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Washington, D.C. 20530

July 25, 1985

Mr. George A. Fisher, Clerk
United States Court of Appeals
for the D.C. Circuit
U.S. Courthouse, Room 5423
3rd Street & Constitution Ave., N.W.
Washington, D.C. 20001

Re: NRDC v. EPA, et al. (No. 85-1150)

Dear Mr. Fisher:

Enclosed please find an original and fourteen copies of a Petition for Review of Final Action of the United States Environmental Protection Agency.

Sincerely,

Assistant Attorney General
Land and Natural Resources Division

By: Mark P. Fitzsimmons

Mark P. Fitzsimmons, Attorney
Environmental Defense Section

Enclosures

CMA 015072

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. [illegible]

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioner,

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, et al.,

Respondents,

and

THE VINYL INSTITUTE, A DIVISION OF THE
SOCIETY OF THE PLASTICS INDUSTRY, INC.,

Respondent-Intervenor.

PETITION FOR REVIEW OF FINAL ACTION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF FOR RESPONDENTS

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STATEMENT OF RELATED CASES

Two other cases presently pending before this Court potentially involve issues similar to those presented by this petition. Those cases are NRDC v. Thomas, Nos. 84-1387 et al., involving challenges to EPA actions concerning benzene under section 112 of the Clean Air Act; and EDF v. Thomas, No. 84-1524, et al., NRDC v. Thomas, No. 84-1123, et al., and AMC v. EPA, No. 85-1285, et al., involving similar actions concerning radionuclides.

BASIS FOR JURISDICTION

NRDC invokes this Court's jurisdiction pursuant to section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b). We contend that this Court should dismiss this petition because petitioner failed to raise its objections during the rulemaking proceedings.

STATUTES AND REGULATIONS

The relevant statute is the Clean Air Act, 42 U.S.C. §§ 7401-7642. The relevant regulations are EPA's national emission standards for vinyl chloride, 40 C.F.R. § 61.60 et seq.

ISSUES PRESENTED

1. Should this Court dismiss this petition to review?

2. Was EPA's decision to withdraw its proposed revisions to the section 112 standard for vinyl chloride, based in part upon considerations of feasibility, proper under the Clean Air Act?

3. If this Court finds that EPA's consideration of feasibility in setting its standard for vinyl chloride was incorrect, what is the proper relief?

This case has not been before this Court or any other court before this petition.

STATEMENT OF THE CASE

A. The Statute

The Clean Air Act ("CAA" or the "Act") establishes a joint state and federal program to control the nation's air pollution. Section 101(b) of the Clean Air Act, 42 U.S.C. § 7401(b), provides that:

> The purposes of this subchapter are . . . to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population . . .

The principal means for reaching this goal is provided in sections 108-110. Sections 108 and 109 grant authority to EPA to set two types of national ambient air quality standards (NAAQS) designed to limit permissible concentrations of air pollutants: the primary standards, to protect public health, and the secondary standards, to protect public welfare. 42 U.S.C. §§ 7408, 7409. EPA has established ambient standards for six pollutants. 40 C.F.R. Part 50 (1984).

Section 110 of the Act requires that each state develop a State Implementation Plan (SIP) capable of ensuring that the ambient standards will be met and maintained. Within nine months after promulgation or revision of a standard, states must devise plans to attain the standard in accordance with eleven criteria set forth in section 110(a)(2)(A)-(K), 42 U.S.C. § 7410(a)(2)(A)-(K). After preparation, the SIPs are submitted to EPA for review to ensure that the requirements of section 110(a)(2) are met. Subsequent revisions to the plans are judged by the same criteria. 42 U.S.C. § 7410(a)(3).

Section 112 of the Act, 42 U.S.C. § 7412, the provision at issue in this litigation, is another means for reaching the goal set out in section 101. That section provides that the Administrator is to publish a list of "hazardous air pollutants" which he is to revise as appropriate from time to time. Section 112(b)(1)(A), 42 U.S.C. § 7412(b)(1)(A). "Hazardous air pollutants" are those pollutants for which no ambient air quality standard applies, and which in the judgment of the Administrator are a threat to health. Section 112(a)(1), 42 U.S.C. § 7412(a)(1).

After a pollutant is listed, EPA is to promulgate emission standards for the pollutant. The standards are to be set "at the level which in [the Administrator's] judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant." Section 112(b)(1)(B), 42 U.S.C. § 7412(b)(1)(B).

Once the standards are established, it is a violation of the Clean Air Act to emit any pollutant contrary to the standards. Section 112(c), 42 U.S.C. § 7412(c). Section 112(c)(1)(B) however provides that existing sources subject to emissions standards may be granted "a period of up to two years after the effective date of a standard to comply with the standard, if [the Administrator] finds that such period is necessary for the installation of controls." Section 112(d) provides for delegation of authority to implement and enforce section 112 standards to the states. Section 112(e) provides that an emission standard may take the form of "a design, equipment, work practice or operational standard or combination thereof . . ."

The Administrator first established emission standards under section 112, including standards for asbestos, during 1971-73. 36 Fed. Reg. 23,239 (December 7, 1971) (proposal); 38 Fed. Reg. 8820 (April 6, 1973) (promulgation). In 1976, EPA promulgated emission standards for vinyl chloride. 41 Fed. Reg. 46,560 (October 21, 1976). Since this time, additional standards have been promulgated, including additions to the asbestos standard, 40 Fed. Reg. 48,299 (October 14, 1975), and 43 Fed. Reg. 26,372 (June 19, 1978); a standard for benzene, 49 Fed. Reg. 23,498 (June 6, 1984); and standards for radionuclides, 50 Fed. Reg. 5190 (February 6, 1985), and 50 Fed. Reg. 15,386 (April 17, 1985).

B. The Administrative Proceedings

This petition challenges EPA's recent withdrawal of proposed amendments to its section 112 standard for vinyl chloride. There is a long administrative history behind this most recent action.

On December 24, 1975, EPA added vinyl chloride to the list of hazardous air pollutants under section 112. 40 C.F.R.

Part 61; 40 Fed. Reg. 59,477. At the same time, the Agency proposed national emissions standards for the chemical. 40 Fed. Reg. 59,532. After consideration of comments and a public hearing, the Agency promulgated a final standard on October 21, 1976. 41 Fed. Reg. 46,560.

