In the

Supreme Court of the United States

The Environmental Protection Agency, et al., Petitioners, v. People Of The State Of California Ex Rel. State Water Resources Control Board And State Of Washington, et al.,	)	No. 74-1435

Washington, D. C.
January 13, 1976

Pages 1 thru 46

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

links

IN THE SUPREME COURT OF THE UNITED STATES

THE ENVIRONMENTAL PROTECTION AGENCY, et al., Petitioners, v. PEOPLE OF THE STATE OF CALIFORNIA EX REL. STATE WATER RESOURCES CONTROL BOARD AND STATE OF WASHINGTON, et al., Respondents.	No. 74-1435

Washington, D. C.,

Tuesday, January 13, 1976.

The above-entitled matter came on for argument at 11:05 o'clock, a.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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

DANIEL M. FRIEDMAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioners.

RODERICK WALSTON, ESQ., Deputy Attorney General of California, 6000 State Building, San Francisco, California 94102; on behalf of the Respondent, State of California.

APPEARANCES [Cont'd]:

SLADE GORTON, ESQ., Attorney General of Washington, Temple of Justice, Olympia, Washington 98504; on behalf of the Respondents, State of Washington and its Department of Ecology.

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 74-1435, Environmental Protection Agency against State Water Resources Control Board, California and Washington.

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

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case, which is here on a writ of certiorari to the Court of Appeals for the Ninth Circuit, presents the same issue as the last case with respect to the need of federal instrumentalities to obtain STate permits, except it arises under the 1972 amendments to the Federal Water Pollution Control Act.

The operative language is the same except for the addition of six words that I will come to later.

Section 313 of the Water Act, like Section 118 of the Air Act, requires that federal instrumentalities comply with State requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements.

Because of some differences between the statutes, however, I would like briefly to outline to the Court the regulatory scheme under the Water Act.

Prior to 1972, the federal program for the control of

water pollution was based mainly upon the development by the States of what are called Water Quality Standards. That is, a general standard as to the level of pollutants that would be permissible within water. And the federal enforcement role was rather limited.

The 1972 amendments marked a dramatic shift in the emphasis and the method by which water pollution was to be controlled. Instead of stressing primarily the quality of the water generally, the Act decided to deal with what is called "point source" pollution, the specific individual, the specific firm that is polluting. And the focus was on what are called technology based limitations; that is, trying to devise the best technology possible in order to reduce the pollutants that each particular point source makes.

And this particular technique, the control of the point source pollutants, was to be accomplished through a permit system. So that this case is unlike the other case in that in the other case there was no reference at all to anything about permits; in this case there's an explicit scheme for permits.

Now, what the statute does is it requires that the Environmental Protection Agency develop nationwide standards, standards for effluent limitations, for point source pollutants in various industries. It's on an industry-by-industry basis. For example, they might have a standard for a cement plant;

the cement plant can't discharge more than a certain amount of phosphate for each hundred tons of cement produced. It's that kind of thing. To determine the maximum permissible pollutants from each particular source.

And it's made illegal under Section 301 of the Act for any person to discharge pollutants into any navigable waters except in compliance with the effluent limitations that the federal agency has developed for the particular sources, except in compliance with the General Water Quality Standards that the federal government and the States have developed, and except in compliance with the permit provisions of Section 402, which has created something called the National Pollutant Discharge Elimination System.

And under that system, EPA has undertaken to issue, is required to issue permits to individual dischargers as long as those dischargers meet the standards it has provided for effluent discharges.

And to date it has issued more than 30,000 of these permits. That's the federal agency has issued more than 30,000 of these permits.

The Act further provides, however, that a State may itself submit a plan under which it will issue permits, and if the State's permit plan meets a large variety of specified conditions in the statute, as well as meeting the general standards, then the Administrator of the EPA is directed to

approve it. And once he approves it, that, under the statute, automatically terminates his authority to continue to issue permits.

And thus far the Administrator of EPA has approved 27 different State plans for State issuance of permits.

The EPA has issued rather detailed regulations governing the State permit plan. And one of those regulations, which is at issue in this case, is that plans that he approves for State permit programs do not cover agencies and instrumentalities of the federal government.

This case arose out of these facts. The States of California and Washington submitted to the EPA their plans for a program permit. EPA approved those plans, but indicated in each instance that the plan did not cover permits for federal facilities, and that the Administrator would therefore continue to issue permits for federal facilities.

In accordance with the provisions of the statute, the States then took this ruling to the Court of Appeals for the Ninth Circuit, which held that under the statute the Administrator has no authority to deny the States the right to issue permits for federal facilities.

The arguments that I have just made under the Clean Air Act are, we think, equally applicable to this statute. Section 313 obviously was modeled upon Section 118. The legislative history of this section, like that of Section 118,

again reflects repeated emphasis that what the federal authorities are to comply with are the State emission standards, the State -- the substantive things, the effluent limitations, same requirements.

There's nothing in this history, like that under the Clean Air Act, that indicates Congress was intending to require federal facilities to obtain State permits.

Now, there is one distinction between the language of Section 313 and the language of 118, which both the Court of Appeals and the States of California and Washington argue calls for a different result. This is a provision which, where after the statute says that they shall comply with State and federal requirements to the same extent as any other person, it then adds the phrase, "including the payment of reasonable service charges."

