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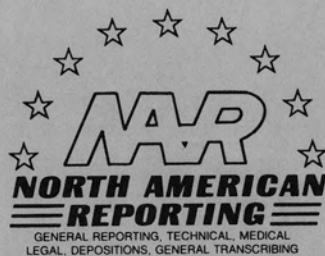
In the

Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY,)
)
PETITIONER,)
)
V.) No. 79-770
)
NATIONAL CRUSHED STONE ASSOCIATION)
ET AL.,)
)
RESPONDENTS.)
)

Washington, D.C.
October 7, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

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 ENVIRONMENTAL PROTECTION AGENCY, :
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 Petitioner, :
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 v. : No. 79-770
 :
 NATIONAL CRUSHED STONE ASSOCIATION :
 ET AL., :
 :
 Respondents. :
 :
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Washington, D. C.,
Tuesday, October 7, 1980

The above-entitled matter came on for oral argument
at 1:59 o'clock p.m.

BEFORE:

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

APPEARANCES:

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 20530; on behalf of the Petitioner.
- GEORGE C. FREEMAN, JR., ESQ., Hunton & Williams,
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 20006; on behalf of Consolidation Coal Company
 et al., Respondents

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20006; on behalf of National Crushed Stone
Association et al., Respondents

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 79-770, The Environmental Protection Agency vs. National Crushed Stone, et al.

Mr. Levander, I think you may proceed when you are ready.

ORAL ARGUMENT OF ANDREW J. LEVANDER

ON BEHALF OF THE PETITIONER

MR. LEVANDER: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on the Government's petition to review two decisions of the United States Court of Appeals for the 4th Circuit. At issue in this case is the scope of the variance clause promulgated by the Environmental Protection Agency with regard to the so-called 1977 effluent limitations required by the Clean Water Act.

At the outset I'd like to emphasize that there is no question in this case about the reasonableness or practicability or validity of any technical or substantive regulation promulgated by EPA. The only question concerns this variance clause.

The court below concluded in both cases that the variance clause promulgated by EPA is invalid because EPA refuses to consider the inability of an individual discharger to afford compliance with the '77 limitations as a basis for

1 granting a variance. Those decisions are in square conflict
2 with the decision of the United States Court of Appeals for the
3 District of Columbia Circuit in the Weyerhaeuser case.

4 This Court has considered on several occasions the
5 complicated provisions of the Clean Water Act, recognizing that
6 it represents a bold attempt by Congress to clean up this
7 nation's waters. As I said, it is a complicated act. I would
8 like to begin by outlining the statutory framework which in-
9 forms this case.

10 There are three critical provisions to keep in mind.
11 Section 301(b), Section 304(b), and 301(c). Section 301(b) --

12 QUESTION: What was that second --

13 MR. LEVANDER: 304(b). Section 301(b) directs the
14 Administrator to promulgate two sets of increasingly stringent
15 effluent limitations. Those are the so-called 1977 and 1987
16 effluent limitations. The Court recognized in duPont, or held
17 in duPont, that the regulations are to be promulgated on an
18 industry-by-industry basis or category-by-category basis, and
19 not on a plant-by-plant basis. And the language and legislative
20 history of the Act shows that the difference in the stringency
21 between the regulations is approximated by that the '77 limi-
22 tations are to approximate if appropriate the average of the
23 best performers in the various subcategories of an industry;
24 whereas the 1987 regulations are to be based on the best per-
25 former in an industry with an eye, if possible, to eliminating

1 discharges altogether. So, as I said, Section 301 requires the
2 promulgation of these two sets of industry-wide effluent limi-
3 tations.

4 Section 304(b) in turn sets forth factors that EPA
5 must consider in promulgating the industry-wide effluent limi-
6 tations. As to both the '77 and '87 limitations, Section 304(b)
7 requires that EPA consider such factors as the differences be-
8 tween plants, the ages of plants, the technologies used in those
9 plants, processes, and other similar factors. And in both cases
10 and most pertinent to this case, EPA must take into account the
11 cost of application. And there's no dispute in this case that
12 in setting the industry-wide regulations in the crushed stone,
13 sand and gravel, and coal industries, which are before this
14 Court, that EPA did take into account quite extensively the
15 costs, total costs, of application. The extensi

16 The extensive administrative proceedings leading up to
17 the promulgation of the regulations contain several reports by
18 independent analysts regarding the various industries, and this
19 is the procedure that EPA follows in every case. These ensure
20 that no effluent limitations promulgated by EPA will substan-
21 tially undermine an industry or in any way shut down an industry
22 in toto or any substantial part.

23 For example, in the crushed stone industry and sand
24 and gravel industry combined, EPA considered that the total cost
25 of the 1977 limitations would be approximately \$21 million, and

1 there are 10,000 dischargers in these combined industries.

2 QUESTION: When you say an industry, you're not talk-
3 ing about a particular firm, you're talking about all of the
4 firms in the industry?

5 MR. LEVANDER: All of the industry. That's right.

6 And there are 10,000 of those in the two combined, crushed stone
7 and sand and gravel, approximately, and the estimate was that
8 the total cost to those 10,000 different firms would be about
9 \$20 million, and that this would have an effect on the price of
10 the product that they sell somewhere between 2 and 8 percent, at
11 most.

12 And further, EPA goes even further than just esti-
13 mating the total impact and total cost to the industry. It also
14 estimates how many marginal firms may be forced to close because
15 they cannot afford compliance. As I indicated before, there
16 are about 4,800 crushed stone facilities and EPA estimated that
17 at most 35 marginal firms would be forced to close because they
18 could not afford to comply or otherwise would not want to comply.
19 And these are all very small firms.

20 The EPA also estimated, with regard to the sand and
21 gravel industry, for example, that only 26 out of the more than
22 5,000 dischargers might be forced to close as a result of the
23 effluent limitation.

24 QUESTION: The '77?

25 MR. LEVANDER: That's the '77; that's right. Now.

1 Now, that indicates that EPA takes very seriously the
2 requirement that it take into account total cost when it sets
3 the initial industry-wide regulation. In fact, the proceedings
4 in these cases show that EPA rejected various requests by
5 environmental groups and others to regulate other kinds of pol-
6 lutants than those it chose eventually to regulate because they
7 were prohibitively expensive.

8 QUESTION: Well, I suppose, then, the EPA does think
9 it's relevant and significant how many marginal firms will be
10 put out of existence?

11 MR. LEVANDER: That's right. I mean, EPA would not
12 promulgate a regulation which would close down the industry
13 entirely, that no one in the industry could afford. And that's
14 not a very realistic possibility because, in the first instance,
15 the guideline for the '77 limitations are existing firms which
16 have technology and the limitations based on existing use of
17 technology.

18 QUESTION: In arriving at that conclusion, what was
19 the concept of total cost?

20 MR. LEVANDER: The concept of total cost as evidenced
21 in the legislative history primarily is a kind of economic total
22 cost, the outlay of firms, capital costs, operating costs,
23 and also --

24 QUESTION: It would include economic dislocation of
25 unemployment?

MR. LEVANDER: Yes. 8

1 MR. LEVANDER: Yes.

2 QUESTION: Did it?

3 MR. LEVANDER: It did in these cases. Representative
4 Jones indicated that total cost also means total impact on the
5 economy as a whole in the regional economics. Nothing in the
6 word "total cost," however, or in the legislative history sug-
7 gests --

8 QUESTION: Well, but did they do all this before ar-
9 riving at the conclusion that there were only 28, if that's
10 the number --

11 MR. LEVANDER: That's right. There are very thick,
12 huge reports that they put out which analyze in detail the
13 economics of a particular industry. And only having judged
14 that, they will not dislocate industry in toto and there will
15 not be massive dislocation, do they promulgate a reasonable
16 and practicable regulation.

