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Environmental Health Department

September 26, 1980

TO: All Official Members - LIA
LIA Environmental Health Committee

FROM: Jerome F. Cole

On September 25, 1980, the industry petitioners submitted a joint petition for rehearing and suggestion for rehearing en banc to the U.S. Court of Appeals for the District of Columbia Circuit on that Court's decision upholding the OSHA standard for lead.

The enclosed petition was prepared by LIA counsel, Debevoise, Plimpton, Lyons and Gates, who serve as the liaison counsel for the industry petitioners.

The petition outlines the reasons why the industry feels that the decision should be reviewed and it is suggested that the entire nine-judge Court participate in this review. At this time, it is not known when the Court will take action on this petition.

Sincerely,

Jerome F. Cole
iko

Jerome F. Cole
Director, Environmental Health

Enclosure

iko

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O.K.'d for ______________ distribution

by ______________ on ______________

9/25/80

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket Number 79-1048 with other consolidated actions

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

RAY MARSHALL, Secretary of Labor, *et al.*,
Respondents.

On Petition for Review of an Order of the Occupational Safety and Health Administration Establishing a New Regulation With Respect to Occupational Lead Exposure

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JOINT PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Counsel for Industry Petitioners and Intervenors (Addresses on pages 26-27)

September 25, 1980

Table of Contents

Table of Authorities

Cases | Page

LIAC3307

CONCISE STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

A. The Background of the Important Issues

This case involves petitions for review of the regulation for occupational exposure to inorganic lead (the "Standard") issued by the Occupational Safety and Health Administration ("OSHA") pursuant to the Occupational Safety and Health Act (the "Act") on November 13, 1978. 43 Fed. Reg. 53007-14 (Nov. 14, 1978). The Standard was scheduled to become effective on February 1, 1979, but was administratively stayed by OSHA on January 25, 1979, and then was partially stayed by this Court on March 1, 1979 pending judicial review.

The industry petitioners challenged the Standard on the grounds, inter alia, that the Standard was issued without adequate rulemaking notice and on the basis of ex parte evidence; was technologically and economically infeasible (OSHA admitted that it had not analyzed or estimated the cost of the final Standard, had not meaningfully estimated health benefits, and had virtually no evidence concerning the technological feasibility of the air-lead exposure limit); and contained requirements--particularly full job and wage protection for workers removed from exposure--that OSHA has no authority to promulgate.

A panel of this Court affirmed the Standard by a split decision on August 15, 1980, as to major sectors of the lead industry, and remanded to OSHA for further consideration with respect to certain other industries, but ordered these industries to comply with most aspects of the standard during the remand.[1] Industry petitioners and intervenors here seek rehearing of so much of the Court's decision as does not fall within the boundaries of the remand.

B. This Case Presents Issues <u>Of Exceptional Importance</u>

<u>First</u>, as pointed out by the dissenting opinion (Diss. Op. at 1-11), this case presents novel procedural, statutory and constitutional questions that even the majority acknowledged were "very close" (Maj. Op. at 7 n.6) concerning (a) the extent to which OSHA can issue a health standard materially different from the proposal that was the subject of the agency's rulemaking notice and hearings when the record could and would have been different if a proper

1. The majority decision was written by Chief Judge Wright, with Judge Robinson concurring. Judge MacKinnon dissented. Pages in the panel's decisions are cited as "Maj. Op. at " or "Diss. Op. at ". Pages in OSHA's preamble explanation and appendices to the Standard (which appear in Volume 43 of the Federal Register (Nov. 14 and Nov. 21, 1978)) are cited by page and column (<u>e.g.</u>, 52981/3).

notice had been issued, and (b) the propriety of obtaining and using secret, post-hearing reports and expert opinion evidence, on crucial issues, from outside consultants who had previously testified.[2]

<u>Second</u>, this case presents for the first time the issue whether OSHA meets its statutory obligation of demonstrating the technological feasibility of a new regulation by substantial evidence when (a) it neither conducts nor refers to a single study concerning the technological feasibility of the standard actually adopted, (b) the standard would force major industry sectors to rebuild all of their plants, from the ground up, in order to incorporate novel and "speculative" technologies, and (c) OSHA relies solely on a "presumption" that the standard <u>may</u> be technologically feasible at some undefined point five to ten years in the future.

<u>Third</u>, this case also presents for the first time the issue whether OSHA satisfies its obligation to demonstrate that compliance with its regulations is economically "feasible" and "reasonably necessary" when the agency, by its own admissions, has not undertaken an analysis of cost

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2. OSHA's <u>proposed</u> rule would have reduced the existing permissible air-lead exposure limit ("PEL") from 200 to 100 micrograms per cubic meter of air (100 ug/m^3); the final Standard reduces the PEL to 50 ug/m^3.

of compliance, has not prepared cost estimates for the standard, is unable to estimate "meaningfully" the health benefits from the new standard, and has not conducted a cost-benefit analysis of the standard to ensure that costs bear a reasonable relation to the benefits the standard is expected to yield.

