In the

Supreme Court of the United States

Commonwealth Of Kentucky, Ex Rel.
Ed W. Hancock, Attorney General,

Petitioner,

v.

Russell E. Train, Administrator,
Environmental Protection Agency,
et al.,

Respondents.

No. 74-220

Washington, D. C.
January 13, 1976

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

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IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF KENTUCKY, EX REL. ED W. HANCOCK, ATTORNEY GENERAL, Petitioner, v. RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	No. 74-220

Washington, D. C.,

Tuesday, January 13, 1976.

The above-entitled matter came on for argument at 10:14 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:

DAVID D. BEALS, ESQ., Assistant Attorney General, Commonwealth of Kentucky, Room 26 Capitol Building, Frankfort, Kentucky 40601; on behalf of the Petitioner.

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

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Hancock, the Attorney General of Kentucky, against Train, Administrator of EPA.

Mr. Beals, you may proceed when you're ready.

ORAL ARGUMENT OF DAVID D. BEALS, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case arises on a writ of certiorari to the Sixth Circuit, to review that Court's interpretation of the Clean Air Act amendments of 1970, as that Act concerns the relation of the Commonwealth of Kentucky and the operator, and the respondent operators of existing federal air contaminant sources located in the Commonwealth of Kentucky.

With the passage of the Clean Air Act of 1970, the Congress set forth a clearly defined and discernible plan for the enhancement and enforcement and protection of the air resources of the United States.

Basic to this plan were minimum standards to be prescribed by the EPA Administrator under Section 109. The Congress stated the means by which these standards would be put into effect in Section 107, directing that the States were to prepare implementation plans to achieve and maintain the national primary and secondary ambient Air Quality

Standards.

That these plans were State plans is entirely consistent with the rest of the scheme of the Act. In 101(a), one of the findings of the Congress with respect to air pollution was that it was the primary responsibility of the State to control air pollution at its source.

Indeed, Section 101(b) listed as one of the purposes of the Act the -- to assist the States and local governments in the formulation and execution of their air pollution programs.

As to what these programs should, at a minimum, contain, Congress was also very explicit. In Section 110 they listed a number of requisites which had to be included in any 110 implementation plan.

Among these, the basic requirement of the plan, was that the plan provide for the attainment of the primary standards as expeditiously as possible. And in no case more than three years following approval.

Also required in 110 were provisions for emission limitations, schedules, timetables for compliance, and such other measures as might be deemed necessary to meet these standards.

But, in addition to these emission standards, 110 also specified that the States had to incorporate into their plan appropriate devices, methods, and systems for monitoring,

compiling and analyzing data and making this data available to the Administrator; appropriate procedures and systems for reviewing the location of new sources; appropriate procedures to insure that no emission in one Air Quality region would cause or interfere with the attainment of the standards in any other Air Quality region.

It also called for adequate personnel, funding, and authority on behalf of the State to carry out the plan. It required that the plan have authority to require the installation of monitoring equipment, to require periodic reports from the air contaminant sources; to correlate this data received from these reports to the emission standards that were currently existing, and to -- it required authorization to restrain any air pollutant source which was presenting an imminent and substantial danger to the health.

It is the contention of the Commonwealth of Kentucky that these requirements, all of the requirements listed in 110, all the requirements which are contained in the State's implementation plan are requirements respecting the control and abatement of air pollution.

QUESTION: Mr. Beals, would you envisage situations where the State would not grant a federal installation a permit?

MR. BEALS: Yes, Mr. Justice, I envision a situation where if the control strategy proposed by a federal source will,

in the opinion of the State Air Pollution Control Agency, not result in the attainment of the ambient standards, will not result in the meeting of the emissions standards, that that federal source would have to redraft its control strategy, its compliance schedule,so that it would indeed meet these standards, as required by the Act.

QUESTION: So you would stop it at the permit stage, rather than later?

MR. BEALS: The permit -- at the permit stage, these things can be worked out. We say, "Your strategy is not sufficiently stringent to meet our standards; your emissions are too high to maintain the air quality required. Therefore, you have to incorporate more standards."

This is as opposed to later finding that they are, indeed, in violation of the standards and presumably shutting them down. That is a possibility. It's highly unlikely that any of the agencies would be, indeed, shut down, but they would be subject to daily --

QUESTION: So you're zeroing in on something more than merely identification of the source of pollution; you want --

MR. BEALS: We are indeed, Your Honor.

QUESTION: -- to withhold at the permit stage?

