EPA v. National Crushed Stone Association

I. INTRODUCTION

There is a growing debate on the application of cost-benefit analysis in environmental law. For example, the American Textile Manufacturers Institute, Inc., has challenged the Occupational Safety and Health Administrator's authority to promulgate standards setting a maximum on cotton dust exposure for workers without demonstrating that the benefits of that standard are in proportion to its costs.[1] President Reagan has participated in the debate by issuing an executive order requiring agencies to analyze both the costs and benefits of proposed actions,[2] as did President Carter.[3]

In *EPA v. National Crushed Stone Association*[4] (*"Crushed Stone"*), the Supreme Court upheld the Environmental Protection Agency ("EPA") policy of withholding variances from individual polluters who are economically unable to comply with 1977 effluent limitations promulgated under the Federal Water Pollution Control Act[5] ("FWPCA"). The Court based its decision on the congressional intent to force polluters to comply with minimal standards or shut down.[6] It is a reminder of the role which congressional intent is to play in deciding issues of environmental economics.[7]

1. Am. Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. 2478 (1981).
2. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).
3. Exec. Order No. 12,044, 3 C.F.R. 152 (1979), *reprinted in* 5 U.S.C. § 553 (Supp. III 1979).
4. 101 S. Ct. 295 (1980).
5. 33 U.S.C. §§ 1251-1376 (1976 & Supp. I 1977 & Supp. II 1978).
6. *See* text accompanying note 56 *infra*.
7. Congressional intent is not always easy to discern. The Supreme Court has implicitly recognized that there may be more than one "correct" interpretation of congressional intent. In Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 87 (1975), the Court wrote:

> [w]e . . . conclude that the Agency's [EPA's] interpretation . . . was "correct," to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the "correct" one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its

This note examines the FWPCA, its legislative history and the case law which led to *Crushed Stone*. It concludes that the present EPA variance policy for 1977 standards which does not include consideration of the polluter's financial situation is the correct interpretation of congressional intent.

II. THE STATUTE

The 1972 Amendments to the FWPCA set a national goal of eliminating the discharge of pollutants into navigable waters by 1983.[8] The goal is to be attained in two stages. By July 1, 1977, each existing point source[9] was to be using the "best practicable control technology currently available"[10] ("BPT") to limit the amount of effluence which it discharged. By July 1, 1983,[11] "categories" and "classes" of point sources must use the "best available technology economically achievable"[12] ("BAT") which will result in reasonable further progress toward the goal of eliminating the discharge of all water pollutants. BPT and BAT are determined by the EPA in accordance with the factors listed in §§ 304(b)(1)(B) and 304(b)(2)(B), respectively.[13]

If a plant discharges pollutants into navigable waters, it must obtain a permit[14] from the EPA or the state in which it operates.[15] If a plant has difficulty in meeting the 1983 standard, it can obtain a variance from the EPA upon showing that a modification repre-

construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency.

8. FWPCA, § 101(a)(1), 33 U.S.C. § 1251(a)(1) (1976 & Supp. I 1977).

9. A point source is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." FWPCA, § 301(b), 33 U.S.C. § 1362(14) (1976 & Supp. I 1977).

10. FWPCA, § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (1976).

11. The 1977 Amendments to the FWPCA extended this deadline to July 1, 1984, for all existing point sources except public treatment works. FWPCA, § 301(b)(2)(E), 33 U.S.C. § 1311(b)(2)(E) (1976 & Supp. I 1977). In order to avoid confusion which might be caused by various sources using "1983 standards" synonymously with best available technology economically achievable (BAT), this note treats "1983 standards" synonymously with BAT.

12. FWPCA, § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A) (1976 & Supp. I 1977).

13. 33 U.S.C. §§ 1314(b)(1)(B), 1314(b)(2)(B) (1976).

14. A permit, issued after opportunity for a public hearing, states the pollutants and amounts thereof which may be discharged from a plant. FWPCA, § 402, 33 U.S.C. § 1342 (1976 & Supp. I 1977).