17 QUESTION: And now, is there any difference in this
18 respect between the '77 limitations and the '87?

19 MR. LEVANDER: Well, to some extent. Again, EPA takes
20 into account on the '87, the cost of application. It's re-
21 quired to do so by statute and it does so. But the emphasis,
22 there's a slightly greater emphasis on costs with regard to the
23 '77 limitations.

24 QUESTION: Well, the '87 said something about, there
25 must be the maximum technology, not the best practical

1 technology --

2 MR. LEVANDER: It says --

3 QUESTION: -- which is the '77 test, isn't it?

4 MR. LEVANDER: That's right, but --

5 QUESTION: And the '87 is maximum. Now, is there a
6 difference between those two tests?

7 MR. LEVANDER: Yes. As a practical matter, as I in-
8 dicated, the starting point is a different one. One is the
9 average of the best performers, the other one is the best per-
10 former. And as a statutory matter, you --

11 QUESTION: I missed the first -- the average of the
12 best, or --

13 MR. LEVANDER: The average of the best performers in
14 the various subcategories of a particular industry. And you
15 kind of analyze the industry as a whole to see in various-aged plants
16 who's the best of the old plants, the new plants, or other --

17 QUESTION: Well, doesn't this mean that under the
18 '87 test the burden is going to be much greater on a member of
19 the industry?

20 MR. LEVANDER: It can be but it doesn't necessarily
21 have to be and in fact --

22 QUESTION: What did you say was the difference? Under
23 the '77, how many would be driven out of business?

24 MR. LEVANDER: Twenty-six and 35, respectively, in
25 the two --

1 QUESTION: Thirty-five under the '87 and 26 under --

2 MR. LEVANDER: No, excuse me; I'm sorry. Thirty-five
3 out of the 4,800 crushed stone facilities and 26 out of the
4 more than 5,000 in the sand and gravel industry will be or could
5 be forced out of business as a result of the '77 limitations.

6 QUESTION: Now, how about as a result of the '87?

7 MR. LEVANDER: There has -- since in these industries
8 up till now the '87 limitations are approximating the '77 limi-
9 tations, since the best performers happen also to be the best
10 performer, and since there's not a great need for further im-
11 provement at this time, they don't expect anybody to be put out
12 of business, as I understand it, as a result of the '87 limita-
13 tions.

14 QUESTION: Realistically, the two standards might not
15 be very far apart. Is that not so?

16 MR. LEVANDER: That's exactly correct, Mr. Justice.

17 QUESTION: The average of the best, or the highest,
18 might be quite close together.

19 MR. LEVANDER: They could be. That's right. On the
20 other hand, then, in other cases, Mr. Chief Justice, there could
21 be large differences between the two, although that has not hap-
22 pened to date.

23 QUESTION: And that's why the 10-year span?--

24 MR. LEVANDER: That is right.

25 QUESTION: -- to allow time for economic and other

1 and technological adjustments?

2 MR. LEVANDER: That's right. And also it's a tech-
3 nology-forcing statute, and so in the course of the ten years
4 there may be new inventions and new devices which will --

5 QUESTION: Suppose, instead of 27 and 35 it was 270
6 and 350? How would that alter this case?

7 MR. LEVANDER: Well, at some point, if EPA initially
8 promulgated on the interim basis, not a final regulation, and
9 then they went out and they did an economic survey and they
10 saw that a substantial portion of the industry was going to be
11 closed down as a result of that, they would have to rethink the
12 level of technology and make it more affordable and reasonable
13 for the industry as a whole.

14 QUESTION: You do concede that the statute with
15 respect to the 1977 limitations does require the agency to
16 weigh the total cost to the industry?

17 MR. LEVANDER: That's correct, and that was done here,
18 and there's no dispute about that.

19 QUESTION: And if the figures were such as suggested
20 by the Chief Justice as a hypothetical question, that could
21 affect the total, -- that could affect -- the total cost to the
22 industry?

23 MR. LEVANDER: I am informed by the Administration
24 that in no case under the 1977 limitations did the economic
25 forecast show that anything more than 1 percent of an industry

1 would be closed as a result of the industry-wide level.

2 QUESTION: If you had those larger figures, there
3 would be a further subanalysis to be made to determine whether
4 those were the marginal operators or whether they were average
5 all the way through the industry.

6 MR. LEVANDER: Or it could turn out that upon promul-
7 gation they'll find out that they didn't know enough about the
8 industry as a whole, and so they have to go back and get some
9 ~~industry~~ more information, because when you have an industry of more than
10 5,000 or 6,000 dischargers, as you have in these cases, you
11 can't -- they don't take into account every single discharger.
12 And so they might have to go back and get some more data or
13 whatever, or they'd have to rethink the process. But today, as
14 I said, in this case there's no question that the effluent
15 limitations which are not at issue here were reasonable and did
16 take into account total cost of application.

17 QUESTION: Suppose a given member of the industry is
18 determined by EPA to be unable to meet the prevailing 1977
19 standards, must EPA then grant a variance?

20 MR. LEVANDER: No, that's the -- well, that's the
21 issue in this case. But the reason is, the question is, why
22 can't he meet the limitations? If the --

23 QUESTION: Well, suppose they determine they can't,
24 what I'm trying to get to, is it your position that they need
25 not, even in that situation, grant a variance but merely to

1 consider that as one of other factors?

2 MR. LEVANDER: No. It depends, Mr. Justice Brennan --

3 QUESTION: The issue in this case is, if the reason
4 a particular component of the industry cannot is a financial
5 reason, your claim is that they do not and need not grant a
6 variance, period.

7 MR. LEVANDER: That's right. And they cannot con-
8 sider --

9 QUESTION: And that's the issue, and your brothers on
10 the other side claim you have a duty to grant a variance.

11 MR. LEVANDER: Yes. And their basis is -- I want to
12 make one point very clear. We do take into account the cost of
13 compliance for an individual discharger in the sense that we
14 analyze their plant. If they come in and they say, we need a
15 variance, and this is a real case I'll have to give you as a
16 hypothetical, one of the requirements, say in the gravel indus-
17 try, was the recycling of water. And this was based on the
18 fact that there are large pits that are easily available to
19 most dischargers in the industry to allow a settling pit to
20 allow the recycling of the water. And this discharger came in
21 and said, well, that may be true for the rest of my competi-
22 tors but I'm located on a 100-foot cliff and the place that I
23 have, the only place that I have for a settling pond is 100
24 feet below. In order for him to recycle, of course, he would
25 have to have tremendously expensive pumping equipment to get

1 the water back up to the top and in that case EPA says, we'll
2 grant a variance, because you are fundamentally different from
3 the other members of the industry whom we considered in setting
4 this regulation. And so, to that extent, cost does come in in
5 the sense that his costs of compliance would be exceedingly
6 greater, maybe sixty times greater, than the average.

7 QUESTION: Suppose in that very instance EPA had refused
8 to grant the variance?

9 MR. LEVANDER: Well, then there might be an abuse of
10 discretion, and that's reviewable in the --

11 QUESTION: Wouldn't he have to show that he had some
12 other proposal that would improve?

13 MR. LEVANDER: No. Under the variance provision, with
14 regard to the '77 effluent limitations --

15 QUESTION: Oh, you're talking about '77 now?

16 MR. LEVANDER: That's correct.

17 QUESTION: If it were '87 --

18 MR. LEVANDER: Well, I will get to that in one moment
19 if I could, Mr. Justice White.

20 QUESTION: Before you leave '77, let me put this hypo-
21 theoretical. Suppose an applicant comes in and shows that if he is
22 required to comply with the contemporary standards, he will not
23 be competitive with the other two or three existing competitors
24 in his area. Is that a factor that would be weighed? I'm not
25 saying that it would be dispositive, but would it be considered

1 by EPA?

