous to justify deferring to the agency. Instead, the court viewed section 301(l) as being quite clear.\footnote{Id. at 646. The court noted that "section 301(l) forbids modifications, and FDF variances are no less modifications than those provisions indisputably prohibited by that section."} Consequently, the court held that the Act forbids the issuance of FDF variances to toxic pollutant dischargers.

\section*{III
THE SUPREME COURT DECISION}

The Third Circuit's holding in \textit{National Association of Metal Finishers} directly contradicted the Fourth Circuit's decision in \textit{Appalachian Power Co.} The Supreme Court granted certiorari to resolve the conflict.\footnote{466 U.S. 957 (1984).} The issue before the Court was whether EPA could issue FDF variances from toxic pollutant limitations. The narrow five-to-four decision upheld EPA's interpretation of section 301(l).

\subsection*{A. The Majority Opinion}

Justice White, writing for the Court, began by examining section 301(l) and the meaning of its use of the word "modify." He argued that the broad meaning of the word sought by NRDC could not have been intended by Congress because such an interpretation would preclude the agency from revising effluent standards, a task EPA clearly was empowered to perform under the Act.\footnote{105 S. Ct. at 1108. The Court agreed with EPA's argument that section 301(l) could not be read broadly because that would conflict with section 307(b)(2), 33 U.S.C. § 1317(b)(2), which directs EPA to periodically "revise" its pretreatment standards. Brief for EPA at 25.} He concluded that the "plain meaning" of the word "modify" was not intended in section 301(l).\footnote{105 S. Ct. at 1108.}
Justice White then recited the two-part test for judicial review of agency decisionmaking that the Court had recently formulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council.* In *Chevron,* NRDC challenged EPA's method of treating industrial groupings as single entities for purposes of regulating air pollution under the Clean Air Act Amendments of 1977. In upholding EPA's interpretation of the amendments, Justice Stevens, writing for a unanimous court, set out the proper methodology for the review of actions by administrative agencies. First, a court should determine “whether Congress has directly spoken to the precise question at issue.” If the court, using traditional tools of statutory construction, finds that Congress has so spoken, it “must give effect to the unambiguously expressed intent of Congress.” On the other hand, 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.” When Congress has not made its intent clear, a permissible construction is simply one which is reasonable. Applying this test to the facts before it in *Chevron,* the Court concluded that Congress did not have an intention with regard to the definition of “source” and that EPA had advanced a reasonable explanation for its construction which justified the Court's deference.

With the *Chevron* analysis as a guide, the majority opinion in *Chemical Manufacturers* examined the legislative history of section 301(l). It found that several different congressional sources supported EPA's argument that section 301(l) was intended only to prevent modifications otherwise permitted under sections 301(c) and (g).

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54. 42 U.S.C. § 7502(b)(6) (1982). At issue in *Chevron* was EPA's definition of what constituted a “major stationary source” of air pollution under section 172 of the Clean Air Act. EPA adopted a “bubble” approach which treated an entire plant as a single source. This exempted individual pieces of process equipment from the stringent regulatory criteria so long as the entire emission level of the plant did not increase. 467 U.S. at 840. The United States Court of Appeals for the District of Columbia had rejected EPA's position as not being in accord with the purposes of the Clean Air Act. *NRDC v. Gorsuch,* 685 F.2d 718, 726-27 (D.C. Cir. 1982).
55. Justices Marshall, Rehnquist, and O'Connor took no part in the decision. 467 U.S. at 866.
56. *Id.* at 842.
57. *Id.* at 842-43.
58. *Id.* at 843.
59. *Id.* at 844.
60. *Id.* at 851, 862.
61. *Id.* at 865.
62. The Court placed special emphasis on a statement by Representative Roberts, the House floor manager for the bill containing the 1977 amendments to the Act. With respect to section 301(l), he stated: “due to the nature of toxic pollutants those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, specifically, neither section 301(c) nor 301(g) waivers based on water quality consider-
The Court considered Congress' failure to react to the *du Pont* decision as further evidence that Congress did not intend to forbid FDF variances.\textsuperscript{63} Had Congress intended to prevent the issuance of FDF variances, it would have stated so.\textsuperscript{64} In light of this legislative history, the Court concluded that Congress had not expressed a clear legislative intent on the issue.\textsuperscript{65}