Fourth, this case raises for the first time in any circuit the issue whether OSHA has statutory authority to impose a medical removal protection ("MRP")[3] which, as a "practical" matter, supersedes all applicable workmen's compensation programs and which requires that a worker who has been removed from a lead-exposed job must retain his full

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3. The issues raised by the MRP provision in the new lead Standard are, as recognized in both the majority and dissenting opinions (Maj. Op. at 66 n.63, Diss. Op. at 14 n.5), totally different from those arising out of the limited earnings protection provisions contained in the asbestos and cotton dust standards which this Court has considered. See Industrial Union Department v. Hodgson, 162 U.S. App. D.C. 331, 499 F.2d 467 (1974), and AFL-CIO v. Marshall, 617 F.2d 636 (D.C. Cir. 1979). Both of those provisions were limited to employees who were unable to wear respirators and for whom "a different position is available" which they are "able to perform". See, e.g., 29 C.F.R. § 1910.1001(d)(2)(iv)(c). As OSHA admits (54441/2), the new requirement is a completely innovative proposal, applicable even when the worker's health is not endangered, even when the perceived hazard to the worker results from off-the-job activities, and even when the employer has no position available to which the removed worker can be transferred. The majority was quite correct, therefore, in stating that the provision is "relatively without precedent." See Maj. Op. at 12, 22 n.15, and 66 n.63.

earnings and seniority, as if he had continued to work, regardless of whether (i) his health is endangered, (ii) the reason for his removal is the employer's fault, or (iii) there is a position available to which he can be transferred.

JOINT PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

For the reasons set forth below, and pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rule 14 of this Court's General Rules, the undersigned industry petitioners and intervenors jointly petition this Court for rehearing of the decision issued in this case on August 15, 1980. Further, they respectfully suggest that a rehearing _en banc_ should be held because the majority decision raises issues of exceptional importance, departs from precedents established by other decisions of this Court, and conflicts with decisions of the Supreme Court and other Courts of Appeals.

Erroneously reading _Vermont Yankee Nuclear Power Corp. v. NRDC, Inc._, 435 U.S. 519 (1978), to shelter the agency from meaningful judicial scrutiny, the majority effectively ignored the Supreme Court's June 2, 1980 decision in _Industrial Union Department v. American Petroleum Institute_, 100 S.Ct. 2844 (1980), and permitted OSHA to engage in rulemaking based on flagrant, inexcusable speculation--speculation that was inevitable because of OSHA's inadequate notice of rulemaking and the resulting absence of any record evidence concerning the air-lead exposure level ultimately adopted. The rulings by the majority are inconsistent with the Supreme Court's decisions in the American Petroleum Institute case and Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980), with decisions by this Court, and with decisions by the Courts of Appeals for the Third, Fifth, Sixth and Seventh Circuits.[4]

Although the majority purported to take a "hard look" at what the agency had done, its examination of each issue was blurred by a failure to focus on the relationship among the issues. The majority apparently did not appreciate the fact that each issue arose from, or was made more pressing by, OSHA's indefensible leap from the proposed exposure limit of 100 ug/m3 (which had been the subject of the hearings) to the final Standard of 50 ug/m3 (which had not). As a result of the agency's post-hearing decision to adopt an exposure limit of 50 ug/m3,

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4. Although upholding the Standard as to the major lead industries, even the majority was sharply critical of OSHA's actions. See, e.g., Maj. Op. at 15 (OSHA was "careless or inefficient in its procedures throughout this rulemaking"); id. at 50 ("the compliance rules in the final standard appear ill-drafted and ill-explained, especially in light of their departure from . . . the proposed lead rules"); id. at 59 (the agency's explanation "is a tour de force of obfuscation"). Notwithstanding these and numerous other criticisms, the majority proceeded to exonerate OSHA on point after point, disregarding the cumulative effect of OSHA's failures and completely white-washing the agency's improper actions. Compare National Lime Ass'n v. EPA, 14 Environ. Rep. (BNA) 1509, 1517-18 (D.C. Cir. May 19, 1980).

-- OSHA deprived the parties of the opportunity to present evidence on critical questions of fact;

-- OSHA found itself forced to rely upon secret *ex parte* reports and opinion evidence from outside experts who had previously testified at the hearings;

-- OSHA did not perform a cost analysis of the final Standard (54496/3) and did not have sufficient data available to derive a "meaningful quantification of cost" (52981/3);

-- OSHA was compelled to make "highly speculative projections about future technology" (Maj. Op. at 145) based upon a hearing record that admittedly contained virtually no evidence concerning the technological feasibility of the 50 ug/m^3 air-lead exposure level (OSHA Stay Br. at 6; 52977/3);

-- OSHA was unable to estimate meaningfully the health benefits, if any, which could reasonably be expected to flow from the reduced exposure level (54427/1);[5]

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5. Unlike most of the other substances that have been the subjects of OSHA's health regulations, lead is not a carcinogen. Indeed, as OSHA itself acknowledged (52964/1), the new Standard was designed not to protect workers from actual disease or illness but from biological "effects" which occur *in the* "*absence of illness*". *See* Maj. Op. at 115-16 ("here . . . OSHA is acting to prevent, not overt early symptoms of a disease, but subclinical effects"); *id.* at 128 ("OSHA's case for a blood-lead level goal of 40 ug/100g ultimately rests on its theory of subclinical effects").

-- OSHA felt forced to adopt, for the first time, a full job security and earnings protection requirement to safeguard against the possibility that the final Standard would not be workable.

To condone OSHA's arrogant disregard of its statutory responsibilities would convert a statute that requires agency action to be "feasible", "reasonably necessary" and supported by "substantial evidence" into one that gives OSHA unfettered and unreviewable discretion.[6] Such an unconstitutional delegation of legislative authority was not intended by Congress and should not be upheld by this Court. Cf. National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974).