2 MR. LEVANDER: I am not quite sure I follow the hypo-
3 theoretical, Mr. Chief Justice. Insofar as he came in and said --

4 QUESTION: Well, I'd come in to EPA and say, I've got
5 three competitors here. If I do all the things that you're
6 telling me to do, and which they are now doing, I won't be able
7 to compete with them.

8 MR. LEVANDER: And the question then becomes, why?
9 his expenses would --

10 QUESTION: Is EPA going to say to me, well, you're
11 just not very efficient, because if your competitors can do it,
12 you ought to be able to do it?

13 MR. LEVANDER: Well, if your plants for all purposes
14 directly relevant to compliance is exactly the same as your
15 three competitors and it is simply a matter of your having been
16 economically inefficient, or incompetent, and you just cannot
17 afford, because you don't have the money that your more effi-
18 cient competitors have to comply, and you are no different in any
19 other respect, that is not a basis for a variance and you'll
20 be forced to close. Except --

21 QUESTION: Forced to comply?

22 MR. LEVANDER: Or comply; right. And, I want to point
23 out, that Section 8 of the Act creates a \$800 million revolving
24 loan fund which is administered by the Small Business Adminis-
25 tration. Any firm under 250 employees who would otherwise have

1 to shut his plant or close his operations because he could not
2 afford to comply can go and get an SBA loan. And that is a very
3 active program. Up to June 30 of this year I understand there
4 were \$28 million in SBA loans under Section 8.

5 Going back to the statutory framework for a moment,
6 as I said before, 301 requires the industry-wide effluent limi-
7 tations, '77 and '87. 304(b) sets forth the factors that must
8 be taken into account as to both '77 and '87 costs of applica-
9 tion as relevant. And Section 301(c), which is quite critical
10 to this case, provides the kind of affordability variance that
11 respondents seek here, but it only provides it with regard to
12 the '87 limitations. Under the 1987 limitations a discharger
13 can get a variance by going in and saying, I cannot afford to
14 comply. The variance --

15 QUESTION: He has to also say, I have made reason-
16 able progress over the '77 limitations, and if the '77 limita-
17 tions are the same as the '87 limitations, he can't get a var-
18 iance under those circumstances.

19 MR. LEVANDER: But then presumably he's been complying
20 with the '77 all along; there's no reason he needs a variance.

21 QUESTION: But there really can't be a hypothetical
22 case, can there, in which anybody could get a variance under
23 the '87 limitations, who has complied with the '77 in this
24 industry?

25 MR. LEVANDER: That's right. Insofar as the coal
regulations may

1 regulations may be more stringent in '87.

2 QUESTION: Before you finish, will you tell me the
3 statutory source of the variance authority under the '77 limi-
4 tations?

5 MR. LEVANDER: Well, that was a -- that was underlying
6 the problem in duPont, I think. In duPont we suggested that
7 the statute and the language and the legislative history of the
8 Act clearly required industry-wide regulations. But because we
9 cannot take into account every single discharger in the indus-
10 try, we would grant variances based on fundamentally different
11 factors between one discharger and another that we hadn't taken
12 into account in setting the regulation. And in a sense, for
13 that particular discharger, that is simply creating a category
14 of one or more, depending on how many fit into his kind of
15 situation as opposed to the industry as a whole, and we're
16 allowed under the Act, under 301 and 304, to create subcate-
17 gories.

18 There is no specific variance provision, and the 10th
19 Circuit in the Petroleum Institute case and some commentators
20 have suggested that no variances need be granted at all, and
21 there is some strength to that. First of all, duPont's discus-
22 sion of the new sources under 306 indicated that the absence of
23 variance meant that no variances should be granted.

24 We still believe, however, that some variances should
25 and will be granted based on this fundamental difference factor.

1 But the express language of 301(c), which is the critical pro-
2 vision here, which allows an affordability variance with regard
3 to the '87 limitations, does not apply to '77 limitations and
4 Congress clearly intended that the inability of a discharger to
5 afford compliance was not to be a factor with regard to the
6 '77 limitations.

7 QUESTION: Well, Mr. Levander, looking at the govern-
8 ment policy as a whole here and including the Small Business
9 Administration loan, it isn't going to be the kind of mom-and-
10 pop crushed stone operators that are hit, when you refer to
11 the marginal ones, because they can get the loans. It's going
12 to be ones conceivably who employ more than 250 people.

13 MR. LEVANDER: That is conceivable although I'd like
14 to point out two things, Mr. Justice Rehnquist. First, Congress
15 anticipated at a minimum that the imposition of the 1977
16 effluent limitations will require as many as 300 major firms
17 employing up to 125,000 people to be put out of business because
18 they couldn't afford or did not wish to afford compliance with
19 the regulations. So that's Congress's judgment that the clean
20 waters of this nation are more important than some of those
21 marginal firms.

22 And the second point is that in the facts of this case
23 I believe that all the firms that EPA anticipated would be
24 forced out of business were in fact smaller firms and I take it
25 that they were in such positions and so penurious that they

1 could afford even with a Section 8 loan or didn't wish to try
2 under a Section 8 loan to afford to comply.

3 The respondents rely on Section 304(b)(1)(B) as the
4 basis for their argument. They say, the statute requires EPA
5 to take into account total cost; we agree, on the industry-wide
6 level. And that under our own version of the variance, we have
7 to retake into account and reconsider every single factor on the
8 variance level. And therefore we are trapped in our own language
9 and we must therefore grant these economic variances.

10 Well, there are several problems with that argument.
11 First, both the '77 and '87 limitations, actually Section
12 304(b)(1)(B) and -(b)(2)(B) require EPA to take into account
13 "cost of application." If the words "cost of application"
14 meant, "and you must reconsider on the variance level," there
15 would have been no need for Congress to expressly create this
16 Section 301(c) variance, which it did create and which it created
17 only with regard to the '87 limitations.

18 The second problem is that respondents have miscon-
19 strued EPA's variance clause and a well-stated and firm position
20 all along. Since 1974 when the first regulation came out --

21 QUESTION: I'll argue with you on that. That '87 variance
22 clause puts another condition on them.

23 MR. LEVANDER: That's right. It must be above '77
24 level. But that makes a very --

25 QUESTION: That's an independent reason for having it,
for having that variance expressly stated.

1 MR. LEVANDER: Well, except that you wouldn't have
2 needed to say, 301. You wouldn't have needed to create the
3 variance on economic grounds. You would have just said, var-
4 iances which are permissible under the '87 have to at least
5 meet the '77 level. But they went ahead and created a specific
6 variance based on the affordability factor and put a limitation
7 on it. But that limitation further emphasizes the correctness
8 of EPA's position. Congress obviously intended the '77 effluent
9 limitations to be a uniform floor and '87 was a hope to clean
10 up the waters even further, but there was a realization that
11 those were more stringent regulations and that some businesses
12 who were doing a good job insofar as they had already complied
13 with the '77 limitations might not be able to take the next
14 step further, only part of that step. And so, under those
15 circumstances, a variance may be available.

16 QUESTION: Let me back up a little bit to ask whether
17 this record discloses how many of the total in each of these
18 industries would be under 250 employees?