QUESTION: I don't -- did you say that they think this, that language leads to a different result in this case or, rather, that it just makes it a stronger case than Kentucky had.

MR. FRIEDMAN: Makes it a stronger case. There is a suggestion -- there is a suggestion --

QUESTION: A stronger case than Kentucky's case?

MR. FRIEDMAN: Than Kentucky's case.

QUESTION: Is their claim.

MR. FRIEDMAN: There's also the suggestion that if

the Court were to agree with us in the Kentucky case, it could go the other way in this case.

The argument is made that the --

QUESTION: I thought vice versa -- well, yes, if the Court could agree with -- we should agree with you in the Kentucky case.

MR. FRIEDMAN: If they hold that there's no authority to apply permits under the Clean Air Act.

Now, the argument is that the words "including the payment of reasonable service charges" refers to charges that the State might impose for issuing permits, and that since a permit might be viewed in the nature of a tax, Congress inserted this provision in order to make it clear that the federal facilities could pay for the State permits.

We think, to the contrary, that what this refers to is to make it clear that the federal facilities will have to comply with any State requirements relating to the treatment of waste material. In this statute there are a number of provisions which provide for vast federal funding and research into the development of adequate local waste treatment facilities.

And the charges for those facilities are, naturally, extensive. And we think that what Congress intended in this provision was that if a State should conclude as part of its plan that waste material would have to be processed through a

local treatment facility, that the federal instrumentalities would have to comply with that, and they would have to pay reasonable charges therefor; not any charges the State saw fit to impose, but reasonable charges.

I am told that the fees for permits are relatively modest. An average permit fee may sometimes be $25 or $50. The State of Washington, which is a respondent here, makes no charge for permit fees. And it seems most unlikely that Congress was concerned about that.

Much more probable, in the light of this whole statute, it seems to us, is that Congress wanted to make it clear that in complying with the federal standards -- I'm sorry, in complying with the State standards, federal facilities would, if the State required compliance in going through the local waste treatment plants, would have to do that.

Now, here again, under this statute, as under the Clean Air Act, there are a number of provisions within the statute itself which we think are inconsistent with the view that Congress intended to require the federal facilities to get the State permits, which, once again, as I just want to repeat it, requiring them to get the State permit means the State can tell them how to operate.

For example, there are several provisions which authorize the States to adopt certain procedures and certain standards, except with respect to point sources of pollution

owned or operated by the United States. One example is Section 308, which provides and requires that permits, to be approvable, must have detailed provisions governing monitoring, inspection, and entry onto plants. Obviously designed to insure that there is compliance with the substantive standards contained in the permits.

The statute, however, explicitly provides that the State standards are not applicable to government facilities.

Now, once again, it seems rather unlikely to us that if Congress intended to give the States the authority to require federal facilities to obtain permits, and then turned around and said to the States: "You've got to have in your plans adequate provisions for monitoring and inspection, to make sure that your permit holders are complying with these standards", it, at the same time, would have said, "But you can't do this with respect to federal facilities."

It's all part of the same thing. If the inspection and monitoring is that important for compliance, and if the federal facilities were intended to have to get State permits, it seems clear to us Congress would have said, "And the federal facilities also are subject to these inspection requirements"; but Congress did not.

There's a similar thing with respect to so-called new sources of pollution. And the statute is explicit that the United States must meet the new sources.

Once again, the Environmental Protection Agency may authorize the States to apply and enforce their own standards of performance for new sources, if they equal the federal standards, except for new sources owned or operated by the United States.

Here, too, we think it most unlikely that if Congress had intended to require and authorize the States to issue permits for federal facilities, it would have denied the States the authority to enforce those permits against federal facilities where the very standards sought to be enforced are those contained in the permits.

We have set forth in our brief a number of other examples and instances in which the whole statutory scheme, the use of the language, the way it's structured, the various provisions seem to us inconsistent with the notion that when it used these general words "to comply with the requirements" respecting pollution of State, federal and local sources, that Congress intended thereby to give the States, in effect, what amounts to a veto power over the operation of federal facilities, usually on federal land, within the State, unless the State decides that it wishes to authorize the federal facility so to operate.

Once again, as in the Clean Air Act, we think something much more explicit and specific is required than what we have in either this language or in this legislative history,

which, I reiterate, again indicates that what Congress was concerned about was the effluent limitations and not the procedures that the State might devise in order to achieve compliance with those requirements by the private firms and people within the State.

Thank you.

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

Mr. Walston.

ORAL ARGUMENT OF RODERICK WALSTON, ESQ.,

ON BEHALF OF RESPONDENT, STATE OF CALIFORNIA

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

The Solicitor General arques in this case that this case is very similar to the Kentucky case. However, in one fundamental respect, our case is very different from the Kentucky case, and that is that our case has a specific permit provision in Section 402 of the Water Act that's applicable to all dischargers.

Thus, there is express authority in the Water Act for States and the Administrator, himself, to issue permits to dischargers. And that authority is found in Section 402 of the Water Act.

Thus, the only issue in the Court is whether the States have authority to apply these permits to federal dischargers.

So there is a fundamental difference between this case and the Kentucky case in that respect.

Now, the Administrator argues that Section 313, which imposes an obligation on federal dischargers to comply with all the requirements under the Act, does not include permits under Section 402.

