In the

Supreme Court of the United States

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, and the United States Environmental Protection Agency,

Petitioners,

v.

NATIONAL RESOURCES DEFENSE COUNCIL, INC., et al.,

Respondents.

No. 73-1742

Washington, D. C.
January 15, 1975

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v.	:	No. 73-1742
NATIONAL RESOURCES DEFENSE COUNCIL, INC., et al., Respondents.	:	

Washington, D. C.,

Wednesday, January 15, 1975.

The above-entitled matter came on for argument at 2:22 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

GERALD P. NORTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Petitioners.

RICHARD E. AYRES, ESQ., 1710 N Street, N. W., Washington, D. C. 20036; on behalf of 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 73-1742, Train against Natural Resources.

Mr. Norton, you may proceed whenever you're ready.

ORAL ARGUMENT OF GERALD P. NORTON, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case is here on writ of certiorari to the United States Court of Appeals for the Fifth Circuit, to review the judgment of that Court reversing the Environmental Protection Agency's approval of a implementation plan submitted by the State of Georgia, pursuant to the Clean Air Act.

The case was before the Court of Appeals on a petition for review, direct review, pursuant to that Act, filed by Natural Resources Defense Council, NRDC, and others.

The Court of Appeals set aside the approval on several grounds, only one of which is before the Court today. That ruling concerns the substantive standards and the procedural requirements governing EPA's consideration of a variance from a requirement of a State implementation plan.

The Court of Appeals accepted NRDC's argument that all variances, regardless of circumstances, must be treated as involving postponements of plan requirements, and therefore are subject to the provisions of Section 110(f) of the Act.

EPA disagrees and has, from the outset, construed the Act as authorizing it to approve variances in at least some circumstances without reference to Section 110(f).

EPA's position has been upheld by the other four Courts of Appeals to consider the question.

QUESTION: You're going to tell us what those circumstances are?

MR. NORTON: That's right.

The -- both the circumstances and the distinctions, the differences that follow from these two approaches, because they are substantial.

The case arises under the 1970 Amendments to the Act, which substantially rewrote the Act, and established a very wide-ranging, complex and innovative program, to try to deal with air pollution.

It imposes on newly created EPA and the States a variety of new duties to be satisfied within a fairly unusual system of statutory deadlines.

Now, before discussing the particular facts concerning the Georgia plan, I think it will be useful if I review the statutory provisions involved here with some care.

The case is principally concerned with the program under the Act to try to deal, control and reduce air pollution resulting from emissions from existing stationary sources, not dealing with motor vehicles or other matters.

Section 109 of the Act required that EPA promulgate what are called National Air Quality Standards for certain pollutants. The so-called primary standards under the Act, which are the ones most pertinent today, were to be set by EPA at a level requisite to protect the public health with an adequate margin of safety -- I'll refer to these as the national standards.

These standards had to be issued by EPA after rule-making proceedings within 120 days from enactment of the Act in December 1970.

They are subject to judicial review, and are also subject to revision by EPA.

At the same time, Section 107 of the Act required EPA, within ninety days of enactment, to consult with the States and to designate air quality control regions, covering the entire country.

These could be either entirely within a State or they would cross State lines.

Now, the States also have important obligations and responsibilities under the Act, consistent with the findings of Congress that it was a primary responsibility of State and local governments to deal with air pollution at its source.

Section 107 provides that each State shall have the primary responsibility for assuring air quality within the State, by submitting an implementation plan which would

show how that State would attain and maintain the national standards within each region, air quality region, in the State.

More specifically, Section 110(a) requires that each State, within nine months of EPA's promulgation of a national standard, hold public hearings, adopt and submit to EPA such an implementation plan.

Under Section 110(a), EPA is required to approve that plan within four months, upon determining that it satisfies eight tests set forth in the Act.

One is of principal interest here. And that is that the plan must provide for the attainment of national standards as expeditiously as possible, but in no case later than three years from EPA's approval of the plan. We refer to this as the attainment date.

QUESTION: As the what?

MR. NORTON: Atainment date. The date of attainment of national standards.

QUESTION: Attainment date.

MR. NORTON: The plan is also to include emission limitations, compliance schedules, and other measures necessary to attain and thereafter maintain national standards.

Congress anticipated that one approach a State could take in its plan was to include emission limitations which would be effective at or near the attainment date, which would

give the sources affected a leadtime within which to try to comply with them.

As the effective date neared, if it seemed that a source might still not be able to comply, a remedy was provided under Section 110(f), one of the provisions involved here.

That section provides that: Prior to the date that a source of emissions is required to comply with any requirement of a plan, the Governor of the State can submit to EPA a request for a postponement of the applicability of that requirement to that source for one year.

EPA is required to approve such a request if it makes four determinations:

First, that good-faith efforts have been made to comply.

Second, that the inability to do so was because the necessary technology or methods were unavailable.

Third, that interim measures have been taken to reduce the impact of the source on public health.

And fourth, that the continued operation of the source is essential to national security or to public health and welfare.

Such a determination by EPA --

QUESTION: Is that to be made on a hearing?

MR. NORTON: Exactly. I just --

QUESTION: Oh.

MR. NORTON: Must be made after a formal public hearing held by EPA itself, and must be accompanied by detailed findings and reasons --

QUESTION: Made on that record?

MR. NORTON: Made on the record, subject to the adjudicative proceedings of the EPA.

QUESTION: That's a postponement?

MR. NORTON: That's just for a postponement. And it's subject to judicial review.

QUESTION: Unh-hunh.

