In the

Supreme Court of the United States

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WILLIAM D. RUCKELSHAUS,
Administrator of the Environmental
Protection Agency,

Petitioner,

v.

SIERRA CLUB, et al.,

Respondents.

No. 72-804

Washington, D. C.
April 18, 1973

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Washington, D. C.
Wednesday, April 18, 1973

The above-entitled matter came on for argument at 2:03 o'clock p.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, Esq., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; for the Petitioner.

BRUCE J. TERRIS, Esq., 1908 Sunderland Place, N.W., Washington, D. C. 20036; for the Respondents.

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-804, Ruckelshaus against the Sierra Club.

Mr. Wallace, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case arises under the Federal Clean Air Act Amendments of 1970. For the convenience of the Court, I have asked the clerk to distribute to each member of the Court a pamphlet containing the full provisions of the Clean Air Act, as amended through the 1970 amendments, plus two excerpts from the Federal Register reproducing completely the parts of the Administrator's recommendations that are at issue in this case, so that all of these provisions can be seen in full context.

The 1970 amendments greatly strengthen the act in a number of ways. Among other things, the amendments for the first time provided for federally prescribed national ambient air quality standards and for federal standards for emissions from new stationary sources of pollutants. The ambient air quality standards apply to the presence of pollutants in the overall air in a community or region

covered by the standards. And the emission standards, also referred to as performance standards in the act, apply to the emissions of pollutants from a single point source.

Under the 1970 amendments, each state is required to submit a plan for implementing the national ambient air quality standards. And the question in this case is whether those plans also have to prevent deterioration of existing air quality in any portion of any state. The Administrator has taken the position that the act does not require or permit him to require the states to include such a non-deterioration provision in their plans, although it preserves the right of the states to do so, if they wish.

Respondents brought this suit for a declaratory judgment to the contrary of the Administrator's position and to direct the Administrator to disapprove the state plans that have been submitted insofar as they do not prevent significant deterioration of existing air quality in any part of any state.

The district court upheld the claim of the respondents on the basis of the act's statement of purposes and on the basis of the court's view of the act's legislative history and what the court regarded as inconsistency in the Administrator's regulation.

It issued a preliminary injunction which the parties agreed to treat as a final order for purposes of appeal.

And on appeal the court of appeals affirmed, on the basis of the district court's opinion. This Court granted the Government's petition for certiorari and the Government's application for a stay, pending its decision.

Q Mr. Wallace, what you just said is something that I have been wondering about in this case. All that was issued was a preliminary injunction by the district court.

MR. WALLACE: The parties agreed that--

Q And the parties agreed to consider it something else for a limited purpose, i.e., for the purposes of appeal. But all that the district court ever issued was a preliminary injunction.

MR. WALLACE: That is correct, Your Honor.

Q And that is all that ever has happened in this case.

MR. WALLACE: The parties agreed that it involved the controlling issue of law that settled the rights between the parties.

Q For purposes of appeal to the court of appeals. Then really is not the frame of the issues here whether or not the court was right in issuing a preliminary injunction, not whether or not it was right or wrong on the merits of the case.

MR. WALLACE: I think not, Your Honor, because what

this Court is reviewing is the judgment of the court of appeals, which--

Q That opinion simply affirmed the preliminary injunction of the district court.

MR. WALLACE: On the basis of the district court's opinion as to the legal issues but on the basis of the submission of parties that this was the controlling legal issue that would govern the practice of the Administrator and whether the Administrator could approve or disapprove the state plans that are pending before it.

Q The preliminary injunction is issued generally, as we all know, on questions of probabilities and possibilities, threats of harm and how immediate and irreparable they are and what not, without getting to a definitive decision of underlying merits, and that is all that was done here, is it not?

MR. WALLACE: The rationale of the district court's memorandum opinion is not based on probabilities at all; it is based on a controlling legal issue that interprets the statute and in effect invalidates the Administrator's regulation. There is nothing in that opinion adopted by the court of appeals that is based on probabilities or--

Q First, have the plaintiffs made a strong showing that they are likely to prevail on the merits? And the answer is that he says yes. But that is not deciding the

merits.

Q Petitioner preached the Virginia Petroleum Jobbers type of standards for this interim purpose, did they not?

MR. WALLACE: That is--the court said initially this matter came before the court in that posture, but the--

Q Mr. Wallace, I do not mean to interrupt you. I have a question when you are through answering either the Chief Justice or Justice Stewart's question.

I am interested in the stipulation on page 37 of the record, which I do not read quite the same way Justice Stewart did. If you look at the first paragraph on page 37 of the appendix, "It is hereby stipulated by and between the parties to this appeal that the decision of the district court be regarded as a final rather than interlocutory order on the merits," and then it sets forth the reasons for doing so. That strikes me as the kind of stipulation that counsel are not unknown to enter or do when they feel the thing cannot possibly come out any different way on the final--wherein they simply waive their right to a final hearing in the district court. I do not read that as a stipulation just for the purposes of an appeal.

MR. WALLACE: It was not intended as just for the purposes of--

Q There could not have been an appeal, could

there, or am I mistaken, of an interlocutory injunction to the court of appeals?

MR. WALLACE: I think an injunction is appealable so long as it enjoins the enforcement of a federal statute. A temporary restraining order would not have been appealable.