Now, that result would lead to a very illogical result, especially as applied to the Administrator's case. For the Administrator concedes that federal dischargers have to comply with permits which he, the Administrator himself, issues in States where he operates his own NPDES permit program.

Well, what is the source of that obligation? Where does the Administrator himself get authority to issue permits to federal dischargers?

That authority has to be found in Section 313 of the Water Act, because that's the only provision in the Water Act that defines the obligation of federal dischargers under the Act. And that section specifically provides that federal dischargers must comply with both State requirements and federal requirements.

Therefore, the word "requirements" in 313 must include Section 402 permits, or otherwise the Administrator, himself, would lack authority to issue permits to federal dischargers.

And under that result, of course, federal dischargers would be entirely exempt from the 402 permit provisions of the Act. And the Administrator himself, in this case, has conceded that that is not the result to be implied; that Congress indeed intended for federal dischargers to comply with the 402 permit program.

Thus, the Administrator's position results in a very difficult dilemma, which the Administrator has yet failed to address in this case. Either the word "requirements" includes Section 402 permits or it does not. And if it does, it must include permits issued by the States. And if it does not, the Administrator, himself, lacks authority to issue permits to federal dischargers.

Now, the Court asked a number of questions in the Kentucky case that I think are partially applicable, at least to the issues in this case.

First, Justices Burger, Marshall and Blackmun asked the question of why does the State have authority or need authority to issue permits to federal dischargers.

Well, the answer in our case is that the permit process itself is the very process by which an effluent limitation is developed with respect to a federal discharger. The permit process is the process which enables the State to get the necessary information it needs to define the effluent limitation to be imposed on the discharger himself.

There's a number of questions that have to be asked of these dischargers, and we have to get answers from them. For instance, what are the --

QUESTION: Well, they are willing to give you the answers.

MR. WALSTON: Pardon me?

QUESTION: They're willing to give you the answers, they're willing to supply the information.

MR. WALSTON: Well, they're not willing to supply the information that the State necessarily requests. For instance, California has an administrative procedural process which requires all dischargers to come to the State to undergo cross-examination, to offer documentary data, and so forth. That, I suppose, would be classified as a procedural requirement under the Administrator's view.

QUESTION: But you say the federal facilities in California have been unwilling to comply with, or substantially comply with those procedures?

MR. WALSTON: As a practical matter, they haven't. As a practical matter, the federal dischargers in California have historically complied with State administrative procedural requirements. They've gone to the State of California and they've got permits from the State of California.

Thus, the administrative practice in California is somewhat inconsistent with the position, the theoretical

position being advanced by the Solicitor General in this case.

QUESTION: Well, as a practical matter, then, has California up to now been able to get the kind of information you say that it's essential for it to get in order to evolve the effluent limitations?

MR. WALSTON: Yes. And the reason for that is that the federal dischargers in California have in fact complied with the procedural requirements of California.

Obviously, if they weren't required to so comply, as the Solicitor General says they need not comply, then California couldn't get the information that it has historically obtained through the administrative permit process.

There is a second answer to the argument which was -- or the question which was posed by the various Justices, and that is this: The Administrator, himself, can't issue permits to federal dischargers once he approves a State program, by virtue of Section 402(c) of the Water Act.

That provision requires the Administrator to suspend his permit-issuing authority in the entire State, after he approves a State program.

Thus, if the Administrator himself can't issue these permits, then nobyd can, according to the Solicitor General's position in this case.

QUESTION: Well, do you agree that the well-established doctrine is that when the federal government surrenders its

immunity, it can be accomplished only by very clear and express statements?

MR. WALSTON: I think that's probably a correct statement of law, Your Honor. But I don't think the question is really applicable here.

Section 313 of the Water Act constitutes a clear waiver of federal immunity from State regulation. It specifically provides that federal dischargers have to comply with State and local requirements. And, as a matter of fact, the Solicitor General concedes that this language obligates federal dischargers to comply with State effluent limitations.

So there's been a waiver of sovereign immunity, or federal immunity in this case. All we're really talking about is the extent or the scope of the waiver.

As I say, it seems to me implicit in the concept that the State has the authority to issue effluent limitations to assume therefrom that the State has the authority to issue the permit which contains those limitations. There's an integral --

QUESTION: But the federal government doesn't have to follow it.

MR. WALSTON: Pardon me?

QUESTION: There's nothing that says the federal government has to follow it.

MR. WALSTON: Section 313 --

QUESTION: I understand the Solicitor General's point is that if you want to subject the federal government to permits, you have to say it.

MR. WALSTON: Well, we think that Congress said that in Section 313.

QUESTION: In haec verba, practically.

MR. WALSTON: Pardon me?

QUESTION: In haec verba, practically.

MR. WALSTON: Yes, we think that Congress spelled that out in Section 313. Congress said --

QUESTION: It didn't say "permits".

MR. WALSTON: Well, it must have included permits, because this is the only -- Section 313 is the only authority that the Administrator himself has to issue permits to federal dischargers.

QUESTION: Well, I don't know whether, in this -- in this delicate field, I don't know whether you have to give up a certain point.

As I understand the government's point, they're willing to go along with everything but this permit business.

MR. WALSTON: Yes, and we feel that that would make it very difficult for the State to actually develop the --

QUESTION: Would it be impossible for the State to do it? Would just make it difficult.