The standard covers plants that manufacture ethylene dichloride, vinyl chloride, and polyvinyl chloride. The regulation was based upon evidence that vinyl chloride caused cancer. The purpose of the standard was to minimize emissions down to a level that was attainable with the best available control technology. The specific emissions limitations promulgated reduced the amounts of vinyl chloride emitted by 90 to 95 percent, depending upon the type of plant. The Agency chose not to require elimination of all emissions, because of the beneficial uses of vinyl chloride, the economic disruption that would be caused, the dangers of substitutes, and because of the substantial reductions that could be accomplished with available control technology. Taking all these factors into account, EPA determined that the standards it had set protected public health with an ample margin of safety. 41 Fed. Reg. 46,560-64.

In setting the vinyl chloride standard, EPA first considered its potential health effects. See the section in the preamble entitled "Health and Environmental Effects," 41 Fed. Reg. 46,560, and response to comment 1, 41 Fed. Reg. 46,561. The standards were designed to substantially eliminate emissions of vinyl chloride to the ambient air. 40 Fed. Reg.

59,543, Col. 3. The standards reduced ambient concentrations to levels far below those at which actual adverse effects on humans had been observed. 40 Fed. Reg. 59,533, Col. 1, 59,534, Col. 2. EPA then went on to set the final limit based in part upon feasibility considerations. The Agency was quite explicit in doing this. It rejected both a total ban on vinyl chloride emissions, and a cost-benefit analysis approach. Instead EPA considered feasibility, to "a very limited extent; i.e. to assure that the costs of control technology are not grossly disproportionate to the amount of emission reduction achieved." 41 Fed. Reg. 46,562. The limitations were then promulgated as low as demonstrated technology could achieve. 41 Fed. Reg. 46,561-2.

On November 19, 1976, the Environmental Defense Fund (EDF) sued EPA over the promulgation. Certain industry parties intervened in the case. EDF v. EPA, No. 76-2045 (D.C. Cir.). EDF contended that section 112 did not permit consideration of all the factors EPA had used, and that the standard was not strict enough.

EPA and EDF entered into negotiations and arrived at a settlement agreement, which was filed in this Court on March 24, 1977. The agreement required EPA to propose changes to make the vinyl chloride standard more strict. The Court accepted the settlement, and granted EDF's and EPA's joint motion to dismiss on June 24, 1977. */

The changes were proposed on June 2, 1977. Proposed 40 C.F.R. Part 61; 42 Fed. Reg. 28,154. In the proposal, the Agency announced a goal of encouraging the reduction of emissions of vinyl chloride down to zero. It also proposed specific regulations which required increased efficiency of control equipment at existing sources, required more stringent control at new sources, and prohibited increases in emissions within the vicinity of an existing source due to new construction. 42 Fed. Reg. 28,154-59.

Though it agreed to consider these changes, the Agency never stated that the 1976 standard did not protect the public health with an ample margin of safety. Instead, it specifically refuted that assertion, and stated that the 1976 standard was in full compliance with section 112. Id. at 28,154, Col. 2.

The Agency received 142 written comments on the 1977 proposal, and held a public hearing on the proposed revisions. Certified List of the Contents of the Record ("Record"), docs. D-1 through D-142, K-1. Petitioner NRDC neither submitted comments nor testified at the public hearings. No person during

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*/ NRDC throughout its brief accuses EPA of violating the agreement. Contrary to these charges, the settlement obligated EPA only to propose changes, not promulgate them. Thus, all of the Agency's obligations were satisfied when the changes were proposed. EDF agreed that EPA had fully satisfied the agreement, since it joined in the motion to dismiss its petition.

the proceedings commented that the Administrator should not consider feasibility.

The Agency conducted a thorough study of control techniques. Record document A-1. It also generally reviewed the entire vinyl chloride standard, and the rulemaking record. The studies and review consisted of consideration of health studies, control technology, and enforcement and compliance experience. Policy decisions were reached. This took a considerable period of time.

The study and review culminated in the following conclusions. The current standard was necessary, but the particular proposed revisions were not. The same factors which had lead EPA to conclude that a total ban on emissions was neither necessary nor desirable were still current. The particular reductions in emissions at existing plants that were proposed did not appear to be justified, on the basis that the technology could not reach that level, and no clear additional threat to health was demonstrated. For the same reasons, different standards for new sources were unnecessary. In other words, EPA concluded that the 1976 standard sufficiently minimized health risks, though it did not completely eliminate them. It also concluded that the improvements in control techniques on which the proposed revisions were based were not reasonably feasible due to inconsistent performance and high cost. 50 Fed. Reg. 1182, 1184-85 (January 9, 1985). The Administrator therefore withdrew the proposed revisions. Id.

At the same time, and as a result of the studies and review, EPA determined that some administrative changes to the vinyl chloride standard were appropriate. These amendments were proposed at the same time as the withdrawal of the 1977 standard, and include the following: a reformatting of the emissions limit for relief value discharges; providing a specific compliance test procedure; an additional emissions limit for operators who strip in reactors; specific requirements for leak detection and repair; and a variety of other revisions, including reporting requirements and definitional clarifications. 50 Fed. Reg. 1186-92 (January 9, 1985). These amendments were proposed and rulemaking is ongoing on them. They are not part of this litigation.

NRDC then filed its petition for review of EPA's withdrawal of proposal.

SUMMARY OF ARGUMENT

This Court should dismiss NRDC's petition for review. NRDC did not participate at any stage of the 1975-76 or the 1977 rulemaking. Nor was the argument NRDC makes made by any commenter on the 1977 proposal. Thus, NRDC cannot raise this issue now.

Moreover, EPA's withdrawal of its 1977 proposed amendments to its vinyl chloride standard was proper. As it did in reviewing the proposal, the Agency may consider feasibility in determining what is an "ample margin of safety" for a hazardous air pollutant under section 112. EPA's interpretation of the

Clean Air Act is entitled to great deference. The language, structure, and legislative history of section 112 all support this interpretation. So does the applicable case law. In addition, Congress ratified EPA's interpretation of section 112 when it passed the 1977 amendments to the Clean Air Act.

Finally, even if this Court finds that EPA's view is in error, NRDC's requested relief is inappropriate. Petitioner has failed to demonstrate that EPA's withdrawal of the 1977 proposal is contrary to the ample margin of safety standard. Thus, any error would be harmless. NRDC's request for a 180-day deadline for completing any rulemaking on remand is especially inappropriate given the circumstances of the case.

ARGUMENT

I. THIS COURT SHOULD DISMISS THIS PETITION FOR REVIEW

It is a fundamental administrative law principle that decisions of agencies may not be challenged on grounds that were not presented at the administrative level. The Supreme Court has reiterated this doctrine on numerous occasions. As the Court stated in Unemployment Commission v. Aragon, 329 U.S. 143, 155 (1946):

> A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented . . .

A party must present relevant legal arguments first to the agency. He may not raise them for the first time on judicial review:

> Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37 (1952).

Not only fairness, but also sound judicial administration dictates that issues must be raised first before the agency:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574-575 (1952). Accord, Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 654 (1973); Glass Packaging Institute v. Regan, 737 F.2d 1083, 1093 (D.C. Cir. 1984); Lorion v. NRC, 712 F.2d 1472, 1474 (D.C. Cir. 1983); Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975); Green v. FCC, 447 F.2d 323, 329 (D.C. Cir. 1971); Quick v. Martin, 397 F.2d 646-47 (D.C. Cir. 1968).

NRDC's sole argument in this case is that it was unlawful for the Administrator to consider technological and economic feasibility in the 1977 rulemaking on the vinyl chloride standard. No person made this argument before the Agency during the rulemaking. This case must therefore be dismissed.

This is especially true in this case because NRDC chose not to participate at all in any of the administrative proceedings on vinyl chloride, including the original 1975-76 rulemaking. As this Court stated in Nader v. NRC, 513 F.2d 1045, 1054-55 (D.C. Cir. 1975):

> We have long adhered to the view that ... "a[n] interested] person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and than complain that he has not been properly treated." . . . "[t]o permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation." . . . [T]hose who refrain from participation in rulemaking proceedings may not obtain direct judicial review of the regulations resulting.

Accord, Environmental Defense Fund v. EPA, 598 F.2d 62, 91 (D.C. Cir. 1978) (emphasis added). Accordingly, because NRDC never bothered to participate in EPA's rulemakings or raise the issue of feasibility below, and because no one raised the issue in the rulemaking at issue here, this Court should dismiss the petition.

II. THE ADMINISTRATOR MAY CONSIDER FEASIBILITY IN PROMULGATING EMISSIONS STANDARDS UNDER SECTION 112

EPA may consider technological and economic feasibility in determining standards under section 112. This interpretation of the Clean Air Act is entitled to great deference. Moreover, the language and legislative history of the provision support it. And Congress specifically ratified EPA's view when it passed the 1977 amendments to the Act.

A. EPA's Interpretation Is Entitled to Considerable Deference

Section 112 is quite explicit as to its general purpose. The Administrator is to investigate and designate hazardous air pollutants, and then is to promulgate emissions standards for those pollutants. Section 112(b), 42 U.S.C. § 7412(b). Beyond this clear directive, however, the section becomes considerably less explicit. Most specifically, the emissions standard for any hazardous air pollutant is to be set at that level which "provides an ample margin of safety to protect the public health from such pollutant." Section 112(b)(1)(B), 42 U.S.C. § 7412(b)(1)(B). What this "ample margin of safety" is to be is left undefined. What is to be considered in defining "ample margin of safety" is also left undefined.

Moreover, in regulating under section 112, considerable discretion is vested in EPA. The choice of what to list as a hazardous air pollutant is limited to those pollutants which reasonably may be anticipated to increase mortality or serious illness, "in the judgment of the Administrator." Section 112(a)(1), 42 U.S.C. § 7412(a)(1). Similarly, what level of emission standard will protect the public with an ample margin of safety is also left to the "judgment" of EPA. Section 112(b)(1)(B), 42 U.S.C. § 7412(b)(1)(B).

As is discussed in detail in section II.D. of this brief infra, from the time of its first regulation under section 112 EPA has used this discretion and considered the technical and economic feasibility of various limitations as part of the determination of what is an ample margin of safety. This long-standing interpretation is entirely appropriate. NRDC's sole objection to EPA's withdrawal of the 1977 proposal is that it was unlawful for the Administrator to consider technological and economic feasibility in any capacity whatsoever. This narrow and overly stringent reading of section 112 is incorrect for several reasons.

First of all, EPA's interpretation of this statute is entitled to great deference, for a number of reasons. NRDC's protestations not withstanding, what an "ample margin of safety" is, how this standard is arrived at, and what factors can be considered in making the determination, are not clear from the face of section 112, which is broadly drawn. Thus, considerable deference is to be accorded the Agency's interpretation, and it is not to be overturned unless clearly wrong.

The Supreme Court has recently reemphasized its long standing rule to this effect in a case involving the Clean Air Act:

> [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

> ... The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.... Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
>
> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. .... If this choice represents a reasonable accomodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accomodation is not one that Congress would have sanctioned ...

Chevron, U.S.A. v. NRDC, ___ U.S. ___, ___, 104 S. Ct. 2778, 2782-83 (1984) (footnotes omitted.) The Court recently reaffirmed this fundamental principle of deference. Chemical Manufacturers Ass'n v. NRDC, ___ U.S. ___, ___, 105 S. Ct. 1102, 1108 (1985). */ And with respect to section 112 specifically, the Court has

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*/ This Court has followed this salutary principle in cases decided before Chevron. NWF v. Gorsuch, 693 F.2d 156, 171, 174, 183 (D.C. Cir. 1982) (interpreting Clean Water Act); Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1147 (D.C. Cir. 1980) (interpreting Clean Air Act).

ruled that EPA's interpretation of section 112 is entitled to considerable deference "under ordinary circumstances," (though not under the circumstances of the particular case, which involved a criminal prosecution for violation of regulations arguably not applicable to the defendant). Adamo Wrecking Co. v. United States, 434 U.S. 275, 287-89 (1978).

When an agency interpretation of a statute has been consistent over time, as this one has, it is entitled to additional deference. E.I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 54-55 (1977); Power Reactor Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396, 408 (1961); Bamberger v. Clark, 390 F.2d 485, 488 (D.C. Cir. 1968). And, when an agency must make scientific judgments in determining the appropriate scope of regulation, again as it has done here, those choices are entitled to considerable deference from reviewing courts as well. Industrial Union Dept., AFL-CIO v. API, 448 U.S. 607, 656, 705-07 (1980) (plurality and dissenting opinions, together joined in by seven Justices); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1025-26 (D.C. Cir. 1978).

B. The Language, Structure, and Legislative History of Section 112 Support EPA's Interpretation

Not only is EPA's interpretation of section 112 allowing consideration of feasibility in setting emission standards "reasonable" and "permissible," it is the correct view. The language, structure, and legislative history of section 112 indicate Congress intended to give the Agency the latitude to consider feasibility in setting standards if it so chose.