Q This was a preliminary injunction.

Q Mr. Wallace, having in mind that the court of appeals wrote no opinion but merely acted on the district court's memorandum, which I might say parenthetically they do not very often do in an important case, can you point to anything in the record here which indicates that the court of appeals was aware that this was being treated as a permanent disposition, a total disposition of the case? Would you point to that for me?

MR. WALLACE: The terms of the stipulation which Mr. Justice Rehnquist just pointed out, plus the chronological situation. The preliminary injunction was issued by the district court the day before the final day under the statute when the administrator had to approve or disapprove all of the state implementation plans. The suit was brought one week before the statutory deadline, and the district court had to act rapidly, and the court of appeals regarded this as a matter for rapid disposition, because the statute specifies these very tight deadlines for implementation of the act. And that is the question that had been presented

in the petition for certiorari here, the governing legal question, which both parties understood the court of appeals to be deciding on the basis of this stipulation. There is nothing to indicate that the court of appeals decided anything else.

Ordinarily one would think that if they were rejecting the stipulated legal issue that was before them in deciding something else, they would have said so. The parties agreed what the legal issue was, and we think that that issue was the question that is now presented in the Government's petition for certiorari.

Q That is not the way the district court put it. It said, "Is there a probability of success?"

MR. WALLACE: And its answer was based on what the parties regarded as the governing legal question. That is the question we presented in our petition and the question to which I would like to devote the remainder of my argument, if I may.

Q You have not suggested, for my satisfaction, that the court of appeals did anything more, as Mr. Justice Stewart has just intimated, than say that in the particular circumstances the action of the district court was not an abuse of discretion as distinguished from whether it was right or wrong, on the ultimate legal issue.

MR. WALLACE: That is not the issue that the parties

stipulated was the issue before the court of appeals. And one presumes that if the court of appeals disagreed with the stipulated issue that the parties said it was deciding, it would have indicated as much. And even if the case has to be regarded as limited in its posture to whether there was an abuse of discretion with respect to the preliminary injunction, our position is that the legal issue is a clear one on the face of the statute and that this Court should decide it in that content, if it regards it as presented in this context, which we do not regard as the context in which it is presented.

Q It seems to me that the Government's application for a stay refers, for what it is worth, to a final judgment.

MR. WALLACE: That is correct.

Q The application not only to the district court but, I take it, to the court of appeals.

Q This is not a shortcut to get around this Court not taking certified questions, is it?

MR. WALLACE: It was not regarded as a shortcut at all. We went to the court of appeals--

Q And the court of appeals merely passed on the district court's opinion without any opinion of their own, right?

MR. WALLACE: Without any opinion of their own.

Q So, they passed it up to us.

MR. WALLACE: Well, it was not mandatory for this Court to grant certiorari. We petitioned and we presented the governing legal question as the question presented in the petition. We think that question is here in either context.

The opinion of the district court, adopted by the court of appeals, in evaluating the probability of success or the legal issues, does not discuss any of the operative positions of the act, although in our view Congress in these provisions answered with complete clarity and with great specificity the underlying legal question that is before this Court. And I would like now to turn to these operative provisions of the act in the pamphlet that has been passed out to the Justices.

The structure of the act relevant here begins with Section 108 on page 9 of this pamphlet, which specifies that the Administrator is to adopt criteria for each of the individual pollutants to be found in the ambient air, and the Administrator has done so with respect to all of the common pollutants. Whether additional ones will be added remains subject to continuing review.

Then Section 109, on page 10, specifies that the Administrator, on the basis of these criteria for individual pollutants, then will adopt what are called the

national ambient air quality standards. Two standards are to be adopted by the Administrator and have been adopted by the Administrator: A national primary ambient air quality standard defined as a standard requisite to protect the public health and a national secondary ambient air quality standard defined at the top of page 11 as requisite to protect the public welfare from any known or anticipated adverse effects. And public welfare is very broadly defined on page 48 of this pamphlet in the act, Section 302H, which says that all language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation as well as effects on economic values and on personal comfort and well being.

These standards are very far-reaching and have been adopted. They are not subject to collateral review in this case for reasons explained in our brief. There is a statutory provision specifying another route for review of the standards. So, this case was decided and should be decided on the premise that the standards adopted by the Administrator are fully adequate to prevent in the ambient air any known or anticipated adverse effects on health, vegetation, and all of the other factors covered in the statute.

The standards themselves are subject to continuous review and revision by the Administrator as additional scientific information becomes available. But these are stringent standards, and the Environmental Protection Agency is of the view that many urban areas will have extreme difficulty conforming even to the primary standard and even greater difficulty conforming to the secondary standard.

The key provision, for purposes of this case, is Section 110, entitled "Implementation Plans," and that title is in the public law in the statutes at large. All of these titles are. And that section required each state to adopt and submit a plan providing for the implementation, maintenance, and enforcement of the primary standard and a plan providing for the implementation, maintenance, and enforcement of the secondary standard. That is all in 110 (a)(1).

And then 110(a)(2) specifies that the Administrator shall--the second sentence of that--shall approve such plan submitted to him or any portion thereof if he determines it was adopted after reasonable notice and hearing and that--and then there are listed (a) through (h)--eight additional requirements that the plan must meet. If it meets those eight requirements and was adopted after reasonable notice and hearing, the act says on its face the Administrator shall approve it. It is undisputed that none of these eight

requirements adds a requirement that the plan provide against significant deterioration of existing air quality other than the requirement that the primary and secondary standards be met, which is part (a). The others are all concerned with different subject matter and are tied in with meeting the primary and secondary standards.

