In the

Supreme Court of the United States

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,
Petitioners,
v.
RUSSELL E. TRAIN, as Administrator, Environmental Protection Agency,
Respondents.

Nos. 75-978
75-1473
75-1705

Washington, D.C.
December 8, 1976

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Washinton, D. C.

Wednesday December 8, 1976

The above-entitled matter came on for argument at 1:08 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT C. BARNARD, ESQ., 1250 Connecticut Avenue, N.W., Washington, D.C. 20036; on behalf of the Petitioners.

DANIEL M. FRIEDMAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1473, Du Pont against Russell Train.

Mr. Barnard, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT C. BARNARD, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BARNARD: Mr. Chief Justice, and may it please the Court:

These three consolidated cases present basic statutory issues as to the form and content of regulations under the Federal Water Pollution Control Act of 1972 for existing sources -- that is, existing plants -- and for new sources -- that is, new plants.

The regulations under which these issues arise concern the inorganic chemical manufacturing industry.

Petitioners in 978 and 1483 present the issue whether the regulations by EPA for existing plants shall be guidelines for effluent limitations as Section 304 (b) expressly commands, or whether EPA relying on an authority said to be derive by implication from Section 301 can override the provisions of Section 304 and issue effluent limitations which shall be mechanically cranked into every permit regardless of the circumstances or the conditions of the plant in the category.

The resolution of these statutory issues provides

the basis for the determination of the jurisdictional issue which is also present in these cases.

The question presented on the cross petition in No. 1705 relates to the issue of whether EPA's regulations should, as the court below held, provide a safety valve procedure, in the Court's words, enabling an individual plant to show that it's entitled to a variance from a single number standard because of the special circumstances of that particular plant.

There's no jurisdictional issue in 1705. The statute expressly provides for review in the Court of Appeals of new source standards.

The Federal Water Pollution Control Act of 1972 made radical changes in the manner in which both municipal and private plant effluents are controlled. The Court in the last term in the California case had occasion to consider this ACt in detail. I shall therefore merely thumbnail sketch the statutory plan.

Section 301 of the Act prohibits all discharges by plants except as the discharge is authorized and covered by a permit. Section 301 states, quote, "...to carry out the objectives of the Act there shall be achieved, by 1977, effluent limitations for point sources requiring installation of best practicable control technology currently available. For 1983 effluent limitations requiring application of best

available technology economically achievable."

Section 301 expressly provides that these requirements are to be defined and determined pursuant to regulations under section 304 (b) of the Act.

The primary means of achieving and enforcing effluent limitations is a permit procedure under Section 402 where the regulations are applied to individual plants.

The regulatory shceme for new sources is similar but has important differences. Section 306 of the Act directs EPA to establish standards of performance -- not guidelines -- for new sources which meet the statutory technological requirement of best available demonstrated control technology.

These standards are also applied to individual plants in the course of a permit process.

I will address first the issues that concern regulations for existing plants, and the jurisdictional issue which is related. I will then turn to the issues as they relate to the new sources on the cross petition.

Before discussing these matters, perhaps I should explain what appears to be the procedural complexity apparent in these cases.

The complexity arises because in February, 1974, about a year and a half after the statute was passed, EPA first announced its position that it had implied authority

to issue regulations under Section 301 establishing limitations. The regulations in the form of single number limitations would be issued, EPA said, under both Section 301 and 304 (b).

At the same time, EPA announced that since these regulations were to be issued under 301, the exclusive review provisions of Section 509 (b) would be applicable, and the 90 day period within which petitions must be filed would be equally applicable.

Petitioners disagree with EPA's view that it has implied authority to issue limitations which override or disregard the expressed commands in Section 304 (b) of the Act.

We likewise disagree with EPA on exclusive jurisdiction to review under Section 509.

However, because of EPA's announced position, petitioners filed the protective petitions for review in the Court of Appeals at the same time as the petitions for review of the new source standards were filed.

Petitioners also filed a complaint, inthe Western District of Virginia, challenging certain of the inorganic regulations that are here before the Court.

The appeal from the District Court was consolidated with the petitions for review in the Court below. The two proceedings on alternate jurisdictional bases -- the complaint in the District Court, and the petitions for review in the

Court of Appeals -- are both b efore this Court. Consequently there is no jurisdictional or procedural issue which stands in the way of this Court resolving the statutory question and the related jurisdiction problem.

With the procedural complexity out of the way, I'd like now to turn to the statutory issue.

In DuPont 2, the Court below characterized the statute as quote vague, uncertain and inconsistent, and described the Court's objective as somehow making EPA's position workable with the statute -- the Court's word was workable.

We suggest that if the Court had focussed more on the words of the statute and less on the quasi-legislative function of trying to make EPA's position somehow workable to the statute, it would have found the statutory plar relatively straightforward and non-complex.

QUESTION: Well, do you suggest that the workability is not a factor that a court takes into account when it examines a statute?

MR. BERNARD: I believe a court should consider workability obviously. But the court should look to the words of the statute, not to see whether it can accomodate something and make it workable in my suggestion. And the words of the statute are not designed to make something workable. The words of the statute are the command which the court and EPA

should follow.

And I would turn to the words of the statute, which I believe dmonstrates that the Court's practical consideration disregards the words of the statute.

QUESTION: Would you carry that to the point where if, pursuing that course would determine the statute was unworkable?

MR. BARNARD: I suppose it could happen thatthe statute could be determined to be unworkable. I don't think that's the situation here at all.

Section 301, as I've said earlier, subsection (a), forbids all other charges, unlessthey are permitted under the law.

Subsection (b) lays the foundations for the regulations for all existing sources. To carry out the objectives of the Act, the subsection says, there shall be achieved, by 1977, effluent limitations requiring 1977-level technology; and by 1983, effluent limitations requiring 1983-level technology.

It is significant that Section 301 is written in the passive voice -- objectives to be achieved. Its only reference to regulation is the specific reference to regulations under Section 304 (b). The technological requirements are to be defined and determined quote in accordance with regulations issued by the administrator under Section 304 (b).

304 (b), to which 301 refers, contains the direct

statutory command that within one year, the administrator shall publish regulations providing guidelines for effluent limitations. And Section 304 (b) contains detailed instructions as to what is to go into these regulations. It provides that the regulations shall do two things; first, subsection (1) (a) and (2) (a) provide that the administrator shall identify in specific terms the degree of reduction in pollution that can be achieved or is attainable by the application of 1977-level technology in one case and 1983 technology in the other.

This is to be accomplished for classe s and categories of point sources.

Second, subsections (1) (b) and (2) (b) direct how the regulations are to be applied to plants within the classes or categories. Regulations shall specify the factors to be taken into account in determining control measures applicable to point sources within the classes or categories.

The statutory command is even more concrete, because it lists the factors which are to be specified in the regulations, and to be taken into account in framing permits under Section 402.

EPA asserts that its permit officers are to apply the factor --

QUESTION: Mr. Barnard, the statute doesn't specifically

refer to Section 402 which you just quoted, does it?

MR. BARNARD: No, it does not.

QUESTION: It just talks about effluent limitations.

MR. BARNARD: Yes, sir. Section 402 (d) refers to guidelines, but it does not -- there is not a specific cross-reference, yes, your honor.

EPA says that if the permit officers are to apply the factors, this will lead to wholesale reconsideration of the factors in the permit process.

We believe EPA's assertion confuses the role as to the factors and EPA's role and the permit officer's role.

Obviously, EPA must consider the factors in specifying them in the regulations. The permit officer uses EPA's explication of the factors as the basis for applying, not reconsidering, the factors.

The Congressional intent that these factors, to be specified by EPA, would be used by permit officers in the permit process, is indicated by the fact which the court below noted that a number of the factors are -- such as age of the plant -- are really relevant or applicable only to a particular plant.

One of the clearest confirmation s of the Congressional intent that this was the pattern to be followed is found in the conference report, the paragraph quoted in page 55 of our brief and discussed at length in all of our briefs.

The report referring to Section 304 (b) which

records the Congressional intent that limitations within a category are to be a s precise as possible, are to be precise in order that the limitations will be as uniform as possible.

EPA focusses sharply on the word, uniform, and disregards the explanation in the report that uniformity does not mean identity.

To the contrary, the report explains what Congress meant. Similar point sources, Congress said, with similar characteristics would be subject to similar limitations. It is precisely this similar treatment which Section 304 (b) is designed to accomplish.

And the factors are specified in the regulations. An officer will be able to select, in the permit process, limitations for plants which have similar characteristics, with the result that they will be treated similarly. This is true uniformity.

Section 301 of the Act says the objectives to be achieved are: effluent limitations requiring 1977 or '83 level technology. The definition of effluent limitations is instructive. Section 502, 11 says that effluent limitations means a restriction on discharges from point sources established by a state or EPA including statutes of compliance. A state clearly cannot establish effluent limitations except in the permit. And a schedule of compliance obviously relates to an individual permit.

Indeed, it was EPA's effort to change the definition in the regulations -- subsection 11 (i) of the general provisions -- by deleting the references to the restrictions established by a state and by deleting a reference to the schedules f compliance which led the Court below to set EPA's definition aside.

The regulations before the Court are entitled quote Effluent Limitations Guidelines for the Inorganic Chemical Manufacturing Industry. The term "effluent limitations guidelines" is not a statutory term, but it is defined in EPA's general regulations, subsection (j). Subsection (j) provides quote, the term effluent limitations guidelines means any effluent limitations guidelines issued by the administrator pursuant to section 304 (b) of the Act.

EPA's brief does not refer to this definition, nor to the fact that the general provisions nowhere speak of regulations under Section 301 of the Act.

The definition in the general provisions is in fact a confirmation of the announcement that EPA made in 1973 in what it called A Notice of Proposed Rule Making. And it referred there to effluent limitations guidelines and standards of performance pursuant to 304 (b) of the Act and 306 of the Act.

The announced purpose of the notice was to

facilitate comment on rules to be published under Section 304 (b) and Section 306. No reference to regulations under Section 301. And the proposed inorganic regulations were published in October, 1973. The preambleexpressly stated with respect to existing plants, quote, the regulations proposed herein set forth effluent limitations guidelines pursuant to Section 304 (b) of the Act. Again, not a word about 301 regulations.

When the final inorganic regulations were published, in March, 1974, the preamble referred back to the proposed regulations for the statement of the legal bases. EPA now asserts that in both the proposed and the final regulations it gave notice that the regulations were issued under Section 301.