MR. NORTON: Now, Congress recognized that the available knowledge of air pollution problems and resources of State and federal agencies in 1970 were not necessarily equal to the task of striking the most refined balance in the formulation of these plans, and accordingly provided for research, training, and funding programs.

In addition, lest these initial hastily reached judgments, or possibly misjudgments, be immutably cast in steel, the Act also provides for revision of the State plans. In Section 110(a).

A revision could be approved by EPA only if the State has held a public hearing on it, and if the revision, like the original plan itself, complies with the requirements of Section 110(a) for plans.

Most significantly, the revision, like the plan,

must provide for attainment of national standards within the three-year period.

If it does so, EPA must approve it.

Upon approval by EPA, the State plan becomes the applicable plan for the purposes of the Act. The requirements of the plan are then enforcible not only by the States but also by EPA and through citizen suits.

And without a revision of the plan or a postponement, a source that does not comply with the requirement of a plan once it becomes effective would be subject to an enforcement action.

To assist the States in this ambitious and cooperative Federal-State venture, EPA promulgated detailed guidelines for the States to use in formulating their plans, covering both technical and procedural matters, set forth in 40 CFR Part 51.

Now, EPA recognized that many States were not prepared at that point to engage in the sophisticated tailoring of the requirements of their plans to the variety of situations presented in the various regions within the State.

Therefore, the States were initially permitted to develop emission limitations and other requirements, more like a butcher than a surgeon, if you will.

For example, a State could determine what was needed to bring the worst source in a region into compliance, or to permit attainment of national standards in view of that

source. And then to generalize those requirements and apply them to all sources within that region, or to other regions.

Such approaches -- and this is not the only one -- built into plans a degree of overkill, in that many sources would be required to comply with the requirements which were not necessary to attainment of national standards.

Now, if the national standard were not being met, in a region in 1972, the practicability of attainment within the three-year period or sooner might well be governed by the ability to reduce or control emissions from a single source or a limited number of sources -- a power plant or a steel mill or smelter, refinery, whatever.

And a period of up to the full three years might be required in order to develop the necessary technology, acquire the equipment, install it, and so forth, obtain regulatory approvals.

If such sources could not attain, or could not comply and attain the national standards prior to the three-year period, then that became the attainment date for those States. This is mid-1975.

There is also a provision for extension of those dates in some circumstances, but they're not presently of great moment.

Now, where attainment prior to 1975 was not feasible for these reasons, a State still had some choice, as to when

to make the requirements of its plan generally effective. It could make them effective near the attainment date, or sooner, or perhaps immediately.

As it might well be feasible for many sources to comply in a shorter period of time, even though such compliance was not necessary in order to attain national standards.

There's no dispute that the Act permits, and indeed encourages, these efforts which go beyond the minimum requirements to attain standards.

Now, EPA anticipated that there would be, inevitably, a need for some provision for variances, exemptions or deferrals. Either because a State adopted plan requirements that were effective too soon or overly strict, unrealistically ambitious, or for other reasons, or because of problems that were simply not anticipated in 1970, '71, '72, when the plans were developed.

The energy crisis, the unavailability of equipment, and the capital problems of various companies being good examples.

Therefore, EPA concluded that where a variance would not interfere with the timely attainment or the maintenance of national standards, it need not be subject to the postponement procedures of 110(f), and instead could be treated as a revision of a plan.

EPA included this interpretation in its proposed

guidelines, which were published, and after receiving comments by NRDC and hundreds of others, none of which criticized this interpretation, EPA included this interpretation in its final guidelines.

Now, while EPA was considering the plans submitted by the States on the basis of these guidelines, NRDC even agreed in congressional hearings that this interpretation was correct, as we've noted at page 31 of our brief.

Having no reason to question its interpretation, EPA went ahead and approved the plans containing variance procedures which did not necessarily require resort to the postponement procedures, and this --

QUESTION: Those approvals were on the assumption that none of the variances would take the State or any stationary source beyond the attainment date?

MR. NORTON: Well, it would not interfere with either attainment of those standards or maintenance of them after the attainment date.

QUESTION: Yes.

MR. NORTON: NRDC then changed its position and challenged several of those approvals. Let me say, this problem arises --

QUESTION: Well, it's a postponement of the -- under the State plan, not a postponement of the attainment date, such as 110(f) would still permit?

MR. NORTON: Well, 110(f) would permit the postponement of the applicability of a requirement of a State plan to a source. It might well, as a result, make attainment or maintenance of national standards impossible, if this were the worst source in a region and it got a one-year postponement, it might mean that attainment was not feasible.

QUESTION: But 110(f), I take it, would, if you go through the 110(f) procedures, permit the State to postpone compliance beyond the attainment date.

MR. NORTON: As to particular sources.

QUESTION: Yes. Yes.

MR. NORTON: It doesn't postpone the attainment date itself.

QUESTION: But your -- the agency's interpretation would not -- unless you comply with 110(f), you couldn't go beyond the attainment date?

MR. NORTON: Well, the original interpretation was not limited to the period prior to attainment. If a variance would not result in, or interfere with maintenance of a national standard, after it had been attained, it could still be treated under the revision procedures.

QUESTION: Even though it carried it beyond the attainment date?

MR. NORTON: That's right, because it wasn't interfering with --

QUESTION: Well, but then -- then you changed your mind because of the courts, I take it?

MR. NORTON: Well, I'll get to that.

QUESTION: All right.

MR. NORTON: There was a change.

By the time NRDC changed its position, however, EPA's interpretation had been relied on by the States in developing their plans, by EPA in approving them, and by the various sources in determining whether to challenge the State plans or to seek variances.