We think it significant that this provision does not even say the Administrator shall not approve such plan unless it meets these criteria. It speaks in the positive, in the mandatory sense he shall approve it if it does meet these standards. It has long been the view of the agency that if a plan were submitted by a state, which admittedly met all these standards, and it disapproved it, it would have a very weak position in court if sued by that state. And it did not think it could prevail in such a suit. And, of course, the case did not arise in that context.

In addition to--I might add that there are other portions of Section 110 which reaffirm that the plans are implementation plans for these federally prescribed standards. I refer the Court in particular to subpart (h) there in this list of eight requirements, which says that the plan must provide for revision, in number two, whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or

secondary standard, not that it is inadequate for some other purpose.

And the only definition of the plan in the act is in subpart (d) on page 13 in Section 110, which says, "For purposes of this act an applicable implementation plan is the implementation plan which has been approved under subsection (a) or promulgated by the Administrator under subsection (c) and which implements a national primary or secondary ambient air quality standard in a state."

The act provides for an additional requirement, and that is the Section 111 requirement on performance standards for new stationary sources. This apart from the primary and secondary ambient air quality requirements. And I will not have time to go into that in any detail. But it is significant that the act defines standard of performance to mean, at the beginning of Section 111, a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which, taking into account the cost of achieving such reduction, the Administrator determines has been adequately demonstrated.

All of this indicates that there are two requirements being imposed by the act, one, the national ambient air quality standards, and the other emission limitation requirements which do not preclude new development

but which impose a practical best available limitation, taking cost into account as a protection that applies as well to areas where the existing air quality exceeds that of the primary and secondary standards.

And then Section 116 of the act specifies that the states are free to adopt more stringent standards for the ambient air if they care to do so. And this is in keeping with the finding recited in Section 101(a)(3) of the act, that the prevention and control of air pollution at its source is the primary responsibility of states and local governments.

This interpretation of the act is also corroborated by other important provisions of the act. The entire structure of the act looks toward these implementation plans as being just what they are called, plans to implement the primary and secondary standards.

Section 107(a) of the act, on page 8, succinctly spells out what the state's responsibility is, and again it is to submit an implementation plan for such state which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained.

And then one of the most persuasive provisions further corroborating the meaning of the act and the entire scheme of it is to be found on page 41 of the act, and that is Section 211(c)(4)-c, the capital C just below the middle

of the page on page 41.

I apologize that this was mistakenly referred to in our reply brief as Section 210. It is actually Section 211.

Subpart 4 basically pre-empts the states from regulating fuels or fuel additives. But this subpart capital C says that the Administrator may, however, approve a provision regulating fuels or fuel additives in implementation plans or promulgate an implementation plan containing such a provision but only if he finds that the state control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard which the plan implements.

Q But there is no implementation plan here, is there, that has been issued?

MR. WALLACE: All 50 plans have been submitted to the Administrator.

Q I mean, he has not issued them?

MR. WALLACE: He has disapproved them insofar as they do not comply with the district court order in this case. But they do not contain an enforcement mechanism consistent with the district court's order.

Q The reason I ask is that down below, your office or the Department of Justice took the position that this was all premature because no plan had been promulgated.

MR. WALLACE: That is correct. We have dropped that contention in this Court. All we did was present the one question presented in the petition for certiorari. We are not arguing that jurisdictional requirements were exceeded in this case in any way.

Q But there is no implementation plan involved here?

MR. WALLACE: There is none in this record, Your Honor. The 50 states have submitted plans and those plans were disapproved in the Federal Register insofar as they do not comply with the district court's order because at that time the order was not stayed. This Court granted a stay later in the context of a situation where the states would have had to devote resources to implementing the district court's order rather than to implementing the rest of the plans which are in effect and were approved by the Administrator.

So, the plans are presently in effect, except insofar as this other question is before the Court, and the Administrator has not promulgated any substitute provisions requiring the states to devote their enforcement resources to assuring that there will not be a deterioration of the air in any portion of any state.

The obvious purpose of this provision (c) was to permit the states to regulate fuels or fuel additives when

they had to do so in order to comply with what the federal act requires of them in their implementation plan. But they are not allowed to do so in order to effectuate anything additional in their implementation plan that they may have put in of their own volition. It is hard to believe that it would have been drafted this way if that was not the frame of reference the drafters had in mind.

The entire act is of one consistent piece and, as we have shown in our brief, the provision at the beginning of the act stating the purposes of the act, which was carried over from the much weaker 1967 act, is entirely consistent with the operative provisions, and so are the Administrator's regulations. And I would like to reserve the balance of my time for rebuttal, if I may.

MR. CHIEF JUSTICE BURGER: Mr. Terris.

