In the

Supreme Court of the United States

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) et al.,

Appellees;

and

ABERDEEN AND ROCKFISH RAILROAD COMPANY et al.,

Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) et al.,

Appellees.

No. 72-535

No. 72-562

Washington, D. C.
February 28, 1973

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IN THE SUPREME COURT OF THE UNITED STATES

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ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL., Appellants v. STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL., Appellees.	No. 72-562

Washington, D. C.
Wednesday, February 28, 1973

The above-entitled matter came on for argument at 1:54 o'clock a.m.

BEFORE:

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

APPEARANCES:

ERWIN N. GRISWOLD, Solicitor General of the United States Department of Justice, Washington, D. C. 20530, for the Appellants United States and Interstate Commerce Commission.

HUGH B. COX, 888 Sixteenth St., N.W., Washington, D. C. 20006, for the Appellants Aberdeen and Rockfish Railroad Company et al.

PETER H. MEYERS, Washington, D. C. (pro hac vice) for the Appellees S.C.R.A.P.

JOHN F. DIENELT, 1712 N Street, N.W., Washington, D. C. 20036 (pro hac vice) for Appellees Environmental Defense Fund et al.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-535 and 562, United States and ICC against Students, and Aberdeen and Rockfish Railroad against Students.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD ON BEHALF OF APPELLANTS UNITED STATES AND INTERSTATE COMMERCE COMMISSION

MR. GRISWOLD: May it please the Court:

These cases are here on appeal from the decision of a 3-judge court in the District Court for the District of Columbia. The suit was brought there to set aside an order of the Interstate Commerce Commission and it involves questions under the Interstate Commerce Act, the National Environmental Policy Act, and other interrelated questions.

I am representing the United States and the Inter-State Commerce Commission. Mr. Cox is representing the appellant railroads in No. 72-562. We have filed separate briefs, but there is no divergence between our positions.

The setting of the stage for this case began in December 1971 when the nation's railroads requested special permission from the Interstate Commerce Commission to authorize on short notice a 2.5 percent surcharge on nearly all freight rates across the board. They asked that this be effective on January 1, 1972. The Commission disallowed this request

on the ground that there was inadequate notice, but it allowed the carriers to refile the proposal to be effective on not less than 30 days notice. And the carriers did refile on January 5, 1972, asking that the 2.5 percent surcharge become effective on February 5.

Under Section 3 of the Interstate Commerce Act, a rate proposed by a carrier becomes effective unless the Commission suspends it within 30 days. And this suspension pending an investigation under Section 15(7) is effective for a maximum period of 7 months, after which the carrier may put the rate into effect unless the Commission prior to that date has completed its investigation and affirmatively found that the proposed rate is unlawful.

In this case, during the 30-day period, protests were filed by shippers and other interested parties, and environmental groups, including the named appellee here S.C.R.A.P., opposed the surcharge on the ground that the prevailing rate structure discourages the movement of recyclable goods and that an across-the-board surcharge would further discourage recycling.

The Commission found that the railroads had a critical need for additional revenue and concluded that the proposed surcharge should not be suspended. It ordered the carriers, however, to publish permanent increased rates no later than June 5, 1972, and provided that the authority to

collect the 2.5 percent surcharge would expire on that date.

The Commission also specifically found that the temporary surcharge would appear to have no significant adverse effects on the environment within the meaning of the Environmental Policy Act. And there was evidence before the Commission to support that finding.

The carriers then filed proposed selective increases averaging 4.1 percent and protests were filed. On April 24, 1972, the Commission instituted an investigation into the lawfulness of the selective increases and suspended them for the statutory 7-month period under Section 15(7). At the same time it authorized the railroads to continue to collect 2.5 percent surcharge until the end of the suspension period which was November 30, 1972.

A few days later, on May 12, 1972, this suit was filed by S.C.R.A.P. And on June 1, the Environmental Defense Fund and other environmental groups intervened as plaintiffs. Various defenses to the suit were advanced, but these were rejected by the District Court.

On July 10, 1972, that court entered an injunction by which the Interstate Commerce Commission is restrained from permitting the railroads to collect the surcharge and the railroads are enjoined from collecting it insofar as it relates to goods being transported for purposes of recycling. As a result, the surcharge is not now being collected on

recyclable materials.

I have stated the basic facts without bringing in the legal issues. These are numerous and somewhat intertwined. Questions relating to the Interstate Commerce Act and the procedures of the Commission will be presented by Mr. Cox. I would like to repeat, though, that there is no difference between our positions, either in substance or approach, and I want to claim the benefit of any argument that he will make.

MR. CHIEF JUSTICE BURGER: We will resume at 1 o'clock.

[Whereupon, at 12 o'clock noon a luncheon recess was taken, to reconvene at 1 p.m. the same day.]

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may proceed.

MR. GRISWOLD: The first issue in the case to which I will turn is the familiar question of standing. We have a rather remarkable situation here. Five law school students -- though I am told they are a changing group, some of them have graduated and others have taken their places, but I understand there are still five--proceeding not as lawyers but as plaintiffs, though modest taxpayers, have tied up all the railroads in the country and with the aid of the District Court have prevented the railroads from collecting $500,000 to a million dollars a month for the past 8 months on shipments of recyclable materials. They have been joined by several environmental groups, but the latter make no different allegations and the case may be treated on the basis of the position relied on by S.C.R.A.P.

Just last Thursday, the District Court did grant a motion to intervene by the National Association of Secondary Material Industries which is an organization which has filed a brief amicus curiae in this Court, the light green amicus curiae. The order wasn't filed with the clerk until Friday, and we didn't hear about it until Monday. I don't think that has any relation to the case which is pending before the

Court on appeal, and in any event insofar as these people are shippers, they would appear to be clearly not entitled to the equitable relief which is the only thing involved here. After all, this is an appeal from the granting of a preliminary injunction because they would have a plain and adequate remedy at law by way of review of the rate order of the Commission.

The allegations of S.C.R.A.P. appear at pages 8 to 10 of the appendix, particularly on the bottom half of page 9. They allege that each member of S.C.R.A.P., although we now have some new members who apparently have not formally joined in this petition, each member of S.C.R.A.P. has (i) been caused to pay more for finished products purchased in the marketplace, made more expensive by both the non-use of recycled materials in their manufacture, and the need to use comparatively more energy in the reduction of a raw material to finished products; and

(ii) Uses the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area and at his legal residence, for camping, hiking, fishing, sightseeing, and other recreational or aesthetic purposes.

And passing to the third,

(iii) Has been, and continue to be, exposed to the quality of the air within the Washington Metropolitan area and their legal residences.

Now, it will be seen that these allegations are entirely general. It is not said which forests, rivers, streams, or mountains. We don't even have a particular valley as we did in the Mineral King case last year. Which forest, stream, or mountain is used by members of S.C.R.A.P. It's obvious that these allegations could be made by any member of the public who wishes to make them.

QUESTION: Did the District Court take testimony on this --

MR. GRISWOLD: No, Mr. Justice, the District Court not only didn't take testimony, but there is no evidence to support the standing, and the position of S.C.R.A.P. in their motion to dismiss is that such evidence was unnecessary. District Court didn't require any proof even of these allegations, and quoting from their motion to affirm, S.C.R.A.P. said that proof of its injuries is unnecessary for the purpose of standing, and it also said that it was -- and I am quoting -- that it was obvious-- that's their word -- that S.C.R.A.P. could not -- and I quote -- prove the amount of additional pollution in the Washington, D. C. area created by the latest ICC railroad rate increase.