The Court next examined whether the FDF variance so frustrated the goals of Congress as to make EPA's construction of section 301(l) unreasonable.\textsuperscript{66} While NRDC argued that FDF variances merely excused noncompliance with the effluent limitations, the Court characterized the variances as necessary given the impracticality of imposing uniform standards upon nonuniform sources.\textsuperscript{67} The variances were a reasonable way to temper the otherwise inflexible and potentially harsh results of EPA's nationally binding pretreatment standards.\textsuperscript{68}

Moreover, it was undisputed that EPA could create subcategories under section 307(b)(2) of the Act.\textsuperscript{69} The granting of FDF variances was simply another means to accomplish the same end.\textsuperscript{70} The Court found this a particularly persuasive reason for deference to the agency interpretation.\textsuperscript{71} The Court concluded that "[i]n the absence of a Congressional

\textsuperscript{63} In a footnote, the Court addressed NRDC's and the dissent's reading of *du Pont* as being limited to BPT limitations. The Court stated that the *du Pont* decision "arguably" applied to BAT limitations as well. It also noted that the BPT regulations contained a variance clause which applied to pollutants declared toxic in the 1977 amendments. Because of a consent decree, those same BPT limitations remained in effect in some industrial categories at the time of the enactment of section 301(l). This, the Court argued, should have provided Congress with notice of the applicability of FDF variances. 105 S. Ct. at 1109-10 n.18.

\textsuperscript{64} "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." Id. at 1109 (footnotes omitted).

\textsuperscript{65} Id. at 1112. Indeed, the Court implied that the legislative history favored EPA's construction. In its own words, "[EPA's] interpretation gives the term 'modify' a consistent meaning with § 301(c), (g) and (l) and draws support from the legislative evolution of 301(l) and from Congressional silence on whether it intended to forbid FDF variances altogether." Id.

\textsuperscript{66} This is the second part of the *Chevron* test. See supra text accompanying notes 58-59.

\textsuperscript{67} 105 S. Ct. at 1110.

\textsuperscript{68} Id. at 1112.

\textsuperscript{69} 33 U.S.C. § 1317(b)(2) (1982) (this power is within the general authority of EPA to revise the standards and the categories as is necessary).

\textsuperscript{70} EPA pointed this out in its brief by noting that it used exactly the same factors to justify granting a FDF variance as it used in setting and revising the national pretreatment standards. The Agency does not take into account any factors that would not have justified a change in the national standards. By granting an FDF variance, EPA argued, it in effect defines a subcategory that has only one discharger. Brief of EPA at 31.

\textsuperscript{71} 105 S. Ct. at 1111.
directive to the contrary, we accept EPA's conclusion that section 301(l) does not prohibit FDF variances.  

B. The Dissenting Opinion

The majority opinion in Chemical Manufacturers provoked a spirited dissent written by Justice Marshall and joined by Justices Stevens, Blackmun, and O'Connor. The dissenters took strong issue with the majority's interpretation of the legislative history. In addition, they rejected the majority's attempt to characterize the issuance of FDF variances as merely an alternative route to the creation of subcategories.

Justice Marshall began by reexamining both the literal meaning of section 301(l) and its legislative history. The plain meaning, he noted, was one of unqualified prohibition that did not imply the limited scope for which EPA argued. Moreover, contrary to the majority's reading of section 301(l), Justice Marshall argued that the legislative history evinced a clear congressional intent to ban completely modifications of the toxic pollutant standards. He further noted that EPA's interpretation was counterintuitive given the congressional concern over toxic pollutants. Certainly the goals implicit in sections 301(c) and (g) were at least equal in importance to those underlying FDF variances.

Justice Marshall also examined the changes made by the conference committee on the 1977 amendments. The original version of section 301(c) came from the House bill and contained a prohibition against var-

72. Id. at 1112. The Court went on to note, "EPA's construction, fairly understood, is not inconsistent with the language, goals, or operation of the Act." Id.
73. Id. at 1115.
74. Id. at 1116. The dissent cited a number of statements by members of Congress involved in the passage of the 1977 Amendments, including Representative Roberts, upon whom the Court's opinion heavily relied, see supra note 62, that indicated a serious concern with toxic pollutants. Those statements further indicated a recognition that a ban on modifications of standards, though likely to be extremely costly to industry and to "result only in a little more clean-up of our waters," was justified in view of the enormous risks involved. Id. at 1115-17 (quoting LEGISLATIVE HISTORY, supra note 62, at 305 (statement of Rep. Roberts)).

