SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1013 & 83-1373

TITLE CHEMICAL MANUFACTURERS ASSOCIATION, ET AL., Petitioners v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Petitioner v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

PLACE Washington, D. C.

DATE Novmeber 6, 1984

PAGES 1 thru 43

(202) 628-9300

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHEMICAL MANUFACTURERS ASSOCIATION :

4 ET AL., :

5 Petitioner :

6 v. : No. 83-1013

7 NATURAL RESOURCES DEFENSE :

8 COUNCIL, INC., ET AL., :

9 - - - - - - - - - - - - - - - - - - -x

10 UNITED STATES ENVIRONMENTAL :

11 PROTECTION AGENCY, :

12 Petitioner :

13 v : No. 83-1373

14 NATURAL RESOURCES DEFENSE :

15 COUNCIL, INC., ET AL. :

16 - - - - - - - - - - - - - - - - - - -:

17 Washington, D.C.

18 Tuesday, November 6, 1984

19 The abcve-entitled matter came on for oral

20 argument before the Supreme Court of the United States

21 at 11:36 o'clock p.m.

22

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APPEARANCES:

SAMUEL A. ALITO, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.

on behalf of Petitioner.

FRANCES DUBROWSKI, ESQ., of Washington, D.C.;

on behalf of Respondents.

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6 MS. FRANCES DUBROWSKI, ESQ.,

7 on behalf of the Respondents 22

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Alito, I think you

3 may proceed whenever you're ready.

4 ORAL ARGUMENT OF SAMUEL A. ALITO, JR., ESQ.

5 ON BEHALF OF THE PETITIONER

6 MR. ALITO: Mr. Chief Justice, and may it

7 please the Court.

8 This is a case under the Clean Water Act, and

9 it concerns the Environmental Protection Agency's

10 authority to issue what are known as fundamentally

11 different factors for FDF variances from its effluent

12 limitations and standards for toxic pollutants. Let me

13 begin by briefly describing how these effluent

14 limitations are set and the important role that FDF

15 variances play in the process.

16 An effluent limitation is simply a figure that

17 tells a facility how much of a particular pollutant it

18 is permitted to discharge. These are usually expressed

19 in pounds or kilos of pollutants per 1,000 pounds of

20 product. For example, one pound of pollutant per 1,000

21 pounds of steel, plastic, or whatever.

22 There are separate sets of effluent

23 limitations for what are known as direct dischargers,

24 facilities that discharge their wastes directly into the

25 navigable waters, and indirect dischargers, facilities

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1 that discharge into public treatment works. This case
2 concerns indirect dischargers, but the basic arguments
3 are the same in both the direct and indirect discharger
4 contexts.

5 Direct dischargers were required to meet two
6 sets of effluent limitations. By 1977, they were
7 required to meet the effluent limitations associated
8 with what is known as BPT, the best practicable control
9 technology currently available, and between 1984 and
10 1987, depending on the type of pollutant, they are
11 required to satisfy the stricter standards of what is
12 known as the AT, the best available technology
13 economically achievable. Indirect dischargers have
14 similar requirements called pre-treatment standards.

15 Effluent limitations are set on what is known
16 as a categorical basis, that is by industrial category
17 and subcategory. EPA has identified those categories of
18 industry where pollution control is most urgently
19 needed, and it has taken the larger categories and
20 further sliced them into numerous subcategories, some
21 fairly broad and some quite narrow. In fact, some of
22 these subcategories have included as few as one or two
23 facilities.

24 The Clean Water Act itself does not set any of
25 these effluent limitations or standards. That is EPA's

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1 job using factors that are generally set out in the
2 Act. For example, some of the factors that are used for
3 BAT and for pre-treatment include the age of facilities
4 and equipment involved, the energy requirements of
5 different types of pollution control technology, the
6 different manufacturing processes that may be used, and
7 the cost of achieving effluent reduction.

8 Let me give an example using the factor of
9 cost to which I may return later in the argument. EPA
10 may determine that for a particular subcategory there is
11 a new advanced form of pollution control technology that
12 will cost between, let's say, between three-quarters of
13 a million and one million dollars per facility to
14 install, and EPA may find that a cost of one million
15 dollars per plant is economically achievable, so EPA may
16 conclude that for this subcategory, this technology
17 represents BAT. It is the best available technology
18 economically achievable.

19 Gathering information on all of the relevant
20 factors in making these determinations for all of these
21 categories and all of these subcategories is an enormous
22 task. Just in the indirect discharger category there
23 are more than 30 -- there are more than 60,000
24 facilities in the 34 primary industrial categories, and
25 EPA was supposed to go about this work at a really

1 breathtaking pace.

2 Under the Act, EPA was given 180 days to

3 proposed the pre-treatment standards for all of American

4 industry. EPA has not been able to meet these

5 impossible deadlines and as a result Respondent has had

6 law suits pending against the Agency for the past

7 decade, seeking to compel the Agency to move more

8 quickly.

9 EPA's only hope of issuing effluent

10 limitations on a reasonably expeditious basis has been

11 to concentrate on the typical plants during the

12 rulemaking phase, and not on the atypical ones, and

13 consequently one of EPA's problems has been these

14 unusual plants. These may be older. They may use

15 different manufacturing processes. Their energy costs

16 may be different because of location, or some other

17 factor.

18 Let me return to my example where BAT was

19 calculated to cost between three-quarter of a million

20 and a million dollars for a facility. For one of these

21 unusual plants, the cost may be two million dollars, far

22 beyond what is economically achievable for any of the

23 facilities in that subcategory.