QUESTION: Who in your opinion would have standing?

MR. GRISWOLD: The shippers whose rates were increased would have standing. I'm not sure that anyone would have standing to obtain an injunction in this case.

That's a question which interrelates with the Interstate Commerce Commission argument that Mr. Cox is going to make. There are those that feel that standing is no longer a relevant argument, though I wonder if our predecessors were always that wrong.

In another case Judge Gazelle in this district a few years ago said in recent years the Supreme Court has greatly expanded the concept of standing and in this circuit the concept has now been almost completely abandoned. And similarly in a recent article in the Cincinnati Law Review, the author concludes with this statement, "The law would be so much better if the courts got directly on the task of deciding the merits of the claims presented without passing on the merits of the plaintiff presenting them."

Now, there is a certain simple appeal in that and it may represent the wave of the future. But it's a serious step, the implications of which should be carefully explored and considered.

Before going further, I may observe that if there is standing in this case, it would be helpful, I think, and a contribution to candor if this Court would indicate that standing is no longer required or to say that standing is required and that there is standing in this case.

QUESTION: Would the United States have standing, Mr. Solicitor General?

MR. GRISWOLD: Yes, I think so, Mr. Justice, the United States has standing to enforce the laws of the United States. And a State might well have standing.

QUESTION: Would the United States have standing if it alleged it's moving to enforce the Environmental Protection Act?

MR. GRISWOLD: Well, I think there are many situations under which the United States would have standing to enforce matters relating to environmental protection, particularly in view of the statute which Congress enacted stating the policy of the United States.

QUESTION: A person in the business of recycling, as some companies are, would they have standing?

MR. GRISWOLD: A person who had a business interest would have standing, yes.

QUESTION: It comes down to the dollar business.

MR. GRISWOLD: I am sorry, Mr. Justice?

QUESTION: It comes down to the dollar --

MR. GRISWOLD: No, I don't think it would be limited to a dollar amount as in Sierra Club v. Morton in the opinion by Mr. Justice Stewart. It was recognized that aesthetic interests could affect it, as, for example, a person who owns a piece of land and in violation of an environmental statute his view is going to be obstructed, even though it might not have a -- it just happened to be a

sentimental view that he had reason to like. But it affects him. It isn't something that deals with the public in general.

Standing is not a fiction and never has been and should not be. If anyone has standing to bring a suit like this, it will mark a substantial shift in the balance under our traditional and constitutional separation of powers. For this is what the Constitution meant by cases or controversies to which the judicial power is extended. If everyone is a private Attorney General free to raise any public question at his whim or because of his academic or abstract interest, more and more questions will be thrown into the courts and we can readily have a situation where every facet of our governmental operation depends on the let or hindrance of the courts where in effect the courts would take over all the details of the administration of the government. In my view that would not be good for the courts, it would not be good for the country.

Perhaps more pertinent, it's not the sort of division of function which was intended by the framers as I see it when they established the Constitution. I don't want to argue another case, but this Court last Monday granted certiorari in United States v. Richardson which is a clear illustration of the type of question which will arise if there is standing in a case like this.

It may seem very fine to some today to have the courts decide all the legal questions, often pretty much in advance and in the absence of concrete facts as is the situation here. For the courts today are progressive and forward-looking and innovative. But it has not always been so. There have been times when the courts were felt by many to be backward looking and obstructive and serious attacks on the courts have occurred.

Of course, the courts should do their duty. They should exercise their judicial power without fear or favor. But the judicial power does not authorize a general overriding sort of oversight of all legal questions arising in the government, a sort of ombudsman to whom all may resort when they feel so impelled. It was for this reason that the judicial power was extended to cases or controversies, and that should mean bona fide disputes by a party who has a real stake and who can show how he has been hurt. That is not this case with respect to any of the appellees.

I turn now to one of the substantive questions in this case, namely, the proper interpretation of the National Environmental Policy Act and its application to the action of the ICC which has been enjoined here. We start with a procedure long established by the Interstate Commerce Act. As indicated in the previous case and as I have said, the Commission is given broad power to suspend proposed rates, but

it has only 30 days within which to take this action, and under Section 15(7) it has only 7 months after suspension to act on the proposed rates. If the Commission has not acted within 7 months, the new rates go into effect.

On January 1, 1970, the President signed the National Environmental Policy Act. This is obviously a statute of great importance establishing a clearly stated public policy, and it is obviously to be taken seriously by all agencies of the Government. It was enacted in sweeping but rather general terms. The Act established a Council on Environmental Quality with explicit duties in the areas of research and investigation into environmental quality. And the Council has issued guidelines under the Act which are set out at pages 43 to 54 of our brief.

But the Council has no administrative responsibilities. It decides no cases and issues no orders to agencies or parties, and there is no provision in the statute for judicial review of any action or non-action. I am not suggesting that there can't be judicial review. I am really observing that the statute, though sweeping, is not particularly articulate. It is cast in very general terms and obviously requires some construing.

When we look at the environment statute itself, Section 102(2)(C), which is on page 42 of our brief, we find that it applies to legislative proposals which are not

involved here. And then the key words are "major Federal actions." Major Federal actions, if they are ones "significantly affecting the quality of the human environment." Thus we have at the threshold two phrases which require the consideration of this Court. There is another phrase at the beginning of Section 102 that I will mention later, "to the fullest extent possible." And it seems to me in large measure part of this case turns on the construction which this Court gives to those three phrases.

There is nothing in the statute which limits these phrases to any particular agencies or types of agencies. For example, literally the statute applies to decisions of this Court and, after all, this Court is a Federal agency and if this Court takes an action it can well be a major Federal action. If so construed, it would require the Court to issue an environmental impact statement after consulting all interested Federal agencies before making any decision which could affect the environment, and under the regulations of the Council on Environmental Quality, this process could take at least four months, probably a good deal longer. As I have said, what this Court does is often a major Federal action and what it does may affect the environment. For example, this Court's decision in this case or in the last term the Sierra Club case or in a case involving school busing at least arguably may have a significant environmental effect.

Now, I hasten to make it plain that I don't think the statute should be construed to apply to the decisions of this Court. But I do suggest that reaching that result takes some construing. In the light of the whole setting, it is right and sound, I think, to conclude that by the words "major Federal actions" in the statute Congress did not mean to include decisions of this Court, though there is no definition of Federal agency or anything like that which excludes this Court, even though they are obviously Federal action and may often be major.

If the statute is susceptible to such a limitation, and I think it is and must be, then it becomes necessary to consider the statute in its application in other settings. Our submission is that as a matter of statutory construction, the National Environmental Policy Act was not intended to displace the Interstate Commerce Act when the application of NEPA is not feasible in the light of the scheme for prompt action established by the Commerce Act. This result requires most straining of the statutory language. Section 102 itself starts out with the provision that the policies of NEPA are to be applied to the fullest extent possible. Where as a practical matter the application of the NEPA procedures is not possible because of the time limitations in the operative statute, NEPA should not be construed to require it.

QUESTION: Is this the Commission's current position

on the applicability of NEPA?

MR. GRISWOLD: As to suspension orders, yes, Mr. Justice.

QUESTION: I see. But not as --

MR. GRISWOLD: Not as to the --

QUESTION: Not as to their final action.

MR. GRISWOLD: Not as to their final action.

QUESTION: They figure that in the course of the investigation and the decision --

MR. GRISWOLD: Then they will develop the materials which as a part of their final action will include an appropriate environmental protection statement. The Commission does not take the position that NEPA is never applicable to the Commission, only that it is not applicable to suspension orders which must be acted on within 30 days.