Later in the dissent, Justice Marshall criticized the majority's heavy reliance on a single statement by Representative Roberts. That statement, according to Justice Marshall, neither comported with the legislative history taken as a whole nor was by itself probative of the congressional intent. Id. at 1120.
75. Id. at 1117.
76. Sections 301(c) and (g) were both compromises on serious problems raised by the Act's stringent standards. See supra note 39.
77. Subsections (c) and (g) are statutory, whereas FDF variances are only regulations. Justice Marshall observed that it was illogical to think that Congress would value an agency's work product more than its own. Yet, that was the conclusion one would draw from EPA's argument that Congress intended to prohibit the modifications under subsections (c) and (g) and not FDF variances under section 301(l). Id. at 1117.
78. The conference committee report made no mention of the changes made to section 301(c), (g), or (l). See H. CONF. REP. NO. 830, 95th Cong., 1st Sess., reprinted in 1977 U.S. CODE CONG. & AD. NEWS 4424.
iances for toxic pollutants. The final version of section 301(c), after changes by the conference committee, no longer contained the prohibition. Section 301(g), which originated in the Senate bill, contained a prohibition against modifications of the standards for toxic pollutants. It retained the prohibition it had prior to being considered by the conference committee. The conference committee added section 301(l).79 Chemical Manufacturers Association and EPA both argued that section 301(l) was taken from section 301(c) and made to apply to both sections 301(c) and (g).80 Justice Marshall pointed out that this did not explain the redundancy created by the prohibition retained in section 301(g).81 If anything, the redundancy suggested that section 301(l) was meant to have general applicability.82

Next, the dissent rebutted the argument that congressional silence on the issue of FDF variances indicated its acceptance of such variances. Echoing the Third Circuit, the dissent argued that *du Pont* provided no warning to Congress of the general applicability of FDF variances. The Court validated the *du Pont* variances because the BPT standards were to have been promulgated on the basis of point sources.83 In contrast, the pretreatment standards, like the BAT standards, were to be set by “applicable category or class of point sources.”84 Congress had no reason to expect that FDF variances had general applicability.85 *Du Pont* validated FDF variances only because the Act seemed to call for individual firm-by-firm standards under the BPT regulations. That was not the case under the pretreatment standards.86 *Du Pont*, therefore, never considered whether such variances were appropriate for indirect dischargers.

Justice Marshall concluded his examination of the legislative history by pointing out that the dissenters’ difference with the majority was based solely on their reading of the congressional purposes behind section 301(l), not on a different reading of *Chevron*.87 Unlike the majority, the dissenters believed that Congress had expressed unequivocally its

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79. Id. at 1117-18.
80. EPA had no real explanation for the redundancy other than to concede that under its interpretation of section 301(l) the prohibition of modifications applied only to section 301(c). Brief for EPA at 33 n.24. Petitioner Chemical Manufacturers Association explained the redundancy as a sort of stylistic change. Brief for Chemical Manufacturers Association at 29-30.
81. 105 S. Ct. at 1118.
82. Id.
83. Id. at 1119. See supra text accompanying notes 44-45.
84. Id. at 1119 (quoting CWA § 307(a)(2), 33 U.S.C. § 1317(a)(2)).
85. See supra text accompanying notes 44-46.
86. Moreover, only after *du Pont* did EPA draft FDF variances for BAT and pretreatment standards. To the extent that Congress even knew of FDF variances during the enactment of the 1977 amendments, it was solely in the context of BPT standards, standards that were due to expire that year. Id. at 1119.
87. Indeed, he noted, “[i]f I agreed with the Court’s analysis of the statute and the legislative history, I too would conclude that *Chevron* commands deference to the administrative construction.” 105 S. Ct. at 1121.
intention that section 301(l) apply broadly. Deference to the agency interpretation was therefore inappropriate.

Finally, the dissent addressed the Court's argument that the FDF variance scheme was simply another means by which EPA could accomplish the permissible goal of fine-tuning the categories. The dissent pointed out that the procedures for promulgating a subcategory pursuant to section 304(b)(2) and those necessary in granting an FDF variance differ from one another. Congress attached significance to the nationwide categorical development of standards. Rather than focus on single dischargers, EPA was to focus on broad groups of dischargers and make reference to the average of the best polluters in setting the standards for that category. This demonstrated that FDF variances not only went against the clear intent of Congress but also contradicted the goals of the Act itself.