15. FWPCA, §§ 402(b), 402(c), 33 U.S.C. §§ 1342(b), 1342(c) (1976 & Supp. I 1977), authorize the governor of each state to establish a state permit program for discharges into navigable waters within its jurisdiction. If a state does not exercise this power, the EPA will issue permits for that state.

sents the maximum use of technology within the economic capability of the owner or operator and will result in reasonable further progress toward the elimination of the discharge of pollutants.[16] The EPA is to review the effluent limitation based upon BAT for 1983 at least every five years and, if appropriate, revise it in a manner consistent with the national goal.[17]

Noticeably absent from the statutory scheme of the FWPCA is a BPT variance provision.[18] This silence gave rise to various interpretations. Before *Crushed Stone* the EPA[19] and the United States Court of Appeals for the District of Columbia[20] concluded that a variance should be granted only to prevent misclassified plants from being subject to improperly stringent standards. The United States Court of Appeals for the Fourth Circuit took the view that variances should be granted if the owner of a plant is financially unable to comply.[21] An examination of the different positions follows.

III. EPA Position on Variances from BPT

The EPA sets uniform effluent limitations for classes and categories of plants based on environmentally significant features which they share.[22] To delineate the categories, the EPA collected data through permit applications,[23] samplings and inspections, industry

16. FWPCA, § 301(c), 33 U.S.C. § 1311(c) (1976).

17. FWPCA, § 301(d), 33 U.S.C. § 1311(d) (1976).

18. Also missing from the statutory scheme is any reference to "categories and classes of point sources" for the 1977 standards. This omission engendered substantial litigation as to whether the EPA had authority to issue uniform regulations for BPT or whether BPT must be decided at the permit stage on a plant-by-plant basis. *See* Am. Iron and Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975).

In E.I. duPont deNemours & Co. v. Train, 430 U.S. 112 (1977), the Supreme Court settled the issue. The Court held that the EPA had authority under FWPCA § 301 to limit discharges by existing plants through industry-wide regulations for both 1977 and 1983, "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 standards." *Id.* at 128.

19. 39 Fed. Reg. 28,926 (1974). *See* text accompanying notes 22-29 *infra*.

20. Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1040 (D.C. Cir. 1978). *See* text accompanying notes 40-47 *infra*.

21. Consolidation Coal Co. v. Costle, 604 F.2d 239, 243-44 (4th Cir. 1979); Nat'l Crushed Stone Ass'n v. EPA, 601 F.2d 111, 123 (4th Cir. 1979), *rev'd*, 101 S. Ct. 295 (1980).

22. FWPCA, § 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B) (1976) lists the environmentally significant features as "the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate."

23. The owners and operators of every point source must apply for a permit to

submissions and reports obtained through contracts with qualified technical consultants.[24] It set up broad categories such as Dairy Product Processing[25] and Soap and Detergent Manufacturing.[26] The EPA analyzed the plants in these categories to determine the effect of certain factors, for example, differences in raw materials, type of manufacturing process employed, product produced, and age and size of plants, in order to determine classes of plants within each category. It identified the control treatment technology for each class within the categories, as well as the problems, limitations and reliability of the technology. It also determined the cost of each technology. Finally, it identified the BPT and BAT for each class after considering the total cost of the application of technology in relation to the effluent reduction benefits to be achieved from such application, taking into account the age of the equipment and facilities involved, the process employed, the engineering aspects of the control techniques, process changes, and non-water environmental impact, including energy requirements.[27]

The EPA grants variances from BPT effluent limitations only if the petitioning plant can show that certain plant-specific factors, such as the age or size of the plant, are "fundamentally different" from the factors the EPA considered in setting the national limitations.[28] Compliance cost is one such factor. A plant may be able to secure a BPT variance by showing that the plant's own costs to achieve the national limitation standards would be a number of times greater than the compliance costs of the plants the EPA considered in setting the BPT limitation. However, a plant's financial inability to comply with the national BPT limitation is not, by itself, sufficient to secure a variance.[29]

continue discharging pollutants into navigable waters. *See* note 14 and accompanying text *supra*.

24. The EPA contracted with technical consultants to amass data because of pressing time limitations. These consultants were instructed to perform in-depth studies of each point source category, under the supervision and with the assistance of the EPA, in accordance with the methodology set out above. 38 Fed. Reg. 21,203 (1973).

25. 40 C.F.R. § 405 (1980).