ORAL ARGUMENT OF BRUCE J. TERRIS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I would like to turn just at the outset to this question about the preliminary injunction. If you look at pages 31 to 32 of the appendix, at the very bottom of page 31, the district court stated: "Having considered the stated purpose of the Clean Air Act of 1970, the legislative history of the Act and its predecessor, and the past and present

administrative interpretation of the Acts, it is our judgment that the Clean Air Act of 1970 is based in important part on a policy of non-degradation of existing clean air and that 40 C.R.F., 51.12(b), in permitting the states to submit plans which allow pollution levels of clean air to rise to the secondary standard of pollution, is contrary to the legislative policy of the Act and is, therefore, invalid."

Admittedly, the Court then went on in the next section under injunctive relief to say there was a likelihood of success. But in fact what the parties did was interpret that sentence that I just read to you as in effect a final conclusion that that regulation was invalid.

Q And you so stipulated in the court of appeals.

MR. TERRIS: That is correct, in the court of appeals.

Q And the court of appeals agreed with you that it was a final judgment, I take it?

MR. TERRIS: Its order, of course as has been pointed out, did not allude to this or any other matter.

Q In the order of the court of appeals on page 48, it said: "On consideration of appellant's motion for a stay of the final judgment of the District Court..."

MR. TERRIS: Yes. They in effect, by that point at least, had interpreted it, as the stipulation indicates, to be a final judgment.

Probably the only thing we do agree with the Government in the case is that this is, we think, a final judgment which is before the Court and should be treated as such.

This case, Your Honors, involves the air quality of most of the United States--

Q The court of appeals affirmance was based on the opinion of the district judge, and that opinion talked about the probability of success.

MR. TERRIS: Yes. Well, it talked about both.

Q It talked about both.

MR. TERRIS: That both said the regulation was invalid and said there was a probability of success. I would read that to say that since the regulation was invalid, indeed there was a probability of success.

Q A hundred percent probability in the district judge's view.

MR. TERRIS: That is right. Your Honors, this case involves the air quality of most of the United States. It involves any area where air quality is better than one or more of the secondary standards for the six pollutants; and, therefore, this case will vitally affect all rural areas, suburban areas, and even a great many urban areas.

Petitioner adopted a regulation which would allow all these areas, the air in them, to deteriorate to the

secondary standards. We believe that the result will be massive deterioration of air quality, both measured by the area affected and by the total pollution emitted into the air. While the pollution in cities will be lowered, under the statute, two of the secondary standards over the next few years, in many particularly clean areas pollution will increase five, ten or even more times. Since there will be an increase of pollution in far more areas than it would be reduced, a vast increase in pollution will result.

This is no mere theoretical possibility. Pollution has increased drastically in the formerly almost pure air of the Southwest, as coal-burning power plants have been located there over the last few years. Any air traveler can see the haze hanging over that area.

The EPA itself has found that even the Grand Canyon is threatened with air pollution.

Plans from Montana and Wyoming are even more threatening. Proposed coal-burning power plants there would emit five to ten times the air pollution of New York City and Los Angeles combined.

We submit that these are only the most dramatic examples of what will occur if the unanimous decisions of the courts below are reversed and petitioner's regulation is approved. An even blanket of air pollution will spread across the country. The pollution level will be approximately the

same from coast to coast as it now is, for example, as to sulfur oxides and particulates in Boston, Detroit, and Pittsburgh.

In protest against this massive deterioration in air quality, 20 states have filed briefs as amici in support of respondents in this Court to challenge petitioner's policy.

Respondents submit that petitioner's regulation is invalid because it is in conflict with the language of the Clean Air Act--

Q What is the interest of the state precisely where it is submitting these amicus briefs? I would think that if a state attorney general thought his state should have a stronger policy, he could simply go to his state and not have to come here and urge that there is federal pre-emption of the thing.

MR. TERRIS: Theoretically that is true, Your Honor. But, as a practical matter, what happens is that there would be competition among states for having the lowest air pollution standard. Let me give an explicit example.

Arizona supports the Government in this case. New Mexico supports respondents. Both of them are now threatened with coal-burning power plants that will add drastically to air pollution. If New Mexico imposes a very

strict standard, then those power plants will be built in Arizona. But New Mexico will get the dirty air from Arizona. And so the net result to New Mexico will be that they will still get their air pollution but they will not get the economic benefits of the power plants.

What these states are arguing is that if in fact there is a national requirement, as they believe the law provides, that there be no significant deterioration of clean air, then the rule will be the same nationally, then industry will not locate in one state versus another because of a low air pollution standard, that industry will then use all of its funds and resources to develop methods for not significantly deteriorating the air and still being able to do the things which the country needs to have done.

Q Like child labor a generation ago?

MR. TERRIS: We think it is an exact parallel, Your Honor.

Q What you are saying is that pollution is not a respecter of state boundaries.

MR. TERRIS: That is right. And that, of course, is what President Nixon said in proposing the 1970 statute. And we have cited a number of studies in our brief which shows that air pollution moves long distances across state lines, that there was a serious air pollution problem in Miami which came from the Northeast, that there have been

serious air pollution problems in Oklahoma which came from the Great Lake States. There is no way for a state to protect its air by prohibiting significant deterioration unless the other states that are nearby also do the same.

We submit that the statute itself is clear. The Congress called the 1970 Amendments the Clean Air Act, and that that act states as the first of its purposes that it was designed to protect and enhance the quality of the nation's air resources.

We submit the petitioner's regulation cannot produce clean air, and will not enhance or even maintain existing air quality. And we believe that it is inconsistent with the language of the statute.