Now, with this background, I'll turn to the specific facts.

In April 1971, EPA promulgated national standards for some six pollutants.

Georgia submitted its implementation plan in January 1972, having developed it in the intervening nine months.

In Georgia, like all but five States, there was at least one air quality region in which the national standards for one or more of the pollutants was not being met, as of 1972.

And like all but three of the States, where at least some of the standards were not being met in some region, Georgia concluded that it was not practicable to attain those national standards until the end of the three-year period, mid-1975.

I should not that since EPA has approved those attainment dates, we must accept here the fact that it was simply not practicable to attain national standards any sooner.

Now, like the majority of States, Georgia made many of its emission limitations effective immediately or much sooner than the actual attainment date. It either gave no leadtime or a limited leadtime.

As a result, compliance problems were inevitable, and Georgia adopted the variance statute which is in issue here.

EPA approved the Georgia plan, including the variance statute, in mid-'72.

Now, as I mentioned, Section 110(a) contemplated that the plans submitted by the States would include compliance schedules, which would be adopted to assure that sources which in 1972 were not in compliance with the requirements needed for attainment of national standards, would be by the attainment date.

This is whether or not the requirements were immediately effective or not, and they could either cover categories of sources or individual sources.

If they had been submitted as part of the original plans, they would have been subject to approval without reference to 110(f), and subject only to the standards of 110(a).

However, because of the enormous demands imposed upon most States by the task of preparing the implementation plan, Georgia, like most States, simply was unable to complete the work of developing compliance schedules completely, and submitting to EPA with its plan a full array of such schedules.

As a result, after these States submitted their plans, and indeed after EPA had approved them, they continued working on the development of compliance schedules and submitted them to EPA.

They submitted them as revisions of the plans that had already been approved, not as postponement requests.

There are some 800 of these in Georgia. There are a total of 3,000 in the States in the Fifth Circuit, and many more in the other States.

Many of these variance requests or compliance schedules have already been approved by EPA.

I should note, there's no reason to believe that this process has resulted in any abuse or undermining of the purpose of the Act, because they would not be approved unless they would not interfere with timely attainment of national standards. And many are limited periods of time which have already elapsed.

So, in practical effect, the basic question here is whether such schedules and variances could only be approved

by EPA in accordance with the procedures of Section 110(f), or whether EPA properly construed its Act as permitting them to treat them as plan revisions.

And it's important to emphasize, in view of NRDC's claims, that the case does not involve merely attempts to extend the deadlines of previously negotiated compliance schedules; with possible rare exceptions, these variances and compliance schedules are the initial submissions, they are not kind of going around for a second bite at the apple.

NRDC claims, and the Court of Appeals held, that the only procedure available for EPA's consideration of these belatedly submitted compliance schedules and variances is the postponement procedure of Section 110(f).

And they would apparently require a compliance with 110(f), even if the variance would not interfere with timely attainment of national standards, and even if the problems calling for the compliance resulted in mechanical breakdowns or tornadoes, or whatever.

Now, they assume that 110(f) is always an available alternative. But, as I noted earlier, by its terms, it's available only prior to the time that a source is required to comply with the requirement of a State plan.

And the States that imposed immediately effective requirements, without a revision of those requirements, 110(f) would not appear to be available at all.

Even if compliance was unreasonable, unnecessary, or a severe hardship or would require closing a plant down.

Now, the Fifth Circuit's position has been decisively rejected by the other Courts of Appeals, in the cases we've cited in our brief. The First Circuit, followed by the Eighth and the Second, held that 110(f) is the exclusive procedure for considering variances only in the period subsequent to attainment of national standards. And even then, the First Circuit held, that limited variances could be granted without reference to 110(f), to account for mechanical breakdowns, acts of God, and the like.

As for the pre-attainment period of principal concern here, these Courts held that compliance with 110(f) was not necessary, unless a variance would interfere with timely attainment of national statndards.

Of course, only rarely in the pre-attainment period would a variance threaten national standards, because it's going to run out before the deadline comes, and since air -- even if a source were producing emissions above the standards, once it stops, in compliance, the air disperses, and by the compliance date it would be at national standards.

Now, these Courts found such authority for variances without reference to 110(f) implicit in the very structure of the Act, in the essential need for flexibility.

Having had its authority sustained as to the most

important period, the pre-attainment period, EPA did not seek review by this Court of the limited adverse aspects of those rulings.

Then, in September 1974, EPA revised its regulations to accord with the First Circuit ruling, so as to disapprove all State plans in so far as they authorize variances, including Georgia's, in the post-attainment period beyond the limited range permitted by the First Circuit.

Subsequently, the Ninth Circuit held that EPA could approve what it called the minor variances, those which would not interfere with timely attainment or maintenance of national standards at any time, even after the attainment date, without reference to Section 110(f).

They found this authority necessarily implicit in the Act, and, like the First Circuit, but,unlike the First, saw no reason for curtailing that essential flexibility of the attainment date.

QUESTION: Does the government show a preference for the First Circuit or the Ninth Circuit's?

MR. NORTON: Well, we show a preference for EPA's original interpretation, which is to root this flexibility in the explicit revision procedures of the Act. We don't have any fundamental disagreement with the Ninth Circuit's approach, or as suggested by some of the amici that this flexibility, this provision is implicit in the Act.

But as between the First Circuit and the Fifth, we prefer the Fifth, as we've indicated in our reply brief.

QUESTION: What about the Ninth?