MR. WALSTON: I don't think so. I don't --

QUESTION: Would just make it difficult.

MR. WALSTON: I don't think that it would be possible for a State to develop an effective meaningful limitation, effluent limitation, unless it somehow had the authority to engage the --

QUESTION: But a minute ago you said it would be more difficult.

You retract that now?

MR. WALSTON: Well, I suppose it wouldn't be impossible -- I suppose that's true. But it certainly would be very difficult.

QUESTION: Of course it would.

MR. WALSTON: Of course, the State could shoot in the dark.

QUESTION: You just want the federal government to say, "We are bound by you, the State".

MR. WALSTON: Yes. I suppose that's true.

In other words, the State could --

QUESTION: And the next step is by permit.

MR. WALSTON: Yes. But it would be pretty difficult --

QUESTION: But you wouldn't settle for less?

MR. WALSTON: Pardon me?

QUESTION: And you wouldn't settle for less?

MR. WALSTON: We don't think -- we won't settle for

less, because we don't think Congress settled for less. We don't see a distinction between the permit process and the effluent limitation that's contained in the permit.

I suppose, in answer to your question, Justice Marshall, that the State could certainly shoot in the dark. It could throw out some effluent limitations based on very poor data, that the federal discharger himself might voluntarily submit. But we wouldn't have any assurance that that's a very meaningful effluent limitation.

We can't do that. We can't form an effective meaningful limitation unless we've got the federal discharger in there to find out, for example, how long it's going to take him to solve his water pollution problems. In other words, what kind of schedule of compliance, for example, has to be built into the federal permit. When must it --

QUESTION: Well, what you're suggesting, Mr. Walston, is that the State's substantive regulations don't simply exist as a body of common law that can be plucked out and applied to a particular individual by the EPA, but, rather, that they are developed in the permit application procedure almost on a case-by-case basis.

MR. WALSTON: That's precisely correct, and that's the whole concept, Justice Rehnquist, of the permit system in the Federal Water Pollution Control Act.

The permit system enables the States or the Admin-

istrator, as the case may be, to develop effluent limitations that are applicable on a case-by-case basis, permit-by-permit basis to each individual discharger. And the State can't develop a broad effluent limitation that is broadly applicable to everybody, it has to develop a limitation by looking at the exigencies of the specific, particular discharge. And the Solicitor General's opinion -- or position, would not allow the States to do that.

Next, Justice Powell asked the question of whether the States could prevent federal dischargers actually from operating. Could the State, for instance, shut down Fort Knox?

Well, there's two answers to that.

First of all, Section 313 of the Water Act specifically authorizes the President to exempt a federal effluent source, if he deems that exemption to be in the paramount interest of the United States.

Thus, the President could simply say, "You can't shut down Fort Knox," to the State of Kentucky, "simply because I exempt Fort Knox."

QUESTION: Well, does the permit -- the procedural aspect really have anything to do with the power, the ultimate power to shut down or not shut down?

MR. WALSTON: I suppose, hypothetically, that if a State refused to issue a permit, the discharger then couldn't operate. I suppose that's true. As a practical matter, the

States don't do that. They issue the permit and then impose the effluent limitations in the permit itself.

So the effluent limitations are the conditions which the discharger must meet. And this leads into the second response to that question. And I think Justice Rehnquist appreciated this response.

We get the same result, even under the Administrator's view of this case. For he concedes that federal dischargers have to comply with State effluent limitations.

Well, it's the effluent limitation that defines the specific nature of the obligation on the federal discharger. The permit itself is little more than a certification that the discharger is complying with those limitations.

But it's the effluent limitation that tells the discharger what steps he must take to correct water pollution, to stop polluting the water, and when he must take these steps.

And so, hypothetically, I suppose a State could develop such astringent effluent limitations, Justice Powell, that the practical effect would be to shut down the federal facility.

QUESTION: Mr. Walston, suppose --

MR. WALSTON: And the Administrator concedes that problem.

QUESTION: -- the State says that you must not discharge more than one point million, whatever it is, of a

certain kind of liquid into a stream; right?

MR. WALSTON: The State says that?

QUESTION: Yeah.

MR. WALSTON: Yes.

QUESTION: The federal government has got to abide by that. Right?

MR. WALSTON: Unh-hunh.

QUESTION: Well, now, suppose the State says, "You can't discharge more than one point blank" -- the same figure -- "and also get a permit."

MR. WALSTON: Yes.

QUESTION: What's the benefit of the permit?

MR. WALSTON: The permit enables the State to make that determination about the one point one figure that the federal discharger has to live with. If the State can't issue the permit and engage in the administrative process that leads to the issuance of the permit, it may not know whether the one point one figure is correct, or whether a one point two figure would be correct, or whether the figure should be five or three or two, or whatever.

QUESTION: Well, once the federal government says, "Well, you go ahead and tell me how much I can do"; right?

MR. WALSTON: Unh-hunh.

QUESTION: Is that okay?

Without a permit?

MR. WALSTON: I didn't quite appreciate the question.

QUESTION: The federal government says, "We've got Plant X."

MR. WALSTON: Unh-hunh.

QUESTION: "You tell us how much we can discharge, and we'll abide by it; but we won't apply for a permit."

MR. WALSTON: Well, certainly, the federal government, in that case, the federal discharger has to comply and live with that particular limitation.