The general notion of regulating on the basis of what is possible and allowing EPA considerable discretion in this regard is incorporated into the language and structure of the section. For example, section 112(e) provides that, where emissions are hard to measure, an emission standard may take the form of "a design, equipment, work practice or operational standard, or combination thereof ..." In such cases, the standard is by definition based upon what is feasible. */ Although this section goes to the question of how to regulate, and not the question of how strictly to regulate, nonetheless, it does demonstrate that Congress recognized the need to be pragmatic and practical, factors NRDC insists are lacking in section 112. Section 112(c)(1)(B) also provides that existing sources subject to emission standards may be granted up to two years "for the installation of controls." Neither of these provisions of section 112 would make sense if emission standards could not be based on, and achievable by, feasible control techniques.

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*/ Many of the § 112 emission standards are in fact in the form of design equipment, work practice and operational standards. *E.g.*, 50 Fed. Reg. 1182, 1191 (Jan. 9, 1985) (vinyl chloride); 49 Fed. Reg. 13,658 (April 5, 1984) (asbestos); 49 Fed. Reg. 23,498 (June 6, 1984) (benzene); 50 Fed. Reg. 15,386 (April 17, 1985) (radionuclides).

Had Congress intended that EPA could in no circumstances consider feasibility, as NRDC claims, it is logical to assume that it would have so provided. Congress knows how to delineate specific factors it wants considered to the exclusion of others. It has done so in the Clean Air Act and other environmental statutes. For example, in designating toxic pollutants and standards under section 307 of the Clean Water Act, Congress provided specific factors to be considered. Section 307(a)(1), (2), 33 U.S.C. § 1317(a)(1),(2). Under the Air Act, section 111(a)(1)(C) lays out specific criteria for promulgating new source performance standards. 42 U.S.C. § 7411(a)(1)(C). Under the Resource Conservation and Recovery Act, section 3001(a) spells out set considerations for designating hazardous wastes. 42 U.S.C. § 6921(a). And under the Comprehensive Environmental Response, Compensation and Liability Act, Congress detailed a very specific list of factors to be included within and addressed by the National Contingency Plan. Section 105, 42 U.S.C. § 9605. By contrast, Congress prescribed the section 112 standard as an "ample margin of safety," leaving to the "judgment" of EPA the determination of what constitutes such a margin.

More generally, section 101(b)(1) of the Act also supports EPA's approach. That section provides that the first purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." This requires the Administrator to consider broadly the effects of his actions on the public health and welfare. Effectively banning the use of essential products, and creating widespread economic dislocation, including unemployment, are effects on the general welfare. Clearly, feasibility fits within the general scheme contemplated by this section.

The legislative history of section 112 also indicates that the Administrator can consider feasibility. NRDC argues to the contrary. It relies on an assertion that the House version of section 112 in 1970 provided for consideration of feasibility, but that the Senate version specifically prohibited it, and that the Senate version prevailed and was adopted. NRDC also places heavy emphasis on a statement by Senator Muskie, that it interprets as saying that where there is any suspected adverse effect from a pollutant, all emissions of it must be banned. NRDC brief at 20-24.

NRDC has misconstrued the legislative history in both its arguments. It simply is not the case that the Senate bill prohibited any consideration of feasibility in setting hazardous air pollutant standards. In fact, the Senate bill assumed that feasibility would be considered. In discussing its version of section 112 (at the time, designated section 115), the Senate Public Works Committee stated:

> This section would establish an administrative procedure to regulate and control the emission of . . . hazardous materials . . . Recognizing that <u>complete</u>

> control of [certain hazardous air pollutants] may not be necessary or practicable, the Committee has provided the Secretary with authority to differentiate among categories of sources in establishing prohibitions.

S. Rep. No. 91-1196 at 20, reprinted in 1 Environmental Policy Division, Congressional Research Service, Library of Congress, A Legislative History of the Clean Air Amendments of 1970, No. 93-18, 93d Cong., 2d Sess. 420 (Comm. Print 1974) [hereinafter "Leg. Hist."] (emphasis added).

Thus, NRDC has misinterpreted the Senate bill, an error that leads it to place excessive weight on the non-adoption of the House bill. The House version of section 112 did explicitly authorize consideration of feasibility. See 1 Leg. Hist. 195. But it does not follow that consideration of feasibility is precluded because Congress ultimately adopted a version of section 112 that is less explicit. Indeed, the Supreme Court has recently cautioned against reading too much into the deletion of language from legislative proposals. Bryant v. Yeller, 447 U.S. 352, 376 (1982). Both houses of Congress adopted bills that contemplated consideration of feasibility, although the House bill was certainly more explicit on this point. The legislative compromise was to specify only an "ample margin of safety," leaving to EPA's "judgment" to determine what such a level would be. In short, EPA's consideration of feasibility in setting the 1976 vinyl chloride standard and in considering proposed amendments to that standard was well within the bounds of what Congress contemplated when it enacted section 112.

NRDC's other legislative history argument revolves around the following remark by Senator Muskie in the Senate debate on the Conference Report:

> The [section 112] standards must be set to provide an ample margin of safety to protect the public health. This could mean, effectively, that a plant would be required to close because of the absence of control techniques. It could include emission standards which allowed for no measurable emissions.

1 Leg. Hist. 133. NRDC somehow construes this provision to mean that whenever there is any health threat presented by a pollutant, any emission of it must be banned, which precludes consideration of feasibility. NRDC brief at 24.

NRDC again is wrong. This is clear enough from reviewing the quote. Senator Muskie said that "ample margin of safety" "could" mean that some plants would have to close, and "could" mean that zero emissions limitations could be promulgated by EPA. Nowhere does Senator Muskie say that section 112 required those results in all cases, however.

In fact, EPA adheres to Senator Muskie's view. There is nothing inconsistent in EPA considering feasibility in setting a standard, and, in certain cases deciding that an ample margin of safety could only be provided if no emissions were allowed. For example, 40 C.F.R. § 61.65(a) (1984) forbids emissions of vinyl chloride from relief valves into the atmosphere except in emergencies. Other rules forbid entire activities that might cause emissions of other hazardous air pollutants. Materials that contain asbestos are totally banned for use as road surface materials. 40 C.F.R. § 61.143 (1984). And 40 C.F.R. § 61.150 (1984) forbids the use of many asbestos-containing materials. Nor is it inconsistent to set a standard that protects human health with an "ample margin of safety" but also takes costs and technology into account.