Section 301 was paraphrased in both the notice in 1973 and inthe preamble to the proposed regulations. The preamble to the final regulations contains the statement that the regulations were issued pursuant to Sections 301, 304, 306 and 307. But at the same time it refers back to the proposed regulations for the statement of legal bases for the regulations, which was Section 304 (b).

The final regulations also incorporate the general provisions which define effluent limitations guidelines to be 304 (b) regulations.

The assertion in EPA's brief that 301 was cited

as the authority, I think, will not withstand the examination of the record.

At most, it is an acknowledgement by EPA that 301 and 304 are related, because 301 directs that regulations shall be issued under 304, and 304 directs that effluent guideline limitations shall be issued.

We suggest that the specific words, effluent limitations guidelines, as they are defined inthe general provisions, and the words in the preambles to both the proposed and final inorganic regulations, concern EPA's contemporaneous interpretation of this ACt, that its job was to issue regulations in conformity with Section 304 (b)'s commands,and that that was what it said it intended to issue.

EPA has not virtually abandoned its February, 1974 contention that the regulations are issued under both 301 and 304. EPA now says that guideline regulations should be -- or regulations should be issued under Section 304 (b). It acknowledges that no such regulations have been issued -- and I believe the word it uses is -- formally.

It now asserts that it has complied with the substance of Section 304 (b) by issuing a voluminous development document and economic report. I'd like to talk about that in just a moment.

EPA now argues that it has authority to issue single number limitations by regulations to be cranked into

a permit by rote, and that this authority is derived, by implication, from Section 301.

It asserts an administrative convenience as the basis for this decision, and a fear of laxity by the state.

We suggest that EPA is wrong both on policy and on legal grounds in this position.

On policy grounds, EPA -- Congress specifically decided that the major responsibility for controlling pollution within a state shall fall upon the state. This policy is confirmed expressly in section 101 of the Act. Section 402 which sets up the permit system provides for transfer from the administration the permits to the states as soon as they satisfy certain conditions in the statute. And 26 states, I believe, have now satisfied those conditions.

EPA's decision to issue single number limitations for -- because of some fear of state laxity reduces the states to a role of a scrivener. Whatever EPA fears amount to, and we submit that they are baseless because of the statutory provisions for review, this reduction of the role of the state is in contravention of Congress' intention that the states shall have a major role in control and administration of pollution regulations within their states.

To understand how EPA's power by implication position does violence to the statute, it is necessary to go back a little bit and look at the statutory plan again. Section 304,

as I said, mandates that EPA shall issue regulations for effluent guidelines which shall identify by category the degree of reduction attainable by application of 1977 or '83 technology, and shall specify the factors applicable in determining control measures for particular point sources within the classes and categories.

The statute lists the factors to be specified; these include: age of facility; process employed; engineering aspects of the application of the control technology; non-water quality considerations, specifically, energy requirements; and cost-benefit for 1977; and process changes for 1983.

The legislative history of the Act, and particularly the Senate report, make clear that what Congress was thinking about was the enormous variety of existing plants. And that they wanted guideline regulations that would contain ranges of numbers for each category, and a specification to guide the permit authorities in selecting the appropriate number in the range.

In our brief, we have used the word flexibility in describing regulations which comply with the command of Section 304 (b). Flexibility in this context means only that the permits will be tailored to the particular situation of a particular plant in light of the factors. It does not mean that either the regulations or the permit officers can

deviate from the technological requirement in Section 301: application of best practical control technology for 1977, and best available for 1983.

Flexibility means that the permit officer will be guided by the regulation in selecting the control technology or control measures for a particular plant which meets the respective 1977 or 1983 requirements, rather than force fit a single number limitation on a plant regardless of its special circumstances. This, we think, is exactly what the Congress meant when it said in the conference report, similar plants with similar characteristics shall be subject to similar limitations.

QUESTION: Mr. Barnard, could I interrupt with just one question?

MR. BARNARD: Sure, sure.

QUESTION: As I understand your basic theory, it is that 304 authorizes guidelines. And pursuant to the guidelines, permits will be issued under Section 402.

MR. BARNARD: That's correct, sir.

QUESTION: And that there's no authority in the EPA to issue limitations pursuant to 301.

MR. BARNARD: That's correct.

QUESTION: But what do you do with the language of 509 (e) which specifically says there's Court of Appeals review in approving or promulgating agency action, approving

or promulgating any effluent limitation or other limitation under Section 301?

MR. BARNARD: I think those words are reasonably clear, your honor. Number one, so far as approving is concerned, that word stems from the fact that the statute that was originally passed required EPA to approve each state permit -- state-issued permit -- before it became valid.

The approving language enabled that action by the administrator to be reviewed in the federal courts.

The limitation language in there clearly refers, in our view, to Section 301 (c), which authorizes the administrator to deviate from the requirements of 1983 on a specific finding set forth in Section 301 (c). In order to have that reviewed, the language had to be in the statute dealing with limitations under Section 301.

EPA assigns no meaning to the word "approving" as it appears in that section, and, indeed, if EPA's construction is correct, it refers to limitations under Section 306, then the limitations words in subsection (f) are actually a

#243 duplication under subsection (a) which deals with new source standards without purpose or without affect.

It seems to us clear that that authorizes -- provides no authority for the kind of general limitations that EPA has issued which override the commands of Section 304 (b).

QUESTION: Well, you've addressed yourself to the

word "approving" but not to theword "promulgating".

MR. BARNARD: Promulgating the effluent limitations under Section 301 (c), your honor. 301 (c) provides that the administrator may vary the requirements of the 1983 level, and the requirements of the 1983 level are set out in subsection (b) which directs that it shall be determined pursuant to regulations under section 304 (b).

In order to review those limitations, the statute had to provide for this kind of review.

QUESTION: Well, do you read 301 (c) as providing for general deviations or specific -- with regard to specific permits?

MR. BARNARD: The statute says -- requires a finding which would make it difficult except to make a finding in terms of a relatively specific plant. But it's conceivable that findings could be made for more than one.

QUESTION: But the language is, the administrator may modify the requirements of subsection (b)(2)(a) of this section with respect to any point source for which a permit application is filed.

I thought it kind of dealt with the specifics rather than the general.

MR. BARNARD: Well, it talks about any plant. And it requires a specific showing with respect to that plant, both technological and economic .

QUESTION: But in any event, it's 301 (c) thatyou say is all that is really referred to in the words "approving or promulgating any effluent limitations or other limitation under Section 301.

MR. BARNARD: We say that with respect to the word "promulgating". With respect to the word approving", I suggested that it has a broader purpose of providing for a review in the federal courts of actions by the administrator in approving permits that are issued by the states.

QUESTION: Thank you.

MR. BARNARD: EPA's position, in reality, using its implied authority, is an attempt to amend the statute and change the statutory plan. Section 304 (b) says that the factors to be specified are to be taken into account in determining the control measures applicable to point sources within the classes. EPA now says it has under its applied authority -- it may issue single number limitations to be mechanically put into the plant -- put into the permit for the plant; and that it can disregard the statutory command in Section 304 (b) to specify the factors which will guide the permit officers.

In effect, this is a repeal pro tanto of section 304 (b) by a power said to be implied in Section 301. EPA places great reliance on Section 301 (c), which was just referred to. Section 301 (c) authorizes the administrator

to modify the requirements of subsection 302 (a), which is the 1983 step, on a factual and economic showing. But the section speaks of requirements. It does not speak of limitations to be issued under the Section 301.

The requirements specified here are that the effluent limitations which require the application of the technology as determined by regulations under Section 304, that's what the section is speaking of. The section was designed to permit the administrator not to provide variances, but actually to provide a deviation from the 1983 technological standards.

Without that authority, he could not have provided a deviation based on the findings which the statute speaks of.

Section 301 (d), which EPA does not mention in its brief, like Section 301 (c), also contains a specific cross-reference to the procedure, the standard to be explicated by regulations under Section 304 (b).

Section 301 (d) provides for review every five years of any limitation required under paragraph (b) (2), (that's the 1983 step).

The procedure for the limitations -- for the review of the limitations is carefully identified. The revision is to be pursuant tothe procedure set out in paragraph (b) (2). This cross-reference is to the procedure

set out in paragraph (b) (2), which is regulations under Section 304 (b).

The legislative history confirms that this section was designed to deal with the period after 1983. The permits normally last five years. They need to be reviewed. The statute provides for 1977 or '83 technological requirements. Beyond that, you're to move toward no discharge.

This section contemplates that as the permits come up for renewal on a five year term, they will be renewed subject to the regulations under 304 (b) which are then in effect; in short, the most up to date regulations will be applicable to those permits as they are reviewed.

EPA now acknowledges that there should be regulations under Section 304 (b). It asserts that the length development document and economic report comply in substance with the mandate of Section 304 (b).

There are two basic objections to this. 304 (b) directs that regulations provided in guidelines for effluent limitations shall be issued -- not discursive documents that have no legal effect. Secondly, these documents perform none of the functions of guideline regulations, because they provide no guidance to permit officers. EPA says it has issued limitations which must be cranked into the permit. There' s no guidance to the officer except to crank them into the permit.

EPA makes four additional and I suggest non-consistent arguments on the matter of the from and contents of the regulations.

In the preamble, EPA says that Section 304 (b) provides for guidelines to implement the standards of Section 301, all by itself, an interesting term. Congress thus recognized, EPA says, that quote some flexibility quote was necessary to take into account the complexity of the industrial world. To achieve that flexibility, EPA put into the regulations for each subcategory a standard clause authorizing the administrator to grant a modification of the single limitation upon a showing thatthe factors applicable to a particular plant are fundamentally different from those considered by the administrator.

This provision, EPA says, provides the flexibility which the statute contemplated. Three courts have disagreed: the court below, the 3rd Circuit and the District Court in the Grain Processing case. The 2nd Circuit held that without some variance provision the scheme of limitations could well founder on the rock of illegality, but it postponed a decision as to the validity of the particular variance clause to the facts of a particular case.

We suggest that this narrow variance clause should not be debated for the reason that it is surplusage. Moreover in August, 1974, EPA announced that it was rethinking the

variance clause, and asked for public comment on the variance clause. EPA has not revealed the results of that re-examination.

EPA is correct, in our view, that the Congress did intend some flexibility. Indeed, it went further. It specifically provided for the flexibility. If EPA had complied with Section 304 (b) by specifying the factors to be taken into account in determining the limitations in a permit, there would be no need to devise a narrow variance clause. The statute itself determines, in specific terms, the flexibility which Congress said was permissible. And that's Section 304 (b).