26. 40 C.F.R. § 417 (1980).

27. 38 Fed. Reg. 21,203 (1973).

28. The EPA announced this policy on August 2, 1974, in 39 Fed. Reg. 28,926 (1974).

29. The original EPA position was that "[t]he cost of control is not an element in granting the variance." 39 Fed. Reg. 28,927 (1974). "The reference to 'other' such factors [in § 304(b)(1)(B)] must be read in light of the previous factors listed; the in-

IV. THE FOURTH CIRCUIT COURT OF APPEALS POSITION

The Fourth Circuit first faced the issue of variances from BPT standards in *Appalachian Power Co. v. Train*[30] ("*Appalachian Power*"). In *Appalachian Power*, several power companies sought

tent here was to include factors of a technical and engineering nature, rather than to broaden the scope of the provision to include economic factors." 39 Fed. Reg. 30,073 (1974).

EPA's position changed after Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976), and E.I. duPont deNemours & Co. v. Train, 430 U.S. 112 (1977). In Appalachian Power, power companies sought review of EPA regulations which established limitations for the discharge of heat from steam electric-generating plants into navigable waters. The Fourth Circuit set aside many of the regulations:

> including the variance provision for BPT. The EPA has offered no reasoned explanation for limiting the variance clause to considerations of technical and engineering factors only. Certainly the adverse non-water quality environmental impact which may result from the strict application of the agency's effluent limitations to a particular plant is as significant as the technological difficulties which may be encountered. The same may be said for a consideration of energy requirements.

Appalachian Power Co. v. Train, 545 F.2d 1351, 1359 (4th Cir. 1976).

In E.I. duPont deNemours & Co. v. Train, 430 U.S. 112, 128 n.19 (1977), the Supreme Court wrote that "consideration of whether EPA's variance provision has the proper scope would be premature."

In re Louisiana-Pacific Corp., [1977] 10 ENVIR. REP.-CASES (BNA) 1841, is the first evidence of a change in variance policy by the EPA. There the EPA Administrator decided that the FWPCA did not allow variances from § 301(b)(1)(A) technology-based effluent limitations merely because the quality of receiving water will not be improved by compliance with those limitations. The Administrator broke with earlier EPA variance policy by alluding to nontechnical factors which are relevant to variances from the 1977 standard: energy requirements, *id.* at 1851, and raw materials. *Id.* at 1846 n.9. The Administrator also cited Appalachian Power Co. v. Train, 545 F.2d 1351, 1360 n.23 (4th Cir. 1976), "[t]he variance provision should, however, allow the permit issuer to consider significant cost differentials of the particular point source involved," on the relevance of cost without qualifying the statement. *In re* Louisiana-Pacific Corp., [1977] 10 ENVIR. REP.-CASES (BNA) 1841, 1852 n.27.

On October 26, 1978, the EPA formally withdrew its earlier variance provision:

> a plant may be able to secure a BPT variance by showing that the plant's own compliance costs with the national guideline limitation would be *X* times greater than the compliance costs of the plants EPA considered in setting the national BPT limitation. A plant may not, however, secure a BPT variance by alleging that the plant's own financial status is such that it cannot comply with the national BPT limitation.

43 Fed. Reg. 50,042 (1978).

30. 545 F.2d 1351 (4th Cir. 1976). However, the issue first arose in the Fourth Circuit in E.I. duPont deNemours & Co. v. Train, 541 F.2d 1018 (1976). The court did not address it, though, because "[t]he administration of these [variance] provisions in practice is a matter of speculation at best." *Id.* at 1028. In Appalachian Power, the court decided that the EPA's statement that the cost of control is not an

review of EPA regulations which established limitations on the discharge of heat from steam electric-generating plants into navigable waters. At that time, the EPA maintained that only technical and engineering factors, exclusive of cost, could be considered in granting or denying a variance.[31] The Fourth Circuit held this view to be unduly restrictive.[32]

The court approached the issue of the 1977 variances by examining FWPCA § 301(c),[33] the variance provision for the 1983 standards, which states that the EPA may grant a variance from the 1983 standards upon a showing that "such modified requirements (1) will represent the maximum use of technology within the economic capacity of the owner or operator, and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." Reasoning that the FWPCA contemplates increasingly more stringent control measures, the court stated:

> [w]e are of opinion that the initial phase of these regulations, the 1977 standards and the subsequent new source limitations,[34] were not intended to be applied any less flexibly than the final Phase II-1983 requirements. Thus, if such factors as the economic capacity of the owner or operator of a particular point source is relevant in determining whether a variance from the 1983 standards should be permitted, they should be equally relevant when applied to the less stringent 1977 standards as well as the new source requirements.[35]

In two more recent cases on the 1977 variance provisions, the Fourth Circuit again struck down the EPA's variance policy as too narrow. In *National Crushed Stone Association v. EPA*,[36] crushed

element in granting a variance made the issue no longer a matter of speculation. Appalachian Power Co. v. Train, 545 F.2d 1351, 1359 n.22 (4th Cir. 1976).

31. *See* note 29 *supra* for the evolution of the EPA's variance policy.

32. Appalachian Power Co. v. Train, 545 F.2d 1351, 1359 (4th Cir. 1976).

33. 33 U.S.C. § 1311(c) (1976).

34. New source limitations are the separate standards of performance to which new plants are subject. FWPCA, § 306, 33 U.S.C. § 1316 (1976). [author's footnote].

35. Appalachian Power Co. v. Train, 545 F.2d 1351, 1359 (4th Cir. 1976). It should be noted that the Supreme Court specifically rejected variances for new sources in E.I. duPont deNemours & Co. v. Train, 430 U.S. 112, 138 (1977), stating that "[i]t is clear that Congress intended these regulations to be absolute prohibitions."

36. 601 F.2d 111 (4th Cir. 1979), *rev'd*, 101 S. Ct. 295 (1980).

stone manufacturers and an industry association challenged EPA limitations on the discharge of pollutants from existing point sources in the crushed stone and construction sand and gravel subcategories of the mineral mining and processing point source category. In *Consolidation Coal Co. v. Costle*,[37] coal producers, their trade associations, citizens' enviromental associations and the Commonwealth of Pennsylvania challenged regulations imposed on existing facilities in the coal industry. The EPA had changed its variance policy since *Appalachian Power* to permit variances when a plant had "fundamentally different" economic costs from other plants in its class but would not grant a variance if the plant simply did not have the economic capability to comply with the BPT.[38] However, the Fourth Circuit held that this variance clause was still not sufficiently broad:

> EPA, in promulgating regulations under the 1977 variance clause, may not exclude the factors to be considered in granting variances under the 1983 standards because the statute contemplates there may be more stringent standards for 1983. . . . Especially in a case where the effluent limits are the same, but in any case, we think the statute is not meant to stop the operation of a plant in 1979 under 1977 standards under more strict conditions than would apply to a plant operating in 1983 under standards for that year. This situation could easily close a plant in 1979 which could be allowed to operate under a variance in 1983.[39]

V. The District of Columbia Court of Appeals Position

In *Weyerhaeuser Co. v. Costle*,[40] American pulp and paper makers challenged the 1977 regulations promulgated by the EPA. Un-

37. 604 F.2d 239 (4th Cir. 1979).

38. *See* note 29 and accompanying text *supra*.

39. 601 F.2d at 124.

40. 590 F.2d 1011 (D.C. Cir. 1978). The court limited its review of the EPA variance policy to

> whether in light of the evidence we now have concerning the Agency's interpretation of its variance provision, it is *capable* of having the degree of flexibility required by *duPont*[.] [O]ur discussion does not foreclose any future explorations of whether, as interpreted hereafter and, particularly, as applied in a particular case, the variance provision has the requisite flexibility.