24 How is EPA supposed to deal with this problem

25 of the unusual plant? One solution, and this is one

1 that Respondent recommends in his brief, would be for
2 EPA simply to withhold issuing its categorical
3 limitations until it has tracked down every single
4 facility and every single subcategory of the category
5 under consideration, and has determined that -- what the
6 requirements and factors are for that facility. This
7 may be theoretically possible, but it would certainly
8 delay the issuance of the categorical limitations and
9 that would not serve the purposes of the Clean Water
10 Act.

11 QUESTION: Suppose regulations could be issued
12 and then amended to care of refinements as time went on,
13 could they not?

14 MR. ALITO: Yes, Justice O'Connor, and that is
15 essentially what we believe the FDF variance mechanism
16 does.

17 Respondent argues that --

18 QUESTION: It accomplishes the same goal, but
19 I suppose not with the same procedural accoutrements
20 that a regulatory change would encompass.

21 MR. ALITO: That is precisely correct. They
22 achieve the same substance in that they would be --

23 QUESTION: Is that what we are really
24 concerned about here as to whether the EPA should have
25 to follow the regulatory procedural requirements and

1 adopted regulations versus issuance of individual --

2 MR. ALITO: Based on the concessions that I

3 perceive in Respondent's brief, I think that's what the

4 issue in the case boils down to. The Agency, of course,

5 argues that it may use FDF variances for all

6 pollutants. Respondent says, no, at least in the case

7 of toxics. But I take Respondent to concede that EPA

8 may amend its effluent limitations regarding toxic

9 pollutants irrespective of the language of 301(1) which

10 they have argued categorically prohibits anything that

11 may be termed a "modification."

12 QUESTION: Well, 307 permits a revision, does

13 it not?

14 MR. ALITO: That's correct, but if I take

15 Respondent to have made in one part of its brief the

16 argument that 301(1) is clear on its face, and it is not

17 necessary to look any further, and I think --

18 QUESTION: Does EPA claim that an FDF variance

19 is a revision --

20 MR. ALITO: An FDF --

21 QUESTION: -- under the meaning of 307?

22 MR. ALITO: No, it is not a revision within

23 the meaning of 307, but neither is the modification

24 within the meaning of 301(1).

25 The other concession made by Respondent that I

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1 want to mention was their concession that an amendment
2 of an effluent limitation may appropriately create a
3 subcategory for one or a few plants. So if you put
4 those two concessions together, I take them to concede
5 that EPA may do essentially what it is doing with the
6 FDF variance mechanism, but it has to do it by a
7 different procedure.

8 I think that once it is understood that this
9 is what the dispute in the case boils down to, then the
10 Agency's position surely must prevail, because an Agency
11 should be permitted to follow the procedure that it
12 prefers unless Congress has dictated another procedure.

13 QUESTION: Mr. Alito, has the Agency requested
14 the appropriate congressional committee to grant an
15 amendment to Section 301 to take care of the problem we
16 are dealing with in this case?

17 MR. ALITO: My understanding is that during
18 the testimony in the House during this session, EPA
19 mentioned the fact that the Third Circuit's decision in
20 this case should be overturned, but that no --

21 QUESTION: Did it go further and offer
22 specific language by EPA to the committee to take care
23 of this problem?

24 MR. ALITO: I'm not aware whether that
25 occurred or not, Justice O'Connor.

1 QUESTION: It was my understanding that it
2 had.
3 MR. ALITO: My understanding was that no
4 specific bill containing such a provision had been
5 proposed and, in fact, no amendments to the Clean Water
6 Act were adopted by this session. In any event,
7 whatever this Congress did, I certainly don't think that
8 it's possible to infer an intent to adopt the Third
9 Circuit's decision. In any event, what this Congress
10 intends concerning 301(1) is a poor guide to the intent
11 of the Congress that adopted 301(1) in 1977.
12 QUESTION: Mr. Alito, may I just ask one
13 clarifying question. When you're dealing with
14 variances, the FDF variances outside of the toxic area,
15 just in the regular area, what is the statutory source
16 of the Agency's authority to grant such variances?
17 MR. ALITO: I think it stems from 501 which
18 authorizes the Agency to issue regulations necessary to
19 implement the Act, and I think it stems from two
20 potentially conflicting statutory commands in the Clean
21 Water Act, namely, to issue these limitations on a
22 categorical basis, and then to do it based on factors
23 that vary significantly among seemingly similar plants.
24 There is tension between these two statutory commands,
25 and the FDF variance mechanism, I think, is a

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1 permissible way of reconciling that.

2 I think in th DuPont case, this Court

3 recognized that the FDF variance was an appropriate and

4 perhaps even a necessary mechanism in the BPT context,

5 and I see no reason to draw a distinction between BPT

6 and and BAT in pre-treatment in this area. The

7 statutory authority is the same, and EPA's practical

8 problem is the same: How do you issue defensible

9 categorical regulations on a reasonably expeditious

10 basis, while taking into account factors that may vary

11 greatly from plant to plant.

12 QUESTION: Are --Sections 301(c) and 301(g),

13 they're not sources of authority, right?

14 MR. ALITO: No, they certainly are not. At

15 the heart of our submission is that those statutory

16 modifications are very different from the FDF

17 variances. That Congress intended 301(l) to apply

18 exclusively to those statutory modifications, and did

19 not intend for 301(l) to apply to FDF variances.

20 I think the center of the Third Circuit's

21 misunderstanding was its inability to understand the

22 difference between those statutory modifications and FDF

23 variances. What the FDF variance does is to correct a

24 mistake, that's all that it does. It corrects a

25 mistake. It establishes the kind of effluent limitation

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1 that should have been set in the first place.