Second, the EPA said it considered the factors in setting up the subcategories in these regulations, and thatthe factors justified no further subcategorization.

The issue is not further subcategorization, but whether EPA can ride roughshod over the command in Section 304 (b) that it specify the factors to be taken into account in determining the control measures for plants within a category of class.

Third, EPA says that its regulations provided ranges because limitations -- different limitations had been fixed for different subcategories. But the fact that there are different numbers for different categories does not create a range that Congress contemplated, as the 3rd

Circuit correctly pointed out. A range made up of different numbers in different subcategories is no guidance to a permit officer in determining control measures for a plant within a single category. A limitation applicable to a plant manufacturing sodium silicate in the sodium silicate subcategory is not relevant in any way to determining the limitations for a plant manufacturing titanium dioxide in the titanium dioxide subcategory.

Fourth, EPA also takes the position that there is an implicit range in each subcategory from the specific limitation number down to zero. But this range is, as the 3rd Circuit, again, we think correctly, held, is an illusion. No factors are specified to enable the permit officer to select a number within this quote range. More basically, the record doesn't provide any support for a number down to zero, when the number EPA selected, based on the record, is a number above zero.

Finally, EPA says that there is great administrative convenience in having single number limitations. It's easier to administer. And it refers to the use of uniform in the conference report.

Whatever the administrative convenience is concerned, it cannot override the commands of section 304 as explained inthe conference report, that similar plants with similar characteristics shall be subject to similar limitations.

This emphasis by Congress on the similarity of treatment is easily understood. When Congress was developing the 1972 Act, EPA was well along in developing the so-called permit program under the Refuse Act. Congress was well aware of the fact that EPA had prepared what are called guidance documents. These guidance documents recognized the range of plants in the industry, and established ranges of parameters by subcategories.

Some of the guidance documents actually referred to the factors. Others, the inorganic guidance documents, says that EPA will provide a technical briefing so that the permit officers will understand how the factors are to be applied in the course of issuing permits.

And it's this same regulatory pattern which we believe the Congress had in its mind when it adopted Section 304 (b) providing for guidelines. Indeed, the regulatory pattern continued after the Act was passed to assist the permit officers in the interval before new regulations were issued. EPA in May, 1973, directed thatthe guidance documents would be used by the officers in issuing permits quote until effluent limitations -- until effluent guidelines are promulgated under Section 304.

This reference to effluent guidelines under 304, and the character of the guidance documents themselves are further evidence of the contemporanceous construction

that EPA gave to this statute.

Now, this pattern was abruptly changed in February, 1974, when Assistant Administrator Kirk's memorandum was made public, a memorandum that announced the new theory that the regulations would provide limitations in reliance on implied authority under Section 301.

This about face by the administration in the midst of the regulatory process demonstrates that there had been no consistent administrative interpretation to which this court should defer. To the contrary, such an about face means, we suggest, that the current administrative position provides very little guidance to what the statute means and to how it should be interpreted.

There are other provisions in the Act which confirm that EPA's current position is wrong, and that Congress intended the regulatory structure to be based on guidelines under Section 304 (b).

Section 515 of the Act creates a distinguished scientific review committee. EPA was directed to send proposed regulations to this committee for review in advance of publication. Section 515 refers specifically to regulations under Section 304 (b). It does not refer to regulations under Section 301.

It's difficult to believe that if Congress had intended regulations to be issued under Section 301, which

override the provisions of Section 304 (b), it would not have provided for their review by the advisory committee. All the other major regulations -- pre-treatment standards, new source standards -- are mentioned along with Section 304 (b), but there is no reference to Section 301 regulations in Section 515.

EPA not only fails to mention 515 in its brief, but also fails to discuss the advisory committee's review of the inorganic regulation, characterizing them as quote unscientific. The committee said, among other things, the regulations fail to take into consideration great differences in the individual facilities. Also, that EPA disregarded the instructions in Section 304as to the cost of application of practicable and available technology, especially for small plants in the industry.

QUESTION: Mr. Bernard, on this 515 argument, as I understand it, you don't challenge the EPA's authorities to issue general limitations for new sources.

MR. BERNARD: No, sir. The statute commends it.

QUESTION: Does the advisory committee have authority to review the regulations relating to new sources?

MR. BERNARD: The statute says they shall be submitted to the committee.

QUESTION: I see. The new source ones and the guidelines, but not the existing source ones?

MR. BERNARD: That's correct.

QUESTION: I see.

MR. BERNARD: The Court below came a long way toward recognizing the statutory plan based on guidelines issued under Section 304 (b), guidelines to be applied in the permit process.

However, its concern with what it called practical considerations, and its desire to find what it thought was a workable interpretation of the statute, led to a compromise which we believe does not comport with the words of the statute.

EPA, the court held, can combine regulations under Sections 301 and 304 and issue limitations by regulation, the court said. But the court was not willing, as EPA would like, to read Section 304 out of the Act.

The limitations, the court concluded, are presumptively applicable. That is, the regulations are to be applicable unless the presumption is rebutted.

The reference, the court said, to 304 (b) in Section 301 means thatthe Congress intended that the factors set out in Section304 (b) were to be applied by the permit officer in determining whether the presumptively valid regulations shall be applied to a particular plant.

The Court stopped short of requiring, as the 3rd Circuit did, that the factors be set out in the regulations.

And we believe this is what Section 304 (b) commends.

The compromise by the court below, on what it called practical grounds, moves a long way from EPA's rigid interpretation of limitations to be cranked in by rote to permits. But it falls short of compliance with Section 304 (b), and in our view EPA should be directed to comply with Section 304 (b).

This brings me to the jurisdictional issue which has already been discussed, at least in response to questions from Justice Stevens. EPA places great emphasis on subsection (e) which Justice Stevens referred to. It refers to review of the administrative action in approving or promulgating effluent limitation under Section 301, 302 or 306. I've indicated that I think the approving language was in there to provide for review in federal courts of action by the administrator in reviewing state-issued permits, and the promulgating language was there to deal with the situation of Section 301 (c), where the administrator is authorized to grant deviations from the 1983 requirement on a specific finding.

We believe it's clear that under the normal course regulations under Section 304 (b) would be reviewable in the district court. Thestatute contemplates that they be issued at different times than the new source standards. There is no question thatthe review of new source standards

is in the Court of Appeals, subsection (a) of 509 (b)(1) specifically so provides.

However, we believe that this is an appropriate case for this Court of conclude that the Court of Appeals had pendant jurisdiction to review the guideline regulations at the same time as it reviewed the new source standards. As it turned out, they were issued on the same record, at the same time, and the issues that arise, the technical issues, are substantially the same. It is therefore, in our view, an appropriate case for this Court to conclude thatthe court #400 below has pendant jurisdiction. This is different from exclusive jurisdiction, and would not invoked the 90-day clause as a penalty on those who, in relaince on the statute, did not file within the 90 days.

I now turn to the cross-petition in 1705 in which the government seeks review of the holding by the Court below that EPA should insert in the new source standards what the court called an escape valve, which would enable permit officers to make adjustments in the requirements of the single number standards to take into account the special circumstances of a particular new plant.

QUESTION: Mr. Bernard, may I ask you one further question --

MR. BERNARD: Certainly.

QUESTION: -- on the first part of the argument,

just to be sure I have it in mind.

Your view, you stressed the passive language in 301 (b) that there shall be achieved effluent limitations by such and such a date. But your interpretation of the words "effluent limitations" in 301 (b) (1) (a) is that that's the aggregate of all the individual permits that shall be issued, is that right?

MR. BERNARD: Correct.

QUESTION: I just wanted to be sure.

MR. BERNARD: Yes, sir. And I think if you look at the second class -- or the second clause, which refers to effluent limitations from municipal plants, which are to require -- are required to implement new source standards, you can't very well have regulations for limitations that implement new source standards.

QUESTION: I'm sorry, I didn't follow. To what did you just refer?

MR. BERNARD: The second clause, which deals with municipal plants, directs that effluent limitations are to be achieved from municipal plants which require compliance with applicable pre-treatment requirements. And since pre-treatment requirements are to be standard, issued under another section of the statute, it makes no sense to speak of effluent limitations by regulation to require application of pre-treatment standards which are also to be

set out pursuant to another section of the statute.

QUESTION: Well, unless it was intended to be a flexible term, covering both the general requirement and an aggregate of specific requirements. Imean, one could read it that way.

MR. BARNARD: Well, since it is in the passive, you can find, it seems to me, the Congress using both words together to refer to the program to be implemented under Section 304 (b) so far as existing plants are concerned, and under 306 or 307 as far as new source standards or pre-treatment standards.

QUESTION: The heart of your argument, as I understand it, is that there's expressed authority in 304, there's an absence of expressed authority in 301, and we should not imply authority from the somewhat ambiguous language in 301.

MR. BARNARD: And as a policy matter, it hsouldn't be implied because the Congress looked at the variety of existing plants and set up a structure that was designed to deal with that variety and do what I've repeated three times, to see that similar plants with similar characteristics get similar limitations.

QUESTION: I think I understand.

MR. BARNARD: And to have single number limitations that override that plan, we think, is not in conformity with

what the Congress had in mind.

Now, the escape valve which the court had in mind below is not like Section 301 (c) which authorizes a deviation from the 1983 technological requirement. The standard for new sources is best available demonstrated control technology. The escape valve envisaged by the court below would merely authorize the permit officer to deviate from the single number limitations that are in the standards, so long as he selects a limitation which requires application of best available technology for that particular source.

Without such authority, new sources -- many new plants will not be built. We suggest, as the Court below is correct, that EPA cannot foresee, in a single number standard, all of the circumstances in all of the new plants, and provide for them in a single number. Theescape valve is necessary to make new plants built.

QUESTION: Mr. Barnard, let me ask just one more. I'd rather catch you while you here, before I lose all this.

The review provisions authorize the Court of Appeals to review the new source standards.

MR. BARNARD: That's subsection (a).

QUESTION: Subsection (a) under the -- any action under 307, in other words.

MR. BARNARD: 306.

QUESTION: 306, right. And also 307.

MR. BARNARD: And also 307 for pre-treatment.

QUESTION: Those are both general in nature and there's review in the Court of Appeals.

You say there's comparable importance to the general guidelines authorized by 304. But there's no direct review in the Court of Appeals of action taken under 304.

MR. BARNARD: That's correct.

QUESTION: How do you explain the -- and when you attach the similar importance to 304 as you do to 306, how do you explain that disparity in the review provision? If the whole thing fits together so well?