1. The majority distorted the nature of the rulemaking notice OSHA is required to give and improperly permitted OSHA to use secret, ex parte reports by outside experts.

(a) Notice of Rulemaking. On October 3, 1975 OSHA published a notice of rulemaking proposing that the permissible air-lead limit be reduced from 200 ug/m^3 to

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6. See Address by Eula Bingham, Assistant Secretary of Labor for OSHA, to ABA Institute on Law, Science and Technology in Health Risk Regulation (April 20, 1979), reported at 1979 BNA OSHA Rptr. 1690 (April 26, 1979) (OSHA is not "prohibited from doing just about anything we want to do"); see also Maj. Op. at 18 (the agency director "served her agency poorly by making statements so susceptible to an inference of bias").

LIAC3316

100 ug/m^3. Three years later, after 39 days of hearings, hundreds of written comments and extensive post-hearing analysis (all of which related to the proposed PEL of 100 ug/m^3), OSHA promulgated a final Standard of 50 ug/m^3.

As the dissent notes, this Court, sitting en banc, has said that a proposed rule, to satisfy an agency's obligation to provide adequate notice, "should be sufficiently descriptive of the 'subjects and issues involved' so that interested parties may offer informed criticism and comments." Ethyl Corp. v. EPA, 176 U.S. App. D.C. 373, 541 F.2d 1, 48, cert. denied, 426 U.S. 941 (1976). Thus, this Court in Weyerhaeuser Co. v. Costle, 191 U.S. App. D.C. 309, 590 F.2d 1011, 1031 (1978), remanded a regulation to the agency for new notice and comment because its "final conclusions [were] far from the 'logical outgrowth' of the preceding notice and comment process."

The panel majority here admits that the difference between the proposed and final standards is "obviously substantial" and "greatly increases" both the number of employees "affected" as well as the "standard's economic and technological demands on industry." Maj. Op. at 46-47. Nevertheless, the majority concludes that the OSHA notice "adequately" informed interested persons of the substance of the final rule, and that such rule was a "logical outgrowth" of the rulemaking proceeding. To support this conclusion

LIAC3317

the majority opinion cites various statements in the notice that "portended" the course OSHA eventually steered. _Id._ at 47. These "portents", as the record indicates, were wholly inadequate.[7] An administrative agency cannot shirk its obligation to give adequate rulemaking notice merely by including in its notices boilerplate language that states that rulemaking proceedings might necessitate a different standard from the one proposed. Maj. Op. at 48. That, however, is precisely what OSHA has done.

The record itself refutes the contention that the final Standard was a "logical outgrowth" of the rulemaking proceedings. OSHA admits that the record is virtually devoid of evidence on the technological feasibility or health benefits of a level of 50 ug/m^3 and contains nothing at all on the economic feasibility of such a level. As the dissent cogently argues,

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7. These portents included OSHA's inquiry whether an exposure level of 100 ug/m^3 "incorporates an appropriate margin of safety" and OSHA's expression of concern about the significance of subclinical effects and the risks to unborn children of female workers. As the dissent correctly observes, OSHA could just as easily argue that these statements justified a standard of 10 ug/m^3 or even complete elimination of lead from the workplace. Diss. Op. at 11. While statements such as the "safety margin" language arguably apprised parties that the final rule might be set at a level of 90 ug/m^3 or 95 ug/m^3, it could hardly be foreseen that "an appropriate margin of safety" would be translated into the material difference between 100 ug/m^3 and 50 ug/m^3.

LIAC3318

"That no such evidence was offered by anyone during the extended hearings, especially considering the intensity of the participants' adversarial positions, constitutes the best support for concluding that the 50 ug/m^3 level was not a 'logical outgrowth' of the Notice of the Rulemaking proposal of a '100 ug/m^3 . . . level.'" Diss. Op. at 10.

Adequate notice obviously would have generated a dramatically different record, both on the technological and economic feasibility of the Standard and on the other issues addressed by industry petitioners.[8] The majority has effec-

8. The majority virtually recognizes as much when it acknowledges the good faith claim of certain industry petitioners that they offered no evidence of infeasibility because the inadequate notice led them to believe that the new Standard would pose no feasibility problem for their member industries. Maj. Op. at 55 n.49. Others, for the same reason, failed to provide evidence concerning other issues, including the infeasibility of particular operations. When the majority then suggests that the absence of record evidence for these industries and operations is a result of a "strategically faulty response" to OSHA's "obviously substantial[ly]" different proposed standard, it encourages agencies to provide as little information as possible on their proposed actions, thereby shifting to the regulated industries the burden of negating the feasibility, not only of the agency's stated intentions, but also of all materially different proposals the agency may decide to adopt. Equally without merit is the majority's suggestion that, since the industry petitioners claimed that 100 ug/m^3 was infeasible, they would make the same arguments--without offering additional evidence--concerning 50 ug/m^3. Maj. Op. at 55. Under this logic, OSHA could have adopted an air-lead exposure limit of zero. However the issue is analyzed, one thing is beyond dispute: the affected parties have had no opportunity to present the "countervailing evidence" that this Court has held must be considered in determining whether an agency's decision is supported by "substantial evidence 'on the record considered as a whole'". AFL-CIO v. Marshall, 617 F.2d 636, 649 n.44 (D.C. Cir. 1979).

tively created a system of notice-by-ambush that violates the statute and has denied due process to the various industries in these proceedings.[9]

