

A Growing Loophole in the Clean Water Act

I. INTRODUCTION

Environmentalists recently suffered a defeat when the U.S. Supreme Court handed down a decision that could potentially result in a long term weakening of the Clean Water Act. On February 27, 1985 the Supreme Court announced its decision in the consolidated cases of *Chemical Manufacturers Assn. et. al. v. National Resources Defense Council* and *United States Environmental Protection Agency v. National Resources Defense Council*.¹ At issue was section 301(1) of the Clean Water Act.²

Congress adopted section 301(1) as part of the 1977 amendments to the Clean Water Act. These amendments reflected Congress' new found concern about the dangers of toxic pollutants. Before 1977, two types of modifications were available to dischargers dissatisfied with industry wide discharge standards. Section 301(c) allows the EPA to modify an industry wide standard if a discharger makes an adequate showing that complying with such standard is not within the discharger's economic capability and that a less stringent standard would result in reasonable environmental progress. Section 301(g) allows a modification if the discharger can prove that a less stringent standard adequately protects water quality.

Section 301(l) disallows these exceptions with regard to toxic pollutants. It reads:

The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.³

In *Chemical Manufacturers Assn.*, the National Resources Defense Council (NRDC) sought a declaration that section 301(l) not only prohibited these statutory variances, but also prohibited the non-statutory "fundamentally different factor" (FDF) variances.⁴

1. 53 U.S.L.W. 4139 (Feb. 27, 1985).

2. 33 U.S.C. § 1311(1) (1982).

3. *Id.*

4. Briefly, the FDF variance results from setting discharge limitations by nationwide classes and categories of dischargers. Any interested party may seek an FDF if that party believes that a certain point source does not belong in a category because of fac-

In opposition, the EPA argued that section 301(l) only prohibits modifications to industry wide standards that are specifically permitted by other subsections of section 301, namely sections 301(c) and (g). FDF variances, the Agency claims, arise because of a different problem in administration and are not addressed by section 301(l).

II.

THE DECISION

By a slim 5-4 majority the Court overturned the Third Circuit Court of Appeals and held in favor of the EPA's interpretation of the statute. Absent any clearly expressed Congressional intention to the contrary, the Court ruled that the interpretation of the agency charged with administering the statute must be given deference.⁵ Although the dissenting opinion agreed that, absent Congressional intention to the contrary, the agency should be given deference, it argued that Congress did intend section 301(l) to apply to FDF modifications.

To reach its conclusion the Court examined the language of the statute, its legislative history, and finally, the underlying goals of the Clean Water Act. First, the majority concluded that the language of section 301(l) does not foreclose the EPA's interpretation. The word "modify," according to the Court, could have no plain meaning because that would lead to an absurd result.⁶ The EPA would not be able to amend its own standards, correct an error, or impose stricter requirements.

Without a clear indication of intent from the statutory language, the Court next examined the legislative history of the 1977 amendments. By pulling small excerpts from floor debates and committee reports, both the majority and dissent demonstrated the flexibility of a lengthy legislative history. Each side presented indications that Congress did, or did not, intend to include FDF variances under section 301(l). There is little use in discussing the merits of these arguments since the majority eventually retreated to the safe, and very defensible, position that the legislative history "does not evince an unambiguous Congressional intention to forbid all FDF waiv-

tors fundamentally different from those considered by the EPA in designing the category and setting the limitation. The FDF procedure will be discussed in more detail below. For a more complete explanation see the FDF variance regulation 40 C.F.R. section 403.13 (1984).

5. 53 U.S.L.W. at 4196.

6. *Id.*

ers.”⁷ Therefore, the court found no reason to overrule the EPA’s interpretation.