MR. BARNARD: Your honor, it may well be that if I had my own druthers, or my own preferences, I would have elected that the review be in the Court of Appeals. But my druthers are not very important. The Congress did not make that election.

QUESTION: You think there was a mistake by Congress, or part of the comprehensive integrated plan?

MR. BARNARD: Well, as it turns out, it became part of a plan. They contemplated that those regulations would be issued at a different time than the new source standards, and under different circumstances. They gave them a different time sequence to do it. And it seems to me that the second thing that should be borne in mind is that the new source

standards are made independently enforceable. The guideline regulations are not. And it's not suitable that regulations that contain ranges and factors should be independently enforceable. It's the permit that contains the effluent limitation that's important.

QUESTION: No, but you stress the importance of the guidelines as letting the permit issuing officer know what to do --

MR. BARNARD: That's right.

QUESTION: -- so that they are of some significance under your theory of the case.

MR. BARNARD: Oh, there's no doubt. And I agree completely with the 8th Circuit that these regulations should have clout, and they do have clout. EPA can review -- it not only controls its own permit officers, but it can review state-issued permits to be sure they are within the guidelines that the statute contemplates.

QUESTION: Thank you.

MR. BERNARD: To return to the escape valve, Section 402 (k) of the Act, we believe, contemplates that such adjustments will be made, because it says that compliance with the permit shall be compliance with the requirements of Section 306. The logic of that subsection is that escape valve adjustments were in contemplation by the Congress.

But even if section 402 (k) were not in the law,

the case establish the principle that an agency may establish general pricniples or general standards, but it has an obligation to look to the facts in a particular case in light of the statutory standard and objective.

This is really almost an element of due process. General provisions can be fatally arbitrary, without some
#454 kind of quote escape valve. The Weller Act didn't leave this to interpretation. It specifically provided in Section 402 (k) for such an escape valve.

These cases present a rather unusual situation for the Court. It's unusual that an issue of statutory construction is being presented to this Court at a time when the EPA has just launched a major review looking to reissuance of 1983 step regulations and new source standards, pre-treatment standards, for 21 major industry categories, including inorganic chemicals.

The 1977 step permit process is virtually finished. Permits are issued. The question turns now on the renewal, onto the 1983 step regulations.

Thus, the Court's decision will come at a time when the regulations are in their inception, rather than at the conclusion of an on-going process, that is now under way for review and reissuance of all these regulations.

EPA's review was undertaken pursuant to an agreement signed in June of this year with Natural Resources Defense

Council and others to settle four lawsuits filed in District Court against EPA.

The Federal Register for November 24, 1976, contains a reference to this review. It contains an invitation for the public to participate in what EPA calls the development of major EPA environmental regulations, and lists, on several pages, the regulations under consideration.

On page 51865, it lists the 24 industry categories
468 under the following heading: proposed effluent guidelines are now being revised for review of best available technology -- that's 1983 -- in the following source categories. Then it lists the 21.

It is perhaps a little more than interesting that out of the litigation context they call them guidelines. This same notice refers to the review that I mentioned earlier undertaken in August, 1974, of the variance clause. And it says: proposed variance regulations. Regulations establishing procedures for obtaining variances from best tactical treatment requirements and adopted effluent guidelines. Again , it's interesting that they call them guidelines.

We suggest that the Court should reverse the decision below, and direct EPA to follow the requirements of Section 304. We suggest also that this is an appropriate case for the Court to conclude that the Court below had pendant jurisdiction to review the regulations, since they

were issued on the same record at the same time as the new source standards which were before the Court.

We think it's appropriate in this case because of special circumstances in the case.

In the cross petition dealing with the new source standards, we urge the Court to affirm the decision below.

Thank you, your honors.

QUESTION: Mr. Barnard.

MR. BARNARD: Yes, sir.

QUESTION: I've forgotten. Did you argue the 8th Circuit Case?

MR. BARNARD: Yes, sir.

QUESTION: That means you were disappointed when the other circuits went the other way, weren't you? Am I
480 correct, was the 8th Circuit the first one to come down?

MR. BARNARD: Yes, sir. There were other cases argued at about the same time, but the 8th Circuit was the first one announced, yes, sir.

QUESTION: Were you in the 3rd Circuit?

MR. BARNARD: No, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Barnard.

Mr. Friedman.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. FRIEDMAN: Mr. Chief Justice, and may it please

the Court:

As this Court pointed out last term in the California case, in the 1972 amendments Congress made a rather sharp change in the methods for dealing with the serious problems this country faces in connection with water pollution.

Previously, the method for dealing with this had been focussed on achieving certain qualities of the water, that is, looking to the end product, the water, and trying to reduce the level of pollutants in it.

In the 1972 amendments, Congress shifted from that primary emphasis to an emphasis on achieving strict effluent limitations, restrictions on the amount of pollution discharged into the water. And it further imposed very strict time schedules: 1977 for the first level, 1983 for the second level, with the hope, the ultimate objective set forth in the declaration of goals that by 1985 pollution of this country's water would be terminated.

Now, the legislative history of these amendments shows a clear congressional intent that this required the establishment of uniform effluent limitations on a national basis.

The theory that petitioners urge before this Court, that all the administrator is to do is to promulgate general guidelines which will specify ranges of permissible pollution

that will detail particular factors that the issuers of permits are to consider in issuing permits, we think would seriously jeapordize and thwart the entire congressional plan.

Instead of there being uniform effluent limitations on a national basis, what you would have is the establishment of effluent limitations in each of approximately 40,000 or 50,000 proceedings looking to the issuance of a particular permit. As I will explain later, we do not suggest that these effluent limitations of the administrator are to be mechanically cranked in to the permits. The permit issuers are not to be mere scriveners, as petitioner described. As I'll explain, the states will have a very major role in issuing permits under the administrator's theory.

But if the petitioners are correct, if that's all the administrator can do, it seems to us it will thwart the basic congressional objectives of achieving these pollution limitations, and hopefully, termination of pollution by the stated date, which can only be achieved through uniform national standards. And it's going to bevery difficult, almost impossible, to have uniform national standards if each of the dozens of permit issuers has a wide variety in passing on the application of the rather generalized guidelines to particular permits.

We think the administrator's interpretation, that

he does have authority under Section 301 to promulgate binding effluent limitations, an interpretation which, I point out, has been adopted by six of the seven Courts of Appeals that have considered the problem, does effectuate the Congressional purpose to achieve these effluent limitations speedily.

We think this is precisely what Congress intended. We shall argue that this is confirmed by the language of the statute, by the scheme fo the statute, and by the legislative history. And it represents the administrative interpretation of the statute by -- in the language in

#510 Udall v. Tallman -- of the officials charged with setting the machinery in motion, of making the parts work effectively and smoothly while they are yet untried and new.

And that kind of an interpretation is one to which the Court traditionally gives great deference. And last term in the California case the Court recognized the appropriateness of such deference in interpreting this highly complex and technical statute.

Now, I will shortly in my argument come and answer the contention that the administrative interpretation first appeared shortly before the regulations were issued. It's our submission that he has taken this position that he is going to act under both 301 and 304 from the outset of the effectiveness of this statute.

Now, we have set out in our brief a number of the statutory provisions which we think show that Congress intended the Administrator to have this authority. Many of them are very technical and not particularly suitable for oral presentation. They involve cross-references back and forth. But there are three or four that I'd like to refer to which we think clearly recognize the authority of the Administrator to promulgate these binding effluent limitations. And the source for this is the Administrator's general authority, under Section 501 (a), to prescribe such regulations as are necessary to carry out the Administrator's functions under this Act.

Now, the first provision to which we refer is Section 301 (e). And we have filed with the Court the paper edition of the statute. It's unfortunately terribly long and terribly complicated, but I will refer to the particular pages of this pocket pamphlet in dealing with them. This is on page 30 of the statute, Section 301 (e).

Now, what it states is, effluent limitations established pursuant to this section or Section 302, which deals with water quality control, shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act.

Now, it speaks of effluent limitations established pursuant to this section. But the permits -- the permits are

not issued pursuant to this section. The permits are issued pursuant to section 402. And it seems to us this recognizes that something other than an effluent limitations --

QUESTION: You've lost me. Page 30, where on page 30?

MR. FRIEDMAN: Page 30 at the bottom of the page, subsection (e), last paragraph.

QUESTION: Thank you very much.

MR. FRIEDMAN: This, it seems to us, indicates that what is being spoken about here in effluent limitations established pursuant to this section is something other than effluent limitations established in permits.

The same thing is true, we think, with respect to subsection (c), which is two paragraphs above subsection (e), which authorizes the Administrator to modify the requirements of subsection (b), which deals with the effluent limitations, in case of any application for permits filed after July 1, 1977.

Well, if the only way that the effluent limitations are to be established is through the permits, there was obviously no need to give the Administrator the authority to waive any limitations. This again, it seems to us, clearly contemplates that there will be established effluent limitations separate and apart from the permits.

Now, Mr. Barnard has suggested in dealing with the

provision in Section 501 (b) (1), which is set out at page 77 of the statute, that when the statute says there may be review had of the action of the Administrator, in approving or promulgating any effluent limitation or other limitation under Section 301 and 302, et cetera; all that refers to is his action in granting an exemption under 301 (c).

Well, first of all, it seems to us the language is much broader than that, and there's nothing in anything of history of this suggesting such a limitation. But that argument ignores the very next subsection of this paragraph which also provides for review of the administrative action in issuing or denying any permit under Section 402.

And it seems to us that if the only way that effluent limitations were to be established was through permits there would be no need for these two paragraphs. Because if they were only to be established through permits, if the Administrator approves a modification, a variance, from an effluent limitation on a particular permit, that would be reviewable, we think, under Section 402.

Now, there's one other provision which Mr. Barnard has not referred to which is Section 505 at page 73 of the statute, it goes over to 74. That provision permits citizen suits against any person alleged to be in violation of an effluent standard of limitation under this Act. And under that provision there's a separate section, subsection (f)

on page 74, which defines, for purposes of citizens' suits, what these terms mean. And it defines effluent limitation to include, under subparagraph (2), an effluent limitation or other limitation under Section 301 or 302, and then under subsection (6), a permit or condition thereof issued under Section 402.

So once again a clear recognition that there are two different animals we're talking about. One is an effluent limitation established under 301 or 302. The other is a permit which, by definition, also will contain an effluent limitation, since it specifies the precise limit of discharge.

QUESTION: Mr. Friedman, wouldn't Mr. Barnard say that Section 301 -- the reference to 301 in subsection (f) -- refers to 301 (c), and a modification which is in a specific case? Or would that not fit?