(b) Ex Parte Evidence. Ignoring the clear mandate of decisions such as Home Box Office, Inc. v. FCC, 185 U.S. App. D.C. 142, 567 F.2d 9, cert. denied, 434 U.S. 829 (1977); United States Lines, Inc. v. FMC, 189 U.S. App. D.C. 361, 584 F.2d 519 (1978); and National Small Shipments Traffic Conference, Inc. v. ICC, 191 U.S. App. D.C. 214, 590 F.2d 345 (1978), the panel majority condoned OSHA's use of secret post-hearing reports (concededly the only evidence considered by OSHA on the feasibility of a PEL of 50 ug/m^3 (Maj. Op. at 45)) by certain consultants who had previously testified as agency experts during the hearings. The majority did so on the grounds that,

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9. The majority relied repeatedly on the Supreme Court's decision in Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978), in justifying the conclusions it reached on both procedural and substantive points. E.g., Maj. Op. at 7, 15, 30, 35-37. The caveats imposed by that decision, however, have nothing to do with the case at bar. The Supreme Court warned in Vermont Yankee that it is "the discretion of the agencies and not that of the courts [which should] be exercised in determining when extra procedural devices should be employed." 435 U.S. at 546. (Emphasis in original.) The questions here are not the employment of "extra" procedural devices but rather the interpretation of the procedural and substantive safeguards that are implicit in and required by the Act and the agency's own regulations.

(a) the industry petitioners failed to show that the reports, which they have never seen and which they were unable to secure under the Freedom of Information Act, contained new data,[10] and

(b) there is "no _functional_ difference" between post-hearing deliberations involving in-house staff and those involving outside consultants, even when those consultants are expert witnesses who had previously taken positions with respect to disputed critical facts concerning the proposed air-lead exposure limit of 100 ug/m^3 and who obviously had a vested professional and economic interest in defending the accuracy of their studies and opinions. Maj. Op. at. 39, 43.

As the dissent explained (Diss. Op. at 4-6), the fallacies inherent in such rationales are obvious.

There can be no question about the prejudicial impact of these _ex parte_ reports. Both admittedly influenced OSHA's decisions. As OSHA acknowledged when opposing LIA's

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10. The mere fact that the consultants were experts meant that their opinions, views and evaluations constituted new evidence, regardless of whether they did or did not rely upon materials outside the record. In any event, as the dissent correctly notes, "the secret reports were _not_ cumulative of the record evidence . . . [and] may have included extra-record evidence." Diss. Op. at 6.

LIAC3321

FOIA request for the documents,

> "[T]he dispositive fact is that the memoranda unquestionably were used by OSHA in its 'on the record' rule-making deliberations." OSHA Reply Br. at 4, Lead Industries Association v. OSHA, 610 F.2d 70 (2d Cir. 1979). (Emphasis added.) See also Maj. Op. at 45 ("the post-hearing contract with . . . [Burton] was OSHA's first attempt to obtain expert advice directly addressing the feasibility of the 50 ug/m^3 standard").

The majority's decision is therefore flatly inconsistent with earlier decisions by the courts of appeals and with the Supreme Court's decision in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), which require that the entire record be available so that the court can perform the searching and careful review called for by the Administrative Procedure Act.

2. The panel majority incorrectly formulated and applied the substantial evidence test to OSHA's determination that the Standard is technologically feasible.

An OSHA standard can be upheld only if "substantial evidence" supports the agency's determination that the standard is technologically "feasible". 29 U.S.C. §§ 655(b)(5), 655(f). See Maj. Op. at 141-42. Here, OSHA admits that "virtually all of . . . [the] evidence" presented at the hearings "went to the feasibility of . . . 100 ug/m^3," not the final PEL of 50 ug/m^3. OSHA Stay Br. at 6; see

Diss. Op. at 2, 9. In an effort to escape the impact of this admission and the dearth of record evidence, the majority adopts an interpretation of the "substantial evidence" test and the word "feasible" that is flatly inconsistent with both the letter and the spirit of the Supreme Court's ruling in Industrial Union Department v. American Petroleum Institute, 100 S.Ct. 2844 (1980), and with prior decisions by this Court and other courts of appeals.

Precisely because an OSHA standard can be upheld only if "substantial evidence" supports the Secretary's determination that the standard is technologically feasible, 29 U.S.C. § 655(f); Maj. Op. at 141-42, a court must conduct a "rigorous . . . review" to ensure that unlimited administrative discretion is not immunized by undue judicial deference. AFL-CIO v. Marshall, 617 F.2d 636, 651 (D.C. Cir. 1979). The panel majority's concept of the substantial evidence test removes this necessary check on agency action; indeed, the decision by the majority would make such a check impossible.

A court, the majority posits, need only "find substantial evidence to justify [the] presumption" that there is a "reasonable possibility" that at some point in the future a "typical firm" will be technologically able to comply with the Standard "in most of its operations". Maj. Op.