2 The statutory modifications do something very

3 different. Under 301(c) a facility may be eligible for

4 a modification if it can show, not that there was any

5 mistake in the effluent limitation, but that it can't

6 afford compliance.

7 If I can return to my example where BAT was

8 calculated to cost between three-quarters of a million

9 and a million dollars, if a plant came in and said, "I

10 can't comply because I can't afford three quarters of a

11 million dollars," it would be ineligible for an FDF

12 variance, but it might be eligible for a 301(c)

13 modification.

14 Similarly, under Section 301(g), a facility

15 may be eligible for a modification based on the quality

16 of the water into which it is making its discharge. Now

17 that is a fact that EPA may not consider in setting its

18 technology-base effluent limitations.

19 Once this difference between statutory

20 modifications and FDF variances is understood, this

21 Court has already clearly recognized the difference and

22 explained it at some length in the National Crushed

23 Stone case -- One this difference is understood, then I

24 think it becomes apparent what Congress did in 1977.

25 It makes perfect sense for Congress to have

1 said, as we believe it did, that statutory modifications
2 are prohibited for toxic pollutants, but that FDF
3 variances are available for all pollutants, because the
4 FDF variance just corrects a mistake, and whether that
5 mistake has to do with a toxic pollutant, or any other
6 pollutant, it should be corrected.

7 But the statutory modification --

8 QUESTION: Can you help me once more. You
9 said, it is kind of hard to follow this, a correcting
10 mistake variance rather than a statutory 301(c). Would
11 you give me an example, again, I think you did, but I
12 didn' quite follow it, one that would be a mistake
13 correction, but would not qualify under 301(c)?

14 MR. ALITO: Yes. If EPA had calculated that
15 BAT for a subcategory was between three quarters of a
16 million and a million dollars, and a plant came in and
17 said, "Because of the age of my equipment," let us say,
18 "my cost is going to be two million dollars, and that is
19 beyond the economic capability of anybody or group, it
20 is not economically achievable for the group," that
21 plant might be eligible for an FDF variance.

22 On the other hand, if the plant came in and
23 said, "I know you calculated the cost between three
24 quarters of a million and a million dollars, and I can
25 see that that's accurate, but I can't pay even three

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1 quarters of a million dollars, or I will go out of
2 business," that plant is ineligible for an FDF variance
3 because it would not have shown that the Agency did not
4 consider the proper range of factors, only that the
5 individual plant was economically weak and could not
6 afford compliance.
7 I think that is the distinction Congress drew
8 in 1977. What the statutory modifications do is not to
9 correct an incorrect effluent limitation, they excuse
10 compliance with a proper limitation based on factors
11 such as the weak economic condition of a particular
12 plant, because under certain circumstances, those
13 factors take precedence. But Congress said, when it
14 comes to toxic pollutants, these other factors must take
15 a backseat. That is the distinction Congress drew, and
16 that is the reason why we think Congress limited 301(1)
17 to the statutory modifications and not to FDF
18 variances.
19 The FDF variance has been a device that EPA
20 has used to deal with this problem of the unusual, and
21 it has worked very well. It has allowed the agency to
22 issue its regulations more quickly than would otherwise
23 have been possible if it had to stop and worry about
24 every unusual facility in the country.
25 It has helped the agency to defend against

1 court challenges to those regulations by facilities
2 claiming to be fundamentally different. It has been
3 specifically cited by several courts of appeal in
4 turning away those challenges, and it has not been
5 necessary to use this safety device very often, which
6 speaks, I think, to the accuracy of the effluent
7 limitations.

8 The issue in this case, of course, is the
9 meaning of 301(l), which prohibits modifications of
10 effluent limitations for toxic pollutants. As I said,
11 EPA's position has always been that this is limited
12 exclusively to statutory modifications under 301(c) and
13 (g). Respondent says that it is contrary to the plain
14 language of 301(l).

15 Respondent says that a modification is any
16 change in an effluent limitation that makes the effluent
17 limitation more lenient. But if that interpretation
18 were correct, then what would happen if EPA issued an
19 effluent limitation for a toxic pollutant and then
20 discovered that its analysis was mistaken, or
21 circumstances changed, energy costs skyrocketted, for
22 example, and a technology that was previously
23 economically achievable became unaffordable? Under that
24 plain meaning argument, EPA would be powerless to amend
25 its own rules, and that can't be what Congress

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1 intended.

2 QUESTION: Would that trigger the revision of

3 Section 307, Mr. Alito?

4 MR. ALITO: Well, we think it would, Justice

5 O'Connor, but our point is that a provision that

6 prohibits modifications but permits revisions is not a

7 provision that is clear on its face, and it is necessary

8 to look further. It is necessary to take into account

9 the interpretation of the Agency with expertise under

10 this Act. It is necessary to look at the legislative

11 history.

12 QUESTION: You think the word "modify" is a

13 term of art requiring Agency expertise to define it?

14 MR. ALITO: I think it is indeed a term of art

15 in 301(l). Congress used "modification" in 301(l) in

16 the same way that it used "modification" in 301(c) and

17 (g). Everything in the legislative history supports

18 that. There is the evolution of 301(l). 301(l) derives

19 from the Senate bill. There wasn't anything comparable

20 in the House bill. In the Senate, however, in the

21 Senate bill, there was not a separate provision like

22 301(l). 301(c) was amended to include the prohibition

23 against that particular type of modification for toxic

24 pollutant, and similarly there was a prohibition in

25 301(g) which was a new provision prohibiting that type

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1 of modification for a toxic.