MR. BEALS: The implementation plan, as expressed by Congress, contains considerably more than just identifica-

tion of the sources of pollution, and it contains considerably more than simply emission standards, it contains the entire mechanism for bringing these standards into being, for --

QUESTION: And you could do that by a compulsion suit later, couldn't you, after the permit is issued?

MR. BEALS: That would hardly be prevention, Your Honor. We might be able to abate any violations that came up later, but it would hardly relate to any sort of preventive concept.

It seems the time for prevention is before the attainment dates. What we're talking about is the pre-attainment period, seeing to it that these control strategies are moving in the proper direction; that the strategies will indeed result in reduced emissions, will indeed result in the air quality of the entire Air Quality Control region being raised to a level acceptable under the minimum primary and secondary standards.

QUESTION: Did not the Environmental Agency state that it would submit all of the information which is called for by the application, but would not submit it in the form of an application for reasons which were given?

Now, doesn't that give you everything that the application would give you?

MR. BEALS: Yes, Mr. Chief Justice, that gives everything that the application would give you, but it does

not give you what the permit requires. The application for a permit is not an automatic issuance of a permit.

QUESTION: Well, as Mr. Justice Blackmun suggested, why not wait until you have the problem, and then go in on the enforcement, where the Environmental Agency raises no question?

MR. BEALS: Once again, Your Honor, the ambient standards are interfered with, the attainment and maintenance of the ambient standards are interfered with. If we wait until --

QUESTION: Well, can't you tell them that when they submit the data that they have offered?

MR. BEALS: But the data they offer is just a status report. That is a listing of --

QUESTION: Isn't that the same thing you get in an application?

MR. BEALS: Yes, but the process does not stop at the application. The process goes on. We use the information we get from the application to determine which -- what sort of controls are necessary to determine what kind of emission standards are necessary to be imposed. This does not stop with just getting the information and finding out where we are and waiting until three years later to see if we got any better.

QUESTION: You say if you had the authority to require a permit, you could say no to an application, whereas,

if you don't have the authority to require a permit, all you can do is kind of file what they're doing and not say no?

MR. BEALS: That is correct, that is what we can do right now. That is what we have been doing for the last three years. We have been --

QUESTION: Well, if you read the government's brief, you get the impression that the government installations will fully comply with the substantive requirements, and presumably EPA, if that's who is regulating the government installations, would be saying no in place of the State agency.

MR. BEALS: That would have been fine, if the Administrator had come in in 1972, when -- under 313, when the implementation plan broke down, when they refused to comply with the implementation plan. What the installations, what the respondents have done so far is, when requested, -- not on the basis of a periodic report -- when requested, they have submitted a status report.

This is not a -- this is not similar to a compliance schedule. The respondents are not operating under any approved compliance schedule, because the compliance schedule is the end result of the process that starts with the permit application.

The position of the government that they are to comply with compliance schedules and emission standards is generally hard for me to follow, since there are no compliance

schedules.

QUESTION: Does the compliance schedule originate at the time the permit is issued?

MR. BEALS: That's correct, Your Honor. The way the Kentucky permit system functions, the information is received on the application; that information is analyzed to see what steps are necessary to bring the source into compliance. If the source is already in compliance, then a permit may be issued. If the source is not in compliance, then no permit will be issued until a compliance schedule, which will bring the source into compliance within the attainment dates, has been agreed to by the source.

QUESTION: Well, Mr. Beals, the information that the government did furnish you, was that accepted or rejected?

MR. BEALS: It was taken as what it was. It was the original --

QUESTION: Well, if it had been in the form of an application for a permit, would a permit have been issued or not?

MR. BEALS: In some cases perhaps it would have been; in most cases --

QUESTION: Well, in this case.

MR. BEALS: Well, this case deals with quite a number of different respondents, --

QUESTION: Well, would any of them?

MR. BEALS: Some of them may have gotten a permit;

some of them, for --

QUESTION: Well, do you have a complaint on those?

MR. BEALS: A complaint? I don't understand the question, Your Honor.

QUESTION: Well, I mean, you just want the formality of asking for a permit?

MR. BEALS: No, we want the cooperation --

QUESTION: I'm talking about those that did meet the standards. The only thing you object to is that the government didn't also say "We want a permit"; is that right?

MR. BEALS: Well, they did not apply for a permit.

QUESTION: But they gave you all the information that they would have given if they had applied for a permit.

MR. BEALS: Only those few sources, and I'm not sure how many of them there are, which would be in compliance.