MR. FRIEDMAN: I don't know. He tries to -- it seems to me that what he tries to do is to take these very general phrases and very broad terms in the Act and attempt to cut them down and try to give them a very limited reading. But we think fairly read the whole statutory scheme is a recognition -- these various provisions, and there are others which we have cited in our brief -- a recognition that in fact Congress intended the Administrator to be able to prescribe effluent limitations that are binding.

QUESTION: But if you look at the statute broadly, and if you're right that there can be a general regulation or general effluent limitation for existing sources, what is there in the statute that requires a permit for existing sources? If anything?

MR. FRIEDMAN: Well, what requires a permit is Section -- we start with 301 (a), which says, except in compliance with this section and sections 302 and 402 of this Act, the discharge of any pollutant by any person shall be unlawful.

QUESTION: But assume that there's a general limitation, and that the discharge is not violating the general limitation. If you're right, say 301 has specified a general standard, and I'm a plant, an existing plant. I discharge in accordance with the general limitation without a permit. What makes what I'm doing unlawful?

MR. FRIEDMAN: Without a permit?

QUESTION: Yes.

MR. FRIEDMAN: 402 requires that you have a permit.

QUESTION: Well, there's nothing in 402 that requires a permit. 402 merely -- is permission to grant permits, isn't it?

MR. FRIEDMAN: Well, I believe that the regulations -- well, let me step back a minute if I may. 301 (a) requires among other things compliance with 402.

QUESTION: All right.

MR. FRIEDMAN: It states that you have to comply with a group of sections including 402. And 402 provides for permits.

QUESTION: It authorizes permits. But why would you need a permit if you're complying with the general standard, that's my question?

MR. FRIEDMAN: Well, oh, because the general standard does not specify and apply the precise amount of discharge that a particular plant can make in terms of the general limitations. Let me, if I may, give a specific example of this. For example, in the chlorine subcategory there are specific limitations. You can discharge a certain amount of a particular pollutant for each 1000 pounds that you produce. That's the way the effluent limitation is formulated. Sometimes it's in terms of so much a day, so much a month, and so on.

The job of the permit issuer, and the reason for the permit, is to specify exactly how much this particular plant can discharge. And that is something more than just a mechanical job. It's not just cranking them in. It requires a number of calculations. For example, frequently it's unclear precisely which subcategory a plant fits into. A plant may have very complicated processes. And it's necessary for the permit issuer to study the thing and find

out where it is. Sometimes, for example, you may have a situation where one of the standards depends on the process employed in the plant. And you may have a plant that says, well, our process seems to be this, but it's really something different. That's another thing that has to be --

Just as important is the permit -- is the place where the schedule of compliance is set forth. That is, a permit not only tells them how much they can discharge, but sets forth sepcific dates by which they are to achieve and be along the way to the accomplishments -- accomplishing the limitations of 1977 and 1983. That is, it will say by such and such a date in 1979 you have to have completed this step. But it takes it -- takes them right along the way, and tells them what they have to do in order to achieve the effluent limitations by the stated date.

And another thing: the permit provides various things with respect to the reports that have to be made, and studies that have to be made by the --

QUESTION: Are all these variables in the permit determined by reference to the guidelines promulgated pursuant to Section 304, or do they come out of thin air?

MR. FRIEDMAN: They -- some -- let me -- they don't come out of thin air. Because the Administrator himself has promulgated a set of rather detailed guidelines that have to be followed by every state that is authorized to have its

own permit program. So a number of these things, such as the monitoring and the reporting requirements, are set forth in his own guidelines for the permit program. IN addition, some of them do come out of the guidelines. For example, in the hypothetical case I suggested to you, in which the question is, which particular process is employed, and therefore into which subcategory the plant fits; one way for determining that would be to look at these length guidelines -- huge, thick document which is filled with a mass of technical detail -- and see on the basis of that what were the factors that led the Administrator to conclude that there was this category and there was that category. And on thebasis of those factors, the permit issuer would seek to fit it in tothe category that the permit issuer thinks most closely approximates that in the guidelines.

But it's not -- I want to stress again because of what Mr. Barnard has said, that the states have a very major role to play in the administration of this permit program. They're not just sitting there and saying, okay, here's this permit, let's see, we add it up and put it in the computer and it comes out with numbers and write them down. It's a very complicated process to issue these permits, to decide precisely what the limitations are, to set the schedules of compliance to determine exactly what can be done and to determine, among other things, whether the plan that this

particular company has proposed, the treatment processes it intends to use, will satisfy the requirements of the guidelines and of the standards. Will this really hold out promise of accomplishing what the company is required to do?

Now, the point has been made that Section 301 is written in the passive tense rather than the active tense, and from that one should imply that no effluent limitations are required to be promulgated.

I think it was employed in the passive tense because that statute, that section, is setting out the standards to be achieved. It has formulated the effluent limitations that are to be achieved by certain dates. And it just seemed that as a matter of grammatical construction that's an effective way to put it. It was announcing the Congressional policy. These limitations are to be achieved by this date. But that does not indicate that Congress didn't intend to give the Administrator the authority to take whatever steps he felt were necessary to accomplish that objective.

Now, there's another thing about this statute. There are a number of provisions dealing with various types of enforcement, permitting citizen suits, permitting the Administrator to go into the District Court. They all speak of enforcement of the various statutory provisions dealing with effluent limitations. You can enforce 301, 302, 307, 306, and

402. At no point -- at no point -- is there any reference to any enforcement of the guidelines. The guidelines, under their own analysis, are not enforceable.

And it seems to us totally inconsistent with the whole statutory scheme to say that Congress intended to enable the enforcement of the limitations in all of these other sections, but when you came to the most vital thing of all, the large number of existing sources that were polluting, nothing could be done with respect to those particular sources unless and until the general guidelines had been made effective as to each source through a permit.

Indeed, there's no question has been raised here, and it's conceded, that the Administrator may adopt binding effluent limitations for these other categories, for new sources, for toxic pollutants, for water quality standards. It just seems so unlikely that Congress would have intended to give him that authority, at the same time denying him the authority to promulgate the effective type of effluent limitations where it was most needed in dealingwith the new sources.

QUESTION: Mr. Friedman, doesn't Mr. Barnard's argument on Section 515, the water quality -- or information advisory committee, just kind of counterbalance what you said?

MR. FRIEDMAN: No, I don't think so, Mr. Justice. Let me explain why. That is -- Section 515 is set out at

page 79 of the statute. And all that 515 requires is that the Administrator within 180 days -- more than 180 days before publishing a proposed rule, is to give the committee notice that he is proposing to do so. He is not to submit to the committee the draft of the regulations. Or, it says he should give notice. In this case, they did in fact -- they went beyond that and gave the committee the draft of the regulations. But all the committee is supposed to do is to get notice. And then within 120 days -- that is, 90 days before the regulationsare to be published, the committee is to report and give the Administrator its views on how to deal with this problem.

Now, the guidelines will basically set forth the technology, the methods of dealing with the problem, the impact of the various proposed methods of reducing effluent pollution on the industry. And at that point, it seems to us, is the place where the expert advice of the committee comes into play. The committee gives the Administrator the benefits of its expert judgement on how best to deal with this problem.

Well, that is the point at which the expert advice is needed. Once that has been done, there would be no occasion for the Administrator, once again, to come back to the committee and say, okay, these are the limitations, the guidelins we're proposing. Now we'd like to get your expert views on whether or not under these standards the effluent limitations for this

particular thing should be one pound of pollution per thousand pounds, or one and a half pounds. It seems to us the critical thing, and the reason for this is to give this expert committee the input at the time the Administrator was studying the problems posed by the technology, the chemical, the engineering technology, all of this is reflected in this vast document. Well, this thing is just a mass of technicalities. I frankly read it -- skimmed it is more accurate. I couldn't understand. But someone in the chemical industry, I'm sure,knows exactly what this means. And this is the type of material, we think, that Congress intended the Administrator to have -- on which he should have the benefit of the views of the expert group.

Now, let me just --

QUESTION: Mr. Friedman, you argue as though this statute were just as lucid as any legislation could be, and that you can all fit it together if you really just study it.

MR. FRIEDMAN: I wish it were that lucid, Mr. Justice.

QUESTION: Don't you think there are some inconsistencies in the statute?

MR. FRIEDMAN: I admit, of course, this statute is not as clear as it could be.

QUESTION: And do you think -- I take it you don't believe, though, that we just have an open choice of which

way to go?

MR. FRIEDMAN: No, we think the clear intendment of the statute and purpose of the statute require the conclusion that the Administrator does have this authority.

QUESTION: You mean just on the plain language of the statute? Or do we have to look to some purpose or intent?

MR. FRIEDMAN: I think you have to consider all of it. I mean, I think the language supports it. The legislative history supports this. The administrative construction supports this. The consequences of their interpretation as against the effect of our interpretation on the basic policies that Congress sought to achieve by this statute. I mean, I wish the statute was so clear that there was no room for this --

QUESTION: But you must -- I suppose you must agree that under your oncstruction of the statute, permit issuers are going to have a much narrower range of discretion.

MR. FRIEDMAN: Of course, I agree.

QUESTION: And much less room to tailor permits to tailor permits to the needs or necessities of individual plants.

MR. FRIEDMAN: Well, I think the statutory scheme --

QUESTION: Well, you're answer is yes, a good deal --

MR. FRIEDMAN: Yes. They would have less authority certainly than under the other --

QUESTION: And furthermore, you say that's not only

true, but Congress intended it.

MR. FRIEDMAN: That's precisely it, Mr. Justice.

QUESTION: You go beyond that and say that if there were any other solution -- I take it this is your position -- it would be impossible to administer it?

MR. FRIEDMAN: Well, it would be impossible to administer it in the sense of accomplishing the objectives, that's our position. If you couldn't accomplish the objectives of getting on with this and really stopping this pollution of the nation's waters, if it was left of all of the permit issuers just to apply these --. I might add, Mr. Chief Justice, that in any case where an application for a permit is sought, a hearing can be requested. There haven't been that many hearings yet. Probably because the view that the permit issuer had a limited authority. But if the permit issuers -- if the permit issuers have considerable free range to decide within ranges, and to decide how they're going to apply the particular factors to a particular plant, it seems to me there are just going to be more and more hearings. There are going to be --

QUESTION: If everybody asked for a hearing, I suppose the capacity of the EPA or the states is finite in this respect.