19 MR. LEVANDER: The record does not break it down but
20 it does indicate that the majority of firms are quite small in
21 terms of the percentage --

22 QUESTION: I should think that the general observation
23 would be, although I would not notice it judicially, that most
24 of the crushed stone people, more than half of them, would be
25 under 250 now.

1 MR. LEVANDER: I would guess that is absolutely cor-
2 rect, Mr. Chief Justice, although in terms of production there
3 are few firms, like 1 percent or 10 percent of one industry
4 produces 40 percent of the production. So there are a few large
5 firms out there producing over a million tons a year.

6 QUESTION: They might be large firms but each unit
7 -- they might well be scattered; a corporation might own ten of
8 these units -- but each of the units is not likely to be over
9 250 employees.

10 MR. LEVANDER: I think that's probably correct.

11 QUESTION: And they'd each be operating under differ-
12 ent conditions with different drainage problems and different
13 supply problems.

14 MR. LEVANDER: Well, but the regulation was set by
15 taking into account these variances. If an industry comes in,
16 as I said, this Birdsall Company in South Dakota and says, well,
17 we're not just slightly different than our fellow next door,
18 we're a hundred feet different, and that's a fundamental dif-
19 ference, then he's entitled to a variance.

20 QUESTION: Tell me something. How long does a variance
21 last when it's granted?

22 MR. LEVANDER: Well, the permits last for five years.

23 QUESTION: Five?

24 MR. LEVANDER: Right. And so the variance is applied
25 for and received at the beginning of the permit. Then it's good

1 for the five years.

2 QUESTION: This is for the '77?

3 MR. LEVANDER: That's correct. And for '87, actually.

4 QUESTION: But at least a variance under '77 couldn't
5 last any longer than -- a variance would be required for the
6 '87s?

7 MR. LEVANDER: That's right. The '77 limitations --
8 when a permit expires, then you would have to reapply for the
9 variance.

10 QUESTION: Well, did the Court of Appeals hold that
11 you had to take in affordability in a sense that if he
12 couldn't afford it, you had to give the variance. Is that it?

13 MR. LEVANDER: That's not altogether clear. There,
14 the language of the opinion --

15 QUESTION: On the other hand, it isn't altogether
16 clear that the question that you present in your brief is really
17 the question. You say, does it require a consideration of the
18 economic -- ?

19 MR. LEVANDER: Yes. Well, that at a minimum. Respon-
20 dents seem to back off the borderline which is the Court of Appeals
21 decision and say that all we need to consider, you don't --
22 it's not dispositive. The Court of Appeals language seems to
23 indicate that it's just like 301(c), which is dispositive,
24 provided that you are at least complying with the '77 limita-
25 tions.

1 I'd like to reserve the rest of my time for rebuttal,
2 if I might.

3 MR. CHIEF JUSTICE BURGER: Very well. Mr. Freeman.

4 ORAL ARGUMENT OF GEORGE C. FREEMAN, JR.

5 ON BEHALF OF RESPONDENTS CONSOLIDATION COAL CO. ET AL

6 MR. FREEMAN: Mr. Chief Justice, may it please the
7 Court:

8 I have argued this case against EPA three times before
9 the Court of Appeals for the 4th Circuit, I have filed amicus
10 briefs in the duPont case which preceded this whole issue in
11 many ways in that circuit and in this Court. I have read with
12 great diligence the opinions and briefs in the Weyerhaeuser
13 case. I am back in the 4th Circuit in a continuation of the
14 Appalachian case with EPA.

15 Every time I argue this case, EPA has a new theory
16 for its position. If you will look at the opinions below, you
17 will see the confusion that EPA is continually shifting inter-
18 pretation of its variance clause and the basis for its right to
19 exclude evidence of affordability in a variance proceeding in
20 all of the cases which they have decided.

21 Justice White, to come to the point that you just
22 made, the issue here today is not the question of whether or
23 not evidence of affordability in a variance proceeding, standing
24 alone, justifies a variance. That has never been an argument
25 that we have made, it has never been a holding --

1 QUESTION: You mean you've never claimed that just
2 because you couldn't afford it, you were entitled to a variance?

3 MR. FREEMAN: No, sir. And what the heart of this
4 case is, is what kind of evidence, economic evidence is admis-
5 sible in a variance clause proceeding. And I submit to the
6 Court that able counsel's concession that under 304(b)(1)(B)
7 that EPA must consider evidence of affordability for the indus-
8 try as a whole is completely --

9 QUESTION: Or even -- or for the variance.

10 MR. FREEMAN: Yes, sir. -- is conclusive that they
11 have to consider it in a variance proceeding.

12 QUESTION: Well, he -- I thought he also said that in
13 making the '77 regulations, might not that -- that they con-
14 sidered affordability in the sense that, how many firms would
15 be put out of existence?

16 MR. FREEMAN: And that's the heart of this case, sir.
17 As Mr. Justice Stevens observed, there is no express authority
18 in 301 for EPA to issue 1977 regulations. That's what duPont
19 was all about. What duPont said was, you have to look at the
20 structure of the Act as a whole to derive implied authority
21 for EPA to issue those '77 regulations in the first place. And

22 And what the 4th Circuit said and what you affirmed
23 in duPont was that that implied authority was conditioned. It
24 was conditioned two ways. First, those '77 regulations were
25 only presumptively applicable at the permit-issuing stage, and

1 as this Court characterized it, saying the same thing, there-
2 fore you have to have a meaningful variance clause. And the
3 logic of duPont is, and the logic of the Government's brief in
4 the recent Appalachian Power case, which I just argued against
5 them, is that a variance clause proceeding under 1977 regula-
6 tions is not a true variance at all. What it does is it shifts
7 the burden and permits the plant owner to come in and produce
8 evidence under all of the statutory criteria of 304(b)(1)(B)
9 that was relevant to the setting of those presumptively appli-
10 cable nationwide effluent limitations for '77, and if he can
11 show by evidence under those criteria that BPT for his own
12 particular plant is a different limitation, then he doesn't get
13 a variance. This is for case-by-case adjustment of BPT. That's
14 in the Government's first brief in this case --

15 QUESTION: Well, when does he get a variance?

16 MR. FREEMAN: He never gets a true variance, sir. He
17 gets the right -- the purpose of the variance clause is to
18 shift the evidence to him at --

19 QUESTION: Well, I know, but when does he win? I'll
20 put it that way.

21 MR. FREEMAN: When does he win? Well, let's take how
22 you would introduce --

23 QUESTION: What does he have to show to win so that
24 he gets his permit? That's what I --

25 MR. FREEMAN: All right. What he has to show is --

1 and let's assume this is an owner that cannot afford, he cannot
2 pay the price --

3 QUESTION: You know, well, you've already conceded
4 as far as I can tell that just because he --n't afford

5 MR. FREEMAN: Yes, but I'm going to tell you --

6 QUESTION: -- can't afford it doesn't get him very far.

7 MR. FREEMAN: That's right. But I would like to say
8 how that evidence is relevant. And EPA's position is that the
9 evidence is not relevant and it will refuse to receive any evi-
10 dence of individual plant affordability in a variance
11 clause, and that's the heart of this.

12 QUESTION: Under '77, for '77?

13 MR. FREEMAN: Yes, sir. One of the statutory criteria
14 under 304(b)(1)(B) is -- and I will try to quote it to be pre-
15 cise about it -- I'm quoting from the statute, "Total cost of
16 application of technology is relevant to the effluent reduction
17 benefits to be achieved from such application." Now that is a
18 statutory cost benefit test. It says, not that, some total costs
19 come in and you look to see what the resulting social benefits
20 are going to be. And we believe that the word benefits here
21 means social benefits because the legislative history of the Act
22 shows clearly that Congress wanted unemployment effects and
23 impacts on the local economy to be considered.