In fact, the information on the application is just the preliminary information through which the analysis should start. It would still require some further information, further cooperation by the respondents; as to those sources which would not be in compliance --

QUESTION: Have you asked them for that information?

MR. BEALS: We have asked for further information. We get status reports.

QUESTION: That's all you asked for, that they apply for a permit?

MR. BEALS: But in asking that they apply for a permit, we're asking that they submit to our entire implementation plan system.

QUESTION: That's what I thought, you just want them to go through the formality in some instances.

MR. BEALS: Well, in the instances where they aren't already in compliance, I agree that they -- if they applied for a permit, they might be -- they would be granted a permit. But those are very few and far between sources which are already in compliance, have all the emissions standards; in addition, the information that we gather from these applications is necessary in order to determine what levels -- at what level the emissions standards should be set.

It is not just an automatic process that they apply for a permit, they get a permit.

What they have to do is to go through the permit process. The determination is made of whether or not these strategies will bring them into compliance with the ambient standards, they will be in compliance with the emissions standards, which are set, through the information. The Air Quality Control region is analyzed to determine what sources are there, what levels of control need to be placed on these sources.

Only through this process can the emissions standards

be set.

Now, the fact that the initial information was put in is just the very first step in the whole permit process. There is a considerable amount of planning required in determining how to bring a plant, such as the Shawnee Power Plant of the Tennessee Valley Authority, into compliance with the emission standards within three years. In fact, it has not been done.

Under the system that the government suggests, where the only standards which they have to meet are the emission standards and compliance schedules, this is very similar to the method of implementation that was considered in Train, when they discussed the Florida method, where they were just told: In three years you have to be in compliance.

And that was it.

This was a method that was discouraged by EPA. This is the method we have. We say: We're turning you loose, but in three years you have to be there.

The State suggested this as a regulatory statute, that the State has some expertise in determining what their Air Quality Control regions require in terms of emission standards. That in developing these emission standards for the particular area, for instance, the Louisville Air Control Region has considerably more stringent standards than the Bowling Green Air Control Region.

This is developed through a complete control over each stationary source in the Commonwealth. We have to analyze the data from each of these sources in order to make the standards for all.

Further, the Section 118 --

QUESTION: You haven't, at least for me, fully answered the questions of Justice Blackmun or of Justice Marshall, or the ones I was trying to put.

If the Environmental Agency is prepared to have the federal facility do everything that it would do, except the formality of the application, and that you're free to respond in the same way to that as you would be to a formal application, in terms of setting up a schedule, then what are we really here for?

MR. BEALS: We're here for the fact that they have not done that.

QUESTION: Well, but had you responded to the informal approach just the way you would to a formal application?

MR. BEALS: Perhaps not, but we haven't had the same information.

QUESTION: That's exactly the point.

MR. BEALS: Well, the informal approach, nonetheless, is totally unrelated to our implementation plan, that Congress said that we had to have this authority, they said that this

is essential to achieve these plans. And what the government has -- or what these respondents have declared is that none of these other things are essential to achieving these standards except the emission standard.

They ignore the way the compliance schedules come into being. They have not -- as I say, we have not gotten control strategies from these sources. We get status reports. They say: Right now we're putting out this much emission; we're installing this sort of equipment.

There's no opportunity to review control strategies. There's no opportunity to review the control strategies in light of the rest of the Air Quality Control Region.

QUESTION: Mr. Beals, may I ask a question? Is there anything in the statute that provides in substance that if the point source is in compliance with the standard, that it's emitting the wrong kind of material, but does not have a permit, that it's in violation of the federal statute?

Does the federal statute require a permit and provide that the failure to have a permit, there's some kind of remedy for that, even though there's compliance with the substantive standards?

MR. BEALS: Not specifically, Your Honor. The federal statute requires that the States draw up an implementation plan containing a certain set of authorities.

Now, the majority, a substantial majority of the

States have adopted a permit system in order to accomplish this. The permit system integrates all the requirements that one can, it integrates all the control necessary; and --

QUESTION: So it's purely a State requirement, the permit itself?

MR. BEALS: It is a State -- well, it has been approved --

QUESTION: It's a State method for implementing Section 110, I gather.

MR. BEALS: Well, it is a -- yes. But it has been approved by the federal EPA, it has been published as regulations of the federal EPA. In effect, the Kentucky implementation plan is the federal implementation plan for the Commonwealth of Kentucky.