QUESTION: I said they said that.

MR. WALSTON: Yeah, they agree with that.

QUESTION: Would they still have to get a permit?

MR. WALSTON: Yes, under Section 313 --

QUESTION: Why?

MR. WALSTON: Well, Section 313 of the Water Act requires that. Section 313 requires federal dischargers to comply with State requirements respecting control and abatement of pollution.

QUESTION: And if we don't agree with you on what 313 means, then that's it.

MR. WALSTON: It's not only that's it, it means that the dischargers themselves --

QUESTION: Then you lose.

MR. WALSTON: -- are completely exempt from Section

402 permit provisions. And the Administrator, this is --

QUESTION: Well, before we get to all of that, you lose? Do you agree?

MR. WALSTON: Well, we lose -- the Administrator loses his own authority to issue permits.

QUESTION: Do you agree that you lose?

MR. WALSTON: Yes, I certainly agree with that.

QUESTION: And your point is that under any consistent reading of the statutory language, then the Administrator, too, would lose any authority to --

MR. WALSTON: Precisely.

QUESTION: -- to issue permits. I understood that's your basic 402 argument, --

MR. WALSTON: Right.

QUESTION: -- which I understand.

I think you were beginning to explain a specific and more limited argument with respect to 402(c) a few minutes ago, when we interrupted you with questions. I'm not sure I understand that.

MR. WALSTON: Well, 402(c) requires the Administrator to suspend the issuance of permits into a State once he -- suspend his issuance of permits in that particular State once he approves the State program.

Thus, under that result, the Administrator, once he approves a State program, doesn't have authority to issue

permits to anybody, federal dischargers or anybody.

So, what I'm saying is that once the Administrator approves a State permit program, he doesn't have any authority to issue permits to federal dischargers under the language of the Act.

Well, that leads to the result that either the --

QUESTION: With regard to that language, can you tell us where the language is offhand?

MR. WALSTON: Yes. It's in Section 402(c) of the --

QUESTION: Yes. Where in the papers filed with us, in the briefs or --

MR. WALSTON: Oh. Page -- California's brief, page 11.

QUESTION: Thank you.

MR. WALSTON: And along these lines, I'd like to confirm that result, Justice Stewart, by quoting the Senate and House Reports which describe the effect of Section 402(c).

Now, listen carefully: quote -- this is the House Report now, page 854 of I Legislative History volumes, quote, "Upon approval of a State program, the Administrator would suspend the issuance of permits for discharges into the waters of that State." That's the House Report.

The Senate Report, and we --

QUESTION: And that has specific reference to 402(c)?

MR. WALSTON: Yes.

And the Senate Report -- and we did quote the Senate in our brief, page 10, at footnote 10, states as follows:

"Therefore, the bill provides that after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall suspend his activity in such State" -- in such State -- "under the federal permit program."

Thus, once the Administrator approves a State program, he loses the authority to issue permits to any discharger, federal or otherwise; and thus he has no authority to issue permits to federal dischargers once he approves the State program.

Thus, --

QUESTION: Mr. Walston, could I ask a question about the federal permit program?

As I read 402(a), the whole federal permit program is permissive rather than mandatory. Do you understand that the federal government is required to issue permits rather than, for example, setting general limitations which must be complied with across the board?

MR. WALSTON: Well, we believe that Section 402 is mandatory as to federal dischargers by virtue of Section 313.

QUESTION: It says "may", you know. That everything must be done on a permit-by-permit basis.

MR. WALSTON: Yes, that's correct.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF SLADE GORTON, ESQ.,

ON BEHALF OF RESPONDENTS, STATE OF WASHINGTON

AND ITS DEPARTMENT OF ECOLOGY

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

Mr. Justice Stevens, the basic answer to your last question is that there are, of course, a number of sections of this Act which are of great importance. The one which answers your last question is Section 301, which is the prohibitory section of the Act, which says "thou shalt not" without a permit.

This means --

QUESTION: I don't think it quite says that, Mr. Gorton. At least, I don't so read it. Maybe that's the way it's generally understood, but --.

QUESTION: Where do we find that?

MR. GORTON: All right. Section 301(a) --

QUESTION: And where do we find that in the papers filed with us?

MR. GORTON: I'm not sure that 301 is quoted in full in any of the briefs. It may be in ours.

QUESTION: All right.

QUESTION: It says, "except as in compliance with

this section and section 402, among other sections" --

MR. GORTON: Right. "-- the discharger of pollutant"--

QUESTION: -- "the discharge is unlawful."

But what is it that says one is not in compliance with 402 if there's been no permit program instituted? The permit program provided by, in -- specified in 402 is permissive, is what I'm suggesting.

QUESTION: That is the federal permit.

QUESTION: The federal permit program.

MR. GORTON: The federal permit program is a -- does -- it is true that the federal program says that, the second line of Section 402 says that the Administrator may issue a permit --

QUESTION: Could not one read that -- I just suggest this as a possibility -- to allow a specific permit of greater discharge than the limitation would normally authorize?

MR. GORTON: Yes. There's no question about that. This is why we had --

QUESTION: Well, just to get my thought out, so that you can address it: would it not be consistent with the scheme of the Act for the federal government to have a general effluent limitation, and then some permits which are more liberal?