Id. at 1033 n.29.

like the Fourth Circuit, the District of Columbia Court of Appeals held that the EPA variance provision had sufficient flexibility, even if a plant could not obtain a variance based on economic hardship.[41]

The court noted how FWPCA § 301(c) resembled language in § 301(b)(2)(A), which defines the 1983 standard. Specifically, § 301(c) states that a variance will be granted upon a showing that the variance represents the maximum use of technology within the economic capability of the owner or operator. Section 301(b)(2)(A) sets the 1983 limitations at the level of the "best available technology economically achievable" for such category of point sources. Thus, the variance provision relieves the owner or operator of a plant from the requirement of using more than the best available technology economically achievable.[42] The court reasoned that the 1977 variance provision must permit a modification from the 1977 standards when the standards demand more of individual owners or operators than the statute permits the EPA to demand of the industry as a whole.[43]

Section 304(b)(1)(B) determines the limits on what EPA can demand of the industry with respect to BPT. The BPT for a class is to be set at the level at which the total cost of pollution control, including external costs such as unemployment,[44] is in relation to the reduction benefits to be achieved at the plants under consideration.[45] Other factors are to be "considered" in establishing BPT but are not part of the above balancing.[46]

From the method of setting the BPT for a class, the court determined when a variance should be granted:

> [a]lthough the "total cost" of pollution control at the petitioning mill must be considered under a satisfactory variance provision, it is only relevant "in relation to effluent reduction benefits to be achieved" at that mill, section 304(b)(1)(B); *so long as those costs relative to the pollution*

41. *Id.* at 1040.
42. *Id.* at 1035.
43. *Id.*
44. The court took this broad definition of "cost" from the Act's legislative history, citing Rep. Robert E. Jones who explained the Conference Committee Report on the floor of the House. *Id.* at 1036 n.35.
45. The phrase "in relation to the . . . benefits" appears in § 304(b)(1)(B) and is unexplained.
46. FWPCA, § 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B) (1976).

> *reduction gains are not different from those that may be imposed on the industry as a whole, the difficulty, or in fact the inability, of the operator to absorb the costs need not control the variance decision.*[47]

In other words, the court upheld the EPA's variance policy because it had the necessary minimum flexibility to grant variances to plants which had heavier burdens than the EPA could permissibly impose. However, no variance would be granted to the owner or operator of an individual plant merely because the owner or operator was financially unable to comply with the BPT requirement.

VI. The Position of the Supreme Court

When the Fourth Circuit raised the issue of the 1977 variances in *Crushed Stone*, the Supreme Court granted certiorari to resolve the conflict between that circuit and the District of Columbia Court of Appeals.[48] The Court held that "EPA is not required by the Act to consider economic capability in granting variances from its uniform BPT regulations."[49]

The Court first examined the plain meaning of the statute. Noting that § 301(c) applies only to BAT limitations,[50] the Court concluded that the Fourth Circuit's broad BPT variance interpretation was unsupported by the statutory language. This conclusion was supported by the parallel construction of § 301(b)(2), which lists the factors to be considered in setting BAT, and § 301(c), which provides for a BAT variance. The same two factors, "maximum use of technology within the economic capability of the owner or operator" and "reasonable further progress toward the elimination of the discharge of pollutants," are used in setting BAT and in determining whether an individual plant should be granted a variance. "A § 301(c) variance, thus, creates for a particular point source a BAT standard that represents for it the same sort of economic and technological commitment as the general BAT standard creates for the class."[51] There is no similar connection between § 301(c), the BAT variance, and the considerations which underlie BPT limitations, and thus the "§ 301(c) variance factor, the 'maxi-

47. Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1036 (D.C. Cir. 1978). (emphasis original).

48. 444 U.S. 1069 (1980).

49. EPA v. Nat'l Crushed Stone Ass'n, 101 S. Ct. 295, 307 (1980).

50. *Id.* at 302.

51. *Id.*

mum use of technology within the economic capability of the owner or operator,' would . . . be inapposite in the BPT context."[52] For example, the § 301(c) requirement of "reasonable further progress" must refer to some prior standard. BPT is the prior standard for BAT, but there is no comparable prior standard for BPT limitations.[53]

Additionally, under § 304 the EPA must consider the benefits of effluent reduction as compared to the costs of pollution control in determining BPT limitations. "Thus, every BPT limitation represents a conclusion by the Administrator that the costs imposed on the industry are worth the benefits in pollution reduction that will be gained by meeting those limits."[54] Granting a variance to an individual plant operator because the plant is unable to comply with BPT requirements would allow a level of pollution inconsistent with the judgment of the Administrator.[55]

Finally, the Court referred to the legislative history which persuaded it:

> that Congress understood that the economic capability provision of § 301(c) was limited to BAT variances; that Congress foresaw and accepted the economic hardship, including the closing of some plants, that effluent limitations would cause; and that Congress took certain steps to alleviate this hardship, steps which did not include allowing a BPT variance based on economic capability.[56]

Instead of variances, the Court found that Congress addressed the problem of economic hardship by providing for low-cost loans to small businesses to meet the cost of technological improvements,[57] and by giving the EPA authority to investigate any plant's claim that it must cut back production or close down because of pollution control regulations.[58]

The Court faced the Fourth Circuit's anomaly of a plant being forced to close under the 1977 standards when it could operate in

52. *Id.* at 303.
53. *Id.* at 302.
54. *Id.* at 303.
55. *Id.*
56. *Id.* at 304.
57. 15 U.S.C. § 636 (1976 & Supp. III 1979).
58. EPA v. Nat'l Crushed Stone Ass'n, 101 S. Ct. 295, 305-06 (1980) (citing 15 U.S.C. § 507 (1976)).

1983 under a variance.[59] The legislative history indicates that the variance provision, § 301(c), was not intended to justify modifications which were not an upgrading over BPT.[60]

VII. Additional Support for the EPA Variance Policy

Further examination of the FWPCA, its legislative history and related case law reveals additional support for the EPA's variance policy.

A. *FWPCA and Its Legislative History*

Section 304(b)(1)(B), which lists the factors the EPA must consider in determining BPT requirements, sets BPT at the level at which costs relate to benefits. Assuming that "cost" includes economic repercussions resulting from plant closings,[61] granting a variance to an individual plant operator because of financial inability to comply counts costs twice, thus skewing the cost-benefit analysis to weigh costs more heavily than benefits.

The 1977 amendments to the FWPCA indicate that Congress realized the difficulties which some plants faced in attaining BPT limitations, but intended to allow no general variance provision. It added section 301(i)(2) to permit modification of BPT for those point sources which have made commitments to discharge into publicly owned treatment works which could not be completed in time for the discharge to comply with the standards.[62] If the EPA determines that the discharger acted in good faith, it may issue a modified permit to the discharger, extending compliance up to July 1, 1983.

Another 1977 amendment provides a limited escape for some BPT violators from criminal and civil penalties which could be assessed against them under FWPCA § 309. The conditions for such relief are: (1) the violater must have acted in good faith and have

59. *Id.* at 307.

60. *Id.* at n.26.

61. Legislative history indicates that "cost" is "meant to include those internal, or plant, costs sustained by the owner or operator and those external costs such as potential unemployment, dislocation, and rural area economic development sustained by the community, area, or region." This statement was made by Rep. Robert E. Jones, chairman of the House managers in the Conference Committee. 118 CONG. REC. 33750 (1972), *reprinted in* 3 U.S. ENVIRONMENTAL PROTECTION AGENCY, LEGAL COMPILATION WATER SUPPLEMENT 1452 (1973).

62. 33 U.S.C. § 1311(i)(2) (Supp. I 1977).

made a commitment (in the form of contracts or other securities) of resources necessary to achieve compliance by the earliest possible date after July 1, 1977, but no later than April 1, 1979; (2) the extension will not result in the imposition of any additional controls on any other point or nonpoint source; (3) an application for a permit[63] under 33 U.S.C. § 1342 (1976 & Supp. I 1977) was filed for such person prior to December 31, 1974; and (4) the facilities necessary for compliance with such requirements are under construction.[64]

Further, the Senate Report which accompanied the 1977 amendments explicitly stated:

> [u]nder existing law there are no circumstances that justify a time for compliance extending beyond July 1, 1977.[65]

These additional arguments show the soundness of the Supreme Court decision to uphold the EPA variance policy.

B. *Related Case Law*

Examination of related case law reveals why the EPA was foreclosed from totally withholding variances from the 1977 standards and provides insight as to the type of variance provision which was required.