Whether or not the statutory language itself is clear enough, the legislative history in this case is overwhelming. It is interesting that the Government in oral argument here has not alluded at all to this legislative history. In fact, they have not in either of their two briefs alluded to some of the most important elements of it. Let me just briefly state what those are.

First, in 1967 the protect and enhance language was first put into the act. The Senate report said that this language was designed to enhance air quality and to reduce harmful emissions anywhere in the country, not just in areas of high pollution.

The history of the 1970 act, which left Section 1857 unchanged, is even more clear. John Veneman, then the Undersecretary of HEW, which enforced the air pollution law at that time, read a statement on behalf of Secretary Finch and the Administration to both the Senate and House committees considering the 1970 act. And this statement is on pages 27 to 28 of our red brief.

It says, "One of the express purposes of the Clean Air Act is 'to protect and enhance the quality of the Nation's air resources.' Accordingly it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with this provision of the Act."

We submit that is our case, that those two sentences are on all fours with our contention; that that language prohibits--

Q That is not language out of the statute, though.

MR. TERRIS: Pardon me?

Q I say that is not language out of the statute. You suggest the Government does not allude to the legislative history. I trust you will allude to the statute.

MR. TERRIS: The first sentence of that--I did, Your Honor. The "protect and enhance" language. The first sentence of what I just read to Your Honor was the statute.

Let me go back. The first sentence of what Secretary Veneman said was: "One of the express purposes of the Clean Air Act is," and then he starts to quote the statute, "'to protect and enhance the quality of the Nation's air resources.'" That is the end of his quote of the statute.

Then he says, "Accordingly," based on that provision of the statute, "it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with this provision of the Act."

So, what he is saying is that provision of the statute prohibits significant deterioration.

Q Yes, but he is not Congress.

MR. TERRIS: No, he is not, Your Honor, and I will get on to what Congress's response was.

Q That really does not help us much more than calling it the Clean Air Act or calling an act the Safe Streets Act, does it?

MR. TERRIS: I think it does, Your Honor, at least in this sense. First of all, we think the language of the statute itself indicates that a massive deterioration of air quality was not intended by Congress, that that is not consistent with "protect and enhance air quality."

Second, that what we have here is that the

Administration coming up, the people that enforce the statute, coming up and telling Congress a provision of the statute prohibits significant deterioration. Congress passes sweeping amendments in 1970 to strengthen the act. It leaves that provision unchanged.

We submit that when the enforcers of a statute come to Congress and say this is what this provision means and Congress, although modifying almost the whole rest of the act does not touch that section, that that is at least persuasive. Now I will get on to what Congress though itself said, because I think that is important. Secretary Veneman also repeated that statement, in effect, in his own words.

In the hearings before the House committee, which was considering the 1970 legislation, a witness representing the chemical industry protested that the bill before Congress would constitute an unqualified edict against any or every degradation, because the standards would apply to all air regions that are now rural, recreational, or otherwise unindustrialized.

He therefore proposed a flexible provision for balancing the equity as to each area in place of the national prohibition against significant deterioration. Congressman Rogers, who was on the committee, a ranking member of the committee, responded by vigorously opposing this proposal because it would allow clean air areas to be polluted so that

the country would be faced with having to clean them up later. And Mr. Rogers' statement is on page 31 of our brief.

The committee left intact Section 1857, which prohibited deterioration, according to the Administration witnesses. In addition, the House report, we think, clearly adopted Congressman Rogers' position, because it effectively said that significant deterioration was prohibited by stating the following: "The war against air pollution will be carried out throughout the nation rather than only in particular geographical areas." And then it went on to say, "Effective pollution control requires both reduction of present pollution and prevention of new significant pollution problems." That is almost identical with what Congressman Rogers' said in response to the witness.

Let me turn to the Senate report which underlies the 1970 act. First, it said that the statute applied nationally and did not apply just to uniquely critical areas. It then made clear that no state plan permitting significant deterioration of air quality should be approved by seeing first that deterioration of air quality should not be permitted except under circumstances where there is no available alternative.

If they had stopped there, obviously what Congress would have meant would have been that in some instances at least significant deterioration could be allowed. But then

the committee went on to say that alternatives existed; it listed the alternatives and said deterioration need not occur. And that is on page 32 of our brief.

The language upon which the statement is based, Section 1857, was in the 1967 act and was not changed by the 1970 statute. Petitioner claims that the Senate bill was later changed before its adoption. The only subsequent changes in the bill after the Senate report, and this is basically a Senate bill, were to tighten the provisions designed to reduce pollution in dirty air areas--in other words, in the cities.

The tightening of controls as to dirty air areas obviously cannot lead to any inference that Congress intended to weaken the bill's provisions as to clean air areas.

Petitioner's reply brief quotes at considerable length summaries of the 1970 act and says that if this very important provision were intended by Congress to apply across the country, why was it not in these congressional summaries of the act. There is a simple answer to this contention, and that is Section 1857 was not in the 1970 act. It was in the 1967 act. The 1970 statute contained only amendments to the 1967 statute. And since Congress after being informed that Section 1857 prohibited significant deterioration, decided to retain this provision

without amendment, it was not in the 1970 act. Therefore, it is natural that the summaries of the 1970 act did not include a summary of a provision which was not in the sattute.