2 What the conference committee did was to take

3 this language out of 301(c) and (g) and create a new

4 section 301(1). When they did that, they did not

5 provide any notice to their colleagues that they were

6 expanding the substance of each of those provisions, and

7 they provided no explanation for the change which

8 suggests to us that the change was intended to be purely

9 stylistic.

10 There is also what Congress said about 301(1),

11 and admittedly it did not say very much, but almost

12 every time it referred to it, it was specifically linked

13 with 301(c) and (g). There is also the inference that

14 we believe may fairly be drawn from what Congress did

15 not say. At no point in the legislative history of

16 301(1) did any Member of Congress suggest that 301(1)

17 was intended to reach EPA's well-established and

18 well-known practice of granting FDF variances. If any

19 Member of Congress had had such an intent, we believe

20 that they would have said something, but nobody did.

21 Respondent says, Congress was not aware of the

22 fact that EPA had been issuing FDF variances, but that

23 is incorrect for at least two reasons. First of all,

24 EPA had been including FDF variance provisions in its

25 BPT regulations for some time, and I think this was well

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1 known in the environmental community. Respondent says
2 that Congress was not worried about BPT in 1977, it had
3 put it out of its mind, but BPT was going to remain in
4 effect for seven more years. So that seems completely
5 implausible.

6 QUESTION: May I interrupt once more, Mr.
7 Alito? Had they talked about the variance practice that
8 had been in effect at the time of these amendments?
9 Were the variances pertaining to toxic pollutants that
10 were well established?

11 MR. ALITO: There were variances pertaining to
12 pollutants that were later designated by Congress to be
13 toxic.

14 QUESTION: Were there variances with respect
15 to pollutants that had been designated as toxic
16 pollutants at the time the variance was granted?

17 MR. ALITO: No, but that is because the way
18 that toxic pollutants were handled under the Clean Water
19 Act was radically changed in 1977. Before 1977, I
20 believe they were supposed to be dealt with primarily
21 under Section 307, which is a separate set of effluent
22 limitations for toxic pollutants. Then in 1977, it was
23 decided that they would be dealt with primarily through
24 the regular technology-based effluent limitations that
25 are issued under 301.

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1 Those effluent limitations had been issued.
2 There had been FDF variances from those limitations for
3 pollutants that were later designated as toxic
4 pollutants, and the pollutants to which 301(1) applies
5 are those on a list that was included in a consent
6 degree between NRDC and the Government prior to the 1977
7 amendments. It is now referred to in Section 307 of the
8 Act, and those pollutants, there are 65 of them, are set
9 out in a provision of the Code of Federal Regulations.
10 Returning to my argument that Respondent
11 maintains that Congress was not aware of EPA's practice
12 of granting FDF variances, I think the thing that really
13 refutes that argument is this Court's decision in
14 DuPont, which occurred in early 1977, and the Clean
15 Water Act was enacted in late 1977.
16 DuPont referred prominantly to FDF variances.
17 This was pivotal case under the Act, and I think the
18 Members of Congress, and surely the congressional staff
19 members who were concerned with the Clean Water Act
20 Amendments of 1977 must have been aware of the FDF
21 variance mechanism. If anybody had any intent of
22 restricting EPA's practice of granting those FDF
23 variances, I think someone would have said something
24 but, as I mentioned, no one did.
25 It is also important to realize that granting

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1 an FDF variance for a toxic pollutant is completely
2 consistent with Congress's intent in 1977 to take strong
3 measures against toxic pollutants because, as I said,
4 all an FDF variance does is to correct a mistake. It
5 just establishes the kind of effluent limitation that
6 should have been set in the first place.

7 CHIEF JUSTICE BURGER: We will resume at 1:00
8 o'clock.

9 (Whereupon, at 12:00 o'clock p.m., the Court
10 was recessed, to reconvene at 1:00 o'clock p.m., on the
11 same day.)

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1 AFTERNOON SESSION

2 CHIEF JUSTICE BURGER: You may proceed anytime

3 you are ready, Ms. Dubronski.

4 ORAL ARGUMENT OF FRANCES DUBROWSKI, ESQ.

5 ON BEHALF OF THE RESPONDENT

6 MS. DUBROWSKI: Mr. Chief Justice, and may it

7 please the Court.

8 The issue here is a very straightforward one.

9 Can EPA grant variances from national pre-treatment

10 standards for toxic pollutants?

11 Congress amended the Clean Water Act in 1977

12 to strengthen EPA's ability to regulate toxics. it

13 identified BAT and pre-treatment standards as the key

14 elements of a toxic control strategy. It carefully

15 considered when and under what conditions EPA could

16 grant variances from these standards, and each time it

17 considered the idea of a variance for toxics, it

18 rejected it. At the same time, Congress enacted 301(1)

19 of the law, which tells EPA in broad and unqualified

20 language not to modify any BAT for pre-treatment

21 standard for toxics.

22 EPA urges this Court to take a very narrow

23 reading of 301(1). EPA says that the broad ban on

24 variances in that section was intended to apply to the

25 statutory variances from BAT that Congress had created.