24 Now, if you make that showing, that still doesn't get
25 you home free. And the Court of Appeals for the 4th Circuit

1 recognized that. It showed you've got to bring in evidence
2 under the other statutory criteria. There are other factors in
3 there too. This is just one of them. And viewing them all as a
4 whole, you have the right to try to persuade EPA or the state
5 that a different limitation represents best practical tech-
6 nology for your plant.

7 QUESTION: Mr. Freeman, let me ask you this. What

8 MR. FREEMAN: Yes, sir.

9 QUESTION: What inferences, if any, could reasonably
10 be drawn from the fact that such a small percentage of the --
11 such a small segment of the industry in each case here is ad-
12 versely affected?

13 MR. FREEMAN: Sir, we don't know how many people are
14 adversely affected here. If you will compare --

15 QUESTION: Well, we were given some figures. Do you
16 challenge those figures?

17 MR. FREEMAN: I do not challenge those figures as
18 being figures in the record. But I will ask the Court, along
19 that line, to compare the meticulous subcategorization which
20 EPA went through with for the paper industry in Weyerhaeuser
21 with the sort of hit-or-miss, few-sample-plant type of subcate-
22 gorization they went through in the crushed stone industry and
23 in the coal industry. And that's spelled out in our brief.
24 What this variance clause is all about, it permits EPA because
25 of the time pressures involved in issuing those '77 regulations

1 to make the kinds of oversimplifications and generalizations
2 that it has to make to issue those industry-wide regulations.

3 QUESTION: Suppose, for example, that the record
4 showed that 1/10 of 1 percent of all the employees in the
5 industry, the employees, would be unemployed, out of business,
6 under the regulations, would -- would that reasonably suggest
7 that the regulations were not unduly stringent?

8 MR. FREEMAN: Oh, sir, I think that would suggest that
9 the regulations were probably all right.

10 QUESTION: Or even too loose?

11 MR. FREEMAN: Well, but the regulations meet one test.
12 At the permit-setting stage what we are looking for is to see
13 whether or not those general regulations which were roughly set
14 will create an anomaly under the statutory criteria that will
15 not make it best available controlled technology at this par-
16 ticular plant. If the plant is going to be closed down, if one
17 of our coal mines is going to be closed down, all the miners
18 that work at the mine are put out of work, the one town that
19 is dependent upon them bankrupted, and if we can show through
20 other evidence that the limitation that EPA is proposing here
21 at that particular mine not only will have that economic effect
22 but it won't do the water or the fish or people or anybody any
23 good, then we think that in that special circumstance the
24 variance clause is supposed to allow EPA to correct on a case-
25 by-case basis for the overgeneralization that it had to go

1 through in issuing these regulations --

2 QUESTION: What do you make out of the example that
3 your colleague gave a few moments ago that the man who is on
4 the edge of a cliff, and if you really enforce the regulations
5 against him, he wouldn't get a permit and if he had to live up
6 to it he couldn't afford it? Didn't he indicate that under the
7 '77 variance procedures that they might give him a special
8 treatment?

9 MR. FREEMAN: I didn't in any way understand him to
10 say that.

11 QUESTION: Oh, you didn't.

12 MR. FREEMAN: And I know that in the cases that I've
13 had where I have tried to present evidence of those economic
14 effects, that EPA clearly will exclude it. And I think that --

15 QUESTION: Well, I asked him if he weren't talking
16 about the '87 variance and he said, no, he was talking about
17 the '77.

18 MR. FREEMAN: Well, sir, I ask you to look at their
19 reply brief --

20 QUESTION: Because let's assume that I understood him
21 correctly. Then I assume that he's, what he said is that he
22 would have to undertake a very expensive pumping operation.
23 And if that isn't taking into consideration evidence of cost and
24 affordability, what is it?

25 MR. FREEMAN: Well, sir, if he said that, I didn't

1 understand it that way.

2 QUESTION: Then he's even changed his position more
3 than you thought, then.

4 MR. FREEMAN: Yes, sir, and it's contrary to the posi-
5 tion set forth in footnote 9 of his reply brief where he makes
6 it clear that --

7 QUESTION: I perhaps misunderstood him.

8 MR. FREEMAN: -- that evidence would not be admissible
9 in a variance proceeding.

10 QUESTION: What do you think he meant by it? What was
11 his cliff example all about?

12 MR. FREEMAN: I don't know. I would say this, sir.
13 The way I took his reference to mean, because my problem is,
14 I've argued this thing over and over again and I get different
15 examples each time -- it is not our argument -- and maybe he's
16 saying here, if all you can show is that you are on the edge of
17 the cliff and if you have to comply with the regulations, you
18 get pushed off the cliff under our theory and as I understand
19 the Government's theory, you get pushed off the cliff. You have
20 to show something more.

21 So what's at issue here is, do we have evidence -- do
22 we have the right in a variance proceeding to show that we're
23 going to get pushed off the cliff as well as to show that we
24 shouldn't be pushed off the cliff because of the other statutory
25 factors as well in 304(b)(1)(B)?

1 QUESTION: Let me put a hypothetical concretely to see
2 if I understand the point you made about their resistance to
3 subjective evidence, as distinguished from objective, industry-
4 wide evidence. Assume a town that has 500 employable and em-
5 ployed people and a coal mine, and you offer to prove to EPA that if
6 a variance is not granted, 350 of them will be out of work. And
7 do you say that they will decline to consider that?

8 MR. FREEMAN: In a variance clause proceeding. That
9 is the logic of their position and --

10 QUESTION: Well, do they in fact?

11 MR. FREEMAN: -- it's what they state clearly time and
12 time again.

13 QUESTION: Do they in fact and in practice have they
14 refused tenders of evidence of that kind?

15 MR. FREEMAN: Well, we have pointed out, sir, and in
16 certain cases of inconsistency on EPA's part -- because one of
17 the things that it has argued here is the presumption of
18 validity to its own regulation, which changes daily, but, in
19 some of the cases, we pointed out that they had admitted evi-
20 dence of that. And in footnote 9 to their reply brief, they
21 said, yes, there was such a case. But the evidence was admitted
22 over our objection because it was inconsistent with our
23 interpretation and reading of our regulations.

24 QUESTION: Well, then the EPA is allowing it in. It
25 doesn't make any difference --

1 MR. FREEMAN: Well, it's allowing it in -- it's being
2 allowed in by a hearing examiner over the objections of counsel
3 for the agency. But the whole reason this case is before this
4 Court -- and I will say that there is no inconsistency whatso-
5 ever in the Weyerhaeuser case and the 4th Circuit cases --
6 they both read the regulation and they both read this Court's
7 opinion in duPont as requiring EPA in a variance clause proceed-
8 ing to admit evidence under all of the statutory factors that it
9 had to consider when it set the regulations. And that means
10 everything that's in 304(b)(1)(B). And --

11 QUESTION: Mr. Freeman, it seems to me we've got
12 another problem that we haven't talked about yet.

13 MR. FREEMAN: Yes, sir.

14 QUESTION: At one stage of the proceeding I thought
15 the question was whether affordability was a sufficient ground
16 for a variance. Another stage I thought the question was whether
17 affordability was relevant at all. Now you're telling us that
18 they won't even admit evidence of unaffordability to be received
19 in a proceeding. And one of the problems I have is, we're
20 dealing with a regulation and not a specific concrete dispute,
21 and I'm seriously concerned about the question of whether the con-
22 troversy is ripe. And one of the reasons is, I think you kind
23 of shift the arguments as the proceeding goes, and your point
24 about whether or not there is disagreement between the Court of
25 Appeals for the D. C. Circuit and the 4th Circuit emphasizes

1 that to my mind. I have difficulty knowing whether --

2 MR. FREEMAN: If I may have -- yes, sir -- well, if
3 I may address that because I think you are wrong, and I think
4 what happened is that the D. C. Circuit and the Court of Appeals
5 for the 4th Circuit arrived at the same point, namely that all
6 of this evidence under 304(b)(1)(B) had to be considered.
7 They both reached the same conclusion that evidence of afforda-
8 bility was relevant to total cost, that component in the cost/
9 benefit test that's in 304(b)(1)(B).