QUESTION: The reason I asked, I was wondering what would happen if the federal point source were in compliance with the substantive standard and simply refused to get a permit, what statutory -- what federal statutory remedy would there be that Kentucky could assert against the federal point source?

MR. BEALS: The federal statutory authority?

QUESTION: Yes.

MR. BEALS: I take it there would be none.

QUESTION: So there really wouldn't be --

MR. BEALS: However, Section 118 clearly makes -- it

is the statute, federal statutory authority which makes all State and federal requirements respecting control and abatement of air pollution applicable to each of these federal respondents.

In that regard, what we adopt as a federal requirement -- as a requirement respecting control and abatement under Section 110, which is republished as a federal requirement respecting control and abatement of air pollution by the federal EPA, we would think that those would be federal requirements that are in --

QUESTION: Well, that's the remedy that you pursued in this litigation, isn't it? That's the remedy -- that's a remedy; that's the reason this case is here. You began a lawsuit asking for a declaratory judgment and an injunction.

MR. BEALS: That's correct, against --

QUESTION: That's a remedy to enforce your permit system, isn't it?

MR. BEALS: That is exactly what -- yes, we are proceeding under 118. We are saying that there is a federal duty under Section 118. The --

QUESTION: Well, Mr. Beals, what you really want is some kind of a report other than the status report?

MR. BEALS: Well, there is a -- yes, the point where you --

QUESTION: Well, why don't you add to those instead of going after a permit?

MR. BEALS: Because the permit will get us everything. The permit will get us --

QUESTION: Why not go the short way?

MR. BEALS: Administratively it is practically impossible to go after each requirement of the permit system individually. We have to -- we would have to go after emergency situation episodes, requlations, separately; we would have to go after monitoring separately.

QUESTION: Well, couldn't you have filed this same suit to require them to file these reports?

MR. BEALS: Well, other than the proliferation of federal district court suits, that that would bring on, it is not a -- that just is not what we consider the plan that the Congress had for the enforcement of these standards. That puts in federal district courts suing every two weeks, if the periodic report doesn't come in on time, and we have to file another suit to get the same information again.

QUESTION: Has the congressional program broken down in the States that do not have a permit procedure?

MR. BEALS: It has indeed, Your Honor. The implementation plan --

QUESTION: Where would we find that in the record?

MR. BEALS: I find that in the record by the fact that none of the respondents here are committed to compliance schedules. I find that in the record in that in May of 1975,

a month and a half before the attainment dates, the EPA was just then trying to find out whether anybody is in compliance. In a publication in the Federal Register, the EPA has put out their guidelines for -- to make a firm public commitment to abate air pollution from federal sources.

This is exactly the same thing that the implementation plan required the State to do in 1972, which the Commonwealth of Kentucky did do, and had that system been allowed to function as it should, not only as Kentucky law but as a federal regulation for Kentucky, then the same thing that the Administrator is trying to do in 1975 would have been done in 1972. We would be much closer to meeting standards.

QUESTION: Mr. Beals, let's look down the road a ways. Assume that you prevail in this lawsuit, and the federal government is required to apply for a permit, and after all the negotiations, and all the good faith, had they exhausted -- let's assume that your appropriate Kentucky authorities conclude that the -- let's take Fort Knox -- that Fort Knox is not in compliance with the standards.

What do you do then? Do you try to get an injunction to close down Fort Knox?

MR. BEALS: Well, that would be the direction of the Clean Air Act. That is what they say that we should do.

QUESTION: What section of the Act suggests that the Congress intended to allow any State to close down Fort

Knox?

MR. BEALS: Well, no section suggests that we should be allowed to close down Fort Knox. However, in terms -- as far as the Air Pollution Control measures taken by Fort Knox, we should be allowed to review them.

The citizens of the Commonwealth of Kentucky are breathing the air. We have the Air Quality Control Regions, and there is no reason why, under the federal Act and under the direction of 118, which declares that they are to -- they shall comply with requirements respecting, that they can't produce a compliance schedule.

QUESTION: This is a national statute we're talking about. Consider, for example, the Tennessee Valley Authority, which operates in several States in addition to Kentucky.

MR. BEALS: Right.

QUESTION: It's in Tennessee and Alabama, and perhaps others. If Kentucky undertook to shut down a part of the Tennessee Valley Authority, would that have an impact on its operations in other States?

MR. BEALS: Well, I take it that it would, but the possibility of shutting down TVA altogether is very, very remote. We would be going after penalties in terms of -- as a matter of fact, the State of Alabama has recently filed suit against the Tennessee Valley Authority for exactly -- for violating emission standards under their implementation plan.