C. The Applicable Case Law Supports EPA's Interpretation

The applicable case law also supports EPA's interpretation of section 112. This Court has reviewed and upheld EPA's section 112 standard for asbestos, which, as is detailed in the next section of this brief, also clearly was based upon considerations of feasibility. National Ass'n of Demolition Contractors v. Costle, 565 F.2d 748 (D.C. Cir. 1977). Indeed, in that case, this Court specifically cited with approval language in the preamble to the original asbestos rule which indicated it was based in part on feasibility. Id. at 750.

Demolition Contractors also states that section 112 gives EPA considerable discretion in determining what is an "ample margin of safety," and how to meet it:

> NADC argues that the Administrator's statutory mandate to protect the public health with "an ample margin of safety" is inconsistent with his decision to use ... "available control methods ...." We disagree.

> Protection of the public with "an ample margin of safety" may necessitate use of different control measures ... The Administrator was not convinced that the drastic measure of complete prohibition of demolition ... was justified ... But ... the Administrator could not be confident that regular use of a relaxed alternative procedure would amply protect the public health ... the Administrator's choice ... was well within the bounds of his discretion.

565 F.2d at 753. EPA's discretion in interpreting section 112, "under ordinary circumstances" has been affirmed by the Supreme Court as well. Adamo Wrecking Co. v. United States, 434 U.S. 287-89 (1978). Moreover, Mr. Justice Stevens, in his dissenting opinion in that case, noted that EPA had first proposed an outright ban on any emissions, but had decided that the effects of that would be too drastic, and so lessened the standard to allow some emissions. Justice Stevens approved that approach, and the majority did not disagree on this point. 434 U.S. at 297-98.

The cases heavily relied upon by NRDC do not support its position. American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981); Union Electric Co. v. EPA, 427 U.S. 246 (1982); API v. Costle, 665 F.2d 1176 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980); Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978). In each of them, an administrative agency (EPA in all save one) used its discretion to interpret a legislative mandate and to promulgate regulations. All of the regulations were challenged in petitions to review or in enforcement actions. In each, the petitioner or defendant claimed that the agency had not sufficiently considered technological and economic feasibility in promulgating the rules. That is not the case here. In one sense, the decisions support EPA's withdrawal of the 1977 proposal; all upheld the agency's view as to how feasibility should be considered in setting standards.

Moreover, when viewed individually, it is clear that the decisions are distinguishable. American Textile Manufacturers construed the Occupational Safety and Health Act. The Act provides that standards are to be set on a protection of health basis, "to the extent feasible." 29 U.S.C. § 655(b)(5). The Secretary of Labor interpreted this language to require standards based on health effects to the extent that was technologically and economically feasible. The industry petitioner argued that the statutory language required cost-benefit balancing for each standard. 452 U.S. at 506-07. The Court upheld the Secretary.

It is hard to see how this opinion affects adversely EPA's interpretation of section 112. It is not the same statute; it is not similar language. Nor is EPA maintaining that section 112 requires cost-benefit analysis. As has been stated in the statement section of this brief, and as is repeated infra, EPA in section 112 is and has been primarily concerned with human health. EPA decided that the 1976 standard protected health with an adequate margin of safety, and considered feasibility in arriving at that standard. The OSHA is perhaps more specific in providing for such an approach, using the language "to the extent feasible." But this does not mean that "ample margin of safety" precludes a similar analysis.

The Union Electric case involved sections 110 and 113 of the Clean Air Act. In that case EPA approved a state implementation plan. After the jurisdictional 30-day period for filing a petition to review the regulations had passed, a regulated party filed a petition. The petitioner, an electric utility, claimed that EPA's approval of the SIP was inappropriate since the petitioner could not meet the standard due to technological and economic infeasibility. EPA argued in response that section 110 spelled out specific criteria that a SIP must meet, and if those were met the statute required the Administrator to approve the plan. EPA also believed that feasibility was not included within those criteria, so that it could not consider such in reviewing SIPs. The Court upheld EPA's interpretation. 427 U.S. at 257-266. It also stated that this conclusion was bolstered by the fact that states in setting their SIPs could take feasibility into account, so long as the overall ambient air quality standard was met. 427 U.S. at 266-67.

It is also hard to see how this case indicts EPA's interpretation of section 112. A wholly different section of the Clean Air Act was being interpreted. The Court agreed with

EPA that because section 110 spelled out specific criteria that did not include feasibility and ordered EPA in its role as reviewer to approve a SIP if it met those criteria, the Agency had no discretion to consider feasibility in SIP review. And the Court's decision was based in part on the fact that feasibility could be considered at other stages in the regulatory process. Section 112 does not spell out specific criteria. The standard to be achieved is an "ample margin of safety." Moreover, section 112 standards constitute actual emissions limitations. There is no implementing phase, such as state deliberations in creating SIPs, where feasibility can be factored in.

Two other cases cited by NRDC, Lead Industries and API v. Costle, also do not support its claim. These decisions can be dealt with together, since on the feasibility point, API v. Costle merely follows the Lead Industries decision.

Lead Industries involved a challenge to EPA's ambient air quality standard for lead under section 109 of the CAA by a number of industry petitioners. That section provides that standards are to be set with an "adequate margin of safety." The petitioners argued that EPA had to take technological and economic feasibility into account in determining an "adequate margin of safety," and in setting the standards. EPA believed that the legislative history of section 109 indicated that it was not to take those factors into account. The Court agreed with EPA's interpretation. 647 F.2d at 1148-1150. */

Once again, this decision is distinguishable. It involved section 109, which provides for the setting of general national air criteria, which are to be met by states formulating plans under section 110 specific to the area, and the sources of emissions within the state. Though the margin of safety language of the standard is similiar to that under section 112, nonetheless it is different. In particular, section 109 has a legislative history which the Agency interpreted to mean feasibility should not be taken into account. EPA judged that the process under section 109 is devoted to health considerations, with questions of technological and economic feasibility reserved to the states in formulating plans under section 110.

Section 112 has a different structure, collapsing all of these elements into a single direct emissions limitation-setting step. It is worded differently and has a different legislative history. That legislative history lead EPA to a different conclusion as to whether feasibility was to be taken into account under it.

The final case invoked by petitioners is Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978). For many of the

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*/ The case is noteworthy on a related point; it states that considerable deference is due the Agency's determinations on margin of safety. 647 F.2d at 1145-46, 1161-62.

same reasons as Union Electric, the case is not authority against EPA's interpretation of section 112. This case also involved a challenge to EPA regulations, this time effluent limits for particular pollutants under section 307 of the Clean Water Act, 33 U.S.C. § 1317. Section 307 details specific factors to be considered in setting regulations. Feasibility is not among them. EPA interpreted the section and its specific legislative history to mean that it therefore was not required to consider feasibility. The petitioners objected to this. Once again, this Court upheld the Agency, on the strength of deference to EPA's interpretation, including the legislative history. 598 F.2d 101-02, 110-13.