10 The 4th Circuit following -- you remember, it started
11 this whole thing with duPont -- and it looked mainly in duPont
12 not to legislative history but to the overall scheme of the Act
13 to see whether EPA had this implied authority to issue the
14 regulations in the first place. It started in Appalachian; two
15 months after it decided duPont it picked up right where it was
16 and said, looking at the overall scheme of the Act as a whole,
17 we think the concept of affordability -- that is, evidence of
18 affordability -- clearly ought to be admissible under total cost
19 because otherwise you would have the anomalous situation of the
20 being able to get away to have it considered under the more
21 stringent limitation without having it taken into account under
22 '77. We think that the reference in the 4th Circuit opinions in
23 Appalachian has to be viewed in that context, that is, its refer-
24 ence to 301(c) said that evidence of affordability has to be
25 considered under the statutory criteria language of total cost

1 in relation to resulting effluent benefit. And it's clear to
2 us that Weyerhaeuser reached that point a different way, because
3 it had benefit of your decision in duPont and the benefit of
4 EPA's shift in its interpretation of the regulations to permit
5 the consideration of economic evidence. So it simply took the
6 shorthand route and looked at legislative history with regard to
7 total cost.

8 MR. CHIEF JUSTICE BURGER: Mr. Garrett.

9 ORAL ARGUMENT OF THEODORE L. GARRETT

10 ON BEHALF OF RESPONDENTS NATIONAL CRUSHED STONE ASSOC. ET AL.

11 MR. GARRETT: Mr. Chief Justice, and may it please
12 the Court:

13 QUESTION: Before you go on, let me pursue the hypo-
14 thetical if not real question posed by Mr. Justice Stevens.
15 Should the Court try to decide this kind of issue on abstrac-
16 tions as distinguished from a case in which, a specific case in
17 which evidence were tendered that 350 out of 500 people in a
18 particular town would be unemployed because of the closure of
19 a coal mine, rather than trying to pass on the regulations in
20 the abstract? If you'd care to comment on that at some point
21 in your presentation?

22 MR. GARRETT: Well, I'll address it now, since it
23 seems to be on your mind. It is true that the variance clause
24 as it was contained in the regulations before the 4th Circuit
25 had a certain amount of vagueness to it. It talked about

1 fundamentally different factors without indicating what those
2 were. And indeed, when we argued the case in the 4th Circuit,
3 one of the problems that we had with the variance clause is that
4 it was vague. You couldn't tell what the grounds were for the
5 granting of a BPT variance. Now, with respect to the ripeness
6 question, I think that that problem has been solved because EPA
7 in 1979 published regulations under its MPDS program applicable
8 to all industries and specifying in detail what factors will
9 and will not be considered in granting a variance. You can look
10 at 40 CFR, Section 125.31, and in particular Section 31(e).
11 In that provision of EPA's regulations, which are binding on
12 the agency and express its position, state unequivocally that
13 the inability of a particular plant to afford costs of compli-
14 ance will not be grounds for a variance.

15 QUESTION: Will not be grounds, but will it be received
16 and weighed, along with other factors?

17 MR. GARRETT: The Agency's regulations say not, and I
18 think that if you read the preamble to the Agency's 1979
19 regulations, it makes it absolutely clear. The regulations
20 say that a variance will only be considered if there are funda-
21 mentally different factors. And the Agency's regulations go on
22 to state that economic affordability under no circumstances can
23 be considered fundamentally different.

24 QUESTION: This is for the '77 variance??

25 MR. GARRETT: Yes. This is for the 1977 variance.

1 QUESTION: Different from the '87? Is that right?

2 MR. GARRETT: I believe that's right. Of course, the
3 Agency's position is that 301(c) supersedes its variance clause
4 for '83.

5 QUESTION: Well, is your response to be taken as
6 saying that if the EPA declined to receive evidence of the hypo-
7 thetical I suggested, economic factors on the town, that would
8 be error? Or --

9 MR. GARRETT: Well, it would be consistent with its
10 own regulations and the Agency would be bound to follow those
11 regulations. It's our position that the Agency's regulations
12 are invalid and that's why we're before the Court. Otherwise
13 we would have a situation where this very issue before the Court
14 would be litigated in hundreds of individual proceedings and
15 indeed it's not clear that it could be litigated, because EPA's
16 EPA's --

17 QUESTION: But at least we'd have a record about what
18 kind of evidence they really will permit and what they won't.
19 How did you understand the example that the Solicitor General
20 presented, the 100-foot cliff example?

21 MR. GARRETT: Well, what I made of it is that if
22 there was a technological factor --

23 QUESTION: Technological? It's just he's on a cliff
24 and it'd cost him money to pump water.

25 MR. GARRETT: My understanding, and I think it's

1 better addressed to the EPA counsel --

2 QUESTION: I thought that the implication was that,
3 sure, we'll receive evidence of that.

4 MR. GARRETT: As to the costs, but not as to affor-
5 dability. In other words, if you can show that the costs are so
6 high that it would force the plant to close --

7 QUESTION: Well, it's evidence of affordability any-
8 way, the cost is.

9 MR. GARRETT: Well, I guess all I can suggest is that
10 you read EPA's regulations as I just cited them. And it seems
11 to me clear on their face --

12 QUESTION: And so you're suggesting the Solicitor
13 General isn't following his own regulations, in this example?

14 MR. GARRETT: Well, I think that you'd better ask him.

15 QUESTION: Well, I thought it was fair, I thought it
16 was fair to ask you.

17 MR. GARRETT: I had understood it in a different way.
18 I understood him to be saying that they would consider costs
19 but not the question of affordability.

20 QUESTION: You mean, if the fellow who is putting in
21 the evidence couldn't go on and say, furthermore, I can't afford
22 this?

23 MR. GARRETT: That's exactly right. And that's what
24 I understand the brief to say.

25 QUESTION: But that they might give him a variance

1 because it was more expensive for him?

2 MR. GARRETT: That's correct. On the other hand, on
3 the other hand, if the Government could show that it were not
4 more expensive for some strange reason, then the affordability
5 question would be irrelevant and he might not be entitled to a
6 variance.

7 QUESTION: I'm sure Mr. Levander will enlighten us
8 when it comes to his four minutes.

9 QUESTION: Your position, as I understand it, the cliff
10 is only about a third as high as it's been described but it's
11 right on the border between justifying a fundamental cost dif-
12 ference and fundamental not. You have two companies, one
13 owned by a very large corporation with lots of money, another
14 owned by a marginal operator, that the marginal operator would
15 get a variance and the other one would not.

16 MR. GARRETT: Well, yes and no. Before it can be a

17 QUESTION: It has to -- for it to be a relevant factor
18 it has to be decisive in some cases. Now, I gave you a marginal
19 case and see if you're not saying that in that marginal case
20 the small company gets it and the big one does not?