MR. NORTON: Well, as between the Ninth and the Fifth or the First, we prefer the Ninth.

The case is here only as to the pre-attainment period, so there's no significant difference between the Ninth and the First in that regard.

QUESTION: Do you say you prefer the Fifth to the First?

MR. NORTON: No, the First to the Fifth, given that choice.

QUESTION: Right.

QUESTION: Yeah, the Fifth is the one you don't want; that's what brings you here.

MR. NORTON: We don't like that one at all.

That's right.

We contend that EPA's interpretation of the Act was reasonable and should be sustained. As the briefs and the amici show, that that interpretation has been heavily relied upon by the States and by the sources of emissions --

QUESTION: I suppose you would just as soon like to know, also, now as well as any time, whether the revision can extend beyond the attainment date?

MR. NORTON: Well, I'm not going to, you know, play Brer Rabbit. Of course, we'd like to know that now. The case -- the question may come up in the Ninth Circuit case.

QUESTION: Because that's now going to be, I take it, prospectively your position?

MR. NORTON: Well, the agency hasn't formally reacted to the Ninth Circuit.

QUESTION: Well, you're going to have to agree with some -- one court or the other. [Laughing.]

MR. NORTON: But we --

QUESTION: You have to wait on the agency pretty much, don't you?

MR. NORTON: Yes. So far as I know, the agency does not plan to seek this Court's review of the Ninth Circuit decision. The other side may well, if that question is not resolved in this case.

We think that our rationale for sustaining the agency's interpretation as to the pre-attainment period would equally apply to the post-attainment period. So if the Court accepts our rationale, that may foreshadow this.

QUESTION: And if it doesn't cover the post-attainment period, it shouldn't cover the pre-attainment period, either?

MR. NORTON: No.

QUESTION: What?

MR. NORTON: We would there agree with the First Circuit, that you can distinguish between the pre-attainment and the post-attainment --

QUESTION: Well, it isn't the same rationale, then?

MR. NORTON: No, it's not the same rationale; the same result.

If EPA had adopted the Fifth Circuit's approach at the outset, I think it would have been an unreasonable interpretation which would have disserved the purposes of the Act, some of the reasons that we've indicated in our brief, imposed tremendous burdens and delays, because EPA itself would have had to hold all the hearings on variances that the Fifty States held.

The States might have adopted less strict standards as a result, or made them effective closer to the attainment date, rather than sooner.

And if presented with the problems of compliance, they might have revised the entire standard, rather than grant an exception for the few who have a difficulty.

Now, EPA's interpretation is consistent with the legislative history, limited though it is, as we have indicated in our brief. That interpretation was brought to Congress's attention explicitly without any sign of disapproval. It's in accord with the premise of the Act, that States have substantial responsibilities. As we have indicated

in our reply brief, it will not threaten public health, as EPA suggests, and we believe it's a classic interpretation of a specialized agency's reasonable interpretation of its own statute, in an effort to make its pieces work and set the programs in motion.

It's entitled to the traditional great deference, particularly where it's been so heavily relied upon; and we think the Court of Appeals' judgment should be reversed.

I'd like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Norton.

Mr. Ayres.

ORAL ARGUMENT OF RICHARD E. AYRES, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

My name is Richard Ayres, and I represent respondents here.

This case involves the interpretation of the language of the Clean Air Amendments of 1970, a statute which was passed to expand markedly the government's program to control air pollution.

The question presented is whether the Act requires individual sources of pollution, who seek more time to comply with the requirements of State plans, to seek a federal postponement, and when, if ever, they may approach the State

governments for State law variances.

In other words, the question is: When does the federal procedure pre-empt the State law procedure?

We believe the statute is clear on its face. The federal pre-emption occurs as of the time certain, and the time certain is the date that the State plans were approved.

EPA, on the other hand, has argued that pre-emption occurs or is triggered only by its own judgment that there would be a violation of air quality standards.

Now, I think it's important at the outset to understand why petitioners, or respondents before the Court here, object to the EPA proposal.

What EPA proposes to do, whenever a source comes forward asking for additional time to meet a compliance schedule, is to go through an entire analysis of the impact of that source on the air quality, that is, the air generally at ground level, as it would be affected by that variance.

In practice, the way this is done is by feeding data concerning the given source into a computer model, which is a very complex set of assumptions, essentially in mathematical form, about what will happen in the air under certain conditions, cranking this through the model and then coming to a prediction on the basis of the model on what the impact would be on air quality. In most cases it is just that: a prediction.

Now, that prediction is subject to a great deal of error, as you might imagine, and EPA has said, as we have indicated in our brief, that it may be subject to error of as much as 100 percent.

At the same time it also means that there is fruitful ground for objection to any conclusion EPA draws on the part of any source. The source may come forward with its own data from monitors, and say the prediction was wrong; or it may come forward and say it's the wrong model or the wrong factor was put into it.

Whatever these possibilities are, there is a fruitful opportunity there for dispute over whether or not the Air Quality Standards would be violated.

The second reason why this approach, it seems to us, is one that should not -- should not and was not chosen by Congress is because it violates the fundamental scheme of the Act. The Act is built on the premise that the State plan begins with an evaluation of Air Quality throughout the State. The State does that on an aggregate basis, on the basis of monitors throughout the State.

The second stage is that the State then determines how much reduction is necessary in the emissions, that is, the pollution coming out of the stacks, in order to meet those Air Quality Standards. Again, a general judgment for the State as a whole.

It then applies to each individual polluter a formula to require reductions in emissions from that individual, and essentially, as you can see, the idea is to spread the burden of reducing pollution across sources all over the State.