We submit that not only is the legislative history strongly supportive of our position but the contemporaneous and consistent administrative interpretation until 1971 was likewise that Section 1857 prohibited significant deterioration. Counsel has said that EPA has long said that implementation plans could not prohibit that--that there was no requirement that implementation plans had to prohibit significant deterioration. That long-standing rule goes back to August, 1971. In 1969 the National Air Pollution Control Administration, which then enforced the statute, gave the states guidelines for its implementation plans.

Under the heading of requirements of the Air Quality Act, the states were told--and this is on page 26 of our brief--an explicit purpose of the act is to protect and enhance the quality of the nation's air resources. Again they were quoting Section 1857 from the statute.

Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portions of an air quality region, clearly would conflict with the express purpose of the law.

So, what HEW told the states in 1969 was this identical language, prohibited significant deterioration.

Then Secretaries Finch and Veneman told Congress, both houses of Congress, the same thing in 1970, as their interpretation of the statute and their interpretation of the 1970 Administration bill. Two other HEW officials, high officials, told congressional committees the same thing in 1969 and 1970.

And in 1971, petitioner promulgated his own national primary and secondary standards, which we think plainly stated the standards shall not be considered in any manner to allow significant deterioration of existing air quality in any portion of any state. We submit those regulations, despite the rather elaborate attempt to explain away that language, is directly inconsistent with the regulation which is involved in this case.

Petitioner principally relies on Section 110 of the act--

Q When did he change his mind?

MR. TERRIS: August, 1971.

Q With a set of new regulations?

MR. TERRIS: No, they did not replace them. We have at the moment--we have two inconsistent regulations.

Q He promulgated some additional requirements under another--for another purpose.

MR. TERRIS: That is right, Your Honor. What we have now are two documents in effect. We have the national primary and secondary air quality standards which we believe clearly prohibit significant deterioration, and then we have requirements for preparation, adoption, and submittal of implementation plans, which has the language which we challenge, which permits significant deterioration.

Q That is 51.12(b)?

MR. TERRIS: That is right, Your Honor.

Q And they rely on 50.1(c), I take it. That is the one you rely on.

MR. TERRIS: We do not rely on it because we think the statute and its legislative history make the regulation invalid. We rely on that for the proposition that the Administrator continued even into 1971 to believe that the statute prohibited significant deterioration; even if we were wrong on that interpretation and the Government's, we think, rather strained interpretation of that regulation is correct, we still believe that the statute and its legislative history and earlier administrative interpretation are conclusive.

We note particularly, Your Honors, that of course when one is looking to administrative interpretation to give the greatest weight, this Court has said it is the contemporaneous administrative interpretation which is most

persuasive. And that, of course, occurred repeatedly in 1969 and 1970.

As I indicated before, we think the heart of what the Government is arguing is that Section 110 is conclusive on this case, that it provides the only criteria upon which the Administrator can reject a state plan, and that these criteria do not include a prohibition on significant deterioration.

We believe that this contention is wrong for several different reasons. First, the language of Section 1857 specifically states that it applies to the entire statute, and we submit that means it applies to Section 110 like it applies to everything else and that therefore there was no need to restate the prohibition against significant deterioration in Section 110 or any other portion of the act, since Congress had been repeatedly told, at least on four different occasions, that Section 1857 prohibited significant deterioration; Congress obviously did not consider it necessary to add another provision in Section 110 but decided simply to leave Section 1857 unchanged.

Second, Section 110 allows the petitioner, as petitioner emphasizes, to enforce the national standards. Since Section 1857 applies to the entire act,we think it is clear that Congress intended the prohibition against significant deterioration to be part of the national

standards. This construction is confirmed by the fact that the statement in the Senate report that state implementation plans may not permit significant deterioration, is part of the report's discussion of the national standards; and if there is doubt about this, petitioner himself is included, a prohibition against significant deterioration in the national standards which he promulgated.

Third, Section 110 or language comparable to it, was contained in the 1967 statute, the 1970 bills considered by Congress, and the 1970 statute. Nevertheless, both high federal officials and congressional committees stated repeatedly that Section 1857 required state implementation plans to prevent significant deterioration.

Q Mr. Terris, you refer to Section 1857. Do you rely on anything more in the statute other than those four lines that you set forth on page 2 of your brief--

MR. TERRIS: No, we do not, Your Honor.

Q --the protect and enhance language?

MR. TERRIS: That is right, Your Honor.

I want to be clear. I doubt that we would be here if that language stood all by itself, that there was no explanation of it anywhere. But what we have is the repeated statements both in Congress and by high Administration officials, charged with interpreting that statute, saying that that language explicitly prohibited

significant deterioration.

Q We usually do not get that kind of prohibition out of a statement of a purpose, unless you find some supportable language elsewhere in the act.

MR. TERRIS: However, Your Honor, it is interesting that the same thing occurred under the earlier water pollution law, that enforcers there interpreted the purpose sections to prohibit significant deterioration.

It seems to me that what is so critical about this is that Congress made clear that it wanted to prohibit significant deterioration. The Administration told them that this had already been done. To now come back after Congress has acted in 1970 and to say, "Well, that statute that we told you prohibited significant deterioration really does not do so," means in effect that Congress, when it was considering these amendments, never got the chance to put into the statute specific language.