In that case they are seeking substantial penalties until the source is brought into compliance.

QUESTION: You don't mean -- I would presume, and I'm asking you: Is it the purpose of that lawsuit to shut down the entire operations of the TVA?

MR. BEALS: It is not the purpose -- it is the purpose of that lawsuit to compel TVA to bring their source into compliance with the Air Pollution Control requirements.

QUESTION: Just like it would be against any utility company.

MR. BEALS: That's correct. Just exactly as it would be against any other utility company.

QUESTION: But certainly Congress contemplated that, didn't it, when it said that the federal installation should be subject to the -- at least to the substantive requirements of the State program?

MR. BEALS: But the Congress didn't contemplate that they would be subject only to the substantive --

QUESTION: But Congress contemplated at least that. That the TVA and Fort Knox would be subject to the substantive requirement of the State program.

MR. BEALS: That's correct, Your Honor. But, as it comes in, then they aren't subject to the means of reaching those ends that every other public utility in the Commonwealth of Kentucky has to go through. They have to come in with a

compliance schedule, which is approvable by the State, which will get them to that point, other than to just say that three years from now we're going to be subject to these things, to these penalties, so we're going to meet the standards. This is a regulatory statute.

We plan -- we plan to get the source into compliance. It's not a question of saying that in three years you're going to have to be responsible to meet these standards, I hope you make it.

That's not what the State does. The State comes in and they plan it. They see to it. They say: Your plant is not adequate.

Then TVA says: We'll do this.

The State then says: Well, okay, that's fine.

QUESTION: So far as you know, is EPA undertaking any parallel monitoring of federal facilities, to see that they come into compliance with the State requirements?

MR. BEALS: In 1975, a month and a half before the attainment dates, the federal EPA was trying to determine the compliance status of federal sources. And to get them to enter consent agreements, if they weren't in compliance, consent agreements which are exactly identical in every respect to what a compliance schedule would have been --

QUESTION: So you say if they had been subjected to the permit program, you would have had those in '72 and not

'75?

MR. BEALS: That is correct.

The fact that the attainment dates -- and in addition to that the federal Administrator is talking about bringing these sources into compliance as expeditiously as practicable.

We were talking about bringing them in in three years. We were talking about trying to arrange it so that they would be in compliance at the end of a three-year period.

EPA apparently is still not talking about that.

I would like to reserve what time I have remaining for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Friedman.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I would like at the outset to advert to the question that Mr. Justice Rehnquist just put to my opponent: what, if anything, the Environmental Protection Agency is doing to insure compliance by federal facilities with State pollution standards?

It's doing a great deal. It has its own office, called the Office of Federal Activities, whose sole function is to insure that federal facilities do come into compliance.

The record contains numerous items of evidence showing that the various federal facilities in the Commonwealth of Kentucky have supplied a great deal of information, a great deal of data, have worked closely with the State authorities to insure that, as quickly as possible, the federal facilities do come into compliance with the State emission standards.

That's what we're talking about, the substantive standards that the State has imposed in implementing the federal plan --

QUESTION: Can it be candidly said, Mr. Friedman, that the EPA is treating the federal facilities just as the Kentucky agency would be treating private facilities?

MR. FRIEDMAN: I think it can. We endeavor to do that, and, indeed, there's a document in the record, a direction from the Regional Administrator which instructs all the federal facilities to work closely, to cooperate with the State authorities, and to submit to them their own plans, their own schedules.

There's a great deal of informal discussion and communication. I mean, the compliance standard for a major installation is not a simple thing, it's very complicated. There are all sorts of standards. There are problems about the technology available. It's not something, unfortunately, that can be done very quickly. It does take time.

But the federal facilities are moving as rapidly as

possible to try to accomplish this. And this is, we think, precisely what Congress intended in Section 118 of the Act, when it said that the federal facilities are to comply with State and local requirements with respect to the emission of pollutants.

The question in the case, basically, is whether, when Congress used that word "requirements" in there, it intended -- it intended also to subject the federal instrumentalities to the various procedures that the State might work out in order to accomplish compliance within the State with these various requirements.

QUESTION: I suppose it's possible that each of the States has its own -- it's likely that they each have their own schedules and own notions about how the compliance can be accomplished, so that there would be no uniformity applicable to all federal installations. Is that likely?