Section 307 of the Clean Water Act provides six specific criteria and has a legislative history indicating that Congress did not intend feasibility to be considered under that provision of the Act. Section 112 provides a much more general standard, and the history indicates a contrary intent. Dicta in the Hercules decision states that feasibility cannot be considered in setting section 112 standards under the Air Act. 598 F.2d at 112. This is only dicta, and the Court did not have the benefit of the full analysis of section 112 and its legislative history as set out above.

Thus, none of the cases cited by NRDC is controlling or persuasive here. Each involved a different statute or different section of the Clean Air Act, each with different language, a different purpose, and a different legislative history. Each also involved an attempt to overturn an agency interpretation of a statute in the context of regulations, to insert cost considerations, or cost considerations to a greater degree. The language of section 112, the case law interpreting it, and its legislative history support EPA's interpretation.

Ultimately, to the extent that this Court does not feel that these precedents can be distinguished, the Supreme Court's more recent pronouncements in Chevron and CMA v. NRDC are instructive. The language of section 112 is broadly drawn and does not squarely address the issue of feasibility, and thus EPA's interpretation of what constitutes an "ample margin of safety" is reasonable and supportable. Therefore, the Agency interpretation must be upheld and those precedents, to the extent they indicate otherwise, must be disregarded.

D. Congress Ratified EPA's Interpretation of Section 112 in 1977.

It is a universally accepted rule of statutory construction that if an agency interprets legislation it administers, and, with knowledge of that interpretation, Congress subsequently reenacts the statute without altering the construction, the interpretation is presumed to be approved by Congress and becomes part of the statute. United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979); Shapiro v. United States, 335 U.S. 1, 16 (1948); NWF v. Gorsuch, 693 F.2d 156, 167 (D.C. Cir. 1982); Wilderness Society v. Morton, 479 F.2d 842, 866-67 (D.C. Cir.), cert. denied, 411 U.S. 917 (1973).

It is clearly a stronger indication of congressional ratification when the interpretation is discussed in the reauthorization process. However, the congressional ratification doctrine may be invoked to uphold agency interpretations even when there is no direct evidence that Congress specifically discussed the interpretation in reenacting the underlying statute. CMA v. NRDC, ____ U.S. ____, 105 S. Ct. 1102, 1109 (1985); Chemehuevi Tribe v. FPC, 420 U.S. 395, 409 (1975); NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974); Commissioner v. Noel Estate, 382 U.S. 678, 682 (1965). This is because Congress is presumed to know how the laws it passes have been interpreted, both by agencies and the courts. If there is an agency or court interpretation and Congress does not change it in the process of reenacting the statute, it is said to approve or at least acquiesce in it. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-79 (1982); Haig v. Agee, 453 U.S. 280, 299-300 (1981); Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979); Lorillard v. Pons, 434 U.S. 575, 580 (1978).

Congress ratified EPA's interpretation of section 112, allowing consideration of feasibility in setting standards, by amending and reauthorizing section 112 in 1977 after EPA had interpreted it to allow for consideration of feasibility. Section 112 was included in the Clean Air Act Amendments of 1970. The first pollutant regulated under it was asbestos. EPA proposed a rule for this pollutant at the end of 1971, 36 Fed. Reg. 23,239

(December 7, 1971), and adopted it in 1973. 38 Fed. Reg. 8820 (April 6, 1973). The asbestos regulation clearly was based in part upon what was achievable by identified control techniques. In the first paragraph of its preamble to the 1971 proposal, the Agency stated that the "overriding considerations" in its proposed rule were health effects. Beyond that threshhold, however, other factors were considered. The preamble states:

> These standards are based on information derived from many sources, including health effects levels, methodology, technical analysis of control capability, and consideration of economic impact.

36 Fed. Reg. 23,239, Col. 1 (December 7, 1971) (emphasis added). Similarly, in the Preamble to the final regulation the Agency concluded:

> [T]he Administrator has determined that, in order to provide an ample margin of safety to protect the public health from asbestos, it is necessary to control emissions from major man-made sources of asbestos emissions into the atmosphere, but that it is not necessary to prohibit all emissions.
>
> In this determination the Administrator has relied on the National Academy of Sciences' report on asbestos, which concludes: "Asbestos is too important in our technology and economy for its essential use to be stopped .... Continued use at minimal risk to the public requires that the major sources of man-made asbestos emission into the atmosphere be defined and controlled."

38 Fed. Reg. 8820, Col. 2-3 (April 6, 1973).

In 1976, EPA promulgated an emissions standard under section 112, this time for vinyl chloride, the pollutant at issue in this case. 41 Fed. Reg. 46,560 (October 21, 1976). */ EPA first considered the health effects of vinyl chloride. See the section in the preamble entitled "Health and Environmental Effects," 41 Fed. Reg. 46,560, and response to comment 1, 41 Fed. Reg. 46,561. The standards were designed to substantially eliminate emissions of vinyl chloride to the ambient air. 40 Fed. Reg. 59,543, Col. 3. The standards reduced ambient concentrations to levels far below those at which actual adverse effects on humans had been observed. 40 Fed. Reg. 59,533, Col. 1, 59,534, Col. 2.

EPA then went on to set the final limit based in part upon feasibility considerations. The Agency was quite explicit in doing this. It rejected both a total ban on vinyl chloride emissions, and a cost-benefit analysis approach. Instead EPA considered feasibility, to "a very limited extent; i.e. to assure that the costs of control technology are not grossly disproportionate to the amount of emission reduction achieved." 41 Fed. Reg. 46,562. The limitations were then promulgated as low as demonstrated technology could achieve. 41 Fed. Reg. 46,561-2. NRDC does not dispute this. It concedes throughout its brief that feasibility was considered in developing the

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*/ The standard had been proposed in 1975. 40 Fed. Reg. 59,477, 59,532 (December 24, 1975).

1976 vinyl chloride standard. */

In 1977, Congress reviewed the whole Clean Air Act, including section 112. By and large that body determined that section 112 worked well as written. The section was included in the 1977 Amendments and reauthorized. Pub. L. 95-95, 91 Stat. 701, 703, 791, 3 Leg. Hist. 207, 209, 217. There were only two narrow changes to section 112. The amendments were designed to ratify what EPA had done and ensure its continued discretion in implementing section 112.