MR. FRIEDMAN: I would assume it would be a very serious problem if everyone requested a hearing.

QUESTION: In that connection, Mr. Friedman, are you going to comment on Mr. Barnard's observation about what's presently going on, the revision of guidelines?

MR. FRIEDMAN: Well, that is contemplated by the statute, Mr. Justice.

QUESTION: Suppose the rules had already been adopted. Suppose that process had been true by the time this case reached here. What would it -- would it affect this case at all?

MR. FRIEDMAN: I don't think it would affect this case. And of course, one of the reasons --

QUESTION: Why not, may I ask?

MR. FRIEDMAN: Well, because you're dealing with the existing regulations at this point. And one of the -- let me just mention this -- one of the --

QUESTION: Wouldn't the existing -- the new regulations govern permits that would be issued now?

MR. FRIEDMAN: No. They would govern permits when they come up for renewal. Most permits are for five years.

QUESTION: That's what I said, govern permits that are being issued now.

MR. FRIEDMAN: Being issued now -- yes, coming up now. But most of them have been issued now. Most of them now have been issued. There's close to 50,000 permits that

have been issued, and most of them will start coming up in two or three years. And of course when the new permits up for issuance --

QUESTION: And what's the posture of the industries here?

MR. FRIEDMAN: I'm sorry, I don't --

QUESTION: With respect to the new regulations, those industries before us?

MR. FRIEDMAN: The Administrator is considering those regulations. And if and when-- whatever changes he may make --

QUESTION: Well, what about the industries that are -- that are -- what about Du Pont that is litigating --

MR. FRIEDMAN: There is revision under the -- this industry, which is the inorganic chemicals manufacturing industry. But if and when there are substantial changes in those regulations, that of course is something that can be challenged at that point. We don't know what's going to come out of this procedure. We have no way of knowing.

But I just want to add that part of the statutory plan is thatthe administrator will be constantly re-examining these matters to take advantage of new technology. And the way under the statute, once you get a permit, the permit is deemed compliance with the statutory requirements for the period of the permit. So that during the normal five year

period of the permit you are not in violation of the statute even though the standards have been significantly changed. But as technology evolves, as knowledge becomes greater, as new processes are developed, the Administrator will be able to change the regulations to require that as the permits come up for renewal the plants will be compelled and forced to adopt the more advanced technology.

Now, I'd like to come to something on which Mr. Barnard has repeatedly been pressing, which is that this position that the Administrator has taken now, that he has authority under Section 301, is a brand new notion. This only came into being a couple of months before the regulations were adopted, and that, in fact, at the earliest stage, the Administrator never dreamt that he was going to act under 301.

In the reply brief, at page 5 -- that's the sort of pinkish document -- there's a quotation of two paragraphs --

QUESTION: What page?

MR. FRIEDMAN: Page 5 of their brief. Quotation of two paragraphs from something that the Administrator issued at the end of October, 1972. This was two weeks after the statute was enacted. And this was a directive, a request put out to various industrial and consulting firms saying the Administrator would like them to submit proposals as to what kind of studies they could make to help him determine these guidelines and limitations.

And Mr. Barnard quotes and italicizes two sections of this statute. And it's set forth at page 6026 of something called the Administrative Record, which is a vast mass of material that is on file with the Court but is not included in the various appendixes. I'm not sure that I could carry it up physically. I know there's more than can be handled here.

QUESTION: Are there more than 6026 pages of this?

MR. FRIEDMAN: Yeah, I'm afraid so, Mr. Justice.

Now, he doesn't italicize the first sentence of that material. And it's quite understandable, because what the first sentence says is, "The Federal Water Pollution Control Act Amendments...requires the Environmental Protection Agency to establish effluent limitations which must be achieved by point sources of discharges." And then it goes on in the next sentence and specifies the source of that requirement, Section 301 of the Act.

Now, after the two paragraphs that Mr. Barnard quotes, there's some more paragraphs to this. And I'd like to read two more sentences to the Court which Mr. Barnard has not quoted.

QUESTION: Are they in any of these briefs.

MR. FRIEDMAN: No, I'm afraid Mr. Justice there at page --

QUESTION: You won't give us an opinion on that?

MR. FRIEDMAN: -- 6026. 6026. And there's a set of that on -- and it's the same page as quoted here, but it's not included in the brief. And if the Court wishes, I'd be happy to make available this particular page.

QUESTION: That's a part of the administrative record has been lodged with the --

MR. FRIEDMAN: Yes, yes.

What it says in the third paragraph of this is, in addition to his responsibilities under Section 301 and 304 of the Act, the Administrator is required by Section 306 to announce standards for new sources. So again, a recognition early on that he had responsibilities under 301 and 304.

And then it goes on in the next paragraph, the third sentence of the next paragraph states: effluent limitations guidelines under Section 301 and 304 of the Act, and new standards of performance under Section 306, will be developed for 27 industrial categories.

So two weeks after the statute was enacted, the Administrator had already taken the position that he was going to act under Section 301 and 304.

QUESTION: Mr. Friedman, that's hardly an unambiguous statement by the Adm-inistrator that he was going to issue self-enforcing regulations under 301. You really think it's that clear?

MR. FRIEDMAN: No, but I think it does show -- it

does show --

QUESTION: It does use the term, effluent limitations guidelines, which is --

MR. FRIEDMAN: But it does show, I think, Mr. Justice that at that early stage he recognized that he was going to dosomething under 301. Now, their argument is, he can't do anything under 301. All he can do is issue the guidelines under 304 and then it's up to the permit issuers to issue it.

QUESTION: Mr. Friedman, what was going on here two weeks after the enactment of the Act that resulted in the compilation of a six thousand or so page administrative record.

MR. FRIEDMAN: I'm sorry, Mr. Justice. The six thousand pages didn't come in two weeks after the Act. That's the six thousand pages are the records in this proceedings. This is the order in which it is set up in the record by -- two weeks after the act we didn't already have six thousand pages of record.

QUESTION: I thought maybe the Administrator had taken a cue from Congress.

[Laughter.]

MR. FRIEDMAN: No, no.

Now, there was a reference to the notice of proposed rule-making in October, 1973. And it was stated that all that

was done in that document was merely to summarize the statutory provisions. But if one looks at this document, there are specific references that the Administrator was proposing to adopt rules pursuant to Section 301, 304, and the rest of them.

I'd like to specifically refer the Court to pages of the Appendix -- that's the brown, thick document in this case. At page 61 of the Appendix, it says they're going to -- notice is hereby given that effluent limitations guidelines will be promulgated for -- and then it lists all of the subcategories in the inorganic chemical manufacturing industry. And it says, pursuant to sections 301, 304, 307 et cetera.

Then similar reflections contained at pages 84, where there's a reference to technology at the bottom of the page, last paragraph: technology based standards as detailed in Sections 301, 304 (b) and 306.

And, finally, there's another one at -- the proposed rule-making in October, 1973, approximately six or seven months before the regulations finally became effective and approximately one year after the statute became effective, set out specific numerical effluent limitations for these industries.

I'd just like to invite the Court's attention to page 110 of the Appendix, where specific numerical amounts are

given in connection with the chlorine subcategory of the chemicals industry.

So it's not just that at an early stage the administrator indicated he was proposing to act under 301, but that he actually, that early, a year after the Act was passed, proposed specific limitations and gave everybody in the industry the opportunity to comment on them. The record contains a number of objections by industry, including the chemical industry, to these proposals, including the complaint that they shouldn't specify a precise numerical limitations, that it should be put in terms of a range, that they should promulgate guidelines, and various factors.

And we think that this does reflect a consistent administrative interpretation, that here's a case in a complicated statute where the Administrator whose charged with setting the thing in motion early on concluded that he should deal with this problem under Section 301 and 304.

Now, what the Administrator -- under the statute the Administrator was directed to promulgate the guidelines within one year. This proved to be an impossible task. Just the sheer magnitude of it, the studies that had to be made of all these industries. He couldn't do it. And what he did, rather than promulgate, first, guidelines, and then effluent limitations, was he combined the two steps into a single proceeding. And at the end of this proceeding

he issued virtually simultaneously the guidelines, the actual limitations, for existing sources and for new sources.

And this seemed to us a preeminently practical method of handling it. There's been no unfairness to the petitioners. They were on full notice early on what was going to happen. There's no indication that if he had filed separate procedures anything would have been different. They knew exactly what he was proposing to do. They had full opportunity to comment on it twice, because the Administrator herefollowed a rather unusual procedure. He first published a notice of -- a proposed notice of proposed rule-making and let them comment on that. And then after they'd gotten comments on that, then he put out a notice of proposed rule-making. Then he got comments on that, and finally he adopted the rules. I mean, it's really giving them more procedural protection than they -- that was required.

The argument is made that these regulations are defective because they don't provide ranges. Now, that argument of course -- and also, they don't provide ranges and they don't specify the various factors that the permit issuer is to take into account really in applying the ranges to the particular plant. That, of course, is just another way of arguing, I think, that the Administrator can promulgate binding effluent limitations. But to the extent -- and I add that there's nothing in the statute that speaks about

ranges that all. The two references in the committee report to ranges, we think that the ranges, to the extent that they are required, are provided by the Act of dividing the industries into subcategories on the basis of particular processes, particular plants, particular types of equipment used.

And, for example, Mr. Mr. Barnard was complaining that one of the facets to be taken into account is age. And he said that age of a plant cannot be put into the formulation of the regulations. Well, in at least one industry they have broken down on the basis of age. In the electric power industry, one subcategory is new plants and another subcategory is old plants, the recognition that there are different problems in controlling pollution in different types of plants.

Now, the specification of factors: we think all that that requires is that the Administrative guidelines specify the factors that are to be applied under the effluent limitations; that is, on what basis is the Administrator going to set the precise numbers. And that, we think, is precisely what he has done here.

QUESTION: Mr. Friedman, could I ask a fairly basic question that's running through my mind?

Assume for a moment the other side is right, and that the action taken under 301 is a complete nullity, there are no legally enforceable regulations under 301; that the

action taken under 304 is not self-enforcing but just some kind of a general guide, and you've done that. Does it really make any difference, if everybody already has a permit, pursuant to 402?

MR. FRIEDMAN: Yes, it makes a great deal of difference, Mr. Justice, because these permits are only for five years. And when the permits start expiring in the next two or three years, and when the question then comes, how should they be changed to reflect the improvements in technology, it seems to me you're going to open up a hornet's nest there.

QUESTION: The difference would be, I take it, that when renewal time comes, instead of renewing the basic set of rules in one single proceeding, you'd have to review a multitude of permit applications.