MR. GORTON: Yes. As a matter of fact, that is the scheme of the program. We have certain goals set out in the

statute for 1977, others for 1985. Those goals are not met by the conditions of the permits which are issued today.

QUESTION: Then, would it not follow, that the abandonment or suspension of a federal permit program within a given State would not remove all federal control over discharges within that State?

MR. GORTON: No, I don't --

QUESTION: That the limitations would still apply?

MR. GORTON: No. Because the State, under Section 510, has the right to impose more stringent limitations than does the federal government itself. That State authority is specifically not only preserved but, perhaps, as you may say, created by Section 510.

QUESTION: Do you understand -- just to get my last question, so I understand this -- do you understand that the federal government would have the authority to disapprove of a State permit program on the ground that it was too severe?

MR. GORTON: No. The federal government would not have the authority to disapprove, --

QUESTION: Because of 510?

MR. GORTON: -- because of 510. We must meet nine qualifications under Section 402(b) to be authorized to have a permit program.

When we have met those nine qualifications, we are entitled to manage our own permit program. But that permit

program and our effluent limitations may be more restrictive than those which the EPA Administrator -- that operated under Section 402(a).

This is consistent -- I'd like to go back, if I can, and walk through several sections of this statute, and just a bit of history.

Up until 1970, of course, as the Solicitor and we agree, only the States could issue permits in water pollution control matters. In 1970, the President discovered the 1899 Refuse Act, and the Corps of Engineers began to issue permits to water polluters.

This, of course, created a duplicatory and relatively wasteful system, besides having the Corps of Engineers involved in it, which it was one of the principal designs of the 1972 Act to cure; it wanted to get rid of that duplicatory system. So the permit system in 402 first says, under 402(a), EPA issues permits.

Second, it says, in Section 402(b) -- and this was expected and is explicitly listed in the sponsor's remarks about the Act -- that as soon as the States met federal qualifications, the EPA must -- must -- approve the State plan -- not may; at one point it did say "may". But as the Act was passed, it said "must approve the State plans"; and under 402(c), "must promptly suspend the issuance of its own permits."

Now, 402, we all agree, contains no exemptions for federal agencies. But during the course of the passage of that Act through Congress, at one point it did contain an exemption for federal agencies from one relatively limited element of Section 402. But that was not only taken out by the Conference Committee, but the Conference Committee Report shows that it was taken out, conscious of the fact that the federal government should not have that specific exemption.

Section 301 refers to persons. The prohibition of Section 301 refers to persons, and is the basic prohibitory section of the Act.

But federal agencies are not included within the definition of persons in Section 502, subsection (5). So if it were not for Section 313, EPA could not issue permits to federal entities; and, of course, neither could the States.

Section 313, as my colleague from California has already said, is the reason EPA can issue permits, as well as the States; and it lumps them directly together. It says federal agencies are to comply with federal and State requirements [sic] respecting control of abatement and pollution to the same extent that any person is subject to such requirements.

So the federal agecies seek 402(a) permits or 402(b) permits by reason of exactly the same authority. And if the word "requirements" in this statute, Mr. Chief Justice, is not broad enough to include procedural matters, i.e. State

permits under 402(b), it's not broad enough to include federal procedural requirements or permits under 402(a).

The authority of the EPA and the States are identical.

Now, not only is this a wrong and absurd result, because it would free federal agencies from any obligation to secure any permits at all, and because the dictionary definition of the word "requirements" has to be totally distorted for you to come to that kind of an answer, it is also wrong --

QUESTION: Mr. Gorton, may I go back to my prior point, just where you are now? It would not, however, free the federal agency from the requirement of complying with the applicable effluent limitation; is that not correct?

MR. GORTON: That's right.

QUESTION: Yes.

MR. GORTON: That's right. This part of the distinction would still theoretically exist. But neither we nore EPA makes the claim, of course, -- EPA doesn't want to make the claim -- that federal entities are free from the permit, its own permit requirements.

But there's another matter which helps in this connection as well, and this may answer directly your question.

If you go to Section 505(f)(6), 505(f)(6) or 505 is the so-called citizen's suit provision of this statute, which

means that if EPA doesn't do its job and the State doesn't do its job, a citizen can come in and bring a lawsuit in order to enforce the Act.

Under that, an effluent limitation, i.e. the substance that the Solicitor is talking about, is defined in 505(f)(6) as a Section 402 permit. That is to say, there is no distinction between substance and procedure.

And then, in parentheses, which also includes a Section 313 requirement. Right back to the very word which the Solicitor claims doesn't include permits.

Effluent limitations, permits, requirements. All fall within the same --

QUESTION: Is 505 reproduced in anything that we have here?

MR. GORTON: Page 19 of --

QUESTION: It's difficult for me to follow this without seeing it.

MR. GORTON: It will be on page 19 --

QUESTION: Of what, of your brief?

MR. GORTON: No, this is the California brief.

QUESTION: Of the California brief. Thank you.

MR. GORTON: I think it's probably in the Appendix to my brief as well.

QUESTION: Right.

QUESTION: What color is the California brief?

QUESTION: It's this color -- whatever color this is [indicating]; putty color.

MR. GORTON: Correct. And let me read it.

Section 505 describes, quote, "an effluent standard or limitation", end quote, as including, quote, "a permit or condition thereof issued under Section 402 of this Act, which is in effect under this Act", paren, "(including a requirement applicable by reason of Section 313 of this Act)", end quote.