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1 In other words, the economic capability variance in
2 Section 301(c) of the law, or the water quality variance
3 in Section 301(g).
4 Congress, says EPA, did not mean to cut off
5 any implied authority that EPA might have at some future
6 time to creates administrative variances from BAT for
7 pre-treatment. Of course, if Congress had this very
8 narrow purpose in mind, it would have had no reason to
9 create 301(1). Both 301(c) and what became 301(g) in
10 the Senate bill already contained provisos limiting
11 their applicability to non-toxics.
12 EPA says that when the conference moved the
13 ban on variances out of Section 301(c) and into a
14 separate subsection, it did so for purely stylistic
15 reasons. Not substitute change was intended, it simply
16 reflected the drafters' desire to put the words in the
17 statute somewhere else. But EPA's analysis is plainly
18 wrong, because Congress did not simply move the words,
19 it changed them to reaffirm the intent that we maintain
20 here.
21 The original ban on variances had said, don't
22 modify any requirement of 301(b)(2)(A), in other words,
23 don't modify a BAT or pre-treatment standard. The new
24 subsection (1) said, don't modify any requirement of
25 301. It included within its scope not only

1 pre-treatment and BAT standards, but the more stringent
2 toxic effluent standards that were not technology based.
3 In addition, Congress moved subsection (l) out
4 of the sections of the conference bill that were
5 entitled "waivers," or "modifications," and into a
6 section of the conference bill that was entitled "Toxic
7 Pollutants." The latter section identified for the
8 first time the toxics of concern to Congress, and told
9 EPA to regulate those quickly.
10 In other words, Congress deliberately wrote
11 301(l) as a comprehensive ban on variances. It wanted
12 to curtail all variances. It did not simply mean to
13 plus the loophole that had been created in 301(c) and
14 301(g) of the law.
15 Ignoring this evolution of 301(l), EPA argues,
16 that if Congress wanted to cut off other variances, it
17 must have believed that there were such other variances,
18 and if so, it is odd that Congress didn't mention them.
19 So EPA searches for legislative history to reference the
20 FDF. In coming up empty-handed, it says, this search is
21 dispositive. This analysis begs the question.
22 The broad language of 301(l) prohibits all
23 variances. It isn't necessary for Congress to have had
24 the FDF variance in mind to curtail it.
25 QUESTION: What does it say? It doesn't

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1 speak -- Does it speak of a variance?

2 MS. DUBROWSKI: It says, do not modify any

3 requirement of Section 301, and the term "modify," very

4 clearly in the context of 301, means the variance.

5 QUESTION: It includes a variance.

6 MS. DUBROWSKI: It includes the variance,

7 yes. Congress uses the term --

8 QUESTION: What else does it prohibit, other

9 than variances?

10 MS. DUBROWSKI: I think it is limited to

11 variances.

12 QUESTION: For toxic pollutants.

13 MS. DUBROWSKI: That's right.

14 QUESTION: Do you think they could amend the

15 standard?

16 MS. DUBROWSKI: There is a provision in

17 Section 307 to revise standards from time to time.

18 QUESTION: So that 301(1) doesn't mean what it

19 says.

20 MS. DUBROWSKI: No, 301(1) means modification,

21 i.e., variance.

22 QUESTION: The word "modify" would certainly

23 what 307 permits, is that right?

24 MS. DUBROWSKI: The word "modify" in this

25 context means variance, it does not mean revision. The

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1 same problem arises with the new source standards.

2 QUESTION: "Modify," that is a strange word to

3 use just to apply to variances.

4 MS. DUBROWSKI: Congress used to encompass

5 waivers and variances.

6 QUESTION: So it does permit the changes of

7 standards.

8 MS. DUBROWSKI: It does permit EPA to revise

9 the standard from to time, yes, it does. The same

10 question comes up in the context of new source

11 standards.

12 QUESTION: Do you think, then, that a

13 variance -- You just don't accept that a variance could

14 be a revision of a standard.

15 MS. DUBROWSKI: A variance, as the FDF

16 variances, is an attempt to relax pollution control

17 requirements for a single source, and that is what

18 301(l) prohibits. That is different from revising the

19 requirements for the entire category of sources.

20 QUESTION: What if anybody who is in a similar

21 situation to the person who gets the variance, would

22 also get a variance. What if they were to give a

23 variance to everyone who was in the position as the

24 first person who got a variance; isn't that equivalent

25 to a revision of the standard?

1 QUESTION: In other words, a group variance.

2 QUESTION: Certainly that is what the

3 Government argues.

4 MS. DUBROWSKI: Yes, they argue that you

5 can -- They argue that the FDF variance is a tailoring

6 to an individual source. It is not a group variance.

7 QUESTION: They must believe they would give a

8 variance to everybody else who is in the same

9 situation.

10 MS. DUBROWSKI: The FDF variance doesn't

11 contemplate looking at the group as a whole. It says,

12 consider -- In the argument that EPA has used here

13 today, the example, consider a source and determine

14 whether that source's pollution control requirements are

15 out of proportion to the group as a whole, and if so,

16 you can get a variance.

17 QUESTION: Yes, but that kind of a variance is

18 based on what they claim to be a mistake. There were

19 some factors that they hadn't considered, and if those

20 factors are present anywhere else, I suppose, they would

21 recognize those factors with respect to other people.

22 MS. DUBROWSKI: There is a difference between

23 a variance that is an individual tailoring of a

24 standard, and a revision that considers the category as

25 a whole.

1 QUESTION: So you would say -- You would say
2 that surely under 307, the Government could say to
3 itself: Well, this person has applied for a variance
4 and has claimed that there were factors we didn't take
5 into consideration. We made a mistake. So we ought to
6 make a subcategory under the standard and say, under
7 307, we are going to publish a new standard and say, for
8 this category of sources, the following is the
9 standard.
10 MS. DUBROWSKI: EPA would have the authority,
11 if it had information --
12 QUESTION: But it shouldn't go about it by
13 purporting to issue a variance.
14 MS. DUBROWSKI: If EPA had information that
15 the standard as a whole was wrong, it could change it.
16 There is a difference between saying that --
17 QUESTION: Or that it needed to be tailored,
18 or it needed to recognize some subgroups.
19 MS. DUBROWSKI: Congress told EPA to set these
20 standard across classes. It told EPA expressly to avoid
21 single plant determinations. You cannot use the
22 revision authority to do what you couldn't do in the
23 rulemaking anyway. You couldn't use the revision to set
24 up a case by case, plant by plant decision-making the
25 way the FDF variance does because that is what Congress

1 said do not do.