The first amendment to section 112 was to the definition of "hazardous air pollutant" in section 112(a)(1). The phrase "in the judgment of the Administrator" was added to the definition of pollutants to be listed under section 112. In other words, Congress meant to commit to the Administrator's discretion which pollutants caused serious enough effects to be listed and regulated under section 112, and meant to give EPA broader range in determining when regulation under section 112 was necessary, and what that regulation was to be. See H.R. Rep. 95-294 at 51, 4 Leg. Hist. 2518.

The second amendment added section 112(e). This amendment confirmed an interpretation by the Administrator of his powers under section 112. The administrative interpreta-

*/ Moreover, every emission standard promulgated under section 112 since similarly reflects in part what is achievable by identified control techniques. 49 Fed. Reg. 23,498 (June 6, 1984) (benzene); 50 Fed. Reg. 5190 (February 6, 1985); 50 Fed. Reg. 15,386 (April 17, 1985) (radionuclides).

tion had been asserted in the first asbestos rulemaking. That regulation had been promulgated as design, equipment, and work practices limitations, instead of numerical emissions limitations. This was done because numerical emissions limitations were impractical. Congress affirmed and adopted this approach, saying such regulation was proper where emissions limitations were not possible. The determination of whether the standard would be an emissions limitation or a work practice once again was committed to the discretion of the Administrator.

In considering and adopting section 112(e), Congress reviewed EPA's asbestos regulations and specifically approved of them. For example, the Senate's Report No. 95-127 states "This limited provision would fully authorize the present EPA regulations governing asbestos." At 44, 3 Leg. Hist. 1418. It is a fair assumption from the use of this language that Congress knew what was in those rules. See also S. Rep. No. 94-717, another Senate bill predecessor to the 1977 amendments, S. 3219, 6 Leg. Hist. 4734. */

Congress was also aware of EPA's vinyl chloride regulation at the time of the 1977 amendments. A proposed amendment that was not included in the final bill makes this clear. The House Committee on Interstate and Foreign Commerce reported a bill of Clean Air Act amendments to the full House of Representatives in May of 1976. H.R. 10498. Section 101 of that bill commanded that EPA promulgate regulations for four pollutants,

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*/ Congress developed the 1977 Amendments over the two year period 1976-77. The 1977 bills substantially followed the 1976 bills.

including vinyl chloride. This was after EPA's proposal of a vinyl chloride standard (in December of 1975), but before promulgation of the final rules in October of 1976. The report on that bill makes it clear that the House knew what EPA was doing about the pollutant:

> While these proposed amendments were under development, EPA proposed emission standards for vinyl chlorides under section 112 of the Act for major sources in the plastics industry. Vinyl chlorides continue to be mentioned in the bill to emphasize the committee's concern that the standards be promulgated without delay and that standards be promulgated for any other significant sources of vinyl chlorides which may exist.

H.R. Rep. No. 94-1175, 6 Leg. Hist. 6572-73.

Interestingly, even though this bill was aimed at forcing EPA action on vinyl chloride, the House Committee continued to vest discretion in the Administrator as to exactly how to regulate:

> [T]he Committee concluded that some impetus for EPA to act to regulate these unregulated pollutants was needed . . . In adopting this section, the Committee does not intend to specify the degree of emission reduction which should be required. With respect to vinyl chlorides . . . the Administrator should apply the appropriate means and extent of regulation under the existing statutory criteria . . .

6 Leg. Hist. 6575.

After the bill was reported, EPA promulgated final standards for vinyl chloride. Some time after that, the 1977 Amendments were enacted. */ The provision in the House bill

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*/ The final vinyl chloride standard was promulgated October 21, 1976. 41 Fed. Reg. 46560. The 1977 CAA amendments were passed by both houses of Congress on August 4, 1977, and were signed by the President on August 7, 1977. 3 Leg. Hist. Preface XII.

calling for specific action on vinyl chloride was deleted. The bill to the extent it called for action on other pollutants was passed. See Clean Air Act § 122, 42 U.S.C. § 7422. It is a logical assumption that Congress did not think it necessary because a final regulation had been issued. If Congress knew about the proposal, it surely knew about the final rule.

This administrative and legislative history demonstrates congressional ratification of EPA's interpretation of section 112. At the time of the 1977 Amendments, EPA had regulated both asbestos and vinyl chloride under section 112. Congress knew about both sets of rules. Both standards quite specifically took feasibility into account. Both had been the subject of litigation. One of the rules, for asbestos, had been particularly controversial and was the basis for a change in the statute. The only changes to section 112, moreover, ratified EPA actions, and gave the Administrator even more discretion in setting standards.

Though there is no specific discussion of the feasibility factor under section 112 in the 1977 legislative history, it is clear that Congress generally was aware of what had been done under section 112; it is unreasonable to assume otherwise. As the courts have held, such knowledge can be imputed to it under such circumstances. Despite all of this, Congress did nothing to overrule or even criticize EPA's rules. Indeed, the lack of discussion on the issue probably can be attributed to the fact that it was noncontroversial, and that Congress thought it was an appropriate implementation of the 1970 section. By its failure to alter or criticize EPA's interpretation of section 112 when it must have been aware of that position, Congress approved the consideration of feasibility in setting section 112 standards.

III. NRDC'S REQUESTED RELIEF IS INAPPROPRIATE

Assuming arguendo that EPA's consideration of feasibility in rejecting the 1977 proposed amendments to the vinyl chloride standard is found to be an error, at most it would be a harmless error, and thus vacation and remand is not appropriate. If this Court does remand however, NRDC's requested 180-day deadline for completion of rulemaking is inappropriate and unnecessary.

NRDC assumes that if feasibility may not be considered in setting standards under section 112, it is automatically entitled to a remand of the Agency's withdrawal of the proposed amendments to the vinyl chloride standard. That view is incorrect, and overlooks the doctrine of harmless error, firmly established in American jurisprudence. See generally Fed. R. Civ. P. 61; Fed. R. Crim. Pro. 52(9); Fed. R. Ev. 103(a); 28 U.S.C. § 2111 (1982).