In *Natural Resources Defense Council, Inc. v. EPA*,[66] a public interest environmentalist group challenged EPA regulations which authorized a permit grantor to exempt individual plants from the regulations' restrictions on maximum permissible effluent discharge upon a showing that the plant's relevant factors are "fundamentally different" from those the EPA considered in promulgating the regulations themselves. The United States Court of Appeals for the Second Circuit upheld the variance provision, stating that the regulations were based on a representative sample of plants, with the result that the regulations were ill-suited to some of the unsampled plants. "Unless the variance clause is established, there is no guarantee that such a defect could be effectively remedied if it occurred."[67]

63. This is the permit for which all point sources of pollution must apply. *See* notes 14 and 15 *supra*.

64. 33 U.S.C. § 1319(a)(5)(B) (Supp. I 1977).

65. S. REP. NO. 95-370, 95th Cong., 1st Sess. 60 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4326, 4385.

66. 537 F.2d 642 (2d Cir. 1976).

67. *Id.* at 647.

Reopening the rulemaking process, leading to the alteration of the pertinent regulation, would be inadequate. "Since the Act authorizes informal rulemaking, review of the regulations will tend to be narrowly confined. The Petitioner's recommendation that the rulemaking procedure be re-opened at the permit-granting stage is unnecessarily cumbersome."[68]

In *E.I. duPont de Nemours & Co. v. Train*,[69] plaintiff challenged the EPA's authority to issue industry-wide regulations on chemical manufacturers' discharges of water pollutants. The Supreme Court held that the FWPCA "authorizes the 1977 limitations to be set by regulations [as opposed to being set individually for each plant at the permit-issuing stage], so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations."[70]

In the same case, the Supreme Court upheld the EPA practice of withholding variances from individual plants which are unable to comply with new source standards. "[T]here is no statutory provision for variances [from new source standards], and a variance provision would be inappropriate in a standard that was intended to insure national uniformity and 'maximum feasible control of new sources.' "[71]

This decision appears to contradict itself. Variances from BPT requirements are necessary to account for differences in plants but variances should not be created unless there is statutory authority for them. An explanation lies in the fact that new sources are necessarily more flexible, more easily changed to fit promulgated standards, than existing sources. However, there is a great deal of variation among existing plants which makes rigid classification difficult and perhaps unfair. Thus, despite the Court's unwillingness to imply a variance provision for new source standards, the Court did so for BPT standards, apparently so as to prevent misclassification of unique plants.[72]

VIII. Conclusion

The EPA variance policy for BPT standards was upheld by the Supreme Court in *Crushed Stone*, a decision which is well-

68. *Id.*
69. 430 U.S. 112 (1977).
70. *Id.* at 128.
71. *Id.* at 138.
72. *See* text accompanying notes 66-67 *supra*.

supported by the statutory language and legislative history of the FWPCA. The Court invalidated an alternative policy which would grant a variance to plant owners who are financially unable to comply.

The EPA policy permits a plant operator or owner to prove that his plant was misclassified and thus should be subject to a modified limitation. The alternative would be to reopen the rulemaking process under which the EPA had promulgated the effluent limitation.[73] The EPA variance policy thus provides an escape hatch for misclassified plants and maintains uniformity of standards within classes of plants, a congressional goal.[74] It also insures that BPT will be the minimum level of performance, another congressional goal.[75] In contrast, the variance policy which the Fourth Circuit held was minimally necessary would result in non-uniformity among similarly situated plants and would not guarantee any minimum technology standard.[76]

Ellen Ryan

73. Language in E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112 (1977), indicates that the Court wanted a limited variance provision, such as the one in Natural Resources Defense Council, Inc. v. EPA, 537 F.2d 642 (2d Cir. 1976): "[the FWPCA] authorizes the 1977 limitations . . . to be set by regulations, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations." 430 U.S. at 128. If that statement is read together with FWPCA § 301(c), the 1983 variance provision which refers to the economic capability of the *owner or operator*, it appears that the same criteria will be considered for a variance from BPT as are considered for a variance from BAT. Allowing for variations among plants is different from allowing for differences in the economic capability of owners or operators.

74. *See* text accompanying notes 66-68 *supra*.

75. *Id.* E.I. duPont deNemours & Co. v. Train, 430 U.S. 112, 129 (1977).

76. *See* text accompanying notes 30-39 and 48-60 *supra* for the discussion of the position of the Fourth Circuit and the Supreme Court, respectively.