And the only answer the Solicitor has to that proposition is that the first five subsections of that section aren't requirements and that therefore this doesn't mean anything.

But the first five subsections aren't included in the parenthetical expression. It's a non sequitur, even so much as to argue that point.

QUESTION: Mr. Attorney General, are you able to tell us how many States have found it possible to function without a permit system?

MR. GORTON: No States, Your Honor. This is not like the Air case. This is not like the Air case, no.

QUESTION: It's not like the other case?

MR. GORTON: No. This is not that kind -- there are 27 States, as the Solicitor General says, which have qualified to operate their own permit system. But in the other 23, the Administrator continues to operate a permit system. This is

the current number.

Now, the United States claims that because federal agencies are expressly exempted from State procedures enforcing new source standards by the terms of 306(c) of the Act, and because federal agencies are expressly exempted from State procedures for inspection, monitoring and entry with respect to point sources within the State, by the terms of 308(c), an exemption from the State permit programs authorized by Section 402(b) has got to be implied.

Now, there are two reasons where this isn't so. The first is because each of those two exemptions, not to mention another in 401(a) which is irrelevant to this argument, and the original House version which was right in Section 402 itself, and was removed by the Conference Committee, each of these shows graphically that the Congress knew perfectly well how to exempt federal agencies from specific Water Control Act programs when it wished to do so.

Not only did it not do so in either Section 402 or 313, it even expunged the partial exemption which originally appeared in Section 402 in the House version, and the legislative history, which you'll find noted on page 30 of the California brief, expressly shows that the Conference Committee knew exactly what it was doing in taking out that particular exemption.

QUESTION: When you use the term "program", what do

you embrace in that?

MR. GORTON: Well, in the case of 306(c) and 308(c), these were fragmented and limited programs. 306(c) applies -- or Section 306 applies only to new source standards; that is, a new factory or a new installation. And Section 308 creates a way in which there will be inspection and monitoring, a procedural matter, I think, essentially, as opposed to substantive requirements.

And this, of course, is exactly the point. What the Congress decided was that if the State wanted to do a half-baked job and only control new sources, or perhaps only to have an independent inspection system, not related to any substantive requirements whatsoever, Congress wasn't going to let the States do that to federal agencies; and that's why they were exempted.

They wanted to encourage the States to take over the whole program. This is the point of the entire Act.

So a State can have a program for new sources only. It can have an inspection program only. But without having a full 402(b) permit system; but it can't enforce that against the federal government because EPA in that same State will still be operating a permit program under 402(a).

And the Congress didn't want this kind of duplicatory system.

But once the State took its responsibilities under

402(b), the federal agencies -- then the federal agencies fall within in, because, under the express terms of Section 402(b), we must have elements of a new source program under 306, and an inspection and monitoring system covered by Section 308.

And at that point, of course, the federal agencies must secure State permits as well as abide by State substantive standards.

And so this Act is completely consistent throughout, just as the State can't require federal agencies to abide by fragmented State programs and create a dual or duplicatory system while EPA is still issuing permits under Section 402(a), so EPA can't create a dual or parallel permit program by carving federal agencies out of a State permit program under 402(b).

With all of the confusion which is automatically going to attend upon a federal permit program, to enforce State standards.

This is what Section 402(c) says. It's what Section 313 says. And it's what they mean.

And the very case which the Solicitor General is making takes him right out of court himself, along with us.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Friedman.

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

First, let me just briefly allude to the argument that Mr. Gorton has made with reference to Section 505(f)(6), and what that says is that, in effect, a citizen's suit may be brought against a federal instrumentality which is alleged to be violating an effluent standard or limitation; and then it says that an effluent standard or limitation includes "a permit or condition thereof issued under 402 of the Act, which is in effect under the Act (including a requirement applicable by reason of section 313 of the Act)."

We think all that the "requirement applicable by reason of Section 313 of the Act" refers to is a substantive standard imposed in a federal permit, not in a State permit, in a federal permit that has been issued to a federal facility.

I'd like to also --

QUESTION: Mr. Friedman, that depends on -- you've answered the case when you say that -- that depends on how you read 313, doesn't it? And isn't that what we're here to decide?

MR. FRIEDMAN: Yes, Mr. Justice, it does come back to that; but my point -- they say that the fact that there's a reference to a requirement of 313 in 505(f)(6) --

QUESTION: And isn't it a question what does the word "requirement" mean in 313?

MR. FRIEDMAN: Yes. It seems to me, if you conclude one way or the other, it's easy. But what they say is the fact there's a reference to a requirement under 313 necessarily indicates that 313 requirements includes the State permit system. That's --

QUESTION: Oh, I see. You're saying requirement -- you're arguing "requirement" means substantive limitation in 313, ergo, it means the same thing in 506 -- whatever it is.

MR. FRIEDMAN: Well, what we say is it means a substantive requirement either in a -- it means a substantive requirement in a federal permit, Mr. Justice.

That is our point. But if -- if they're right, it could mean one of two things.

It couldn't mean the substantive requirement in a permit, because we say the States have no authority to require permits for federal facilities.

But we do say it means the same substantive requirement which may be included in a federal permit that has been issued to a federal facility.