2 Furthermore, if you use the -- whatever

3 mechanism you use, the question that arises is, is this

4 the maximum technology that is affordable for this

5 source, because that is the BAT standard, and the

6 pre-treatment standards are supposed to be set equal to

7 BAT. BAT in the statute asks those questions.

8 The FDF variance, as EPA has written it, does

9 not look at the question of affordability. It looks

10 only to costs, and if your costs are out of proportion

11 to someone else's, you would get a variance.

12 QUESTION: Right.

13 MS. DUBROWSKI: That is not what Congress

14 intended. Congress didn't say, are you costs higher.

15 Congress said, this is the best technology achievable

16 for the class as a whole.

17 QUESTION: Ms. Dubrowski, this case, of

18 course, involves BAT standards.

19 MS. DUBROWSKI: That's right.

20 QUESTION: Would you say that EPA is barred

21 under 301(1) from granting FDF variances for BPT toxic

22 effluent guidelines?

23 MS. DUBROWSKI: We would say that EPA is,

24 although I should point out that that question is at

25 this point legally irrelevant.

1 QUESTION: I understand that it is phasing
2 out, but I want to know what your view is.
3 MS. DUBROWSKI: We would say, yes, 301(1)
4 would apply to BPT.
5 QUESTION: How do you square that with the
6 language this Court used in the DuPont decision?
7 MS. DUBROWSKI: 301(1) was enacted after
8 DuPont, it changes the law. EPA says, DuPont should be
9 read to cover BAT and pre-treatment, a reading of DuPont
10 which we don't think is supported. But, in any event,
11 whatever authority EPA had, 301(1) is written broadly
12 enough to curtail those variances.
13 I'd like to return to the question of how is
14 this different from happened in a rulemaking. This
15 Court said in National Crushed Stone that the FDF
16 variance does precisely what Section 301(c) variance
17 does, that is, it takes the statutory criteria for the
18 category as a whole and it tailors it to an individual
19 source. The quesions that you ask in a BPT variance
20 proceeding, as opposed to in a 301(c) variance, are
21 different because BPT and BAT are different.
22 If EPA were to reword its FDF variance so that
23 it did encompass the tests that it is supposed to, the
24 BAT tests, they would have to ask the question: Is this
25 the maximum technology achievable for this source? That

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1 is the precise question that 301(c) asks, and EPA
2 concedes that 301(1) bars that question. 301(1),
3 therefore, bars asking the same question under the name
4 of an FDF variance. That is why the Third Circuit said,
5 these two variances serve the same function. It makes
6 no sense to assume that Congress prohibited one and not
7 the other for toxics.

8 There are other differences between
9 subcategorization during a rulemaking and a revision
10 after. One very critical difference is that a revision
11 afterwards takes place in the context of a statutory
12 compliance deadline.

13 Congress said that sources had only three
14 years from the date the standards were issued to come
15 into compliance. In that sense, pre-treatment is
16 different from BPT and BAT. There is no permit
17 mechanism here. There is no mechanism to tailor these
18 standards to individual plants. Sources don't have the
19 luxury of waiting for that permit, they must comply
20 automatically with that standard once it is issued.

21 The FDF variance is anti-factidal to that
22 statutory scheme because it takes EPA seven or eight
23 years to decide these variance applications. If it
24 takes seven or eight years, you can't meet a three year
25 compliance deadline.

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1 Also during the rulemaking, EPA cannot
2 categorize sources on the basis of cost, the way it
3 purports to do in an FDF variance. All sources must
4 come up to the level of the best performer, that means
5 that some sources will have higher costs than others.
6 Congress anticipated that, and it was envisioned in BAT
7 that that would happen.
8 If you could subcategorize on the basis of
9 cost, you wouldn't need a 301(c) variance, you wouldn't
10 need reference in the legislative history to fact that
11 sources might close, or that everyone had to come up to
12 the level of the best performer because the
13 subcategorization would take care of that. EPA cannot
14 subcategorize on the basis of cost as the FDF variance
15 would allow it to do. It must, for each source,
16 bringsthat source up to the level achievable across the
17 category as a whole.
18 The new sources standards in the Act are not
19 subject to variances as this Court held in DuPont.
20 Those standards can be revised from time to time to
21 reflect new developments in technology. In fact,
22 Congress used the same language to tell EPA to revise
23 new source standards as it did to tell EPA to revise the
24 pre-treatment standards.
25 So the ability of EPA to revise the standards

1 does not in any way interfere or conflict with their
2 duty to prevent case by case decision-making, plant by
3 plant tailoring of the standards to individual sources,
4 especially after the rulemaking, when the compliance set
5 time is running.

6 I would like to turn to a moment to the
7 legislative history because the legislative history here
8 is very clear. Senator Muskie said, there are no
9 waivers or modifications for toxics, a statement that
10 was also made in the Senate Committee report. Senator
11 Muskie is the principal author of the 1977 amendments on
12 toxics.

13 Likewise, Congressman Roberts, the House floor
14 manager, referring to the very portion of the conference
15 bill that contained 301(1), said, "Strict requirements
16 are in effect for damaging pollutants such as toxics.
17 For certain other pollutants, industry may get a
18 waiver." In fact, one House Member said, "Listing all
19 these substances, and denying any waiver with respect to
20 these substances at all, may lead to new regulations
21 more stringent than any previously contemplated."