We believe that the "protect and enhance" language is at the very least strongly indicative of our position. We think that a massive deterioration of air quality in this country cannot possibly be consistent with the statute which requires that the air quality be protected and enhanced.

When I said that we would not be here on that language alone, what I--

Q Was there ever anything else at any stage of

the statute that was any more in your favor than this language?

MR. TERRIS: No, Your Honor. That language is the identical language which was relied on by the Administration repeatedly in 1969 and 1970 and was relied on by the Senate report. There is no other language--no language was ever taken out of the statute which could possibly be the justification for earlier statements that significant deterioration was prohibited and therefore one could argue that the present law did not include that prohibition.

In fact, I think that gets to a critical point--

Q Somebody might have asked Mr. Veneman where he found that prohibition.

MR. TERRIS: He had said it.

Q I know, but there was not anything else you would have said. "Mr. Veneman, that says that in the purpose of the law. Where is the provision in the law that implements that purpose?" He could not have answered it, could he?

MR. TERRIS: Unless what Mr. Veneman had thought and the Administration thought in repeated statements was that that purpose section was meant to have operative effect.

Q So, he would have said there is no other provision in the act?

MR. TERRIS: That is right. He would have said

this section prohibits significant deterioration. He did say it. That is exactly the language I quoted to you.

Q I know. So, he would have said there is no other provision, yes.

MR. TERRIS: Exactly right.

Q Mr. Terris, is there any possibility here that we are dealing with a situation where the statute along with the language that you rely on could have permitted the Administrator to go either way on the thing; that is, the language you rely on would have supported what you claim he is now required to do but it would it would not require it?

MR. TERRIS: Your Honor, that would be possible except that is not what was said to Congress. What Congress was told was that significant deterioration would conflict with the express purpose of the law.

Q That can be an administrative determination, and he may be supported if he makes that conclusion administratively but not required to do it as a matter of statute.

MR. TERRIS: Your Honor, it seems to me that the question of the language, what was told to Congress--Congress was told that significant deterioration would conflict with the law. It did not say that Congress was not told the Administrator could find that, that he had the option to do

it. It was the said that the law itself was in conflict with significant deterioration. I submit that that is as clear as one can be. The question was not raised obviously in the direct form that Your Honor has just raised it with me. But it was said over and over again.

And, for example, when the witness before the House committee said the statute was an unqualified edict, Congressman Rogers said, "That is right and we are going to keep it there." And the House committee did keep it there. And the House committee said, "The reason we are keeping it there is because we want to prevent new pollution problems from arising."

What the Government is in effect saying is that--and I think there is not much doubt about this, in the very least they suggest this--that the 1967 statute did prohibit significant deterioration. But now it does not.

Now, that is in effect an argument that what has happened is that there has been a repeal by implication because the language is identical, that it was not changed by the 1970 act.

Q Mr. Terris, suppose instead of a statement of Mr. Veneman's that you rely on as giving some added force here, it was a statement in a staff report to the committee. Would you think that would be more or less significant or that we should give it more or less weight?

MR. TERRIS: I think that would give it considerably less weight, Your Honor. This was a statement by the highest Administration official charged with enforcing this particular statute, and I think under well recognized principles of statutory construction that is entitled to very considerable weight.

Q I suppose then it would follow from what you have responded that if a staff appeared with something contrary to Mr. Veneman--well, what would that produce?

MR. TERRIS: I am--well, I do not--

Q I am trying to get at how much weight we should give to what Mr. Veneman thought about this matter.

MR. TERRIS: I think it is entitled to a very great deal of weight, but it does not stand alone, Your Honor. It stands with Mr. Johnson, who is the next man under Mr. Veneman on this subject, saying the same thing to Congress in 1969. Dr. Middleton said the same thing to Congress in 1970. The official guidelines of the agency which enforced the statute said the same thing in 1969. The Senate report says the same thing in 1970.

I think I cannot answer quite whether I would urge to Your Honor that if this stood all by itself whether this would be sufficient. I think we would argue that it is sufficient. But there is such a mass of legislative history here and administrative history that there is no need

to look at one isolated sentence.

The interesting thing is really the Government does not have any substantial answer to this. Their reply brief says--and I guess this is supposed to be the answer to most of this--it is in the second sentence--"At most, this legislative history indicates that some individuals testifying on the bills, and even some Congressmen, believed that a policy of non-deterioration would be advisable."

That seems to be a rather weak way of describing what Secretary Finch and Secretary Veneman were saying. They came to the Hill as the official spokesmen of the people that enforced the statute. We have a Senate report. We have a House report. Those reports do not say it is advisable. They say the statute requires it, that any allowance of significant deterioration would be inconsistent, would be in conflict, with this provision. And we submit that that ought to be sufficient.

Q But the Administrator does need some excuse to a state who submits a plan why he will not approve it.

MR. TERRIS: That is correct, Your Honor.

Q And the states says, "Well, I have run through all this list here in Section 110, and tell me what I have left out."

And the Secretary says, "Well, you have left out

the requirement of 1857."

MR. TERRIS: Which applies to Section 110.

Q So, I shall not approve it unless it also complies with 1857--that is your argument?

MR. TERRIS: My argument is twofold on that, Your Honor. First of all, 1857 in turn applies to Section 110 as it does to every other section of the statute. That is the first argument on that proposition.