IV
DISCUSSION

The fundamental difference between the majority and the dissenting opinions in Chemical Manufacturers is in their respective readings of the legislative history. A comparison of the two opinions shows the dissent to be far more persuasive; the dissent effectively rebuts each point in the Court's opinion. Its analysis of the legislative history, and, in particular, the sequence of events leading to the enactment of subsections (c), (g), and (l) of section 301, made clear the weaknesses in the majority's opinion. Similarly, the dissent pointed out, just as the lower court had, why du Pont could not have provided notice to Congress of the general applicability of FDF variances. The dissent, by its persuasive analysis of the legislative history, shows the errors underlying the Court's conclusion that the legislative history does not prohibit the variances.

Despite the Court's approval of FDF variances for toxic pollutants, Chemical Manufacturers is not likely to be a decision of great import to

88. Id. at 1121.
89. See supra text accompanying notes 67-71.
91. See supra notes 24, 32. See also 40 C.F.R. § 403.13(d) (1985).
92. Id. at 1123.
93. Id. at 1123-24.
94. See supra text accompanying notes 87-88.
95. See supra text accompanying notes 73-82.
96. See supra text accompanying notes 44-46.
97. See supra note 63.
98. See supra text accompanying notes 83-84.
the environment. In practice, the variances are difficult to obtain,¹⁰⁰ and, as a result, EPA has issued very few.¹⁰¹ Language in the Court's opinion further indicated that its approval of the variances was in part tied to their limited availability.¹⁰² Were EPA to start issuing large numbers of the variances, the court implied that it might take a different view.¹⁰³ To the extent that the decision broadly endorses FDF variances as an allowable and reasonable tool for implementing fair effluent standards, the decision represents, as one commentator has noted, a widening loophole in the Clean Water Act.¹⁰⁴ The real significance of the Court's decision, however, is not specifically in the area of environmental law.

Instead, Chemical Manufacturers is significant because of its application and development of Chevron. The Chevron decision made a sharp break with earlier precedent by setting out a very lenient rule of deference to the statutory constructions of administrative agencies.¹⁰⁵ While the Court's approach to administrative questions in the past has never been entirely consistent,¹⁰⁶ the Court has frequently inserted its judgment of the correct interpretation of a statute based on the general history, terms, or purposes of the legislation.¹⁰⁷

¹⁰⁰. See supra note 32.
¹⁰¹. NRDC acknowledged that only 50 of the 4000 major industrial dischargers covered by BPT limitations had applied for FDF variances and, of that number, only two had received variances. 105 S. Ct. at 1107 n.12. EPA noted that, as of 1984, only four FDF variances had been granted nationwide to direct dischargers and none to indirect dischargers. In addition the Agency estimated that 40 FDF variance requests had been filed and were pending. Brief for EPA at 36 n.28.
¹⁰². At the end of its opinion, the Court noted that FDF variances were permissible only so long as they were granted to fundamentally different dischargers. 105 S. Ct. at 1112 n.24.
¹⁰³. Id.
¹⁰⁶. In particular, numerous commentators have noted that the Court seems to use two different standards of review in resolving administrative law questions—a reasonableness standard and a rightness standard. Under the reasonableness standard, the Court defers to the agency's interpretation if the interpretation has a reasonable basis in the statute. Under the rightness standard, the Court examines the correctness of the interpretation. See Note, supra note 105, at 469-74. See also K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.00 (2d ed. Supp. 1982) ("The Supreme Court has long maintained two lines of cases . . . [o]ne line involves substitution of judicial judgment and the other line uses the rational basis test.").
¹⁰⁷. See, e.g., Securities and Exch. Comm'n v. Sloan, 436 U.S. 103, 122 (1978) (Court set aside longstanding agency practice based on an absence of any persuasive legislative history to support agency's view and because the entire statutory scheme suggested that the agency was not so empowered); Federal Maritime Comm'n v. Seatrain Lines, 411 U.S. 726, 731, 742 (1973) (where statute was vague, agency interpretation was set aside based on contrary legislative history and governing statutory purpose); Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261, 272, judgment amended, 392 U.S. 901 (1968) ("[t]he courts are not obligated to stand aside and rubberstamp their affirmance of administrative decisions..."
Chevron rejected the legitimacy of the Court making judgments based on general historical or structural inferences.108 Instead, the decision called for a more formalistic approach to agency review. The Court there indicated that extrapolating specific meanings from the general purposes of a statute, as the lower court had done in defining the term "source,"109 was improper. Rather, the Court's function should be to determine whether Congress has "directly spoken to the precise question at issue."110 If it has not, regardless of its reasons for not doing so,111 the Court must consider the matter as having been delegated to the agency and therefore subject to review under a reasonableness standard.112 The Court observed that to do otherwise forces the Court into the illegitimate role of making policy judgments on basically political issues.113