MR. FRIEDMAN: That's right.

QUESTION: That's the basic thing we're fighting about, is that correct?

MR. FRIEDMAN: That is the basic thing, that under our system --

QUESTION: The other side of the coin, if you're right and they're wrong, how are they hurt? As of now? It doesn't really make any difference today, it just makes a difference on renewal.

MR. FRIEDMAN: Well, I suppose they may not be

hurt now, except to the extent -- I don't know, I haven't thought about this, whether the invalidation of effluent limitations would do something to the permits that have been issued. It may be that if the permits were --

QUESTION: Why? If they're in accordance with the guidelines and they've been issued by the man who has the authority to sign the permits, what difference does it make? I don't see how the validity of any already issued permits can possibly be affected by this proceeding. Now, maybe I missed something very obvious, but I just don't quite see that.

MR. FRIEDMAN: I suspect not, but I'm sure an attack would be mounted on the permits. And also --

QUESTION: Well, Mr. Friedman, I suppose there could be a range of permits that could be issued. And each one of them consistent with the guidelines.

MR. FRIEDMAN: If it's only the guidelines. But again would depend, if --

QUESTION: And if a specific factor that the Administrator had prescribed, he had no power to prescribe, and where the state might have issued a permit -- a completely different permit but it was still consistent with the guidelines -- I suppose there would be an industry that would rather have the state issue a new permit than to keep the old one.

MR. FRIEDMAN: If that's open to them. That, it seems to me, would be productive of some rather extensive and difficult litigation if that happened. Because I'm sure they would contend that somehow the permits, even though in compliance with the guidelines, that the were issued not in compliance with the guidelines but in compliance with the effluent limitations, and if the effluent limitations are involved, I think they would then argue that --

QUESTION: Yeah, but Mr. Friedman, this document is a hybrid, it's a 301-304 kind of document.

MR. FRIEDMAN: Yes.

QUESTION: And it's their argument, they say, well, the 301 is a nullity, it has nothing to do with -- it really doesn't cause a repeal or it doesn't nullify the document to the extent that it has authority under 304. And they have no power in this proceeding to get review of 304.

MR. FRIEDMAN: No, they have no power to get -- well.

QUESTION: Under -- insofar as it's the same under 304. Then they would have had to go back to the district court and start all over, I suppose.

MR. FRIEDMAN: I suppose so, although they make the argument that if they prevail that you shouldn't send it back to the district court, that you should allow to stand the portions of the Court of Appeals' decision that have

invalidated some of the regulations.

The Court of Appeals in this case, in addition --

QUESTION: Oh, I see, they had jurisdiction pursuant to the new source aspect. And then they argued its pendant jurisdiction --

MR. FRIEDMAN: They argue that there's pendant jurisdiction which is -- we say that in the particular circumstances of this case, if that should be the outcome, it would be sort of futile to send it back to the district court which would undoubtedly follow the views of the Court of Appeals.

But in the meantime, of the 22 regulations that are involved in this case, 11 of them have been reversed on various grounds and sent back to EPA for further study. And those are at the present time in the course of study.

QUESTION: If we did not accept their pendant jurisdiction action, that would not have been done, then. That's why they need the pendant jurisdiction, they want to preserve their victories --

MR. FRIEDMAN: That's right, that's right. Because if there is no pendant jurisdiction, then the entire judgement of the Court of Appeals has to be wiped out. And then it goes back to the district court, but the district court, undoubtedly seeing what the Court of Appeals had done to this case, would probably -- I suspect -- follow the dictates of the

Court of -- it would just be kind of a futile thing to go back and forth.

QUESTION: I see.

MR. FRIEDMAN: Now, the legislative history --

QUESTION: May I interrupt you for a moment? You said the 11 that were sent back, any question about them before us?

MR. FRIEDMAN: No, no. There's no -- the only issues before this court are the authority of the Administrator to establish these binding effluent limitations, and the validity which I'll come to in a moment, the subject of our cross-petition, of the holding of the Court of Appeals that there has to be a variance procedure for new sources as well as -- that's the only thing we have challenged.

But the only question before this Court of any of the modifications or revisions requested in the substantive terms of the regulations themselves. It's just a question of the authority and power of the Administrator.

QUESTION: But in the view of the very disparate views of the various Courts of Appeals, surely this issue doe have continuing practical importance, does it not?

MR. FRIEDMAN: Oh, yes. It's of great practical importance because --

QUESTION: And it's continuing -- has a bearing on continuing practice until resolved.

MR. FRIEDMAN: Yes. We're not suggesting that this case is moot or in effective --

QUESTION: Or has become unimportant in any way --

MR. FRIEDMAN: No, no.

QUESTION: -- just by reason of the issuance of --

MR. FRIEDMAN: No, no, it's of terrible importance because, apart from the question of what's happening to the existing permits, the fact that you're going to have all these renewals.

QUESTION: Surely.

MR. FRIEDMAN: And it's critical when these renewals come up to know whether the Administrator can establish binding limitations, or whether on each renewal the whole thing is to be opened up.

QUESTION: Most permits are five year permits?

MR. FRIEDMAN: Most of them are. And a number of them were issued -- originally, a fair number were issued by the Administrator prior to the time that State permit programs were approved. Now, only 27 states now have approved permit programs. So as far as the other states, the regional administrators have been delegated by the Administrator the authority to issue permits.

QUESTION: Mr. Friedman, one other rather general question. Am I correct in my recollection that with respect to some industries, some industries take the position that the

government takes, in terms of which court should review these --

MR. FRIEDMAN: Yes.

QUESTION: The industry position is divided, but the government position has been rather consistent.

MR. FRIEDMAN: It is. Indeed, it's rather interesting: we have a large stack of amicus curiae briefs in this case. The American Iron & Steel --

QUESTION: On top of the 6,066 pages.

MR. FRIEDMAN: On top of -- yes. This is just a massive amount of stuff here. The American Iron & Steel Institute has a lengthy argument as to why the Court of Appeals had jurisdiction. The American Paper Institute says the district court has jurisdiction. The American Petroleum Institute says it accepts the jurisdiction of the Court of Appeals. And the -- the one amicus brief supporting us, the Natrual Resources Defense Counsel, says the jurisdiction is in the Court of Appeals.

So there's a division even within the industry itself as to jurisdiction here. And of course, except for the 8th Circuit, every other Court of Appeals held that it, and not the district courts, have jurisdiction.

The -- we have quoted in our briefs a number of excerpts from the legislative history, which we think confirms that Congress intended to permit the administrator to adopt these regulations. I'm not going to go through them at

any length. Let me just quote one or two. The conference report -- there were differences in the House and Senate bill, which we've quoted at page 60 of this brief -- said that the conferees contend 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, clearly, we think, contemplating an effluent limitation to be established for a class or category of source.

And then in the House bill quoted at the top of page 63, the House report says that all reports issued under this program shall be consistent with the specific requirements of the bill including effluent limitations or other limitations. Once again, a clear recognition that effluent limitations are something other than and separate from the provisions in this permit.

Now, let me turn to the question presenting in our cross-petition, which is the requirement of the Court of Appeals that for new sources there have to be a variance procedure. The statute in Section 306 (b) directs the Administrator to establish by regulation federal standards of performance for new sources within each industrial category. And the standard for those -- the standard of that is the best available demonstrated technology. And it

said, including where practicable a standard permitting no discharge of pollutants. That is, Congress hoped that when you dealt with new sources as distinguished from existing sources, the Administrator would be able to find that there was sufficient available technology to permit no discharge at all.

It's illegal after these standards of performance have been promulgated for any new source to operate in violation of the standard.

QUESTION: Mr. Friedman, let me ask you a question about the cross-petition. Is it possibly premature -- in other words, you criticize a part of the Court of Appeals opinion, but is there anything in its order that really will be affected by our judgmental processes?

MR. FRIEDMAN: Oh, yes, yes. It's remanded to -- and it's directed -- the Administrator is directed at pages 262 and 263 of the record to come forward with some limited escape mechanism for new sources. It's not just a general statement that they should be. It said they should be, and they say to the Administrator, and you're directed to provide it. It's told the Administrator to work out some scheme whereby new sources can have an escape mechanism.

If this decision stands on the remand, he's got to come up with some variance procedure for new sources.

Now, the Court of Appeals recognized that both

under the statute 301 (c) for the 1983 sources, and under the administrative regulations for the 1977 sources there is a variance provision. The Court recognized also that there is no comparable thing for new sources. But nevertheless it concluded that a variance procedure should also be presumptively applicable -- I'm sorry, that the new source standards like the existing source standards would be presumptively applicable and that there should be some variance provision.

This rather significantly is something the Court of Appeals did on its own. The petitioners didn't ask the Court of Appeals to do this, the Court did it itself. And we challenge that, because we don't think that Congress ever intended there should be a variance provision for new sources. We think the reason is there's a basic difference between getting existing sources into compliance and new sources.

When you deal with an existing source, improving it, bringing it up to standards, can be a very complicated, time consuming and expensive procedure. There are all sorts -- a host of problems. The Administrator, when he dealt with the existing sources, promulgated the limitations on the basis of a particular subcategory. And inevitably in that process he could not take account of particular problems that were unique to a particular plant.

And therefore it would be fundamentally unfair

to require a particular plant with unique problems to observe the general effluent standards and limitations that are applied to all members of this sub-industrial category. And for that reason the Administrator concluded that there should be a variance. This is also reflected in the statutory provision for a variance under 1983 sources.

But when you're dealing with a new plant, it seems to us you have a very different situation facing you. To begin with, by definition there's no requirement of a plant making any changes. Secondly, the new plant, when it's being built, has much greater freedom to adopt new technologies, not having to take its existing operation and change it, but starting afresh. And it's not only more feasible, andnot only better able to do this, but it's usually likely to be a lot cheaper.

The standard that Congress directed to be set for new standards -- new sources -- is the best available demonstrated control technology. And there's no reason why, if a plant is being constructed from scratch, it can't comply with that. This is the best way to control pollution. When you -- you've got a tremendous problem in getting existing sources to comply, and to cut down on their discharges to accomplish the achievement of these objectives. But when you're dealing with a plant that hasn't been constructed with a new source, the best way to avoid any growth of

pollution is to make sure that the new source complies with these strict standards. Indeed, the hope was -- the hope was in Congress that in the case of new sources, the standard would be no discharge at all.