QUESTION: I suppose they take the same position whether they do suspend the rates or don't.

MR. GRISWOLD: Whether they do or do not, they must do one or the other within 30 days. If the Commission doesn't act within 30 days, the new rate goes into effect. If Section 102(2)(C) is applicable, it requires the preparation of an elaborate environmental impact statement, the elaboration of which is apparent from the material in the statute on page 43 of our brief which I won't take time to read but which shows that it is a very large undertaking.

The guidelines issued by the Council which were suggested in the Committee reports of both Houses of Congress is not something that the Council made overly elaborate. The guidelines indicate that environmental impact statements should be issued in two stages. First, a draft should be prepared by the agency involved. Then it's provided in the statute it should be reviewed by other agencies, Federal, State and local, which have special interests or expertise. The Council suggests that 90 days be allowed for this process. The draft is also available to citizens for comment. The agency then prepares a final statement in the light of all the comments it received. It then issues a statement and makes it available to the Council on Environmental Quality and the public. It's not to take any administrative action for 30 days thereafter. In making the statement it is further enjoined by statute in very comprehensive terms which appear at the bottom of page 33 and top of page 34 of our brief. It's required to utilize a systematic interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and decision-making which may have an impact on man's environment.

QUESTION: Does it define that last phrase "environmental arts"?

MR. GRISWOLD: No, Mr. Chief Justice, "environmental

design arts" is not defined.

QUESTION: What would that apply to? Buildings and highways, I suppose.

MR. GRISWOLD: It applies to anything to which it applies, Mr. Chief Justice. It's in very broad and sweeping terms.

QUESTION: That would mean an attack on a proposed building because someone thought the design of the building was bad.

MR. GRISWOLD: That argument no doubt will be made under this statute at some point.

QUESTION: Well, here, relatively speaking, the determination of the Commission was to do nothing, wasn't it? It was to not suspend.

MR. GRISWOLD: Almost, Mr. Justice. That is the position of the Commission that that's what they did. Actually, what they did was to say, "We will not suspend it, but you must within a fixed time propose permanent rates and we will then terminate the suspension when your permanent rates go into effect."

So it was a conditional non-suspension. It wasn't simply, "We don't suspend," which would have put the 2.5 percent increase into effect.

The Commission has to consider suspension orders in approximately 4,000 cases a year. The Commission was

obviously confronted with the task of determining its duty in the light of the two statutes taken together. By its own terms NEPA is applicable only to actions significantly affecting the quality of the human environment. And in this case the Commission made a specific finding that the proposed across-the-board temporary surcharge "will have no significant adverse effect on the quality of the human environment."

The court below said that this finding appears to be no more than glorified boiler plate. Perhaps this did not adequately recognize the Commission's experience in the field nor its standing as a coordinate agency of the Government seeking to comply with its duty under provisions of two statutes which are surely not wholly clear in their interrelations.

Now, it's obvious that NEPA can't be complied with fully within 30 days. The appellees suggest that since the enactment of NEPA, the Commission should always suspend new rates until an environmental impact statement has been prepared and filed. But as the Second Circuit has pointed out, sometimes suspension has environmental implications. If, for example, the railroads should be so impaired that they have to abandon some of their services, the very things that the appellees are concerned about might come into operation.

QUESTION: Do you say, Mr. Solicitor General, that the Commission was obligated under NEPA to do even as much as

it did in a statement that you have just quoted saying that in its view it would have no substantial adverse effect on the environment?

MR. GRISWOLD: Yes, Mr. Justice, I think that they were required to --

QUESTION: Do that much.

MR. GRISWOLD: Well, perhaps not. I think that was helpful. That's one way that they can make NEPA not applicable. The other way is by saying that NEPA should not be construed in any event because of the "to the fullest extent possible" language to apply to suspension orders which under the statute must be made within 30 days. I think I would say they were two alternative grounds upon which the Commission could refrain from making a full environmental impact statement.

Mr. Cox will now deal with further questions under the Interstate Commerce Act and the procedures of the Commission.

MR. CHIEF JUSTICE BURGER: Mr. Cox.

ORAL ARGUMENT OF HUGH B. COX, ON BEHALF
THE APPELLANTS ABERDEEN AND ROCKFISH
RAILROAD COMPANY ET AL

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

Because of time I may have to limit my argument to

a single point which is directed to the nature of the injunctive relief that was granted below. That injunction, as it has been said, enjoined the Commission from permitting the interim rate increase and the railroads from collecting it.

Now, it is my submission that even if it is assumed that the plaintiffs have standing, that NEPA applies, that the Commission did not comply with NEPA, even on those assumptions, that injunctive relief was erroneous.

Now, of course, we do not accept those assumptions. They are disputed in our brief. There is one additional assumption which is of great importance, and that is that these orders refusing to suspend rates are reviewable at all. If I have any time, I shall try to say something about that. Otherwise, I shall have to submit it on the brief.

But for the present I am making these assumptions. And our point is that on those assumptions, the court would have been entitled to set aside these orders and to remand the case to the Commission with directions to the Commission to comply with the court's statement of the law. And the Commission would have been obliged to do so. But the court did not have authority to suspend the rates itself or to compell the Commission to suspend them or to enjoin the railroads from collecting them.

Now, this is a point of great practical importance to the rail transportation system of this country. This

injunction, as it has been said, has caused and will continue to cause substantial revenue loss to the railroads and particularly to the railroads in the northeastern part of the United States who are least able to stand it.

But beyond those immediate consequences, it has general consequences which are far more serious. Because it is an assertion of power on the part of a District Court to enjoin rates when the Commission has declined to do so in any case involved in environmental issues, to enjoin the railroad from collecting the rates, although the rates have never been determined to be unlawful, and what is more, to do these things without paying any attention to the 7 months limitation on suspension orders that is specifically prescribed in the Interstate Commerce Act.

QUESTION: How long has this suspension gone now?

MR. COX: If you take it from the time the Commission itself could have suspended the rates, I think that that time expired I think on the 5th of September. If you take it from the time that the District Court -- I wouldn't think this is proper, but if you take it from the time the District Court enjoined the rates, they have been suspended more than 7 months because that period expired about the 15th of this month. So any way you look at it, however you do treat the dates, these rates have been suspended as a result of the District Court's injunction for more than 7

months. And there was no limitation in the injunction at all.

Now, the practical importance of this situation lies in the fact that the most, one of the most, difficult and constant problems that the railroads of this country have had for 25 years is the lag, the time lag that exists between the time when they must pay increased costs and the time when they can partially offset those costs by increasing the rates.

Now, some time lag is inevitable. The railroads have to endure it, because it's imposed upon them by the Interstate Commerce Act. They have to give 30 days notice unless the Commission relieves them from it. And the Commission can suspend the rates for 7 months. And that loss is irreparable. The railroads can't do anything about it.

But the railroads are gravely disturbed by any judicial alterations of the regulatory plan of the Interstate Commerce Act which increases that delay and increases the time lag.

Now, I think some figures about this present proceeding were pertinent here. At the end of 1971 when the railroads initiated this, tried to initiate this rate increase, at that time and since the last time they had raised their rates generally, their costs had increased by $1 billion. Most of that cost is in labor cost and payroll taxes on wages.

In the time in which this proceeding has been pending to date, those costs have been increased by another billion dollars. Now, if the railroads had been able, which they were not, to lay their hands on the revenue, the entire revenue, that they hoped to obtain from the rate increase, the general rate increase that is involved here which was about $350 million, if they had been able to lay their hands on that at the very beginning of this proceeding, it would have been only a partial offset, about 25 percent, of these increased costs.