LIA03323

at 154, 159. (Emphasis added.) Because of this legally untenable premise, the majority found, not surprisingly, that the substantial evidence test was satisfied by evidence that "give[s] some credence to OSHA's prediction that the PEL might be met." Maj. Op. at 177. (Emphasis added.) Indeed, with respect to the primary and secondary smelting industries generally, the majority upheld the Standard even though OSHA only "managed to cite some record evidence promising technological developments that might meet the PEL in the long range." Id. at 206. (Emphasis added.)[11] See Table I attached hereto (previously submitted to the panel in the consolidated industry briefs and at oral argument), the accuracy of which has never been challenged by OSHA or

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11. The majority attempts to justify this reduction of OSHA's burden to a meaningless formality by noting the availability of temporary variance proceedings and enforcement proceedings in which a company could contend that subsequent events have proved that the Standard is infeasible. Maj. Op. at 161-63. But in the analogous context of a challenge to an EPA air pollution standard, this Court expressly rejected such an argument, holding that "the flexibility appropriate to enforcement will not render 'achievable' a standard which cannot be achieved on a regular basis . . . ." National Lime Ass'n v. EPA, 14 Environ. Rep. (BNA) 1509, 1517 n.46 (D.C. Cir. May 19, 1980). Equally without merit is the majority's conclusion that an OSHA health standard is technologically feasible under the Act merely because it may be feasible "in most . . . operations". Maj. Op. at 159. Such an interpretation of OSHA's rulemaking authority would permit the agency to disregard totally the requirements of the Act with respect to precisely those hard-to-control operations that may create the health hazards which are the subject of the Act.

the union petitioners.

Such an interpretation of the Court's role in reviewing an agency's determination is unjustifiable for at least three reasons. First, it conflicts with prior decisions of this Court and of other circuit courts of appeals interpreting the technological feasibility requirement. These decisions have permitted OSHA or its sister agencies to "force" an industry to upgrade its technology only when it has found, on the basis of substantial evidence, that (a) technology exists (not _might_ exist) that is adaptable to the industry in question, (b) the technological improvements that are required involve changes in existing "processes" or "devices", not the development of entirely new and untested technologies for an entire industry, and (c) rapid past improvement indicates an ability to effect the changes in the very near future, not rebuilding all plants and factories over a five- to ten-year period (_compare_ 52978-79, 52981-82). _See_, _e.g._, _ASG Industries, Inc. v. CPSC_, 193 U.S. App. D.C. 169, 593 F.2d 1323, 1334, _cert. denied_, 444 U.S. 864 (1979); _Society of Plastics Industry, Inc. v. OSHA_, 509 F.2d 1301, 1309-10 (2d Cir.), _cert. denied_, 421 U.S. 992 (1975); _American Iron & Steel Institute v. OSHA_, 577 F.2d 825, 833-34 (3d Cir. 1978), _cert. granted_, 100 S.Ct. 3054, _cert. dismissed_, U.S. (1980); _Mar-_

shall v. West Point Pepperell, Inc., 588 F.2d 979 (5th Cir. 1979).

Second, the interpretation is contrary to the Supreme Court's statement in Industrial Union Department v. American Petroleum Institute, 100 S.Ct. 2844, 2869 (1980), that the agency must meet the burden of producing sufficient evidence to show that "it is at least more likely than not" that the statutory standard was satisfied.[12] The majority's formulation bears no relation to these requirements.

Finally, the majority's interpretation expands OSHA's authority beyond the constraints imposed by Congress in its choice of statutory language, raising the spectre of unreviewable discretion and unconstitutional delegation of

12. Even Mr. Justice Marshall, dissenting in Industrial Union Department v. American Petroleum Institute, 100 S.Ct. at 2895-96, acknowledged that the "substantial evidence" test is "more stringent than the traditional 'arbitrary and capricious' standard," and that even the latter test "contemplates a searching 'inquiry into the facts' in order to determine 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)." See National Lime Ass'n v. EPA, 14 Environ. Rep. (BNA) 1509, 1516, 1535 n.126 (D.C. Cir. May 19, 1980) (the "arbitrary and capricious" standard imposes a "rigorous standard" of judicial review involving a "hard look" at an agency's actions). Mr. Justice Marshall noted that careful performance of this task is especially important under the "more rigorous" substantial evidence test. This should be compared with the panel majority's description of the substantial evidence test as merely imposing "rather generous constraints". Maj. Op. at 145.

LIA03326

legislative authority. See the plurality's opinion in Industrial Union Dept. v. American Petroleum Institute, supra, 100 S.Ct. at 2866. The Act limits OSHA's power to the realm of technological feasibility; the majority's decision expands that power to the world of speculation where presumption replaces evidentiary fact.

3. OSHA failed to demonstrate that the Standard is economically feasible or reasonably necessary; it also did not conduct the required cost-benefit analysis.

The majority found that OSHA had demonstrated economic feasibility despite the conceded absence of any evidence with respect to the economic feasibility of the 50 ug/m3 air-lead standard actually adopted.[13] Maj. Op. at 169-70; Diss. Op. at 9, 25. Citing the Supreme Court's decision in Industrial Union Department v. American Petroleum Institute, he majority tiptoed around the evidentiary gap in OSHA's case by reading the "best available evidence" rule in Section 6(b)(5) of the Act, 29 U.S.C. § 655(b)(5), to refer solely to the evidence, if any, that happens to be "available" in the record, whatever that evidence might be.

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13. OSHA, for example, concedes that it did "not undertake a formal analysis of cost of compliance" (54496/3), did not prepare "cost estimates" for the standard (OSHA Br. at 222), and did not have sufficient data to derive a "meaningful quantification of cost" (52981/3).