An additional argument is that we think that means that this prohibition on significant deterioration is part of the national standards. In fact, the Administrator has made it part of the national standards.

If you look through the list of the reasons why you can turn down an implementation plan in Section 110, everybody agrees that one reason for turning it down is it does not comply with the national standards. He has made it part of the national standards. We think he had to, because Section 1857 applies to the entire statute.

Let me just make one final point, because I know the red light is on. And that is all the statements I have talked about, Secretaries Finch and Veneman, the House report, the Senate report, the other legislative and administrative history, all apply to a statute which either had the identical provision as Section 110 or had a provision similar to Section 110 in the sense that they required the

Administrator to approve implementation plans if they met certain criteria which did not include explicitly within that section Section 110. So, all this legislative history and administrative history goes directly to this point of what Section 110 means in conjunction with Section 1857.

Thank you, Your Honors.

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

Mr. Wallace?

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WALLACE: May it please the Court:

Counsel for the respondents has stated that under our interpretation of the act there would be a massive increase in pollution across the country. We disagree with that. But there is no factual record in this case on that subject. And even if that were true, I do not think that gives us much insight into the significance of the "protect and enhance" langugage which is at the beginning of the act, Section 101, since that language was carried over verbatim from the much weaker provisions of the 1967 act, which did not provide for a federal standard of emissions at all from point sources, or for a federal standard of ambient air quality, which had no application to areas of the country where there was not a public health or welfare problem such as is now covered by the primary and secondary

standards, which had no provisions about fuels or fuel additives, no provisions limiting aircraft, weaker provisions with respect to motor vehicles.

The significance of some of the testimony about that language I think can only be appreciated in the context of the 1967 act, which was the basis of interpretations that Secretaries Veneman and Finch and others at HEW had developed as to the significance of this provision in the beginning.

The 1967 act required the states to develop their own standards to be applicable only in areas where there were significant health or welfare problems. There was nothing telling the states what those standards should be. And HEW arrived at the conclusion that because the stated purpose of the act was to protect and enhance the environment and it was to apply in these problem areas, that the state standards to be developed by the states under those provisions should not allow significant deterioration of the air quality in those problem areas.

The standards under the 1970 act are specified as primary and secondary standards, which provide in detail the protection of health and welfare that was the concern of HEW in stating that those state standards developed under the 1967 act should not allow for deterioration that is going to cause health and welfare problems. There is no weakening

in the 1970 act. The 1970 act spells all of this out in detail and prevents the states from allowing deterioration that will in any way cause any known or anticipated effect, adverse effect, on health, on vegetation, on any of the broadly defined protections of the 1970 act. It goes much farther than the 1967 act does.

There was admittedly some confusion in the testimony because of this other habit of mind, of thinking of what significance the provision could have. When you look at the provision on the face of the act, in itself it requires nothing. It merely states a purpose of the act, and there is nothing to which the respondents can point in the entire act to which this can meaningfully be applied, because--

Q Did the Administrator ever interpret the act differently than he does now?

MR. WALLACE: He did not.

Q He did not change his mind.

MR. WALLACE: He did not change his mind. I would like to explain that on the basis of these regulations just as soon as I finish making this one point. There is nothing in any of the operative provisions of the act that can be interpreted in light of this statement which in itself requires nothing to add a requirement to the states. Because every place in the act that it says that the states must

submit a plan, it says a plan to implement the primary and secondary standards. There is no general requirement of a state plan other than a plan for that purpose. And Section 110 specifies in great detail exactly what is required in the plan, and that the Administrator shall approve the plan if it meets those requirements.

The provisions that have been adopted in these regulations were adopted in two separate parts, which I have distributed to the Court. The part that was adopted in August is the part that purports to specify what the plans submitted by the state have to include, and it is undisputed that that part did not include any requirement against significant deterioration.

The part that is at issue, distributed in April of 1930, was not on the subject of the plans. That was where the national primary and secondary ambient air quality standards were adopted. And the great bulk of this regulation concerns the national primary and secondary ambient air quality standards. It is at the beginning, and this is on page 81-87, the very first page on the right as you open it up, a little scope provision, Section 410.2. That provision in parts (a) and (b) defines what these primary and secondary standards are, and then part (c), which is the one that is disputed here, and part (d) were intended to be savings provisions. The respondents say

that they would be redundant if both were regarded as savings provisions. And part (d) saves to the states the right to include in their plans requirements that go beyond the primary and secondary standards, and part (c) saves to the states the right to impose requirements in any manner, whether in their plans or not, that go beyond the primary and secondary requirements.

Part (c) is peculiarly worded, in light of this legislative background. I asked the Environmental Protection Agency why this peculiar wording should have been used in a savings provision, and they told me that it was put in as an accommodation to the environmental groups, because it was known that the environmental groups were going to try to persuade the state to adopt requirements against any significant deterioration, and they wanted to make clear that the national primary and secondary standards would not have the effect of authorizing any significant deterioration if the state chose to forbid it. That is the reason why this peculiar language was used in the savings provision.

These regulations are not about what the state plans have to include. They are about the standards that were being promulgated as the primary and secondary standards.

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

MR. WALLACE: Thank you, Your Honor.

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

The case is submitted.

[Whereupon, at 3:09 o'clock p.m., the case was submitted.]

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