Now, if you go about looking at each individual polluter's effect on air quality, when he comes in to request a variance, you are then re-examining these general decisions, but on an individual basis. And the result will be that if you hand out a lot of variances, you will end up with a very unequal burden being placed on the polluters.

Those who have not received variances will be left with complying, and they will have to pay the cost of that; those that receive variances, because they've been able to convince EPA that they won't violate ambient air quality standards, will be left with no requirement to reduce emissions.

The result, we think, would be fundamentally unfair.

Now, these, I think, are the reasons why Congress chose, in the first place, to require any individual change, any change in an individual compliance schedule or any other requirement of the wtate plan with respect to an individual source, to go through the postponement procedure and not to be judged on the basis of its effect on air quality.

That was too iffy a judgment, and it was too unfair to go about it that way.

I think we have shown in our brief that the language of the statute is totally unambiguous. It states that any source that seeks a change in any requirement that applies to it must go through the postponement procedure.

In fact, the importance of going through this procedure, the importance of the strictness of the procedure is demonstrated over and over in the legislative history. As you may have noticed in reading in the Appendix, Congress originally considered requiring sources to go to a Federal District Court to obtain this kind of postponement. Ultimately they left it to an administrative adjudicative hearing, as in the final Act.

But this does re-emphasize the importance in Congress's mind of this procedure as a way to prevent easy escape from the requirements of State plans.

Now, EPA has put forth an alternative interpretation, which is that somehow through the revision authority of the law it has the authority to allow States to grant variances rather than having sources go through this procedure.

We have canvassed this issue rather thoroughly in our brief, but I think it can be summed up in a rather simple way. Revisions clearly are -- I think it's clear in the statute -- something which is set up to allow general changes

in a State plan. If the State, for example, should determine that it had required stiffer requirements than it really needs to meet the ambient air quality standards, it would be free to go to EPA in a general way and ask for a general change in its plan. But the burdens of that change would have to be distributed equally.

It can't go to EPA and ask for individual changes which would unequally distribute the burdens of meeting the national ambient Air Quality Standards.

The primary purpose of the revision authority, I think it's clear in the statute, was to allow for situations where changes had been made or could be made that would allow for earlier compliance rather than later compliance.

But, in any case, the revision authority is something which is to be used to make general changes in the State plan, not changes applicable to specific sources. And the distinction, we think, is very clear.

Now, this distinction has also been agreed to by five Courts of Appeals that have reviewed the issue. All five of those Courts of Appeals rejected EPA's claim that it had authority under the revision authority to allow specific sources of pollution to have more time.

Four of those five Courts of Appeals agreed with us, that the trigger, after which the postponement procedure became applicable, was a date certain, not a judgment about

air quality.

The Fifth Circuit chose what we think is the correct interpretation, that the date certain was the date of approval of the State plan, which of course was 1972 in most cases.

QUESTION: That's your position now, it wasn't always, was it?

MR. AYRES: No, that's always been our position.

QUESTION: Has it?

MR. AYRES: Unless you're referring to the statement before Congress that I made, in which case all I can say is that that was a statement made in the context of a general attack on the State variance laws. We believed at the time that those were too lax, and it was also made in the context when we really hadn't looked at the law closely.

QUESTION: Well, in any event, one Court has agreed with you as to the time, as to the time of the trigger.

MR. AYRES: That's right. Three --

QUESTION: Three have not.

MR. AYRES: Three others --

QUESTION: Four others now.

MR. AYRES: Well, four others have not. The three Courts, the First, Second and Eighth Circuits, agree with us as to the concept, that is, it's the date certain that triggers the postponement procedure, not an air quality judg-

ment.

But they chose to set that date as the date, the attainment date specified in the State plan for meeting Air Quality Standards.

This is confusing. I think the crucial thing to notice is that it's the date set for attainment, it's not a question of whether an individual source will affect attainment, that's the government's position. The other three Courts said it's date certain, it's the date certain that the States chose to attain the national standard, which in most cases is mid-1975; although there are some cases where later dates were chosen through another procedure which is not at issue before the Court here.

I think it's important also to look at the suggestion EPA has made, that strict construction of 110(f) as it's written would be burdensome, because I think that's a false argument.

110(f) does not always require a hearing; 110(f) requires an opportunity for a hearing. It requires that there be findings in an adjudicative proceeding, and that those findings relate to the availability of technology, the uses of all the available alternative measures in order to reduce the effects of the continued pollution during the interim period, and a judgment about whether the source is sufficiently valuable so that it's continued pollution, at those levels,

is cognizable.

EPA has, in effect, admitted that this is not a terribly burdensome procedure by promulgating the September 26 regulations. Those regulations require that in the post-attainment period the only means for obtaining more time is through the federal postponement procedure. And, obviously, if that procedure were as burdensome as the agency has made out before this Court, it would not have been willing to publish those regulations.

In fact, the scheme that EPA proposes, the revision authority is more burdensome, it involves the States making an original judgment on the requested variance, a judgment which includes additional factors besides the ones that are included under 110(f), such as the question of the effect on air quality, which is a difficult and expensive determination to make.

These proposed variances then go to EPA, which goes over the same set of information, comes to another judgment on air quality as well as other issues, and if it disagrees with the State and decides that the air quality impact would result in a violation of ambient Air Quality Standards, sends the proposed variance back to the State, where the State begins, at that point, through the postponement procedure.

This, in our view, is a recipe for delay, it's much more burdensome than the 110(f) procedure, which is a single

procedure with a smaller number of issues to deal with.