I think against that background, the Court can understand why this situation concerned the railroads and has concerned the rail transportation system of this country because the railroads need this revenue, they need it to provide the services which improve their services, maintain their services to prevent diversion of traffic to trucks which are, as the appellees say themselves, an environmental consequence. They need it, as a matter of fact, for their own environmental projects on which they spend a great deal of money.

Now, the conclusion that, the practical situation that is created by this assertion of judicial authority, I point out to the Court, is a serious one because it's limited -- you can say it's limited to cases involving environmental issues, but that limitation doesn't reduce its practical significance, because the arguments the appellees here show

in the arguments they made before the Commission, a claim of environmental effects can be based on any adjustment in rail rates on the ground that it diverts traffic to trucks and even these recyclable commodities involve a great range of commodities, and they are commodities that are involved in litigation not only in these general rate increase cases, but in more limited and specific cases.

QUESTION: I take it you are arguing that the fact that NEPA is involved here shouldn't make any difference in the applicability of Arrow.

MR. COX: That's right. That's precisely the point. Precisely the point.

QUESTION: I gather except for NEPA, the fact situation here is the same as in Arrow.

MR. COX: In the sense, at least, that there had been -- there is one -- it is I think very similar. There is one difference, Mr. Justice Brennan. This injunction was interposed at the suspension stage of the proceeding before the Commission. Of course, the Commission there had exercised its suspension power.

QUESTION: That's right.

MR. COX: And then the railroads had voluntarily extended them. Here, the Commission having refused to suspend them, the court stepped in and in effect suspended them.

QUESTION: Well, the situations are comparable, aren't they?

MR. COX: I think they are, yes.

QUESTION: Because it is an imposition of the courts before the Commission has even purported to take final action.

MR. COX: That's right, and before it has ever considered the lawfulness of the rates. And nobody here has suggested that these rates are unlawful. Even the court below didn't do that.

QUESTION: Is there any possible argument that NEPA injects factors which the Commission should consider separately and apart from justness and reasonableness? Or would it be a part of that concept?

MR. COX: Well, I would say that if you give those terms their broadest meaning, Mr. Justice White, that NEPA would require the determining -- at least I would be prepared to say that NEPA would require the Commission in considering and determining justness and reasonableness to take into account environmental factors, which it did sometimes before the passage of NEPA.

QUESTION: Now, the Commission's only charter is to determine justness and reasonableness.

MR. COX: Yes. You include in that all the various -- discrimination usually is and noncompetitive rates, and that kind of thing. That's its statutory mandate. Now what NEPA,

I suppose, has done is to add some additional factors to that just as the Declaration of Transportation Policy did and as the old Hop Smith resolution did back in the 1920's.

QUESTION: As in the case of anti-trust factors?

MR. COX: Yes, as in the case of anti-trust factors which I think was more done by the courts than by Congress. But it's there just the same.

Now, these consequences are consequences a man might accept if he were forced to them by some explicit Court line of judicial decisions or legislative command. He could hardly embrace them even in those circumstances. But my submission is that this assertion of power by the District Court cannot be justified by any statute or by any line of decisions of this Court, but is in fact inconsistent with the Interstate Commerce Act and with this Court's decision in Arrow.

QUESTION: Is there any indication, Mr. Cox, in the legislative history of NEPA that would suggest that they intended to modify the Arrow doctrine?

MR. COX: I think my time has expired, but I will answer.

QUESTION: Not quite, no. You still have 5 minutes.

MR. COX: There is absolutely no indication either in the words of the statute or in its legislative history that it intended, the statute was intended to amend the Interstate Commerce Act or change the regulatory plan or

overrule --

QUESTION: Did Congress even address the question of the Interstate Commerce Act?

MR. COX: As the appellees, one of them here, says, oddly enough in support of his argument, that Congress did not specifically deal with this matter, or, to use the appellee's words, even pause to consider it. It seems to me an extraordinary argument to make.

QUESTION: Perhaps that's because no one thought freight rates could affect the environment at the time they were thinking about this subject.

MR. COX: That is perhaps a reasonable speculation. I couldn't say. But I do say to the Court on this very point that their ultimate reliance in this case is on the NEPA argument because while they state some precedents and concepts from existing law, when you examine those cases they cite in the concepts, they aren't applicable here. And, of course, one on which they principally rely, I think, was dealt with in that footnote 22 on page 671 of the Arrow opinion. So that the ultimate reliance on this extraordinary injunctive relief is simply that NEPA changed the law --

QUESTION: Mr. Cox, is there any indication what the position of the Environmental Protection Agency is? Is it in charge of construing and enforcing the statutes. We

have had agencies squabbling before. Does the Agency have any difference with the Interstate Commerce Commission on this issue?

MR. COX: I think I should have to say, Mr. Justice, at least in this proceeding I think they have taken the position that they would prefer not to have the rates increased.

QUESTION: They would like to see the rate suspended. They filed --

QUESTION: They filed a separate --

MR. COX: They have not filed anything in this Court.

QUESTION: That may be one thing. But what about the procedure? How about the necessity for having an environmental impact statement before you suspend or not the rates?

MR. COX: Well, the dean has -- I beg your pardon. The Solicitor General has stated the argument on that point.

We heartily concur on it. I think we take the position that at the suspension stage, because of the time involved and the nature of the decision, no environmental statement, and indeed, no finding of no environmental impact is required. That can be dealt with in the next stage of the rate proceeding. Alternatively we say that if anything was required, the finding was required and the finding was made here and it was supported by

substantial evidence.

I would like, if I have any time left --

QUESTION: Until the red light goes on.

MR. COX: -- to speak rather briefly on this question of reviewability which is in some ways ancillary to the point I have made, although independent.

Now, here again, the appellees rely really on NEPA because there is a long line of cases in the -- unbroken line, really of cases holding that an order that does nothing except refuse to suspend rates is not reviewable at all. There is a suggestion by Judge Friendly in one case that an order suspending rates may be reviewable if it's made by,or vitiated by an absolute lack of power. For example, if the Commission tried to suspend for more than 7 months. But refusalsto suspend have been held generally not to be reviewable, I think because of the considerations pointed out in the opinion in the Arrow case because of its relationship to the injunction point that I have argued.

And here again appellees ultimately rely on the assertion that NEPA has changed the law and has made orders reviewable that were not reviewable before. And here again there is nothing whatsoever in the legislative history or in the Act that suggests the statute was ever intended to have that consequence.

Now, I emphasize in concluding that my argument on

reviewability is independent of the argument on the nature of the injunctive relief, and I end where I began by saying to this Court that if you assume everything else, the court below here went far beyond any legitimate function it has as a reviewing court when it undertook to suspend these rates and to enjoin the railroads from collecting rates that have not been determined to be unlawful.

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

Mr. Meyers.

ORAL ARGUMENT OF PETER H. MEYERS ON BEHALF OF THE APPELLEE S.C.R.A.P.

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

Every year this nation produces more than 4 billion tons of solid refuse. Only a very small fraction of this scrap is recycled, even though most of it is capable of being recycled and reused. Railroad freight rates which are authorized by the Interstate Commerce Commission are a major factor discouraging recycling. This is what this case is all about.

I will address myself primarily to the issue of the Commission's failure to comply with the National Environmental Policy Act to the fullest extent possible prior to its April 24th order. Mr. Dienelt will address the other issues in this case.