22 EPA cannot point to a single sentence in the
23 legislative history which supports its reading, its
24 authority to grant these variances. Instead, EPA tries
25 to dismiss all the statements which run the other way.

1 EPA says, those statements were made in the context of
2 301(c) or 301(g) of the law. EPA is wrong.
3 The statement that I quoted from Congressman
4 Roberts discusses Section 53 of the conference bill,
5 which contains 301(l). Senator Muskie's statement that
6 there could be no waivers or modifications takes place
7 in the context of a floor statement entitled, "Toxics
8 and Modifications of BAT." It is true that Senator
9 Muskie mentions only the 301(c) and the 301(g) variance,
10 but that is because they were the only identifiable
11 variances at that time.
12 In 1977, EPA had a well established practice
13 of drawing a distinction between the BPT standards on
14 the one hand for which it had FDF variances, and the BAT
15 and pre-treatment standards for which it did not have
16 such variances.
17 So EPA's analysis of the legislative history
18 hinges on a single word, when Congressman Roberts said,
19 in another statement, "Due to the nature of toxics,
20 there will be no waivers or modifications, specifically
21 no variances under 301(c) or 301(g)." EPA hinges on
22 that word "specifically," and said that is a word of
23 limitation. In context, it is more appropriately viewed
24 as an example of the types of variances that Congress
25 was prohibiting.

1 EPA's argument is not based on support in the
2 legislative history, it is based on silence. That
3 argument is hardly sufficient to overcome a statutory
4 provision which tells you not to modify BAT or
5 pre-treatment standards. It ignores much that cuts the
6 other way.
7 When Congress created BAT in 1972, it said,
8 except as provided in 301(c), these standards will be
9 uniform across the class. When it reexamined BAT in
10 1977, it considered the fact that these standards might
11 be viewed by the courts as not sufficiently flexible,
12 and they created 301(g) for that purpose, but it said,
13 that is not available for toxics.
14 When it examined pre-treatment, it considered
15 the problem of people who could not meet the standards
16 and said, the answer to that is to let the municipality
17 do the controls. It carefully circumscribed each
18 opportunity to create a variance. It inconceivable that
19 Congress would have gone to that detail if, as EPA
20 maintains, it intended to leave open the question of
21 what variances could be given, and what could not.
22 Indeed, this Court has said, where Congress considers
23 exceptions to a statute, non-statutory exceptions are
24 not available.
25 This case is not simply an extension of

1 DuPont, as if Congress did nothing in 1977. In fact, if
2 Congress read DuPont the way EPA does, so that DuPont
3 authorized variances from BAT and pre-treatment, it is
4 strange that Congress would not have said, in enacting
5 its subsection (l), we want to be very clear here to
6 draw a distinction to say that this is not intended to
7 rule out FDF variances. Congress didn't do that.

8 This Court in DuPont said that variances were
9 not available from new source standards. Pre-treatment
10 standard are like new source standards. There is no
11 variance for pre-treatment standards.

12 301(c) and (g) that are applicable to BAT
13 standards are not available in the context of indirect
14 dischargers. There is no mechanism for tailoring these
15 standard to individual plants. There is no permit
16 mechanism. The deadlines here are very different.

17 Congress told EPA to set the pre-treatment
18 standards more quickly than it told EPA to set the BAT
19 and BPT limits, and it gave sources only three years, as
20 opposed to a 1977 or 1974 deadline for meeting
21 pre-treatment -- excuse me, for meeting BPT or BAT.
22 That makes sense when you consider that pre-treatment is
23 a program with several goals.

24 It is not simply to protect water quality, it
25 is also a program to protect the integrity of a capital

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1 investment in pollution control equipment, the pollution
2 control equipment at the municipal sewage treatment
3 plant.

4 Pre-treatment standards are to prevent
5 industries from discharging toxics that could interfere
6 with the operation of that sewage treatment plant, or
7 that could contaminate large volumes of municipal
8 sludge.

9 QUESTION: Ms. Dubrowski, what do you think --
10 what do you suggest the standard should be, that we
11 should apply in this situation where the Agency has
12 construed the statute in a way that you think is wrong.
13 Should we independently decide whether it's wrong, or
14 should we give some deference or should we ask -- What
15 questions should we ask? Is it a rational construction
16 of the statute even though not the best one, or what?

17 MS. DUBROWSKI: This is not a case of an
18 ambiguous statutory provision. This is not, for
19 instance, the Chevron case which this Court decided last
20 year.

21 QUESTION: Now, how about my question, what
22 questions should we ask? Is this a rational
23 construction of the statute or a permissible
24 construction of the statute, or what, or just the best
25 one?

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1 MS. DUBROWSKI: If this Court decides contrary
2 to our argument that 301(1) is not clear, then the
3 question arises, what could EPA do outside of the
4 context of 301(1).
5 QUESTION: If it is clear like you say it is,
6 any other construction would just be irrational,
7 wouldn't it. It just wouldn't be permissible.
8 MS. DUBROWSKI: That's right.
9 QUESTION: So is that our question that we
10 should ask?
11 MS. DUBROWSKI: I am not quite sure I
12 understand the question.
13 QUESTION: Well, here the Agency is pressing a
14 construction of the statute, and what should we do, say,
15 well, we think there is a better construction of it, or
16 should we say, or should we ask, is this a permissible
17 construction, a rational construction, even though there
18 are other constructions. You say there is no other
19 construction than yours, I take.
20 MS. DUBROWSKI: That's right. We think that
21 this was in the context of 301 clearly met to prohibit
22 variances.
23 QUESTION: Of course, the Agency, certainly
24 and obviously, has not agreed with you for some time,
25 and neither does the Solicitor General. They think