In our view, basically, the difference between the two schemes, with respect to burden, is that the revision procedure suggested by EPA shifts some of the burden to the States. That may be in EPA's bureaucratic self-interest, but it's not necessarily in the public interest.

And finally, I think it's important to realize that EPA's statements about the burden of this 110(f) procedure ignore the whole purpose of the 110(f) procedure, of making it a stringent procedure, which was to discourage sources from seeking additional time rather than compliance. And if the 110(f) procedure works as it was intended, there will be fewer requests than there will be if you use the revision procedure. In that case, the burden on the agency will, if anything, be reduced.

I think it's important to realize that EPA has brought this case before the Court because, essentially, of an error that was made in 1972 by the agency; when the States first adopted their plans, EPA consented to a confusion in some State laws between what a compliance schedule was and what a variance was. Compliance schedule being a schedule set at the time emission limitations were adopted, which gave the source time to comply with those emission limitations, as opposed to a variance, which adds more time on the end.

As a result, EPA now has several thousand in the

Fifth Circuit, State law variances which are, in effect, compliance schedules under federal law.

Now, this obviously creates a burden if you continue to operate on the premise that these will continue to be dealt with as variances.

In our view, we have no interest or desire in forcing the agency to go back through a whole process, which amounts to, essentially, changing the name of what was called a State variance and calling it something else.

The Court stayed the order of the Fifth Circuit, knowing at that time that it would result in EPA's approving several thousand variances in the Fifth Circuit. Those variances are approved, and in our --

QUESTION: Did we stay it or did the Fifth Circuit stay it?

MR. AYRES: The Fifth Circuit refused -- denied a request for stay, and the Court --

QUESTION: The Fifth Circuit denied the stay, and then did we do anything or not?

MR. AYRES: Yes, the stay request was made here, and it was granted. And during that period EPA promulgated approval of these several thousand variances.

Now, as to those variances, we're perfectly happy to leave them where they are. We believe that, in effect, they are compliance schedules, and it seems to add nothing to

go back and to try to reclassify those.

In fact, the Fifth Circuit's order was not one that would require retrospective application. The Fifth Circuit ordered EPA to disapprove the State of Georgia's variance statute, and it said nothing about retrospective application, it talked in terms of future application.

So we think that, although we've suggested one alternative for how to deal with these variances in our brief, perhaps an equally good or better alternative is simply to make -- to affirm the lower court's ruling, which would have prospective effect, and leave the variances, as they were called before, in place.

QUESTION: So you would enjoin the agency from acting in accordance with this -- with a contrary view? For the future.

MR. AYRES: For the future, we would - we would have the agency under order to -- not to approve any such State variance, and to order --

QUESTION: Except as a postponement?

MR. AYRES: Well, yes, such a procedure would go through the postponement procedure.

Disapproval of the State variance law would leave only the procedure of the postponements to go through.

With respect to those future requests for more time, EPA's September 26 regulation disapproved the State

variance statutes, so one stage of what we believe was the proper interpretation of the Fifth Circuit's decision, and what this Court should uphold, has already taken place: EPA has disapproved all the State variance statutes.

EPA also proposed a replacement federal regulation --

QUESTION: But EPA is not in compliance with the Fifth Circuit order.

MR. AYRES: EPA -- well, they disapproved all State variance statutes in compliance with the First, Second, Fifth and Eighth.

QUESTION: Yes.

MR. AYRES: They then proposed an alternative federal regulation to replace those, which was in compliance with the First Circuit.

We believe that proposed regulation should have been one that was in compliance with the Fifth Circuit, and the agency would of course be free, in compliance with a ruling from this Court, to promulgate a regulation that properly implements the Fifth Circuit rather than the First Circuit ruling.

QUESTION: Mr. Ayres, is the complaint here in the Court? Is it filed?

MR. AYRES: Pardon me?

QUESTION: The original complaint.

MR. AYRES: Is it before the Court?

QUESTION: Yeah -- no, is it -- it's not in any of the documents; is it here? Is it lodged with the Clerk?

MR. AYRES: This is a case which went directly to the Court of Appeals rather than to the District Court, so there was only a notice petition for review.

QUESTION: And where's that?

MR. AYRES: That is, I believe, in the Appendix. Is that right? [Addressing co-counsel]

QUESTION: Is it?

MR. AYRES: I think it's in there.

QUESTION: It went from the agency to the Court of Appeals?

MR. AYRES: Yes. The statute requires that a review of the Administrator's action in approving a plan will go directly to the Court of Appeals.

QUESTION: Is this the report? No, this is the Senate Report, you don't want that.

QUESTION: Petition for Review, I guess, is what it would be, wouldn't it?

QUESTION: Well, where is it?

QUESTION: I don't think it's in the Appendix, it may be in --

QUESTION: Well, it would be in the record, would it? So there's no problem.

MR. AYRES: Yes. It's noted on page 1 of the Appendix as a petition filed for review; it's a docket entry of June 30, 1972.

QUESTION: It's noted, but it's not incorporated?

MR. AYRES: I guess it's not incorporated; I thought it was.

QUESTION: Well, all of these things are here with the Clerk?

MR. AYRES: I believe they are. The government --

QUESTION: Well, will you check and see, and let us know?

MR. AYRES: We will check that, yes.

QUESTION: Thank you.

QUESTION: The -- my brother Marshall's question raises one in my mind, if we're going back to the threshold, of the matter of the standing of your clients in this case. That's not discussed anywhere in the briefs, nor in the Court of Appeals opinion, and maybe it's not -- there's no question of it; but --

MR. AYRES: Well, we don't think there's any question of it. It was briefed before the Fifth Circuit.