On January 1, 1970, the date NEPA became effective, a national policy was established to protect the environment. All agencies were required in the strongest language to consider environmental values in their decision-making procedures. In Section 101(b)(6) of the Act Congress specifically focused on the recycling problem and declared that it was the responsibility of all Federal agencies to, and I quote, "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

In the three years that NEPA has been in effect, the Commission has failed totally to fulfill this duty to encourage recycling and has refused to implement the procedural obligations of Section 102(2)(C) of the Act requiring the preparation of environmental impact statements. The Commission has granted three general rate increases on recyclable materials since 1970, this case is the third, without ever making a detailed assessment of their environmental impact, without attempting to accommodate its procedures to the requirements of NEPA, and without proposing any legislative measures to the President pursuant to Section 103 of the Act to bring the Commission's procedures into conformity with NEPA if there were any conflicts.

It is hard to imagine a case where both the Council on Environmental Quality and the Environmental Protection

Agency have more strongly protested an agency's implementation of NEPA. These letters to the Commission in this and prior proceedings were in the record before the District Court and are in the appendix before this Court.

It is S.C.R.A.P.'s position that compliance with Section 102(2)(C) of NEPA to the fullest extent possible required the Commission to prepare a draft environmental impact statement prior to its April 24th suspension order in this case. We do not necessarily seek, and the District Court specifically refused to hold more generally that a draft impact statement is always required before the Commission makes suspension decisions. The District Court's language to this effect is quoted on page 20 of our brief.

Section 102(2)(C) of the Act requires the preparation of a detailed environmental impact statement prior to agency action involving, as the Solicitor pointed out, a major Federal action significantly affecting the quality of the human environment. Copies of this statement, according to the language of Section 102, and I quote again, "shall accompany the proposal through the existing agency review process."

The clear objective of the impact statement requirement is to build into the decision-making process a careful and thorough assessment of the potential environmental dangers of an alternative to agency action and to assist the agencies

in implementing the policies declared in Section 101 of the Act specifically including the duty to encourage recycling.

QUESTION: Mr. Meyers, what if the Commission had simply declined to suspend the rates, in effect done nothing? What would be your position then as to the requirement of an environmental impact statement?

MR. MEYERS: It's S.C.R.A.P.'s position, your Honor, it does not matter what action the Commission takes, whether it suspends or does not suspend. The important factor in this case is that when the Commission is going to make that decision, when it's considering whether or not to allow increased rates on recyclable commodities to go into effect, it is required to know what effect those rate increases will have. Whether it takes either specific action is not crucial.

The language in section 102 which requires compliance with 102 to the fullest extent possible has been held by a number of courts,which are quoted in our brief, to impose a high standard. It does not create, as the Court in Calvert Cliffs pointed out, an escape hatch for foot-dragging agencies. The impact statement must be prepared as early as possible and in all cases prior to agency decision which may have a significant effect upon the environment. These are interim agency decisions. The cases to this effect and the Council on Environmental Quality guidelines to this effect are quoted at pages 15 through 16 of our brief.

The Solicitor as well as the railroad places great stress on the Commission's February 1 finding of no environmental impact. I would like to address this point for a few minutes.

It is our position that the court below correctly held that this unsupported finding which was severely criticized by both the Council on Environmental Quality and the Environmental Protection Agency was no more than glorified boiler plate. It ignored Section 5(b) of the CEQ guidelines. Section 5(b) of the CEQ guidelines requires agencies to prepare an impact statement whenever there is, and I quote, "potential that the environment may be significantly affected," or if the impact is, and I quote again, "likely to be highly controversial."

The Government points out in its brief that the CEQ guidelines are entitled to great weight. We agree with that position. In any event, the Interstate Commerce Commission has incorporated the CEQ guidelines into its own rules and would be bound by them in this proceeding.

Another reason why the February 1st finding cannot adequately support the Commission's decision in this case is that on February 1st, the Commission was considering whether or not to suspend a temporary 2.5 percent surcharge. We did not go into court after the February 1st suspension decision. We waited until the Commission had made a suspension

decision on the 4.1 percent permanent selective increases. We are unable to see how a finding with respect to a 2.5 percent temporary surcharge could be held to support the Commission's decision on April 24th when it was considering larger permanent increases.

Finally, on March 6, the Commission issued a draft environmental impact statement. The scope of this statement is somewhat unclear. At portions of the impact statement, the Commission says that for purposes of considering the impact, they will evaluate the permanent increases. In other portions of the statement the Commission says it is considering the surcharge as if it were a permanent part of the rate structure.

In this draft impact statement, which is set out also in the appendix, the Commission frankly acknowledged it did not know what effect even the surcharge would have if made a permanent part of the rate structure. If this is true, how could the Commission know what effect larger permanent increases might have on the environment. And how can they continue to rely on this February 1st finding in the very beginning of the proceeding where they made their boiler plate determination about potential impact.

The crucial issue in this case as the railroads and the Solicitor have argued it is whether it is impossible for the Commission to comply with NEPA and with the CEQ

guidelines within the 30-day period it has for determining whether or not to suspend a rate.

Before answering this, I would like to reinforce our position in this case that the District Court did not hold and we are not seeking an absolute rule that the Commission must always prepare its draft impact statement before a suspension decision, but we point out to this Court that it may be quite possible for the Commission to prepare impact statements in future general rate increase proceedings on recyclable commodities once it has finally prepared the draft environmental impact statement in this proceeding.

Secondly, we submit to this Court that the 30-day period is not an inflexible period. The Commission can and has extended this 30-day period to several months in order to give the public greater notice of the proposed increase. The Government's reply brief at page 4 quotes a portion of Section 6(3) of the Interstate Commerce Act. Reading that whole section of the Interstate Commerce Act it becomes apparent and it has been consistently construed by the Interstate Commerce Commission that whenever the railroads request special permission to depart from normal tariff filing requirements, the Commission can require the railroads to provide the public with whatever amount of time notice the Commission thinks is appropriate.

Now, the Solicitor's brief points out -- it makes

the argument that whether or not the Commission should file an impact statement should not depend upon the fortuitous circumstances of whether the railroads request special permission. It is my understanding, however, that railroad tariffs for the last 30 years and into the foreseeable future are always so complicated that the railroads are as a practical matter always required to seek special permission in these general rate increase cases, and that as a practical matter, the Commission will always have the opportunity to extend this 30-day period.

More important, however, is the fact that the Commission should have begun its environmental assessment when NEPA went into effect three years ago. It should not have waited until the railroads came to them with their proposed increase. It will always be, in the Commission's language, impossible for the Commission to comply if it does nothing. It will have its first 30-day suspension period, in its own language, then it will issue its final order and it will be impossible to comply in that proceeding. And then the second time the railroads come for their rate increases, it will be impossible to comply at the suspension stage and by the final order. And this can go on forever.

Also, the Council on Environmental Quality specifically informed the Interstate Commerce Commission below that it should file an adequate draft impact statement prior to its

first suspension decision on February 1st and inform them again prior to its second suspension decision on April 24th.

QUESTION: Are you arguing that if the Commission can't get its job done with respect to the environmental impact, that it must suspend the rates until it does?

MR. MEYERS: That is not a necessary conclusion of our argument. It should have suspended at least until it found out what the impact was.

QUESTION: That's the same argument, isn't it?

MR. MEYERS: Yes. But we don't take that position that it's necessary in every case.

QUESTION: Why don't you take that position in this case?