Finally, the majority faced the question that makes this case worthy of attention. Do the FDF variances frustrate the purposes and goals of the statutory scheme set up by Congress? The Court answered no. The majority viewed the dispute over whether to allow FDF variances as an inconsequential argument over the means used by the EPA to define subcategories of indirect dischargers. Since the FDF variances cannot be granted except to correct an improperly drawn category (by removing a point source that does not belong) and Congress intended uniformity within a category, the court ruled that the intent of Congress is not violated. The alternative to granting an FDF variance is drawing a new category under the rules of section 307(b) of the Clean Water Act. This procedure, the Court concludes, would lead to the same result, but would be less efficient. This reasoning is superficially appealing. The last conclusion, however, deserves close consideration. The FDF variance procedure and the section 307(b) rulemaking procedure may very well yield significantly different results both in the short run and in the long run.⁸

The dissent points to two reasons why the FDF procedure is less protective of the environment. First, a discharger is eligible for an FDF variance if he can prove that his production processes, and therefore his costs of compliance, are different from those taken into account in setting the categorical standards. However, no evidence would be presented about whether other dischargers are in the same situation, but use processes that make pollution control possible at a much lower cost. A section 307(b) procedure would require an examination of the industry for similar production processes and could set a standard much stricter than that adopted by an FDF mechanism.

In the long run, the FDF procedure would do less to encourage technological innovation. As demonstrated above, the section 307(b) procedure is more likely to require a discharger to meet stricter standards. Thus, 307(b) will compel dischargers to purchase new technology in order to meet the standard set by the “best” discharger. The resulting increase in demand for new tech-

7. *Id.* at 4197.

8. Among other things, § 307(b) requires a notice and comment procedure, data gathering on pollutants discharged by an industry, the processes employed, the treatment technologies used by the industry or available for use, the treatability of pollutants, and the economics of the industry. 33 U.S.C. § 1317(b).

nology, brought about by section 307(b), will create incentives for technological innovation. Such innovation should lead to more advanced technology and the possibility of further tightening of the pollution control requirements.

The dissent concludes that Congress chose to set standards by class and category, instead of point source, for the above reasons. To allow an FDF procedure would defeat Congress' intent to foster new technology and the most stringent standards possible.⁹ Stringent standards are even more important, the dissent reasons, when toxic waste is being discharged. Toxic waste deserves special consideration because small changes in the level of a pollutant can lead to large differences in water quality.

III. IMPLICATIONS FOR THE FUTURE

It is difficult to predict the number of dischargers that will take advantage of the FDF procedure to gain a variance for toxic pollutant discharge. Judging by past performance the number will probably be small. According to the EPA brief, by 1977 only fifty of four thousand major industrial dischargers under BPT limits had applied for FDF variances.¹⁰ Only two had been granted. By 1984 a total of four FDF's had been granted to direct dischargers and none to indirect dischargers.¹¹

More important than the interpretation of section 301(l), however, could be the Court's first indication that the FDF variance can be used beyond the limited context of its inception. Until this decision, FDF variances have been commonly thought to only be available for temporary BPT standards. The Clean Water Act designated that BPT standards be set by individual point sources, but the EPA believed that to be an impractical method and set BPT standards by class and category. In *E.I. duPont de Nemours & Co. v. Train*¹² the Court authorized the EPA to set BPT standards by class as long as there was a variance procedure (the FDF variance) to provide for dischargers who felt prejudiced by this process. The

9. The Clean Water Act requires that every point source eventually use the "best available technology" (BAT) to control discharge. 33 U.S.C. § 1311(b).

10. Before the *Chemical Manufacturers* decision, FDF's were thought to be available only to point sources governed by temporary BPT (Best Practicable Technology) standards. Further explanation appears in the text below.

11. 53 U.S.L.W. at 4195 n.12.

12. 430 U.S. 172 (1977).

opinion was commonly read to imply that FDF's were limited to this context.

The *Chemical Manufacturers* opinion, however, states that FDF's may also be permissible for BAT standards, even though the Clean Water Act designates BAT standards to be set by category and class.¹³ In fact, since the Court now views the FDF as an efficient corrective mechanism, the *Chemical Manufacturers* opinion seems to encourage the use of FDF's for any Clean Water Act standard set by category.

The Court has not been as receptive to FDF's in the past. For example, *Train* expressly forbids any variance procedure for New Source Performance Standards that are set by class. There, the Court overturned an appeals court ruling that advised the EPA to come forward with "a limited escape mechanism for new sources."¹⁴ The Court stated: "a variance provision would be inappropriate in a standard that was intended to insure national uniformity and 'maximum feasible control of new sources.'"¹⁵

After the decision in *Chemical Manufacturers*, *Train* will be read in a new light. The result may be a less stringent mechanism for assuring the cleanliness of America's waters.

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13. 53 U.S.L.W. at 4197 n.18.

14. 430 U.S. at 138.

15. *Id.*