21 MR. GARRETT: Well, first of all, I think our position
22 has consistently been that you have to consider a number of fac-
23 tors so that that one factor --

24 QUESTION: All other factors are neutral except
25 affordability in my hypothetical.

1 MR. GARRETT: Secondly, I'm not sure that the size of
2 the plant alone --

3 QUESTION: Well, it's the capital structure of the
4 company. Those plants are physically identical in my case.

5 MR. GARRETT: Well, let's say that the large company
6 concludes that by virtue of imposition of these added costs
7 that it becomes uneconomical to operate that plant, whether it
8 be a crushed stone facility or some other facility.

9 QUESTION: You keep changing my example.

10 MR. GARRETT: Well, my only point is that it might
11 be a relevant distinction and it might not.

12 QUESTION: Yes; duPont's. If duPont owned that coal
13 mine or crushed rock --

14 QUESTION: Well, if you say it might or might not be
15 relevant, what are we arguing about?

16 MR. GARRETT: My point is it's always relevant.

17 QUESTION: What are we arguing about?

18 MR. GARRETT: It's always relevant. The question is
19 whether or not it's --

20 QUESTION: The government's position was that that was
21 wholly irrelevant.

22 MR. GARRETT: That's our understanding of their
23 position.

24 QUESTION: But now you just said it might or might
25 not be relevant.

1 MR. GARRETT: Well, our position is that it would
2 always be relevant. I understood the question to be whether or
3 not it would be dispositive, and I'm sorry for the confusion.

4 QUESTION: I don't understand how anything could be
5 relevant but never be dispositive. If it's the only differen-
6 tiating factor between two otherwise comparable cases. Seems
7 to me it's either dispositive or it's then irrelevant; one of
8 the two.

9 MR. GARRETT: Well, I just think that all other
10 factors being equal it might be dispositive, yes, recognizing
11 the fact that there is a certain amount of discretion that the
12 Agency has and that it's hard to find two plants that are in
13 identical circumstances with respect to the impact on receiving
14 waters and other factors.

15 QUESTION: I'm sure Mr. Levander will clear it up
16 for us.

17 MR. GARRETT: The difficulty that we have with the
18 Agency's regulations is that the Agency says that it will grant
19 the variance based on a number of factors, and they enumerate
20 them, including engineering, process factors, land availability,
21 and so forth. Yet the one issue that they -- as we understand
22 it -- refuse to consider in current permits is the question of
23 whether or not the discharger can pay for the required control
24 equipment. The Agency will not consider the issue even if the
25 resulting controls will result in no benefit to the environment.

1 Now, the Agency says, oh, yes, we'll consider finan-
2 cial inability as a factor in 1984 but not now. This is hardly
3 any consolation to a plant that's forced to close now because
4 they cannot afford BPT permit requirements.

5 Now, Shakespeare once said, "Those who die seldom
6 do, or never recover."

7 We submit that it's totally arbitrary for EPA that
8 it will consider every relevant factor except the one that means
9 the very survival or extinction of a company. Now, it seems
10 to me that there is a tradition of fair play in America that
11 allows persons to be heard on matters of significance. And I
12 think that EPA's position here is at odds with that tradition.
13 It's inconceivable to me that Contress would have delegated to
14 EPA the authority to shut down a plant without a hearing at
15 least on this issue, not in cases where they are in clear vio-
16 lation of tha law, not in a situation where a plant is endan-
17 gering human health, but simply because a small businessman
18 cannot obtain financing or otherwise afford the cost involved.

19 Now, there's been a lot said about the statutory
20 structure. I'd like to simply make a couple of points regarding
21 that. The 1977 standard is supposed to be practicable and in
22 turn the Agency notes that it's not anticipated that large
23 numbers of plants will be forced to close as a result of BPT.
24 In contrast, by 1984, the standards are supposed to be more
25 stringent and reflect the best available technology economically

1 achievable, and to ensure that firms will not be forced to close.
2 Congress provided in Section 301(c) for an explicit variance
3 from the 1984, or the Government refers to them as the 1987
4 limits on grounds of affordability.

5 Now there are two key respects in which the regula-
6 tions depart from this scheme and in turn those departures re-
7 late to two independent grounds for affirming the decision below.
8 First of all, EPA's initial BPT regulations often go very far
9 beyond what is practicable. In the case of the crushed stone
10 industry, for example, EPA adopted BPT regulations that require
11 zero discharge of process water, and they publish the identical
12 regulations planned for the 1984 standards.

13 Now, contrary to the Government's suggestion that the
14 regulations were upheld in all respects, certainly the 4th
15 Circuit found that in major respects the crushed stone regula-
16 tions were unreasonable. The crushed stone industry contains
17 hundreds of small privately owned businesses. And EPA's
18 regulations would close many plants that cannot afford the costs
19 involved. We strenuously disagree with Government counsel that
20 the costs were fully considered by the Agency or that the
21 impact would be small.

22 And on that, I would point out a couple of factors
23 since it's been brought up as an issue this morning. The Agency
24 acknowledges that the greatest impact of its regulations will
25 fall on small plants. Indeed, the Agency predicted that there

1 would be 35 closures within its small plant category. Its
2 economic analysis had several categories of plants, the smallest
3 of which was the so-called small plant category, and this con-
4 sisted of a 100,000 ton-per-year plant.

5 QUESTION: How does that translate into number of
6 employees?

7 MR. GARRETT: I'm not sure, Mr. Justice Burger, but
8 it's relevant with respect to EPA's economic analysis, and the
9 adequacy of that analysis, that one-third of the industry --
10 some 1,600 companies -- are composed of plants that produce
11 less than 25,000 tons per year, far smaller than studied by EPA
12 even in its smallest small plant economic analysis. In other
13 words, this is a category of plants that was never studied by
14 EPA. We believe that many small plants in this industry will
15 have a financial position that is significantly different from
16 that studied by the Agency. And if EPA's position is upheld
17 today, then plants in this subcategory will never have a chance
18 to have EPA or state or anyone consider whether they're funda-
19 mentally different in this respect.

20 QUESTION: Mr. Garrett, you don't make any constitu-
21 tional argument in this case, do you?

22 MR. GARRETT: Well, we suggest that there's a delega-
23 tion problem that could be avoided if the statute's interpreted
24 our way.

25 QUESTION: Well, I thought it was a matter entirely.

1 of statutory construction.

2 MR. GARRETT: I think the case can be disposed of
3 as a matter of statutory construction but I --

4 QUESTION: I thought that's what the issues were.

5 MR. GARRETT: That is the issue. I would just simply
6 point out that, as I mentioned earlier, that I can't conceive
7 that Congress intended to delegate to EPA the power to make
8 these kinds of decisions without considering this factor and
9 without even affording the company an opportunity for hearing.

10 QUESTION: But there's no due process argument, or
11 there's no argument that there's a taking without compensation,
12 or anything like that.

13 MR. GARRETT: Well --

14 QUESTION: Is there or isn't there?

15 MR. GARRETT: Not as such, although the issue is
16 going to surface in one proceeding or the other, which was
17 getting to my second point. There is a relationship here, an
18 interrelationship between the setting of the national standards
19 and the allowance of a variance. The courts have in many
20 cases upheld national regulations considering EPA's data base
21 and the way in which EPA evaluated the evidence on the grounds
22 that, well, maybe this was less than perfect, but in situations
23 where it isn't perfect, where there might be a taking or there
24 might be a problem of insufficient consideration for statutory
25 factors, that'll be accounted for in the variance procedure.