MR. MEYERS: In this case we do. There has to come an end to the time where the Commission can continue to grant these incremental increases which the Council on Environmental Quality and the Environmental Protection Agency --

QUESTION: The argument on the other side is that you are taking a position that they should come up with something in 30 days which is an impossibility.

MR. MEYERS: I would like to make two specific responses to that, your Honor. First, in Section 102(1) of the Act, Congress specifically requires the Commission to adjust its proceedures to permit it to comply with NEPA. In Section 103 of the Act, Congress says if there is any

conflict which does not permit you to comply to the fullest extent possible, go to the President, propose changes.

QUESTION: Do you know whether the Commission's practice almost invariably is to suspend the rates if they start an investigation?

MR. MEYERS: No, it is my feeling it is not their invariable practice.

QUESTION: So even if they must have a proceeding to investigate the reasonableness of the rates they don't nsecessarily suspend them?

MR. MEYERS: Right. That's correct. That's my understanding, your Honor.

QUESTION: That may be why you don't make the argument I was suggesting.

MR. MEYERS: And in addition, the Commission -- I neither of the suspension orders involved in this case did the Commission rely upon this impossibility argument. The Commission didn't say it wasn't possible to comply with NEPA. The Commission has in effect left it to its counsel to make this argument to this Court now more than 3 years after NEPA has been into effect that it's impossible to comply. The Commission however has not gone to the President to propose changes, has not attempted to adjust procedures to the requirements of the Act. The Commission has done virtually nothing. The Commission has -- this is the third general

rate increase proceeding after NEPA went into effect, and the Commission says because they have done nothing previously, "We can't comply now."

QUESTION: What triggers the need for the ICC to get this impact statement?

MR. MEYERS: Triggers the need when the railroads propose increases on recyclable commodities which could have a significant environmental effect.

QUESTION: Is it limited to recycling?

MR. MEYERS: No. The increases went to all rates.

QUESTION: Well, the case that was just before this, should they have gotten an impact statement?

MR. MEYERS: I can't see how inspection charges for grain movements could even remotely have an environmental impact.

QUESTION: You said the ICC should have had this done long before this. Is that correct?

MR. MEYERS: That's correct, your Honor.

QUESTION: Why?

MR. MEYERS: NEPA when it went into effect in 1970 placed upon the Commission in Section 101(b)(6) a specific duty to encourage recycling.

QUESTION: On the Commission?

MR. MEYERS: On all Federal agencies.

QUESTION: Including the courts?

MR. MEYERS: I wouldn't go that far, your Honor. Not presented in this case. There is no question that the Commission is obliged to follow the commands --

QUESTION: But you are suggesting in response to Justice Marshall's question that this is a blanket requirement over a whole spectrum of government, or most of it at least, and that without any specific direction or order or request, they should all be getting up environmental impact statements on every subject that might come before them so that they will be prepared to respond in, let us say, 30-day time limits. Is that your position?

MR. MEYERS: No, your Honor. Our position is that it's the words of Section 102(2)(C). The impact statement is required only for major Federal actions significantly affecting the quality of the human environment.

Now, the Commission knows, there should not be any doubt that the railroads, for example, will be requesting another rate increase in the next year or two. This is no secret. These are things which could have been expected and should have been foreseen by the Commission when NEPA went into effect.

QUESTION: It wasn't foreseen by Congress, was it?

MR. MEYERS: Excuse me, your Honor?

QUESTION: Were they foreseen by Congress? I understood the Solicitor, or Mr. Cox to say Congress didn't

even -- there is nothing in it about the ICC at all.

MR. MEYERS: Nothing in it specifically dealing with the Interstate Commerce Act. Congress, I believe, did make it clear that no agency of the Federal Government can -- and I am quoting from a portion of the legislative history now, the major changes in the Senate, "can under its statutory authorizations shall utilize and excessively narrow construction of its existing statutory authorizations."

QUESTION: Is that a restriction against this Court that we shouldn't use a narrow construction? Do you want to go that far while you are at it?

MR. MEYERS: I would not go that far, your Honor.

Section 102(2)(C) of NEPA in requiring environmental impact statements did not intend this requirement to be the type of hollow ceremony which the Commission apparently believed it to be when it filed its draft environmental impact statement in this case. Congress intended that the agencies undertake a detailed assessment of the environmental impact of its actions. The reason -- one of the primary reasons, I submit to this Court, that the Commission has not complied with NEPA and has not even attempted to integrate NEPA into its own procedures is that it has refused to make the accommodations in its own procedural requirements which would make NEPA meaningful. It has continued to rely upon the limited self-serving statements which the parties submit

to it in these general rate increases. It has continued to act, as the Court pointed out in Calvert Cliffs as an umpire sitting back and evaluating the submission by the parties. We submit that this Court should follow those courts which have said that NEPA requires the agency to take the initiative in considering the environmental values and make whatever adjustments in resources or procedures are necessary to fully comply with the Act.

Thank you.

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

Mr. Dienelt.

ORAL ARGUMENT OF JOHN F. DIENELT, ON BEHALF OF THE APPELLEES ENVIRONMENTAL DEFENSE FUND ET AL

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

I would like to begin my argument by discussing some of the questions which have been raised by the Court to other counsel, and initially to reply to the question that Mr. Justice Brennan posed to Mr. Cox, regarding the relationship between NEPA and this Court's decision in the Arrow case.

The Court's decision in this case applying NEPA is a very different decision, very different set of facts than the decision involved in Arrow. Arrow involved judicial interference with rate-making. Arrow involved a court deciding

what a reasonable rate would be, issuing an injunction on that basis. This case has nothing to do with that kind of exercise of discretion which we acknowledge is committed to an agency. This case deals with clear, unambiguous procedures that the National Environmental Policy Act imposes upon all Federal agencies, not including the courts who are not agencies under the APA and whom we submit are not agencies under NEPA.

The significance of the difference between the Arrow set of facts and the set of facts in this case is that in Arrow it could be said that a court was interfering with the congressional decision to commit discretion to the agency. Here what the court is doing is enforcing on what is perhaps the most recalcitrant agency among Federal agencies with respect to NEPA the clear congressional requirements. It's working to enforce congressional requirements; it's not working against the discretion of an agency which Congress has committed to that agency.

What the court did was see that the Commission from the beginning of the National Environmental Policy Act on January 1, 1970, had done nothing to attempt to accommodate its practices to the requirements of NEPA. The court was faced with the situation where as early as October of 1970 the Council on Environmental Quality, which in answer to your question, Mr. Justice White, is the agency which we could say would have the responsibility to interpret NEPA, had told

the Commission, "It's your job to begin to comply with NEPA. It's particularly your job to apply its procedures in order to fulfill the explicit policy that Congress set forth in NEPA." The clearest policy, the clearest substantive policy that Congress set was to enhance the quality of renewable resources and to approach the maximum attainable recycling of depletable resources.

QUESTION: What did the agency ever say, that they had to complete this statement before they either suspended or didn't suspend the rate?

MR. DIENELT: I don't believe that the agency has said either way on that question.

QUESTION: They have never disagreed that it would satisfy the Act if they did an adequate job during the process of considering whether a rate is just and reasonable?

MR. DIENELT: That was, we submit, the issue before the District Court. The CEQ didn't say one way or another.

QUESTION: That's the issue here. That's one of the issues here. So unless the agencies really disagreed with the Commission's position in this respect --

MR. DIENELT: Well, your Honor, we don't have a statement in this record from the Agency with respect to the general question of whether the Commission is obliged with respect to rate increase proposals to submit an impact statement in the 30-day period. We do have statements from the

CEQ criticizing the Commission's compliance with NEPA in this case, and I submit there's a very good reason why we don't have a statement by the CEQ --

QUESTION: That isn't the issue here, is it?