An important issue left undecided by Chevron was the degree of explicitness required of Congress to justify the Court setting aside an agency's interpretation. The facts of the case did not allow that issue to be decided because the legislative history of the Clean Air Act contained no specific comments on the "bubble" concept.114 Consequently, the arguments submitted by the litigants were premised largely on policy grounds.115 This prevented the Court from indicating what constitutes a clear and unambiguous intent.

Chemical Manufacturers is significant because, as one commentator has noted, it illuminates "the standard in judging whether Congress has 'directly spoken to the precise question at issue.'"116 In other words, the Court was forced to decide how closely it should scrutinize the legislative history. According to this commentator, the disagreement between the majority and dissenting opinions "arose over the intensity of the justices' search for a clear congressional intent."117 Thus, the majority, after examining both the facial conflict between the statutory provisions and the failure of Congress to define the scope of the term "modify," found that Congress had not spoken to the precise question at issue.118

108. See supra text accompanying notes 56-59.
110. Chevron, 467 U.S. at 842; see supra text accompanying note 56.
111. The Court specifically noted that whether Congress intentionally delegated an issue or simply did not consider the specific issue was irrelevant for purposes of judicial review. 467 U.S. at 865.
112. See supra text accompanying notes 58-59.
113. 467 U.S. at 865-66.
114. Id. at 851; see supra note 60.
115. Id. at 864.
117. Id. at 493.
118. Id.
dissent, by contrast, made a more searching inquiry into the legislative history and, significantly, examined the general purposes of the section. The commentator concludes that the real difference between the two opinions is that the dissent relied on the general purposes behind section 301(l) whereas the majority would not. He concludes that Chemical Manufacturers is significant because it indicates that such reliance is no longer appropriate.

This commentator does not, however, accurately characterize the two opinions or the significance of the Court's decision. While the dissent noted that the majority did not adequately recognize the general purposes of the statute, it did not rely on the general purposes of section 301(l). Rather, it made a searching inquiry into the legislative history. That inquiry differed from the Court's only by being far more persuasive.

The significance of Chemical Manufacturers is also broader than the conclusion drawn by the commentator. The decision not only elaborates on the requirement under Chevron that Congress have squarely addressed the question at issue, but it also calls for a high degree of deference on the part of courts when reviewing the actions of administrative agencies. Congress did not directly address the issue of whether FDF variances for toxic pollutants were prohibited by section 301(l); the issue seems never to have been considered. Consequently, there were only persuasive indications that EPA's construction was not in accord with the congressional intent. This was not enough for the Court to set aside EPA's interpretation. The conclusion to be drawn from the Court's decision is that a high level of explicitness is required of Congress under Chevron before a court is justified in rejecting an agency's interpretation. To the extent that the Court's decision warrants this conclusion, Chemical Manufacturers is significant because it calls for a very deferential standard of agency review.

The decision, however, remains somewhat uncertain in its significance because the Court did not rely exclusively on the Chevron analysis. In particular, the Court did not simply address itself to determining whether Congress had expressed a clear intent with regard to FDF variances. While the Court ultimately concluded that Congress had not, it also argued that Congress understood and expected the construction

119. Id.
120. Id. at 494.
121. "Chemical Manufacturers clarifies what was implicit in Chevron—that reasoning from the general purposes of the statute is not one of the 'traditional [sic] tools of statutory construction.'" Id.
122. 105 S. Ct. at 1113.
123. See supra text accompanying notes 73-86.
124. See supra text accompanying notes 95-99.
125. See supra text accompanying note 72.
EPA put on section 301(l)\textsuperscript{126} and that this construction was consistent with its legislative history.\textsuperscript{127}

These arguments run counter to the \textit{Chevron} analysis itself. If the Court had found these arguments convincing, it need never have proceeded to \textit{Chevron}'s second step of determining whether the interpretation was reasonable.\textsuperscript{128} By doing so, the Court, in effect, was arguing that EPA's interpretation was \textit{both} right and reasonable. While that may be a more persuasive argument than only arguing that the agency's approach is reasonable, it is not what \textit{Chevron} dictates. By going outside of the \textit{Chevron} analysis, the Court seemed to be shying away from the formalistic approach called for under \textit{Chevron}.