MR. FRIEDMAN: That is correct, Mr. Chief Justice, because not all States have permits -- some call them permits, some call them registration; there's a wide variety in the plans.

But I think it's essential, and I think this has been brought out in the colloquy with my opponent, as to what we're really talking about here. What the State is saying is, it wants the authority to control the way in which the federal instrumentalities are operating within the Commonwealth of

Kentucky.

What the federal -- what the State permit regulation provides is that you must have a permit in order to construct, use, operate, or maintain an air contaminant facility. And I think it was brought out very clearly that if the State believes that Fort Knox is not complying with its standards, it can shut down Fort Knox.

And I think this whole concept -- this whole concept that the State somehow has a veto power over the operation of federal facilities runs and flies in the face of the jurisprudence of this Court for more than 150 years, that ordinarily, unless there's a clear indication that Congress intended it to do so, that the federal facilities are not subject to control by the States, and that the States cannot require federal facilities to obtain a permit --

QUESTION: Well, everybody agrees with that statement. I think we don't need to go into that, Mr. Friedman.

The question in this case is the meaning of Section 118.

MR. FRIEDMAN: And whether in 118 Congress has --

QUESTION: Precisely.

MR. FRIEDMAN: -- precisely and clearly --

QUESTION: That's the issue; that's the only issue.

MR. FRIEDMAN: -- indicated that the federal facilities are -- but I think in determining -- I think, Mr.

Justice, in determining whether 118 has that effect, it's important to keep in mind this broad background --

QUESTION: But if it doesn't have that effect, then you win. That's all.

MR. FRIEDMAN: That's correct.

QUESTION: And if it does, you lose.

MR. FRIEDMAN: That is the thing.

But our submission is -- our submission is that before one can conclude that Congress intended to subject the federal facilities to this kind of State control, there has to be some clear indication that Congress did so.

And our submission is that there's nothing in this statute that indicates that Congress intended to subject the federal facilities to State permit requirements.

My opponent has conceded there's nothing explicit. And when one looks at the legislative history --

QUESTION: Well, what you -- he concedes what, Mr. Friedman?

MR. FRIEDMAN: I thought -- I thought, as I understood him to say --

QUESTION: He says the plain meaning of the language is very explicit, as I understood him.

That's quite a lot for him to claim. I mean, that's -- he says this statute on the States covers it.

MR. FRIEDMAN: Well, but he's conceded -- he has

conceded, Mr. Justice, --

QUESTION: But he conceded nothing else, maybe. In this case.

MR. FRIEDMAN: No, he's conceded there's nothing in the statute that explicitly refers to permits.

QUESTION: Well, there's nothing in the statute that refers to substantive requirements, either.

MR. FRIEDMAN: It does use the word "requirements".

QUESTION: Well, it doesn't say "substantive" in the provision.

MR. FRIEDMAN: It doesn't say "substantive", but --

QUESTION: And it doesn't say "procedural".

MR. FRIEDMAN: It doesn't, but --

QUESTION: So which one would you like to leave out?

MR. FRIEDMAN: Well, it's not a -- with all due respect, Mr. Justice, it's not a question of leaving it out.

QUESTION: Well, which one would you think ought to be included?

MR. FRIEDMAN: Only "substantive"; we think it means only substantive. And we think that is the --

QUESTION: Well, why? Why?

MR. FRIEDMAN: Because that is precisely, we think, what the legislative history of this statute shows, that what Congress was intending to do in this statute, and --

QUESTION: But it leaves only substantive require-

ments, then, isn't EPA under a duty to enforce just as rigorously against the federal facilities the State's substantive requirements, so that Fort Knox will be shut down if it doesn't comply? The only question is whether it will be shut down by the Kentucky Commission or by the EPA.

MR. FRIEDMAN: Well, I don't think that the shutting down -- I agree that the federal Administration is required to enforce the standards just as rigorously as the States do, and that's precisely what we do.

But the question of shutting down Fort Knox, it seems to me, is not a substantive standard, and I would think that that is a matter for the federal authorities to decide if they think it is necessary to shut down Fort Knox because it's not complying with the pollution requirements.

QUESTION: Well, then you're talking about a good deal more than just a permit requirement, you're talking about the remedies that may be imposed for failure to comply with the substantive standard.

MR. FRIEDMAN: But the remedies, Mr. Justice, the remedies are themselves tied into the permit requirement, because if you have a State permit requirement, then you cannot operate unless you have obtained the permit.