MR. DIENELT: The issue here is not whether the Commission is obliged to file an impact statement in every rate proceeding in the 30-day period.

QUESTION: It isn't even whether the content of an impact statement submitted by the Commission satisfies the Act.

MR. DIENELT: The issue, your Honor, I am afraid I don't understand. The District Court held that the Commission had not complied with NEPA in this case to the fullest extent possible. It didn't say exactly what procedures the Commission would have to comply with. It expressly indicated that if the Commission made to it a good faith showing of compliance to the fullest extent possible, that it would be inclined not to impose an impact statement requirement on the Commission or to indicate that its order had violated NEPA. The Commission has never taken the position until it arrived in court and it was taken by its lawyers that it's an impossibility for it to comply with the Act in the 30-day period.

The 30-day period is something of a false issue, Mr. Justice White, because rate decisions are not made, at

least general rate increase proceedings, which is what we are talking about, are not --

QUESTION: You are saying this because the Commission could suspend for 7 months and do its job?

MR. DIENELT: That's one thing the Commission could do, your Honor. Another thing that the Commission could do, as it has in the most recent general rate increase proceedings, tell the railroads that they don't have special permission to file a rate within a short period of time, that they have to give the public 75 days notice, or 90 days notice, or whatever period of time is appropriate. And in that time the Commission can comply with the Act to the fullest extent possible.

QUESTION: And you say the Environmental Protection Act gives them that power.

MR. DIENELT: Gives the Commission, not the power, not merely the power, but the duty to comply with the Act to the fullest extent possible.

QUESTION: So does that wipe out the 30-day -- doesn't that wipe out the 30-day rate-making process?

MR. DIENELT: No, your Honor, it doesn't.

QUESTION: In all cases where the environmental impact is asserted?

MR. DIENELT: In cases where the environmental impact is asserted, it may well be that one doesn't exist.

And in those circumstances, a Commission finding of no significant environmental impact, if it's based on a record and if it's adequately explained or at least if the District Court can figure out what the Commission did, would suffice on review. In some circumstances where you have a general rate increase proceeding, where you have a rate increase of recyclable materials, where there is a significant environmental impact, then, we submit, it's appropriate to throw out the 30-day proceeding because NEPA requires that.

But we want to stress that the 30-day issue is somewhat false because more time is permitted to the Commission under the Act on the one hand, and on the other hand NEPA's requirements as interpreted by the CEQ guidelines -- and I will refer you to Section 10 of the guidelines -- is flexible to permit an agency to come to the CEQ and say, "Look, we have these problems, this is how we want to comply with the Act. This is what we think is compliance to the fullest extent possible." And the CEQ would say, "All right."

But in further response to what Mr. Justice White was asking, the Commission never went to the CEQ. The CEQ's communications with the Commission had indicated that the Commission has to comply with NEPA, it has to begin, and it should have begun on January 1, 1970, to consider the effects of its permitting rates to continue to go into effect on recyclable materials. And it hasn't done that.

QUESTION: Let me see if I understand you. Your argument is that to comply with NEPA's mandate, that the Commission shall adjust its procedures.

MR. DIENELT: That's correct, your Honor.

QUESTION: If within the 30-day period it's not possible to comply with procedures for an impact statement, then the duty of the Commission is to use the option open to it of suspending for 7 months. Is that your argument?

MR. DIENELT: Our argument is that is one possibility the Commission could employ to comply with the requirements of the Act. There are others.

QUESTION: In other words, the Commission can't say, "We can't do it within 30 days, and therefore it's impossible," because they could suspend and do it within the suspended period. Is that it?

MR. DIENELT: Even if they didn't suspend, your Honor, they could do something.

QUESTION: What else besides suspension?

MR. DIENELT: For example --

QUESTION: Let's take the assumption that it's really not possible within 30 days time to complete it.

MR. DIENELT: And let's take the assumption that 30 days is what they are limited to, which I think is not the case. Within the 30-day period they could submit an outline of a draft environmental impact statement. They could

take their general experience and the evidence that the parties submit, the evidence that their own staff develops which they didn't do in this case, and they could make a decision, a good faith decision whether or not there was a significant environmental impact. The Solicitor General earlier argued if that decision is supportable, then they don't have any further requirement. If it's not, and if there is an impact --

QUESTION: Mr. Dienelt, what is the significance of the 30-day limitation? Does it have any significance in connection with the compliance with NEPA?

MR. DIENELT: There may be circumstances where, for example, the railroads propose a change in one rate and it will go into effect in 30 days. And in that period if an environmental impact may exist and it's alleged, we submit the Commission should consider whether there is a significant environmental impact from, say, that one rate and whether --

QUESTION: Now, let's take the situation where it can't be done within 30 days. Then in face of the requirement that something be done within 30 days, what is open to the Commission?

MR. DIENELT: Among the things that would be open to the Commission would be to file a draft impact statement, to file an outline of a draft impact statement to indicate how it's going to go about complying with NEPA, to indicate

the process it's going to follow, to make a decision in good faith there is no significant environmental impact.

QUESTION: One or the other of those things must be done within 30 days?

MR. DIENELT: That's within the time period that the Commission has.

QUESTION: Is it 30 days or not?

MR. DIENELT: It is not, your Honor, in a general rate increase.

QUESTION: You said they weren't limited to 30 days. Why aren't they?

MR. DIENELT: Because the railroads when they come in with a request to raise general rates, as I understand it, now as a practical matter have to come in with what is called a master tariff instead of coming in, as I understand it, with an indication of what the rate on scrap iron between Dubuque and Omaha is and for every other rate in the country, they come in with general guides. This doesn't comply with other provisions of the Interstate Commerce Act as I understand it, namely Section 4 and others. So they have to ask for special permission as a practical matter whatever the details of --

QUESTION: The leverage is either you ask or we will suspend for 7 months.

MR. DIENELT: That's one of the --

QUESTION: What over leverage does the Commission have?

MR. DIENELT: You have to ask for special permission in order to be able to publish a rate that doesn't comply with all the other requirements of the Act, which you can do -- if you can indicate what your rates are you don't need this special permission, you can go in for 30 days.

QUESTION: I see.

MR. DIENELT: Otherwise, you have to take longer. The Commission can then tell you how much notice you have to give. And in the last regional rate increase proceedings, it's been something like 75 days, 45 days, 60 days. It's a flexible time period.

QUESTION: Even if the railroads file something that doesn't comply with general tariff regulations, all the Commission could do is to suspend them for 7 months until they have a proceeding and make a decision.

MR. DIENELT: That's the Commission's authority.

QUESTION: Well, that is their leverage then, isn't it?

MR. DIENELT: Yes, that's part of the leverage under the suspension --

QUESTION: Are you saying that in circumstances where no other way of doing it is available to the Commission, the Commission must suspend them for 7 months?

MR. DIENELT: No. No. We are not trying to get into the question of rate-making. What we say is that the

Commission must comply with NEPA to the fullest extent possible. That's a flexible provision in this context and in this case the District Court found no effort, no good faith effort, to comply. That's the basis of the injunction in this case. It doesn't extend to the broad range of questions that we have been discussing.