See, *e.g.*, Maj. Op. at 147-48, 170 n.133. But none of the opinions in *American Petroleum Institute* remotely suggests that the "best available evidence" rule permits OSHA to relieve itself of its burden to establish feasibility by gathering evidence on one proposed standard and then promulgating another standard for which it finds, not surprisingly, that the record contains no available evidence. *See*, *e.g.*, Mr. Justice Powell's concurrence at 100 S.Ct. 2876 ("the statutory preference for the 'best available evidence' . . . implies that OSHA must use the best known techniques for . . . accurate estimation . . . when such techniques are available").[14]

OSHA made no attempt to present or elicit evidence on the costs of the 50 ug/m^3 final Standard. Nor did it attempt to determine the costs of the MRP earnings protection requirement or the cumulative impact that would result from the new EPA National Ambient Quality Standard for Lead

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14. The panel majority also relied on the "speculative nature of the technology" that the industry must develop to attempt to meet the Standard as an excuse for OSHA's failure to estimate the costs of compliance. Maj. Op. at 170, 179. On this theory, the weaker the proof of technological feasibility, the less demanding is the burden of proof of economic feasibility. Carried to its logical conclusion, the majority's reasoning suggests that if OSHA merely hints that someone someday may invent the technology to meet a proposed standard, the agency can then forego *any* attempt to demonstrate the economic feasibility of a standard.

LIA03328

(upheld by the same panel a few weeks before this case was decided). To hold that the "best available evidence" rule excuses such an abdication of responsibility is, as the dissent states, "patently irresponsible" and "ludicrous". Diss. Op. at 27. Such a holding is in direct conflict with this Court's admonition that a reviewing court must not allow "an agency's claim of ignorance [to] clothe it with unreviewable discretion." AFL-CIO v. Marshall, 617 F.2d 636, 651 (D.C. Cir. 1979).

The majority decision also is in conflict with decisions of the Courts of Appeals for the Fifth, Sixth and Seventh Circuits, that OSHA must "determine whether the benefits expected from a standard bear a reasonable relationship to the costs imposed by the standard." American Petroleum Institute v. OSHA, 581 F.2d 493, 503 (5th Cir. 1978), aff'd on other grounds sub nom. Industrial Union Department v. American Petroleum Institute, 100 S.Ct. 2844 (1980); RMI Co. v. Secretary of Labor, 594 F.2d 566 (6th Cir. 1979); Turner Co. v. Secretary of Labor, 561 F.2d 82 (7th Cir. 1977). Although the Supreme Court in American Petroleum Institute did not reach the issue whether OSHA must conduct a cost-benefit analysis, the plurality's statement that "Congress intended, at a bare minimum, that the Secretary find a significant risk of harm and therefore a probability of significant benefits," 100 S.Ct. at 2865, implies that the agency before promulgating a standard must evaluate not only costs but also health benefits. Diss. Op. at 34.

In this case, OSHA was unable to evaluate the health benefits of the Standard and hence totally failed to establish that the new Standard was "reasonably necessary . . . to remedy a significant risk of material health impairment," as required by the Supreme Court in American Petroleum Institute, supra, 100 S.Ct. at 2863.[15] Not only did the agency fail to generate and analyze data on the cost side of the equation, but it also conceded that,

> ". . . the available data does not allow meaningful quantitative estimation of the degree of prevention

15. The majority candidly admits that for some industries there is little or no record evidence that workers are actually exposed to lead, and acknowledges that exposure in other industries is intermittent. Maj. Op. at 215, 225-26, 227. If the Supreme Court's decision in American Petroleum Institute is to have any meaning, "significant risk" cannot exist when exposure is infrequent, minimal or non-existent. Certainly no finding of "substantial risk" can be made for the many lead industries which were "never even mentioned in the Preamble" (Maj. Op. at 224 n.162) but which are nonetheless subjected to most aspects of the Standard. To permit the Standard to apply to these industries during the remand is inconsistent with Section 6(e) of the Act, 29 U.S.C. § 655(e) (requiring OSHA to explain the reasons for its standards) and with the rule requiring inadequately explained agency action to be "vacated and . . . remanded . . . for further consideration." Camp v. Pitts, 411 U.S. 138 (1973) (Emphasis added.)

LIA03330

> of the different forms of health damage likely to be achieved by lowering worker air exposures and blood lead levels by various amounts for various periods of time." (54427/1)

Translated into plain English, OSHA was saying, "We are unable to estimate the health benefits, if any, that would be achieved by reducing the air-lead exposure limit to the level set in the new Standard." Indeed, even the majority concedes that there is no evidence of "the actual incidence of significant health effects at the old and new PEL's." Maj. Op. at 110.

OSHA's statutory obligation to conduct cost-benefit analyses and to determine that a standard is "reasonably necessary" to remedy, and will remedy, "significant risk[s] of material health impairment" is simply a recognition that capital resources are finite and that, to be used most effectively, finite resources must be allocated in a rational way. See RMI Co. v. Secretary of Labor, supra, 594 F.2d at 573 ("there must be a reasonable assurance that there will be an appreciable and corresponding improvement in working conditions"). That obligation is inherent in OSHA's basic charter to protect workers' health, since every dollar wasted on infeasible engineering controls is a dollar that is unavailable to accomplish actual benefits through more efficient alternatives. See American Petroleum Institute, supra, 100 S.Ct. at 2878 & n.7 (Powell, J., concurring). The necessity for these analyses becomes all the more acute when, as here, OSHA would force the major lead industries to rebuild all their plants to accommodate new, speculative technologies (e.g., 52978-79. 52981-82, 54480, 52979/3)--technologies which might well fail and which, even if successful, would still require heavy reliance upon respirators to protect workers' health. Such analyses are also particularly necessary here in view of the fact that OSHA's new Standard is designed to protect workers not from cancer or even less serious disease or illness but from biological "effects" which occur in the "absence of illness" (52964/1). See Maj. Op. at 115-16, 128.