Now, it seems to me that's a very different kind of thing than the situation where there is an obligation on the federal facilities to comply with the State's substantive

standards. But if -- if there is non-compliance, there's two remedies available: either the State can sue, as the State of Alabama is suing TVA; or, alternatively, the federal authorities can take whatever steps are necessary to bring the State -- the federal facilities in the State into compliance.

But that's --

QUESTION: But you say that even though the State Commission dealing with, say, the Kentucky Power Company, if it were doing the same thing, could order the facilities shut down if it hadn't complied in ninety days.

But EPA, given precisely the same situation with respect to the power plant at Fort Knox, can say: Try to come around, as a matter of comity, in five years.

MR. FRIEDMAN: Well, it's not -- it doesn't say, Mr. Justice, with all due respect, to try to come around within five years; they tell them that they have to comply and they're taking every step possible to comply as rapidly as possible.

QUESTION: Is there any remedy issue before us now? Or is only the application question before us?

MR. FRIEDMAN: Well, the only question, really, is whether the State can require the federal facility to obtain a permit.

QUESTION: So it will be another case and another day when we'd have to deal with the question of whether they could close Fort Knox?

MR. FRIEDMAN: Yes, and I would hope we would never come to that; but the State apparently claims the power. That's the thing. Under the argument that it can apply its permits to the federal facilities, the State would claim the power.

QUESTION: Well, of course, the President of the United States has the -- you have that escape clause.

MR. FRIEDMAN: There is an escape clause, but it's -- and it's been interpreted rather narrowly, because it says "in the paramount interest of the United States".

QUESTION: I would suppose the President could interpret it -- he can make a finding that it's in the paramount interest of the United States to keep Fort Knox open.

MR. FRIEDMAN: Yes. But it's not just that, it's a lot of other things in connection with the -- the way in which a federal facility operates.

For example, one of the facilities involved in this case is the AEC's gaseous diffusion plant, which is uranium. Now, I suspect there's probably a fair amount of pollution involved in that, and steps are being taken. But the notion that the State, the Commonwealth of Kentucky can in effect say to the Atomic Energy Commission: Unless you don't operate this plant the way we want you to, you will get a permit and threaten them with closing down.

It seems to me that before one could find that Congress intended to give the States that kind of power, there

would have to be some very clear indication of it.

QUESTION: Mr. Friedman, can I be sure I understand your position? Assume the State -- assume a facility does not comply with the substantive requirements, forgetting the procedure and the permits for the moment --

MR. FRIEDMAN: Yes.

QUESTION: -- and assume the President has not made an exception; would you not agree that the State could then close the facility down?

MR. FRIEDMAN: I wouldn't think it could close it down, Mr. Justice. It could bring a lawsuit, under Section 304 --

QUESTION: And wouldn't the lawsuit have merit?

MR. FRIEDMAN: I would think so. And I -- of course --

QUESTION: But the court would have to decide.

MR. FRIEDMAN: -- the court would have to decide.

QUESTION: What would the defense be to such a suit?

MR. FRIEDMAN: I don't know --

QUESTION: If you assume a violation of the substantive requirement.

MR. FRIEDMAN: If one assumes it, I would think the court would order them to comply.

And if they fail to comply, the court has whatever sanctions are available to compel compliance.

I would assume that once a court told a federal facility that it was not in compliance and ordered it to comply, it would comply. One must assume that, I think.

We don't have any question that we have to comply with the standards.

Now, what does the legislative history show about what Congress intended in Section 118?

The original bill that was passed by the House directed that federal facilities were to comply with local emissions standards, and the House Committee Report on the bill said the same thing, that it would direct the federal facilities to comply with local emissions standards.

Now, if that's all you had, there couldn't be much question, we think, that compliance with local emissions standards means that, and does not mean complying with permit standards.

The Senate Bill used different language. It said it should comply with the requirements in this Act in the same manner as any other person should comply; but the significant thing to us is that the Senate Committee, in reporting this bill, saw no difference apparently between the word "requirements" in this bill and "emissions standards" in the House bill, because it said that the purpose of this section, using the word "requirements" was to require federal facilities to meet the emissions standards necessary to achieve ambient air

quality standards, as well as those established in other sections of Title I.

Now, when the Conference Committee came along and adopted the language now in the bill, "to comply with the requirements to the same extent as every other person", what it said is that the language it was using required that the government comply with requirements respecting control of air pollution -- it said the House Bill and the Senate Amendment declared that federal departments and agencies should comply with applicable standards of air quality and emissions.

"Standards" -- standards of air quality and emissions.