QUESTION: Didn't the Commission say that the impact was so tenuous that there was nothing to it and it did not need --

MR. DIEMELT: Your Honor, it said, and all it said, was that it appears there will be no significant effect on the human environment under the National Environmental Policy Act. It didn't explain the basis for that and the District Court wanted to know how did it find that. It had said in other rate increase proceedings that it was granting hold-downs on recyclable commodities, in other words, not giving the railroads all it wanted for environmental reasons. It said in a draft impact statement in this case that there might be significant impact. It's behavior was entirely ambiguous. The District Court was confronted with what we submit it properly called boiler plate. And that boiler plate the Commission has used in virtually every order since 1970 when NEPA took effect. The Commission has simply not made an effort in this or any other case to comply with the Act. The court found that, and that is the basis of its ruling under

NEPA.

If I may go on to the question that I believe you asked, Mr. Chief Justice Burger, regarding the legislative history of NEPA and the power of the court to issue an injunction which would extend beyond the 7-month period, it's true that there is nothing in the legislative history regarding the Interstate Commerce Commission's responsibilities. What is in the statute, the statute itself, are two things we consider to be significant.

First, the requirement that agencies begin to accommodate their procedures to the requirements of NEPA, an immediate and continuing requirement which was confirmed almost immediately after the Act was passed by a Presidential order, No. 11514.

The second thing is Section 103 of NEPA which says to an agency, "If you have a problem, if you can't comply with the Act," and in this case compliance might be suspending for even more than 7 months while they studied, I don't say it would have to be, but it might be, "then you come back to the Congress and say, 'Look, we found this problem, we need to resolve it.'" The Commission didn't do that. The Commission seems to think that there isn't a problem. But if we reach the point of injunction extending beyond 7 months, we submit we have a conflict between a statute NEPA which to be effective may require that an injunction issue until

the Commission has complied with its obligations under NEPA and another statute, the ICC Act, which limits the Commission to 7 months. In this circumstance, we think that the conflict, in light of the Commission's behavior, ought to be resolved in favor of affirming the District Court's very effective action.

I would like to leave the standing question principally to the brief. I believe that there really is no serious issue here. The plaintiffs in this case are injured. They allege injury, in fact. The case doesn't simply involve five law students, and it's not an academic exercise to them. The conservation groups whom I represent represent 130,000 citizens. These people use and enjoy the environment. There can't be any dispute about that. These people are affected in their use and ejoyment of the environment by the failure to comply with the requirement of NEPA that we maximize recycling.

QUESTION: How was that membership figure established in the record in this case?

MR. DIENELT: We alleged the membership of each of the organizations in our complaint, your Honor.

QUESTION: Beyond the allegation?

MR. DIENELT: I was going to address Mr. Justice Rehnquist's question. There was no proof put on with respect -- no testimony taken, I should say, with respect to our

membership. We would be shocked if anyone would challenge the fact that we represent this large number of members or that those people enjoy the environment. And certainly since --

QUESTION: By the way, how could anyone challenge it?

MR. DIENELT: I suppose -- and I was going to suggest this in response to the claim of the railroads that our allegations were not sufficiently precise, that they take discovery if they want. When we go back, if we go back --

QUESTION: They could ... to see if your allegation is correct?

MR. DIENELT: If they wish to challenge such a basic thing as the veracity of our membership.

QUESTION: Well, isn't that a form, to borrow a phrase that you have used, isn't that a form of boiler plate allegation in a complaint for standing?

MR. DIENELT: Well, it's accepted boiler plate, and it's also something that we can prove if we are put to it. This was a preliminary injunction, your Honor, and when we go back, if we go back, we can put that kind of proof on.

QUESTION: It would be unusual, I suppose, to have a preliminary injunction heard on the affidavits without oral testimony.

MR. DIENELT: No, your Honor, I don't believe so.

Certainly there was evidence in the record with regard to the effect of freight rates on recycling, which is the other part of the allegation of injury.

But the proof is there. These allegations are provable. The environmental groups allege an injury in fact which we submit is sufficient under Sierra Club.

QUESTION: What has the size of your membership got to do with the question? What on earth has it got to do with the question? The number of your members.

MR. DIENELT: Nothing. One person is --

QUESTION: If anything, if it holds anything, it holds that.

MR. DIENELT: That's correct, your Honor. I agree. I was responding to the point about the five law students. One law student, one person --

QUESTION: One law student or a hundred million. It doesn't have anything to do with the problem of standing.

MR. DIENELT: That's correct, your Honor.

QUESTION: On the procedural posture of the case, it's your position that you are entitled to have your allegations taken as true, but by the same token, I suppose you are bound by them, you can't go beyond them if there was no oral testimony in the court.

MR. DIENELT: That's correct,your Honor. But there was evidence in the record regarding the effects of

recycling which it seems to me is the essence of the claim of lack of standing, usually, a question on the merits, do we have some sort of standing to litigate this issue on the merits because we have alleged a sufficient effect as a result of the rate increases. And we submit that there was --

QUESTION: Could any citizen who pays higher prices challenge the consequence of a price board's order authorizing an increase in meat prices?

MR. DIENELT: I would submit he had standing. He might not prevail on the merits, your Honor, but --

QUESTION: You would think he does have standing.

MR. DIENELT: He satisfies the injury in fact half of the standing test. I can't respond to his zone of interest question there because I don't know what the statute is. But I do know what the statute is here, and it's NEPA and it creates a right,we submit, on any citizens to seek to obtain from the Government an impact statement.

QUESTION: So the Sierra Club or the membership is irrelevant. Any citizen.

MR. DIENELT: Any citizen, your Honor, that's correct.

QUESTION: And if it isn't right about any citizen,if that isn't correct about any citizen, it isn't correct about your plaintiffs.

MR. DIENELT: That's correct, your Honor. We have a

position here taken by the Government and the railroads in essence that if it's any citizen and he is injured to the same degree as any other citizen, then no citizen has standing. And we submit that that's a ridiculous rule.

QUESTION: Do you get that right from NEPA?

MR. DIENELT: Beg pardon?

QUESTION: Do you get that right from NEPA?

MR. DIENELT: We get that right from NEPA and also from the --

QUESTION: Where do you get it in NEPA?

MR. DIENELT: The review here is sought under the Administrative Procedures Act --

QUESTION: Where do you get the right to sue in a Federal court or any other court in NEPA?

MR. DIENELT: There is no specific statement in NEPA providing for citizens suit.

QUESTION: Of course.

MR. DIENELT: There is a statement in NEPA that citizens shall enjoy a healthful environment. There is, I would point out to the Court, although this isn't in our brief, that testimony of the Council on Environmental Quality in June of 1971 before the House Committees on Fisheries and Wildlife Conservation regarding a citizens action bill in which the Council, the agency which is responsible for interpreting NEPA, which says the Council takes the position

that the National Environmental Policy Act and other similar environmental protection legislation confers standing on concerned citizens and citizens who wish to challenge violations of that legislation.

The standing issue is clear.

Briefly, with respect to the question of reviewability we point out that nothing in Arrow dealt specifically with reviewability. It dealt with injunctive relief. You can have review under NEPA and still have an injunction not issued. And there is no indication in the ICC Act of a clear and convincing legislative attempt to preclude review. There is no indication in NEPA that review isn't warranted, and the Government here is seeking an exemption for the ICC, at least with respect to suspension decisions which doesn't apply to any other Federal agency.

So we submit that the plaintiffs here have standing under Sierra Club, that this decision by the Commission, this suspension order, can be reviewed, that on review of it the District Court properly found that the Commission had taken no steps in thisor in any other case to attempt to comply with NEPA to the fullest extent possible, that that was appropriate and that an injunction should have issued and that this Court should affirm that.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:26 o'clock p.m., the argument in the above-entitled matter was submitted.]