4. The majority ignored the language and legislative history of the Act, and misinterpreted the Supreme Court's ruling in Whirlpool, in concluding that OSHA has authority to require employers to provide full earnings protection and job security to all workers in the lead industries.

OSHA is not vested with statutory authority to adopt the medical removal/earnings protection program required by the new lead regulation. As the dissent persuasively explains (Diss. Op. at 13-20), th majority's reasoning on this issue flies in the face of the clear statutory language, the legislative history of the Act, and the

LIA03332

Supreme Court's recent interpretation of such language and history in Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).

(a) General Authority under the Act. OSHA's authority under the Act to adopt regulations to deal with "working conditions" and provide safe or healthful "places of employment" does not give OSHA authority to regulate any aspect of employment that OSHA happens to believe may have an incidental impact on worker health or safety. There is a fundamental difference between ordering an employer to provide biological monitoring and medical surveillance programs for his employees, on the one hand, and requiring that he make payments designed (as OSHA concedes (54467/3)) to induce recalcitrant employees to participate in those programs, on the other. Such payments--somewhat akin to bribing children to be good--are hardly the kind of costs contemplated by Congress when it imposed on employers the "costs . . . in meeting the standards of health and safety to be established" under the Act.

(b) The Legislative History of the Act. Nothing in the legislative history of the Act supports a congressional intention to grant OSHA the power to require these payments, and, indeed, all the legislative history is to the contrary. Only one year before Congress enacted the Act, it adopted the Federal Coal Mine Health and Safety Act of 1969, which explicitly required job removal with earnings protection for miners with pneumoconiosis. 30 U.S.C. § 843(b)(2)-(3). Congress not only failed to include a similar provision in the 1970 Act, but in fact explicitly rejected such a provision--the "Daniels amendment"--in one of the bills considered at the time of its adoption.

The Daniels amendment would have required employers to pay their workers their regular salary when the workers reasonably absented themselves from a workplace that _HEW had determined_ contained improperly high levels of toxic substances. _See_ Diss. Op. at 16 n.6. This controversial "strike with pay" provision was withdrawn, not, as the majority suggests, because it left to each individual employee the determination of whether his work site was health-threatening (HEW, not the empl ;e, made that decision), but _because it compelled employers to pay employees full earnings for no work_. This crucial feature was emphasized by the Supreme Court in _Whirlpool Corp. v. Marshall_, 445 U.S. 1,   & n.29 (1980) ("Congress' concern necessarily was with the provision's compensation requirement"). The Court there distinguished another regulation on the grounds that it imposed no such pay obligation on the employer when his employee reasonably chose to absent himself from the job. The majority's attempt (Maj. Op. at 73 n.69) to read the decision as premised on anything other than the absence of a provision giving employees the right to their usual compensation is incorrect.

The majority presumably did not know that even the Secretary of Labor, in his brief filed with the Supreme Court in Whirlpool in December 1979 (after the briefs in the lead case had been filed with this Court), conceded that Congress' opposition to the Daniels amendment "was premised solely on the fact that employees would be paid while not working--a novel proposition in federal labor legislation"; the Secretary of Labor explained that the regulation considered in Whirlpool was not inconsistent with congressional opposition to the Daniels amendment because the regulation at issue in Whirlpool "does not require an employer to pay an employee who does not work" (p. 19). Thus, the Supreme Court reached its decision after the Secretary of Labor had unequivocally told the Court that Congress did not want to enact a statute that adopted "the novel proposition in federal legislation" that "an employee was to be paid while not working." The MRP provision in the lead Standard constitutes just such a "novel proposition".

As recently as July 1980 the Secretary of Labor emphasized (at page 9 of his brief opposing the petition for certiorari in the cotton dust case) that the congressional concern about the "regulation discussed in Whirlpool centered on avoiding endless disputes over compensating employees for _not_ working." The Secretary then went on to assert that,

> "The provision at issue h e [in the cotton dust case] stands in sharp contrast [to the Whirlpool regulation]. Rather than enabling an employee to refuse to do any work and still be paid, the [cotton dust] medical-transfer and income-protection _provision only requires a transfer to do other work, and then only if such a position is available_." (Emphasis added.)

Yet the MRP provision in the lead Standard, as distinguished from the MRP provision in the cotton dust regulation, _does_ require paying an employee for not working; it is not limited to "transfer[s] to do other work . . . if such a position is available." Also, there is no doubt that the requirement in the lead Standard will generate endless disputes about compensating employees for not working, since under the lead Standard (a) an employee can initiate procedures for his own removal by the company physician (_see_, _e.g._, 54462/2-3 concerning MRP for workers "desiring to parent a child in the near future"), and (b) if an employee is not satisfied by the decision of the company's physician, he can go to his own physician and then insist, all at the company's expense, that a third physician be retained to resolve the controversy (_see_ 52997-98).