The doctrine of harmless error has been incorporated into administrative law, most particularly by the terms of the Administrative Procedure Act, 5 U.S.C. § 706 (1982). That section expressly provides that courts reviewing agency action shall take "due account . . . of the rule of prejudicial error." This provision makes the harmless error doctrine directly applicable to judicial review of agency action. See, e.g., Consolidated Gas Supply Corp. v. Federal Energy Regulatory Commission, 606 F.2d 323, 328-29 (D.C. Cir.), cert. denied, 444 U.S. 1073 (1979); Delta Air Lines, Inc. v. Civil Aeronautics Board, 564 F.2d 592, 598 (D.C. Cir. 1977); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). Harmless error is applicable to this case under the terms of the APA. */

An essential component of the harmless error doctrine is that the party urging reversal has the burden of persuading the appellate court that prejudice was caused by the error below. Palmer v. Hoffman, 318 U.S. 109, 116 (1943); Creekmore v. Crossno, 259 F.2d 697, 698 (10th Cir. 1958). Unless the objecting party can demonstrate such prejudice, the error is deemed harmless and cannot serve as a basis for reversal or remand on appeal.

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*/ The Clean Air Act has a specific provision which makes the harmless doctrine applicable in review of Agency action under a number of sections, including section 112. CAA section 307(d)(8),(9), 42 U.S.C. § 7607(d)(8),(9). That provision does not apply to the 1977 proposal however. It was added by the 1977 amendments, and did not go into effect until after the changes to the vinyl chloride standard were proposed. Even if § 307(d)(8) did apply, it would not affect this analysis. At at a minimum harmless error under section 307(d)(8) is equivalent to harmless error under the APA. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 521-23 (D.C. Cir. 1983).

NRDC cannot show such prejudice. Section 112 demands that standards under it be set at that level which in the judgment of the Administrator provides an ample margin of safety to protect the public health. Section 112(b)(1)(B), 42 U.S.C. § 7412(b)(1)(B). In promulgating the 1976 standard for vinyl chloride, EPA did exactly that. As has been discussed, EPA gathered and reviewed all the available data and arrived at a regulation which in the Administrator's judgment provided an ample margin of safety. In other words, the requirement of the statute was met then, no matter what factors went into the final determination. In proposing the 1977 changes, EPA did not state that the public was not protected with an ample margin of safety by the 1976 standard. It then considered the changes, decided they were unnecessary and not required by section 112, and withdrew them.

NRDC does not dispute these facts. Its real challenge is to the manner in which EPA's decisions were arrived at on both the 1976 standard and the 1985 withdrawal of proposal, not whether the vinyl chloride standard protects human health with an ample margin of safety. */ NRDC does correctly quote the

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*/ NRDC attacks the 1976 regulation on the same grounds as the 1985 proposal. It is beyond dispute that this Court has no jurisdiction to entertain an actual challenge to the 1976 standard. Section 307(b) requires challenges to regulations under the Clean Air Act to be filed within 60 days

(FOOTNOTE CONTINUED ON NEXT PAGE).

Agency as saying that vinyl chloride causes cancer, that there is no known absolute level below which there are no adverse effects, and that absolute protection would only be provided by a zero emission limitation. But that does not address the ultimate question of what level of regulation of vinyl chloride provides an ample margin of safety to protect human health. NRDC may be equating "ample margin of safety" with zero emissions, but it makes no effort to demonstrate this, nor does the 1977 proposal which EPA rejected and which presumably NRDC is arguing for, so provide. NRDC has made no attempt to say with specificity why the 1976 standard does not adequately protect health, whether the 1977 proposal would, what the actual standard should be, or support any argument by reference to the record.

Thus, NRDC has failed to carry its burden of showing prejudice. It has neither argued nor proved that the existing standard fails to provide an ample margin of safety. Nor has it demonstrated or argued whether the 1977 proposal was necessary

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE).

of promulgation. (At the time of promulgation of the vinyl chloride standard, the time limit was 30 days.) This provision is jurisdictional. NRDC did not file within the required period. United States v. Ethyl Corp., 761 F.2d 1153 (5th Cir. 1985); Luckie v. EPA, 752 F.2d 454, 456-57 (9th Cir. 1985); Group Against Smog & Pollution Inc. v. EPA, 665 F.2d 1284, 1289 n.39 (D.C. Cir. 1981); Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 661 (D.C. Cir. 1975). NRDC seems to recognize this point. It spends considerable effort indicting the 1976 standard but does not seek any relief concerning it.

to provide an ample margin of safety. NRDC has contended only that impermissible factors were considered in rejecting the 1977 proposal, which is not the same thing.

EPA's conclusions, that the 1976 standard is adequately protective of the public health, and that the 1977 proposal was unnecessary and not required by the statute, stands uncontroverted. Thus, even if NRDC is correct that feasibility should not have been considered in rejecting the 1977 proposal, there has been no showing of prejudice from that alleged "error," and the withdrawal of proposal need not be remanded.

In addition, NRDC's requested relief is inappropriate given the nature of the 1977 proposal. That proposal would constitute a tightening of the standard, but it is not the overhaul of the regulation NRDC is arguing for. Indeed, it suffers from the same alleged defect as the 1976 standard, and the 1985 withdrawal of proposal. The 1977 proposed changes may have been more stringent, but they also were tempered by feasibility considerations. 42 Fed. Reg. 28,154-55 (June 2, 1977). If the 1977 proposal was promulgated, it would be subject to challenge by NRDC and others on the same grounds put forward in this petition. NRDC's requested relief does not fit its argument. */

*/ Should this Court decide to remand the 1977 proposal, NRDC's request that EPA be ordered to complete a rulemaking within 180 days is also inappropriate and unnecessary. This is true for several reasons. As has been stated repeatedly, there

(FOOTNOTE CONTINUED ON NEXT PAGE).

CONCLUSION

For the reasons stated above, NRDC's petition should be dismissed. Even if judgment is entered for NRDC, however, its requested relief is unnecessary. Any error is harmless, so a remand is inappropriate. If a remand is to be ordered, at a minimum NRDC's proposed deadline for concluding the rulemaking should not be granted.

Respectfully submitted,

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE).

presently is a standard for vinyl chloride emissions under section 112. It has been in effect since 1976, and is stringent. This is not a case where there is no regulation in place at all. Thus, the cases cited by NRDC do not apply. In each of those decisions, a statute had been enacted for some time, but the agency involved had not regulated under it. That is not the case here. Moreover, the deadline in section 112(b)(1)(B), asserted by NRDC, is also inapplicable. That is a timetable for promulgating rules once a pollutant has been listed under section 112, i.e., once it has been established that it poses a threat and that regulation is necessary. But there is already a regulation for vinyl chloride, and EPA's uncontradicted conclusion is that that regulation is enough. Moreover, the subsection in no way refers to amendments to standards.

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