1 there is another permissible construction of the
2 statute, other than yours.
3 MS. DUBROWSKI: Then the question becomes, is
4 that valid? Is this a permissible construction of the
5 Statute? We think that it is not because the notion of
6 going back and correcting mistakes after you set a
7 standard takes place during a statutory compliance
8 period of three years.
9 Experience shows that EPA can't make those
10 corrections within that three-year period. In fact
11 these variance applications are pending for seven or
12 eight years. That is why Congress said, we want these
13 decisions made during the rulemaking, and make these
14 standards as uniform as possible.
15 That is why Congress said, don't do a tailor
16 in a BAT context under 301(c), because it was concerned
17 about maintaining that statutory deadline. The FDF
18 variance thwarts that statutory scheme. You cannot wait
19 seven or eight years for a variance application to be
20 decided, and still meet the three year statutory
21 deadline.
22 QUESTION: May I ask a question there. Have
23 you finished your answer? If you haven't, I don't want
24 to interrupt you.
25 MS. DUBROWSKI: I just wanted to add one other

1 point to the answer there, and that is that Congress
2 wanted these standards to be uniform, or as uniform as
3 possible across the class, because it wanted sources who
4 paid for pollution control equipment to know that their
5 competitors were doing likewise.

6 The FDF variance also thwarts that goal of
7 uniformity because sources may delay compliance while
8 they have a variance application pending, even though
9 that application may be prove to be totally lacking in
10 merit.

11 QUESTION: I just would like to know whether
12 you agree with your opponent that there was statutory
13 authority for variances in the non-toxic area, and that
14 the statutory authority is what he described, namely,
15 501 and of the general scheme of the Act.

16 MS. DUBROWSKI: 501 simply -- No. The direct
17 answer is no. We do not think there is statutory
18 authority for variances for BAT and pre-treatment,
19 except as in 301(c), which was eliminated in 1977.

20 QUESTION: Is it part of your position, then,
21 that before -- Was 301(c) part of the '77 amendments?

22 MS. DUBROWSKI: 301(c) existed in 1972. In
23 1977, it was clearly eliminated as far as toxic
24 pollutants.

25 QUESTION: So your position is that variances

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1 in the non-toxic area all had to be pursuant to 301(c)
2 or 301(g)?
3 MS. DUBROWSKI: That is correct.
4 QUESTION: If that were true, then the
5 prohibition would have cut them out in the toxic area.
6 MS. DUBROWSKI: That is correct.
7 QUESTION: So you disagree with your
8 opponent's reading of what the basic statutory for any
9 variance was before '77?
10 MS. DUBROWSKI: That is correct. That is
11 correct.
12 QUESTION: May I ask one other question which
13 was prompted by what Justice White asked you, the extent
14 to which we should give deference to the Agency's
15 construction of the statute.
16 This is unlike Chevron, if I get the history
17 right here, in that the Agency has had this construction
18 of the statute through the change of Administration.
19 There is, I think, this Section 403.13 that was in
20 effect in 1978, was it, and then it was not changed when
21 the new --
22 MS. DUBROWSKI: That is correct.
23 QUESTION: At least, we have a consistent
24 agency interpretation of the Act.
25 MS. DUBROWSKI: Actually, no, we don't. In

1 that sense, it is very different from Chevron. In
2 Chevron, the Agency had an interpretation of the statute
3 which preceded the reauthorization.
4 Here the interpretation of the statute, prior
5 to the reauthorization, at least as far as practice
6 would indicate, is directly contrary to what EPA said it
7 could do after the reauthorization, that is, before
8 1977, EPA granted FDF variances only from BPT, and the
9 only variances that you could have for BAT were the
10 301(c) variances. The FDF variance was not created in a
11 BAT or pre-treatment context until after the law was
12 amended in 1977.
13 QUESTION: Yes, but the Agency in '78, and the
14 Agency since 1980 has taken the same view of the
15 statute.
16 MS. DUBROWSKI: Yes. This is not a question
17 of a change in Administration leading to a different
18 interpretation of the statute. However, there was a
19 change.
20 QUESTION: I understand what you are saying.
21 MS. DUBROWSKI: One other argument that EPA
22 makes is that this variance is necessary to the
23 rulemaking. It is necessary either for information that
24 EPA doesn't get in a rulemaking, or for information that
25 it can't consider. That argument does not withstand

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1 analysis.

2 Section 308 of the law gives EPA ample

3 authority to require, during the rulemaking, all the

4 information that is relevant to the standard. The

5 record suggests that EPA should be making more use of

6 308, and less use of FDF variance mechanism, because EPA

7 says, we sent questionnaires to 500 electroplaters, and

8 only 200 of whom responded with some of the information

9 that we requested. If those sources failed to bring the

10 information to EPA's attention during a rulemaking,

11 there is no reason to give them a second bite of the

12 apple, to challenge the standard after the rulemaking.

13 Likewise, EPA has data that it doesn't

14 consider during the rulemaking. There is no reason to

15 sanction EPA's failure to consider that data. In fact,

16 its rules might be vulnerable.

17 Thank you.

18 CHIEF JUSTICE BURGER: Do you have anything

19 further, Mr. Alito?

20 MR. ALITO: I have no rebuttal.

21 CHIEF JUSTICE BURGER: Thank you, Counsel.

22 The case is submitted.

23 (Whereupon, at 1:28 o'clock, p.m., the case in

24 the above-entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1013 - CHEMICAL MANUFACTURERS ASSOCIATION, ET AL., Petititioners v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

#83-1373 - UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Petitioner v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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