(c) The Language of the Act. Congress stated in the Act itself that "nothing" in the Act "shall be construed to supersede or in any manner affect any workmen's compensation law . . . ." 29 U.S.C. § 653(b)(4) (1976). As even the majority concedes (Maj. Op. at 79), the MRP earnings protection requirement as a "practical" matter affects and supersedes workers' compensation programs for workers who are ill and who, but for MRP, would be entitled to receive workmen's compensation. The majority suggests, however, that the language of the Act was concerned not with practical impacts on worker's compensation laws, but solely with legal impacts. Yet it is virtually undisputed--as OSHA's own expert witness testified--that the MRP/earnings protection program would completely replace coverage under existing worker's compensation laws for lead industry workers. The majority's interpretation thus distorts the language of Congress and its careful deference to state laws, laws which invariably recognize (as Congress did when rejecting the Daniels amendment) the dangers inherent in paying an employee 100 percent of his salary for not working.

Conclusion

For the foregoing reasons, this Petition for Rehearing and Suggestion for Rehearing En Banc should be

LIA03337

granted, and the cases should be remanded to OSHA for new hearings, after appropriate notice of rulemaking, conducted in accordance with the procedural and substantive requirements of law.

Dated: New York, New York
September 25, 1980

Respectfully submitted,

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Summary of Evidence

	Process	Evidence Cited By OSHA In Federal Register To Show That A PEL Of 50 ug/m3 Is Technologically Feasible	What The Evidence Cited By OSHA Actually Says About The Feasibility Of 50 ug/m3	Record Evidence Cited In OSHA Brief To Show That A PEL Of 50 ug/m3 Is Technologically Feasible In Specific Operations
Primary Smelters	Concentrated Handling and Storage	Caplan and Godsey	Nothing. Some references to 100 ug/m3 only (Caplan 6388-89; Ex. 196, at 4, 7 and 10)	None.
	Sintering	None	Nothing. Some testimony that 100 ug/m3 might be reached with "enough money and good luck." (54480/3)	None.
	Blast Furnace	None	Nothing.	None.
	Drossing	None	Nothing. Little hope of achieving even 100 ug/m3. (Caplan 5698)	None.
	Refinery	None	Nothing.	None
	Crane Equipment	Caplan.	Nothing. Testimony deals only with 100 ug/m3. (Caplan 57:32)	None.
	Baghouses	None	Nothing.	None.
	Maintenance	None.	Nothing. Admits respirators will be required.	None
Secondary Smelters	Battery Breaking	First, Bergsoe.	Nothing. Admits respirators will be required.	None
	Scrap Handling	Bergsoe, First.	Nothing.	None.
	Blast Furnace	Caplan, Bergsoe.	Nothing. Admits respirators will be required.	None
	Reverberatory Furnace	None	Nothing.	None.
	Slag Handling	None	Nothing.	None.
	Refinery Operations	None	Nothing.	None
	Casting and Fabricating	DBA, Caplan	Nothing.	None
	Baghouses	Bergsoe, Godsey	Nothing.	None
	Maintenance	None.	Nothing. Admits respirators will be required.	None.
Battery Manufrs	Oxide Manufacturing	1941 Health Service study, Caplan, Thomas, Mirer.	Nothing, except conclusory statements by UAW representative that equipment could be designed in the future.	None.
	Oxide Receiving	UAW, Caplan.	Nothing.	None.
	Paste Mixing	None	Nothing.	None.
	Pasting	Thomas, Caplan	Nothing, except Thomas thesis showing 88 percent of samples at plants in excess of 50 ug/m3.	None
	Plate Handling	None	Nothing.	None.
	Plate Breaking	Sappington.	Testimony that exposures were "50 to 100 micrograms on the low end, to 600 to 700 micrograms ... on the high." (5977)	None.
	Plate Stacking	Caplan, Thomas.	Nothing. Admits compliance may have to "await innovations in both technology and incentive work practices." (54487/2)	None.
	Burning	Thomas, Caplan.	Nothing.	None.
	Assembly	None.	Nothing.	None
	Reclaiming	None.	Nothing.	None.
Nonferrous Foundries	Molding	None	Nothing.	None.
	Melting	None.	Nothing.	None.
	Pouring	None	Nothing.	None.
	Grinding Operations	None	Nothing. Admits respirators will be required.	None.
	Baghouses	None.	Nothing. Admits respirators will be required	None
Pigment Manufrs	All Operations	First	Nothing.	None
Shipyards	Lead-burning	None	Nothing. Admits respirators will be required.	None
	Sandblasting	None.	Nothing.	None.
	Welding	None.	Nothing.	None.
	Painting	None	Nothing.	None.
Automobile Manufacturers	Solder Grinding	None	Nothing. Admits respirators will be required.	None.
	Spray Painting	None	Nothing. Admits respirators will be required.	None

Table I

LIA03340

N 3710.02

<u>Certificate of Service</u>

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STANDISH F. MEDINA, JR., a member of the Bars of the State of New York and this Court, and a member of the firm of Debevoise, Plimpton, Lyons & Gates, attorneys for Lead Industries Association, Inc., hereby affirms under penalty of perjury that he has caused copies of the within JOINT PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC to be served on or before this date by causing true copies thereof, securely enclosed in postage-paid envelopes, to be sent by first class mail to the persons whose names and addresses are set forth in the listing attached hereto.

ORIGINAL SIGNED BY
STANDISH F. MEDINA JR.

Standish F. Medina, Jr.

Dated: New York, New York
September 25, 1980

LIA02341

N 3710.03

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