QUESTION: It was?

MR. AYRES: Yes, and the Court --

QUESTION: Doesn't even mention it, do they?

MR. AYRES: Well, it doesn't mention it, so, since

that is a question that --

QUESTION: Well, it was decided in your favor, obviously.

MR. AYRES: -- goes to jurisdiction, it must be presumed to have decided in our favor, yes.

QUESTION: Right. And it's not mentioned in the briefs here?

MR. AYRES: No, it's not mentioned in the briefs here; that's right. It's not at issue between the parties, and never has been, except that we got --

QUESTION: Well, I'm thinking of our decision in the Sierra Club case, and so on; what is your -- what is the injury to your clients, in fact?

MR. AYRES: Well, the injury in fact -- you'll notice that the petitioners here are a national organization --

QUESTION: Yes.

MR. AYRES: -- with members in Georgia; a Georgia organization; and two Georgia residents.

So the injury in fact involved is the effect on their health of breathing continued polluted air, which we believe would result from the failure of the State plan to reach the intended goal of meeting the national Air Quality Standards on time.

QUESTION: The -- all we have is National Resources Defense Council, Incorporated, et al; and the "et al" includes

two individual persons --

MR. AYRES: Yes. On the cover of Respondents' brief you'll see a listing of the parties.

QUESTION: Janey Weber and Susanne Allstrom.

MR. AYRES: Those are -- they are both residents of Georgia, yes.

QUESTION: And "Save" is a Georgia --

MR. AYRES: It's a Georgia non-profit organization.

QUESTION: Do the two individuals live near a source that has sought a variance?

MR. AYRES: They live in areas where abatement actions have been undertaken. I don't know for sure whether they live in an area where the source has sought a variance.

QUESTION: Does the record shed light on this?

MR. AYRES: I don't believe it does, no.

The organizational plaintiffs or petitioners, I think in both cases, sue on behalf of their members, which obviously is one of the crucial tests, is that there be members involved in those areas, would be affected by the action; and I think in both cases the organizational petitioners below do have members there who would be affected by continued pollution in those areas.

QUESTION: Does the record show the number of members in Georgia?

MR. AYRES: I believe it does, yes. The issue, as I

say, was briefed before the Fifth Circuit Court, and a statement was filed in the Court as to the standing possessed by the various parties.

QUESTION: Well, I gather it has some 16,000 members; is that right?

MR. AYRES: Approximately, yes.

QUESTION: Was the -- it was briefed, you say; was it at issue? Did the government --

MR. AYRES: Well, it was not raised in the briefs in chief on the case. It was raised by the government at oral argument, and the Court asked for supplementary briefing on the issue, so the briefs were --

QUESTION: Unh-hunh. On both sides, so it was --

MR. AYRES: On both sides.

QUESTION: -- it was an adversary briefing?

MR. AYRES: Yes, it was.

QUESTION: Unh-hunh.

QUESTION: What's the statutory language, "any interested person"?

MR. AYRES: The statute -- the section sued under goes to the proper court, that is to say, it says that a suit to review the Administrator's action in approving a specific State implementation plan shall be filed in the appropriate circuit.

QUESTION: But doesn't it say "by any interested" --

isn't the language "any interested person"?

MR. AYRES: There is a separate -- what it says is: a petition for review of the Administrator's action in approving or promulgating a plan may be filed only in the United States Court of Appeals for the appropriate circuit.

There is a separate section which provides for citizen suit in certain circumstances, which states that any person may bring suit. And I think it's pretty clear in the legislative history of this section, that the intent was quite the same in both sections.

QUESTION: So that any citizen can bring suit?

MR. AYRES: Yes. Within the constitutional limits, one must presume.

QUESTION: I would be interested in a little canvassing of this question: I wonder if, with the Chief Justice's permission, I could ask that the parties perhaps just submit the briefs that were submitted to the Court of Appeals.

MR. AYRES: Certainly, we can do that.

MR. CHIEF JUSTICE BURGER: If you still have copies available.

MR. AYRES: Yes, we do. We would be pleased to.

MR. CHIEF JUSTICE BURGER: That will be satisfactory. Submit them in sufficient numbers to comply with our rules.

MR. AYRES: Yes.

QUESTION: Were those just addressed to the statutory question as to what Congress intended the parties might -- who the parties might be? Or was -- did you address that constitutional question?

MR. AYRES: We addressed both the issue of the attributes of the parties and the requirements of the statute and the general requirements this Court has enunciated with respect to standing in general.

QUESTION: Would your petition show standing?

MR. AYRES: The petition is a notice petition, in compliance with the usual --

QUESTION: Well, does it show anything about standing?

MR. AYRES: No, it doesn't allege anything about standing.

QUESTION: Well, where do we get the standing -- from? The factual basis for the standing.

MR. AYRES: Well, I think that there are two ways of answering that: one is that the court below did consider the information --

QUESTION: Well, there's no two ways -- there's no two ways to answer my question. I mean, where in the record is the material we can use to find out whether or not your clients have standing?

MR. AYRES: Well, one is --

QUESTION: In the record.

MR. AYRES: Well, one is in the documents submitted along with the briefing of this issue. Since the issue wasn't raised in the briefs in chief, it was --

QUESTION: What documents are you talking about? Affidavits?

MR. AYRES: Yes, there are affidavits in there.

QUESTION: Are they acceptable evidence that we could consider?