1 The implications of EPA's positions, it seems to me,
2 are going to be to put an enormous burden on the initial regula-
3 tion-setting stage, because if companies realize that the possi-
4 bility of a variance is really illusory, that EPA has to have
5 done superb economic analysis in the first instance, otherwise
6 they're never going to be heard on the question of afforda-
7 bility, you're going to have extensive litigation and rule-mak-
8 ing proceedings on the extent to which EPA conducted an ade-
9 quate economic analysis.

10 It seems to us that at some stage these issues must be
11 considered.

12 Now, the Agency's justification apparently is that
13 since the statute allows for a variance and for BAT in 1984,
14 and it's silent for BPT as to 1977, that that's dispositive on
15 the question. We submit that Congress would not have intended
16 such a result and that the decision of the 4th Circuit should
17 be upheld. Thank you.

18 MR. CHIEF JUSTICE BURGER: Now you'll clarify this
19 problem for us, Mr. Levander.

20 ORAL ARGUMENT OF ANDREW J. LEVANDER

21 ON BEHALF OF THE PETITIONER -- REBUTTAL

22 MR. LEVANDER: Yes. Before I do that I'd like to
23 make one point, if I might, Mr. Chief Justice, or two points.

24 The first point is that nothing in their brief -- at
25 least I read it several times, and I could find nothing about

1 any constitutional question, any delegation question; this is
2 simply a matter of statutory construction.

3 The second point is, as this Court made very clear in
4 the duPont opinion, under the Clean Water Act the question is
5 not what we think is an appropriate way to regulate; it is what
6 Congress said and what Congress did. And here the language of
7 the Act, although somewhat complicated, strongly supports EPA's
8 position and the legislative history, which has not been dis-
9 cussed here at all, is simply overwhelming. The report, the
10 conference report -- Senator Muskie, who was quoted with
11 approval in this Court's dupont opinion at page 130 and page
12 129, and other consistent statements by Congressmen over and
13 over and over again reflect three things, one, that these regu-
14 lations would force certain marginal economically inefficient
15 companies out of business; two, that in order to sort of
16 appease that problem to some extent, Congress created Section 8
17 financing. Senator Nelson introduced that bill saying variances
18 are a problem because -- and it's exactly the situation where
19 you have a little fellow who's going to go out of work and it's
20 very sympathetic, that it's hard to deny him a variance.

21 Nonetheless, Congress made a determination that he
22 would be denied a variance unless he could get the Section 8
23 funding.

24 And three, over and over and over again -- and I
25 direct the Court's attention to page 7 and 8 of the reply brief

1 in particular. There's just statement after statement that the
2 economic affordability will not be reconsidered on a plant-by-
3 plant basis.

4 QUESTION: Are there some contrary indications in the
5 legislative history?

6 MR. LEVANDER: No. The only contrary indications
7 that are put out by respondent are post-adoptive legislative
8 history. And even as to that, I think it is indicative of the
9 weakness of their position. They claim that in 1977 when
10 Congress amended the Act that it thoroughly considered and
11 approved and acquiesced in the 4th Circuit Appalachian Power
12 decision.

13 Now, the basis of that claim is three things. First,
14 the Congress didn't expressly disapprove it in 1977, so we have
15 this legislative silence which is supposed to be dispositive.
16 Second, that a Congressman got up on the floor of the House and
17 waved a 126-page Library of Congress report which indexes 144
18 reported decisions, including the Appalachian Power decision
19 and including decisions that suggested that the variance clause
20 was valid on the same page, and said that this report he found
21 it very useful to understand the Act, saying nothing about the
22 Appalachian Power decision. And on the basis of this we are
23 supposed to assume that Congress was aware of and acquiesced
24 in this decision.

25 QUESTION: Would the Government be satisfied if we

1 adopted the formulation of the problem of the D.C. Circuit
2 with which you say this 4th Circuit is in conflict?

3 MR. LEVANDER: Yes. I think the D.C. Circuit deci-
4 sion is correct that -- and this is the part I explain what the
5 difference is -- EPA will take into account all kinds of funda-
6 mental differences directly related to compliance which affect
7 the cost, that is, the financial outlay that a discharger would
8 have to spend in order to comply.

9 QUESTION: Is that the man on the cliff problem?

10 MR. LEVANDER: That's the man on the cliff problem
11 and all kinds of other problems. Another example --

12 QUESTION: So you take evidence of cost as relevant?

13 MR. LEVANDER: Cost of compliance.

14 QUESTION: And you do -- would you agree with Brother
15 Stevens that it will be determinative sometimes?

16 MR. LEVANDER: That is correct. What we will not
17 take into account, the discharger's bankbook, which is to say
18 we will not take into account affordability, his ability to
19 afford, so that if you had four dischargers in an industry,
20 all of them identical, and one of them was simply economically
21 inefficient and had wasted money or didn't have money or was
22 incompetent or whatever his problem is --

23 QUESTION: Does the cost of compliance include capital
24 costs? Interest costs?

25 MR. LEVANDER: Well, that, of course, I answer by

1 Section 8 financing which is available, so that the person
2 who couldn't get monies for --

3 QUESTION: No, no, not in whether there's financing,
4 but in determining costs, are capital costs an item that you're
5 looking at? Which in turn may vary from company to company, as
6 you know.

7 MR. LEVANDER: Well, that's a closer question as to
8 whether his lack of money, we don't take into account. Now, if
9 he were to show that for some reason he was different from the
10 rest of the industry in his ability to get financing and that
11 was not satisfied by Section 8, that's a question I don't think
12 EPA's passed upon, but my answer would be that he would not
13 be entitled to a variance simply because his cost of money was
14 11 percent versus 12 percent or 10 percent.

15 QUESTION: So if he offers his operating statement
16 for the past five years, you reject it?

17 MR. LEVANDER: We don't want to see it.

18 QUESTION: You reject it.

19 MR. LEVANDER: That's right. What we want to know --

20 QUESTION: But if he wants to tell you how much it's
21 going to cost him?

22 MR. LEVANDER: That we want to know, and that's the
23 basis for variances and that's what will keep these claims of
24 all these industries --

25 QUESTION: Even though in making up the regulation

1 you wanted all those operating statements?

2 MR. LEVANDER: In taking into account we analyze these
3 total cost of application, which includes the industry-wide
4 outlay to afford compliance. And we also, in addition, we have
5 discretion under 304(b) to take into account any other relevant
6 ^{dis} factor and we have consistently --

7 QUESTION: You don't think the fact that he'll go out
8 of business triggers the necessity to consider some of the
9 other factors?

10 MR. LEVANDER: Well, I think it heightens the analy-
11 sis on the variance proceeding, but it's simply irrelevant --

12 QUESTION: Well, then, how can you say you don't
13 want to see his operating statements?

14 MR. LEVANDER: We don't. It's not affordability.
15 Congress made the determination that affordability is only a
16 factor to be considered in the '87 limitations and not as to
17 the '77 limitations. And one last point, if I might. There's
18 been a lot of criticism here of EPA vacillating. If you'll read
19 the progression of EPA statements, starting with 39 Fed. Reg.
20 in 1974 and up to this very date, one thing that has never
21 been vacillated on is this question of affordability. EPA
22 has never suggested and has never taken into account affor-
23 dability as a basis, based on the language and the legislative
24 history of the Act.

25 Thank you very much.

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M MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
The case is submitted.

(Whereupon, at 3:02 o'clock p.m., the case in the
above-entitled matter was submitted.)

1 CERTIFICATE

2 North American Reporting hereby certifies that the attached
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6 No. 79-770

7 Environmental Protection Agency

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