Now, if the Conference Committee believed that in using the word of the Senate Bill, "requirements", rather than using the word "emissions standards" of the House Bill, that it was somehow changing the standard, it seems to us more extraordinary that it didn't indicate that.

To the contrary, what it indicated is that it viewed the same two -- the two phrases as meaning the same thing.

And this is, I think, particularly brought out by the fact that the very next sentence in the Conference Report points that in one respect it was changing the bills. What it said was: The Conference substitute modifies the House provision to require that the President, rather than the Administrator of EPA, be responsible for assuring compliance by federal agencies.

Now, it pointed out the change it was making, in saying that it was to be the President rather than the Administrator of EPA who was responsible for insuring federal -- compliance by federal agencies; but yet it treated the words "emissions standards" and "requirements" in the two versions of the legislation as meaning the same thing, and the same thing it said it meant was standards of air quality and emission.

Moreover, it seems to us, it would be most extraordinary, we think, that after the Conference Committee said that it was giving the President responsibility for insuring compliance with the standards of air quality emissions, that it then would have turned around and expected that the President would have to comply with the State permit provisions.

Now, we have set out at length in our brief a number of respects in which we think the word "requirements" in the statute reflects a congressional intention to cover only the substantive standards and not the procedural ones.

Many of them are rather detailed and technical, and not particularly appropriate for oral presentation.

But let me just refer to one particular provision, which I think dramatizes it very clearly.

That's in Section 110(e)(1)(A), and it provides that after the State has approved a plan for compliance, if a particular emission source is unable to achieve compliance with the deadlines because of technological problems, that

period for compliance may be extended.

Now, there the requirements with which they can -- for which they can extend the time for compliance because of technological problems, obviously refers to the substantive standard, the problems that because of the lack of technology they are not able to control particular emissions. It can't refer, in any meaningful sense of the term, to any technological problems with respect to seeking a permit.

And if what Congress was attempting to do in that provision was to reach the permit thing, it seems to me it would have put it in those terms.

Now, we have a final point, which this Court relied on in its Train opinion last year, which is that the Administrator of the Environmental Protection Agency, who is the person charged with enforcing this statute, has interpreted it as not applying to federal facilities. He did it in a 1972 ruling, and a 1973 ruling.

I should mention that the 1972 ruling, which is embodied in a letter from the Regional Administrator of EPA in the region involved here, at page 57 of the Appendix, points out the importance of the federal instrumentalities submitting their compliance schedules.

It's not just the substantive standards. The federal instrumentalities are to meet the State compliance standards.

One final point. There's been a --

QUESTION: The Administrator is a party to this litigation, is he not?

MR. FRIEDMAN: He is.

He is a party, but he was also a party in the Train case, Mr. Justice, in which this Court placed considerable reliance on his interpretation. And indeed, in most litigation in which this Court has applied the principle of giving weight to the administrative determination --

QUESTION: By rights, it does --

MR. FRIEDMAN: It's usually a suit to challenge --

QUESTION: It's an advantage that the ordinary party doesn't have.

MR. FRIEDMAN: That's -- well, and the ordinary party, however, doesn't have the expertise of the Administrator.

There's been a great deal of discussion here by the Commonwealth as to the importance and the desirability of requiring the federal instrumentalities to obtain permits, that this is the most effective way in which one can assure compliance.

That, it seems to us, is a matter for the Congress to consider, because we think that the statute, as it's written, its language, its structure, its legislative history, rather clearly indicates that Congress did not intend to subject the federal facilities to State permit requirements.

QUESTION: Mr. Friedman, --

MR. FRIEDMAN: If that is to be changed, we think it is for Congress to change it. And, rather significantly, there is now pending before the Congress a rather lengthy bill which would revise the Clean Air Act in many, many particulars. And one provision of that bill would provide that from now on, if this bill is passed, federal facilities would be required to obtain permits from States if the States so require.

That, we think, is the way in which, if federal facilities are to obtain permits, the Congress should make its intention clear and explicit.

QUESTION: Mr. Friedman, before you sit down, would you say it's a fair summary of the legislative history to say that it does not indicate that anybody actually thought of the precise problem that this case raises?

MR. FRIEDMAN: I think that is a fair -- that is a fair summary of it. And our answer is that in this kind of a situation, unless Congress clearly intended to permit this kind of State authority, it should not be implied. It's the kind of authority, we think, that has to be provided explicitly.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:04 o'clock, a.m., the case in the above-entitled matter was submitted.]