MR. AYRES: Well, there's a difficult -- I think they are, but there's a difficult problem here, in that this case arose before a Court of Appeals. It was not --

QUESTION: Well, you just --

MR. AYRES: -- not before a court that was really equipped to take evidence.

QUESTION: But we still have to have a case or controversy, we have to have standing.

MR. AYRES: I think there's no question that there is a case or controversy.

QUESTION: You say, for example, that these organizations are in there because some of their members in Georgia will breathe bad air. Would that also allow the Chamber of Commerce to join?

MR. AYRES: I presume it would if their members would --

QUESTION: The American Medical Association could join? The Red Cross?

QUESTION: The Ninth Circuit held that it didn't.

MR. AYRES: The Ninth Circuit -- that decision with respect to standing is still on petition for rehearing in the Ninth Circuit.

QUESTION: Well, I understand that, but it, nevertheless, did.

[Laughter.]

MR. AYRES: They did hold that; that's right.

We believe that decision was wrong --

QUESTION: But they permitted -- they permitted individual members.

MR. AYRES: They permitted individuals to sue, yes.

QUESTION: Your members as individuals could sue?

MR. AYRES: Yes.

QUESTION: But not the organization?

MR. AYRES: They held that an organization could only sue if the organization was injured in a way identical with that of the members. And we believe that is wrong, under a long line of your cases, and that's what we've sought petition for rehearing.

QUESTION: But you think there's no question of a -- of the standing of a resident of Georgia, for example, to attack the adequacy of the Georgia plan?

MR. AYRES: I think there's not. I think it --

QUESTION: Any resident, not just your members.

MR. AYRES: Yes, I think that's right. I think the statute was intended to provide broad citizen participation.

QUESTION: Well, I gather Janey Weber and Susanne Allstrom are not -- they're not parties as your members, are they?

MR. AYRES: That's right, they're parties --

QUESTION: Independently.

MR. AYRES: -- independently on their own.

QUESTION: Just as citizens of Georgia?

MR. AYRES: That's right.

QUESTION: Suffering from -- injured by having to breathe this air.

MR. AYRES: Yes, that's right.

QUESTION: Mr. Ayres, take a look at 63a, if you have it there, of the government's petition, which sets forth some of the statutory language. And I can't keep all these sections straight, but in subparagraph capital B that begins about the middle of 63a:

"Any determination made pursuant to this paragraph shall be subject to judicial review by the United States Court of Appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person ..."

Now, does that govern this particular action that's here before us now?

MR. AYRES: No, this -- this has to do with the review of the Administrator's action in granting a postponement. I take it it has only to do with that.

QUESTION: And what is the section, then, that authorizes review of the Administrator's action which you sought to have reviewed in the Fifth Circuit?

MR. AYRES: That is Section 307 of the Act, which is Section 1857h-5.

QUESTION: Do you know where it is in the government's brief or your brief?

MR. AYRES: I'm not sure that it is cited, I believe, in --

QUESTION: Well, don't -- don't worry about it. At least not now, anyway.

MR. AYRES: This, the issue of that section is briefed in the briefing that was done in the court below on standing, so it will be clear from that, I think.

QUESTION: Right; thank you.

MR. AYRES: Well, to summarize very quickly, the -- we feel that the issue before the Court is one which involves the interpretation of the statute, which is very clear, unambiguous on its face. And this Court should, in line with its traditional function, interpret that statute

as it reads, and that the agency should, if it believes this interpretation of the law as it's written is incorrect, take that controversy to a forum which can consider it in full; which would be, in this case, the Congress.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Norton, do you have anything further?

REBUTTAL ARGUMENT OF GERALD P. NORTON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. NORTON: Very briefly, if I may respond just to the standing question first, that's been raised.

I think the statutory problems here demonstrate why the agency's interpretation should be entitled to great deference. The Act is not a really cohesive piece. There are different wordings and a different standing, whereas the judicial review provisions.

I don't know whether the briefs in the lower court include all of the cases that have been decided on this question; but we'll see what they do say and submit something appropriate.

EPA's position, as I understand it, comes down to the proposition that if a State failed by one day to submit a compliance schedule as part of its implementation plan, it would be completely out of the picture.

His concept of federal pre-emption would totally

take over, and there would be nothing left for the State to do.

We don't see the Act as reading that way. It would stand the principle of cooperative federalism on its head to do so.

On the question of the efficacy of the analysis of -- the effect of a particular source on air quality in a region:

First, that comes up only in the post-attainment period. A pre-attainment variance is not going to have any effect on the attainment of air standards.

As to the post-attainment period, we've indicated in our reply brief, at page 4 that the other side is failing to distinguish between analyzing the effect of an existing source and analyzing and predicting the effect of a future source.

And, finally, on the question -- the suggestion that somehow the case is no longer alive because of what has happened:

First of all, we don't know the consequences of the Fifth Circuit's ruling on variances which were granted pursuant to EPA's long-standing interpretation.

I don't suggest the Court has to resolve those issues, but it does present a live issue for the sources in the States in question.

And notices of citizen suits have been filed in at least some States.

In addition, some attainment dates extend as late as 1977.

Thirdly, the cycle that we've gone through here, of pre-attainment period and attainment date, can be repeated, because the statute provides for the possibility of the promulgation of new national Air Quality Standards, when EPA determines that there are additional pollutants that need this treatment.

In addition, they can revise the existing standards, which would again set in motion the same cycle.

Then, finally, the decision as to the pre-attainment period does have bearing on what the law is for the post-attainment period, as I've indicated.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:21 o'clock, p.m., the case in the above-entitled matter was submitted.]

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