And we think that what Congress contemplated in Section 306 was that for a new source, unless it could comply with these strict effluent limitations, it shouldn't be built at all. That is, Congress adopted a different approach when it was dealing with correcting existing sources and permitting new sources.

Now, 306, with its very explicit saying that no plant -- no new source shall be -- shall operate except in compliance with these standards is in sharp contrast with some other provisions of the statute which do explicitly permit but not require the Administrator to grant waivers.

Reference has already been made to Section 301 (c) with the waiver of the permit requirement. Section 316 (a) permits the Administrator to waive the requirements of both Sections 301 and 306 for particular plant for a single aspect of pollution, local thermal pollution, the discharge of heat into the water, if he finds that compliance to the thermal pollution standard is unnecessary to protect wildlife.

And finally we refer you to Section 313 of the Act. That's the provision requiring federal facilities to comply with all of the standards. And that section permits

the president to grant a one year waiver from any of the requirements of state and federal pollution standards if he determines that it's in the paramount interest of the United States for any federal facility to have such a waiver except that he cannot even do that with respect to either new source standards under 306 or toxic pollutants under 307.

And it seems to us that if the Congress didn't even permit the President to waive compliance with the new source standards for federal facilities when he was able to conclude it was in the paramount interest of the United States to do so, he certainly didn't intend to permit the Administrator to do this in the case of new sources merely because they said they couldn't really comply, it would be very laborious, very difficult for them to comply with the existing standards.

The legislative history confirms this interpretation we think. In the committee report of the House, which we cited at page 15 of our brief, the committee listed on of the two most significant factors in the attainment of clean water, and I quote, the need to preclude the construction of new sources which use less than the best available control technology for the reduction or elimination of discharge of pollutants. And that word, to preclude the construction of new sources which use less than the best available technology,

is the precise standard written into Section 306 for new sources.

Now, let me just briefly refer to the jurisdictional issue --

QUESTION: Could I just ask you a question here? In the 8th Circuit, where you had an unfavorable decision?

MR. FRIEDMAN: Yes.

QUESTION: Who was prescribing these specific effluent standards, in thosestates, in the 8th Circuit?

MR. FRIEDMAN: In the 8th Circuit? Well, the specific standards were written by the Administrator.

QUESTION: Well, I know. But didn't the 8th Circuit decide that he had no authority under 301 to write the specific--

MR. FRIEDMAN: Under 301, that's right.

QUESTION: Well, then, who -- how about permits in that Circuit? Has that decision been stayed or what? Or have permits been issued by state authorities using -- specifying their own effluent standards consistent with the guidelines?

MR. FRIEDMAN: I cannot answer that question, Mr. Justice. I'll be happy to get the answer and furnish it to you.

QUESTION: Because I suppose if you win, those permits, there's some cloud on them, is there not?

MR. FRIEDMAN: I don't know. I'll have to get that information, Mr. Justice, and forward it to you.

QUESTION: Okay.

MR. FRIEDMAN: Now, on the jurisdictional question, as I understand now, there's no disagreement between us and the petitioners that if the Administrator has the authority which we say he has, and which he consistently said he has under 301, they concede as they have to, first, that the Court of Appeals has jurisdiction to review the effluent limitations. And second, they also apparently now agree that as an incident to review of the effluent limitations, the guidelines also may be reviewed. That -- there was some uncertainty at an earlier stage of litigation precisely what their argument is.

Now, as I understand, there argument is only that if it be held that the Administrator does not have authority under Section 301 then the guidelines standing alone are to be reviewed in the district courts. And they take the further position that if the Administrator doesn't have the authority under Section 301, that if a suit has been brought in the Court of Appeals challenging the exist -- the new source standards which by definition are reviewable only in the Court of Appeals, then the guidelines can come in under pendant jurisdiction.

It's a very involved question. We hope the Court

doesn't have to face it. Of course, if the Court agrees with us, they don't.

If the Court should reject our submission on this, we would suggest to the Court along the lines of the Court of Appeals in this case that even if it were to hold that the Administrator has no authority under 301, nevertheless a close relationship between the 301 standards and the 304 guidelines would make it appropriate that the Court of Appeals should nonetheless have jurisdiction to review the guidelines.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Mr. Barnard.

REBUTTAL ARGUMENT OF ROBERT C. BARNARD, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BARNARD: Your honor, I realize it's late. May I just take a minute or so?

MR. CHIEF JUSTICE BURGER: You have six minutes of your time, and we'll hear you out.

MR. BARNARD: I hope I don't need to take it.

Mr. Friedman referred to a quotation from our request -- a quotation from a request for an application by a contractor that was quote in part in our brief.

I will confess tothe Court that the paragraphs that he quoted we eliminated on the grounds of brevity. But we asked the Court to look at them. And we suggest the

Court also look at the contract as it was finally issued. There's a notice that the contract requires the contractor to put into his report -- it appears on page 6424 of the record. Happily, it's reprinted in the final document in the form of a notice called an abstract that appears in the front of the development document, which is the form of a notice. And it says that the regulations that this document is designed to assist in developing effluent limitations guidelines for existing point sources and standards of performance, and pre-treatment standards for new sources, to implement sections 304,306, and 307 of the Act. There is no reference to Section 301.

QUESTION: Mr. Barnard, you don't want us to read that whole 6,000 pages?

MR. BARNARD: No, sir. I don't think you need to.

QUESTION: Thank you.

QUESTION: Mr. Barnard, just supposing we summarized your opponent's argument this way, that even if you're right about what Congress expected, the way the Congress expected the Act to work. And they thought there would be the guidelines first and then so forth and so on. Nevertheless, they did put in this escape hatch that the EPA can issue general regulations as they see fit. And after they'd had some experience with the statute they found that the individual permit procedure is going to be just too darn cumbersome,

and we need some general regulations, and that's kind of something an Administrator can do. If we don't follow that approach, we're going to have an awful lot of review proceedings on individual permits.

MR. BARNARD: I suggest you won't, your honor. Most of the permits that have been issued were issued before regulations were issued. They were issued under the guidance documents which had the same sort of general form as the 304 (b) regulations. The hearings are provided in the statute. Nothing has been cluttered up. The permits have been got out in due course. And there's no reason to belive they won't be going on in exactly the same procedure as happened in the past.

QUESTION: Well, if that's true, then is it not also true that the -- that the documents you challenge are really valid as 304 promulgations, and all the permits are perfectly all right?

MR. BARNARD: I don't think that at this stage in the game we're dealingwith a challenge to existing permits. What we're dealing with --

QUESTION: Well, we're dealing with a problem that may cause there to be a large number of challenges to existing permits, and future permits. That's what I'm saying.

MR. BARNARD: That's conceivable, although since the permit system was administered under a program that

resembles 304 (b) I see no reason why you should anticipate something's coming that didn't come in the past.

May I address again, I believe it was you, Mr. Justice, who said that the remark in a request for a proposal from a contractor wasn't a direct -- a very direct statement of authority under 301. I referred to the notice which they directed be attached.

Mr. Friedman also referred to the notice published -- the proposed rule-making published in 1973. And he read from page 61 in this book. If you move to page 62, what EPA said was, the regulations proposed herein set forth effluent limitations guidelines pursuant to Section 304 (b) for -- and then it lists all the categories. Not a word about section 301.

We urge-- I don't want you to look at 6,000 pages yourhonor. But we urge that the statements be examined. Because we think that the contention that somehow or other the Administrator, before February, 1974, claimed this power by implication, will not stand an examination of the record.

Now, Mr. Friedman referred to Section 301 (e), which provides that effluent limitations established pursuant to this Section, Section 302, shall be applied to all point sources pursuant to the provisions of this Act.

If you look at 301 (c) and (d), which has the

cross-references to the procedures in that Act, this section seems to us -- when they're talking about pursuant to the section, the section itself sets up the procedure, which is regulations to be issued under 304 to carry out the requirements of technology as they are set out in Section 301 of the Act.

It is not limited to just 301 (c) as you have suggested, in our view. This is the procedure that was in contemplation. This is not an authorization section. This is a procedure which is in contemplation.

I will not discuss the legislative history. It is discussed perhaps too much in the briefs. What we suggest to the Court is that neither the legislative history nor these considerations of practicality of administration, whatever they are, can overcome the clear command of Section 304 (b).

QUESTION: What has happened in the states, Mr. Barnard, governed by the 8th Circuit judgement? Have states been issuing the permits with their own specific standards?

MR. BARNARD: My understanding is that the permit proceeding has gone forward, yes, sir.

QUESTION: And has there been a great rash of litigation in those --

MR. BARNARD: I believe -- I know of one hearing that is pending on a permit. But that's all I know of.

QUESTION: Well, I suppose the states don't want

to individualize -- don't want to face a lot of problems too. I suppose they must have some sort of standards of their own within the guidelines.

MR. BARNARD: Yes, indeed, they do.

QUESTION: I suppose they treat one permit like another one?

MR. BARNARD: I assume they do.

QUESTION: Do they have some writing and some regulations setting outin the 8th Circuit area the equivalent of what the Administrator has himself published?

MR. BARNARD: Well, I'm not sure that it's within the 8th Circuit area. But I think that states do have regulations which they apply. And the statute specifically contemplates that they may impose restrictions which are more severe.

QUESTIONS: Well, I take it there are some states in the 8th Circuit that are following the 8th Circuit opinion.

MR. BARNARD: Well, the 8th Circuit opinion does not prevent the permit officers from going forward and issuing permits.

QUESTION: Well, of course it doesn't. But it odoes say that the specifics of the permit are not -- don't need to be those that the Administrator prescribes.

MR. BARNARD: No, I don't think that's what the -- well, the 8th Circuit has not yet addressed the validity

of the regulations for the existing plants in the wet corn milling industry. The -- Judge Stewart in the grain processing case did address the validity of those regulations, and did conclude that those regulations were not supported by the record and did not comply with the statute.

So far as we are aware, EPA -- that is now on appeal. So far as we are aware, the process of permit issuance has gone forward despite this with the permit officers working out within the context of what they understand to be the technology and the statutory standard, what are the required limitations to be put into a permit.

I'm sorry, your honor.

QUESTION: Well, let me just make one other point, Mr. Barnard. Is it not true that the effect of the 8th Circuit holding was to invalidate the EPA's action insofar as it relied on Section 301?

MR. BARNARD: That's correct.

QUESTION: But not to touch it insofar as it relied on 304, which provided the guidelines which would justify further issuance of permits.

MR. BARNARD: That's correct, your honor.

Thank you, your honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:01 o'clock, p.m., on December 8,

1976, the case in the above-entitled matter was submitted.]