If I may just refer briefly to one point you made earlier as to whether the permit program under Section 402 is a mandatory program, the Environmental Protection Agency takes the position that it is, that they have to have a permit program

-- that this is the whole scheme of the statute to control point source pollution by a program of permits. First, to be issued by the Environmental Protection Agency, and then, if a satisfactory State permit program is included, by the State.

Now, the suggestion is made that because the statute requires and terminates the authority of the Administrator to issue federal permits once he approves a State permit program, if he approves a State permit program, that means one of two things: either that his entire authority to issue permits to federal facilities is terminated; or, as it's been suggested in the brief, that somehow when he gets rid of his authority to issue permits, that means somehow the States get it.

Well, it seems to us that if we are correct in our position, that there is no authority under this statute to -- for the States to compel federal instrumentalities to obtain permits, that when the Administrator approves a State plan which provides for the State issuance of permits necessarily, he cannot approve the plan insofar as it purports to give the States authority to issue permits for federal facilities, because there's nothing in the statute that permits that.

And we think that inherent in the whole concept is that when he approves a plan, all that he can approve and all that he loses authority to issue is with respect to those portions of the State plan that are valid; and that if the State plan is invalid, as he held in his regulation and as he

held in these two cases, if it's invalid because under the statute the State cannot require federal instrumentalities to obtain a permit, then, necessarily, his approval -- his approval of the State plan does not touch upon that issue.

QUESTION: That's your response to the 402(c) argument.

MR. FRIEDMAN: Yes.

QUESTION: But how about to their more basic 402 argument, that if -- that the State and federal permits under the statute stand or fall together?

MR. FRIEDMAN: We don't think they have to, Mr. Justice.

QUESTION: Well, I'd like to hear why, because --

MR. FRIEDMAN: Because we --

QUESTION: -- that's a great big part of their argument, and, so far as I've heard, you haven't directed yourself to it.

MR. FRIEDMAN: Yes. Our answer to that is that the authority to issue permits does not stem from 313, it stems from 402. All that 313 does is to state that the federal facilities must comply with the substantive requirements of State and federal law, however those requirements are imposed, whether they're imposed under a State permit program, whether the State has some sort of a regulatory scheme, that doesn't matter, as long as the State imposes substantive requirements,

313 requires the federal instrumentalities to comply. But there's nothing in 313 that speaks of permits.

The whole argument is whether the word "requirements" in 313 covers permits. But 313 does not authorize any issuance of permits.

The permits are issued by the federal system under -- by the Administrator under 402; if the Administrator delegates to the States the authority to issue such permits, then they have that authority under 402.

But you look to 402 only to see who can issue permits. But the authority to issue permits, and the requirement that there be compliance with the substantive standards, either in the permits or elsewhere, is what 317 [sic] does.

QUESTION: Well, perhaps you've said, Mr. Friedman; would the Administrator approve a State plan that did not have a permit system?

MR. FRIEDMAN: He would not have -- no, because, under 402, the only State plan is a State plan for a permit.

Now, he could approve --

QUESTION: So that if a State doesn't have a permit system, their plan will be disapproved?

MR. FRIEDMAN: That's right. The only State, because -- and then the federal permit plan would continue in operation. That's what we have in the 23 States that have not submitted, and do not have any State -- any federally

delegated, federally approved permit plan.

That doesn't mean that the State couldn't impose other requirements. But a State might have a permit plan which is very different from the federal standards, which it would apply within the State, but, nevertheless, there would still be the federal permit plan.

The only way that the State can oust the EPA plan which is in operation is if it submits a plan which EPA approves.

QUESTION: So that if a State submits a plan that has only substantive standards in it, and no permit system, what happens?

MR. FRIEDMAN: The EPA would have to disapprove that plan.

QUESTION: In its entirety?

MR. FRIEDMAN: In its entirety.

QUESTION: Okay.

QUESTION: So in that respect, as in others, this statute is different -- this federal statute is different from the Air legislation that we had in the previous case?

MR. FRIEDMAN: It's different because --

QUESTION: Which does not require that State plans have permits.

MR. FRIEDMAN: That's correct. This statute is different because one of the key elements of this is a permit

plan.

QUESTION: Right. Right.

MR. FRIEDMAN: But it seems to us it's -- there's been a suggestion here that somehow, because you have a permit plan generally, that necessarily indicates the Congress intended to impose that same kind of permit plan, permits issued by the States, upon the federal authorities and the State authorities.

It seems to us it's a very different thing -- I'd like to conclude on this note -- between saying that the federal instrumentalities have to comply with the substantive requirements that the State has imposed, which is what Congress has done in Section 370 [sic]. And to take the next and, to us, a very large step of saying "and it's the States" -- it's the States and not the federal government that can require the federal instrumentalities to do that.

We don't think Congress has gone that far in this statute.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you --

QUESTION: Could I just ask one question? Is there any way for a State to articulate a substantive requirement except through a permit?

MR. FRIEDMAN: Well, I think they can negotiate, they do it; they can announce that for a particular -- they

can come in and talk and they can say that for a particular point you shan't throw into the water more than ten gallons of chlorine a day.

They come in, they talk to these people, they can work the thing out, and then the federal people would be required to comply with that.

We don't accept this notion that the only way -- the only way -- you can have meaningful effluent standards is through a State permit program.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 12:00 o'clock, noon, the case in the above-entitled matter was submitted.]

- - -