For this reason, the significance of the Court's decision is somewhat uncertain. On the one hand, the Court seemed to be applying the \textit{Chevron} test rigorously to the facts of \textit{Chemical Manufacturers}. To the extent it did so, the Court's decision significantly enhances the discretion of administrative agencies by lessening the scrutiny with which courts may examine their actions. The wisdom of such a high degree of deference is questionable insofar as it may demand too high a degree of specificity on the part of Congress.\textsuperscript{129} This was illustrated by the Court's fruitless search for an unambiguous statement regarding FDF variances. Given what appears to have been Congress' unawareness of the issue, the Court's expectation that it would make such a statement was unrealistic. Viewed from this perspective, the Court's decision calls for a very high degree of deference.

On the other hand, the slim five-to-four majority relied on reasoning that was unnecessary and outside of the \textit{Chevron} analysis. Its refusal to rely exclusively on that analysis may indicate some hesitancy on the

\textsuperscript{126} For example, the Court went to great lengths to argue that Congress was aware of \textit{du Pont} and interpreted its silence on the applicability of FDF variances to constitute an endorsement of EPA's practice. \textit{See supra} text accompanying notes 63-64. Similarly, the Court relied heavily on a single statement of Representative Roberts to show that the legislators responsible for the bill's passage also fully expected and intended EPA's interpretation of section 301(l). \textit{See supra} note 62.

\textsuperscript{127} \textit{See supra} note 65.

\textsuperscript{128} \textit{See supra} text accompanying notes 57-59. Perhaps the Court did not find its own arguments persuasive. The structure of its opinion, however, does not indicate that to be the case. The Court's analysis did not approach the legislative history as one which was ambiguous. Instead, it cited indications of congressional intent that favored EPA's interpretation. \textit{See supra} note 126. Only after the Court had dismissed all of NRDC's arguments regarding the legislative history did the Court conclude that Congress did not evince a clear intent to forbid FDF waivers with respect to toxic materials. \textit{See supra} text accompanying notes 62-65; \textit{see also} 105 S. Ct. at 1108-10. The Court's conclusion does not fit with the structure of its argument.

\textsuperscript{129} This is especially true given the institutional inability of Congress to revise its statutes. Leventhal, \textit{Environmental Decisionmaking and the Role of Courts}, 122 U. PA. L. REV. 509, 515-17 (1974) ("Congress suffers the disability of severe time constraints which make it impractical to review numerous individual cases of decision making.").
Court's part to abdicate the more substantive review role it has exercised in the past.\textsuperscript{130} Thus, \textit{Chemical Manufacturers} may indicate the Court stands at a juncture. Either it must choose to follow \textit{Chevron} or it must back away from the formalistic review that that decision sets out. Until the Court does so, \textit{Chemical Manufacturers} will remain an uncertain precedent.

\textbf{CONCLUSION}

In reversing the Fourth Circuit's decision, the Supreme Court may be developing an increasingly formalistic approach to agency review. First stated in \textit{Chevron} and since expanded upon in \textit{Chemical Manufacturers}, this approach places a strict limit on courts not to set aside an agency's statutory construction unless Congress has in very clear and unambiguous terms expressed a contrary intent. At the same time, the Court seems to have expressed some misgivings with the standard of review set out in \textit{Chevron}.

\textit{Chemical Manufacturers} is significant in part because it demonstrates that the standard for what qualifies as a clear and unambiguous congressional intent is a rigorous one. Both the plain meaning and the legislative history of section 301(l) indicate that Congress did not intend to permit any modifications of the standards controlling toxic pollutants. Nonetheless, the Court did not find that there was a sufficiently clear and unambiguous statement of congressional intent to justify overriding EPA's interpretation of section 301(l).

At the same time, the less than unqualified reliance on \textit{Chevron} may indicate some uneasiness on the part of the Court with its application. The Court did not simply decide that EPA's interpretation was reasonable. It implicitly decided that it was also the right choice after interpreting, albeit incorrectly, the legislative history. Thus, \textit{Chemical Manufacturers} indicates that the Court has arrived at a crossroads. It only narrowly decided to defer under \textit{Chevron}, and it did so on grounds outside of its analysis. Where the Court will go from \textit{Chemical Manufacturers} is unclear.

\textit{William David Kissinger}

\textsuperscript{130} See supra text accompanying notes 105-07.