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

No. 85-1150

NATURAL RESOURCES DEFENSE COUNCIL, INC.

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

Petition for Review of an Action of the
Environmental Protection Agency

REPLY BRIEF FOR PETITIONER

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September 3, 1985

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SUMMARY OF ARGUMENT

NRDC's petition for review is not barred by the doctrine of exhaustion of remedies. The legal issue whether EPA has authority to consider economic or technological factors when setting standards under Section 112 was fully aired in the rulemaking below and is properly before this Court now. The issue was raised both by the Environmental Protection Agency (EPA) itself and by the Environmental Defense Fund. This Court has repeatedly held that the purposes of the exhaustion doctrine are served, and the exhaustion requirement met, if another party or the agency itself raises an issue.

NRDC has standing because it represents members living near vinyl chloride-emitting facilities who are injured in fact by EPA's refusal to issue the regulatory amendments proposed in 1977. The Clean Air Act establishes no more restrictive requirement.

The Court has jurisdiction to hear this petition because it was timely filed within 60 days of the final action petitioners are seeking to have reviewed.

Nothing in the statutory language supports EPA. Section 112(e), authorizing work practice standards in certain cases instead of numerical emission limits, grants no authority to consider feasibility when determining what is required to protect health with an ample margin of safety. Section 112(c)(1)(B), authorizing a two-year waiver for existing sources to install controls, is the statute's exclusive concession to feasibility concerns; it does not allow feasibility considerations to enter into the setting of the standard. There is absolutely no basis for the claim that the words "in his judgment" in Section 112(b)(1)(B) delegate to EPA the authority to define the legal meaning of the "ample margin of safety" test any way it sees fit. Finally, the statutory purpose cited here by EPA to justify feasibility considerations was cited by EPA to preclude the very same considerations in Lead Industries; EPA cannot have this both ways.

The legislative history confirms that Congress intended standards to be based on health factors alone. A statement in the 1970 Senate Report that trace levels of two specific pollutants need not be curbed does not indicate a feasibility concern. Rather, the statement reflects the belief at the time that these pollutants exhibited threshold doses. For pollutants which are hazardous at any level, the bill provided for an emissions prohibition. That requirement was embodied in the final "ample margin of safety" test. Senator Muskie's authoritative post-conference summary states that for pollutants hazardous at any level there must be "no measurable emission" requirements even if plants have to be closed as a result.

The cases confirm that standards must be based on public health considerations only. EPA claims that the four main cases NRDC relies on (Union Electric, American Textile Mfrs., Lead Industries, and Hercules) are simply examples of deference to agency interpretations will not hold water. Each of the cases firmly holds that the statutes require the holding reached, regardless of agency interpretations. EPA misreads National

Ass'n of Demolition Contractors. The feasibility issue was not presented in that case. The case holds only that EPA was not arbitrary when it refused an industry's request for further weakening of the asbestos standard. EPA's final plea for boundless deference, even to the extent of disregarding all of these cases, cannot be accepted without reducing judicial review to a meaningless rubber stamp.

Congress did not ratify EPA's interpretation. EPA admits there is no discussion of the feasibility issue in the 1977 legislative history pertinent to Section 112. EPA merely asks the Court to "assume" that Congress knew of and approved of the Agency's interpretation. In the effort to give any basis for such an assumption, however, EPA badly distorts its actions regarding asbestos in 1973 and Congress's statements regarding vinyl chloride in 1976. The fact is the 1976 committee report relied on by EPA explicitly abstains from any endorsement of EPA's interpretation. Without indication that an agency's view has been brought home to Congress (and not merely to a single subcommittee) and without some indication of congressional approval, ratifications by reenactment cannot occur.

EPA makes the ridiculous argument that it is not enough for a petitioner to show that an agency decision was fundamentally compromised by a legally impermissible factor. Rather, EPA asserts the petitioner must prove the decision would be different if it had been made in accordance with law. This is an absurd proposition of law. Moreover, in this case it is obvious that the decision would have been different; the only bases given for the January 1985 withdrawal were cost-benefit and technological feasibility tests that are plainly illegal.

NRDC requests that the Court vacate the January 1985 withdrawal and remand for further rulemaking within 180 days. This is precisely the remedy ordered by the Court on identical facts in the tall stacks case, Sierra Club.

I. THE ISSUE OF EPA'S LEGAL AUTHORITY TO IMPOSE COST-BENEFIT AND TECHNOLOGICAL FEASIBILITY TESTS WAS FULLY AIRED BELOW AND IS NOW PROPERLY BEFORE THE COURT

Alleging incorrectly that the legal issue presented by NRDC's petition for review was not raised in the rulemaking below, EPA argues that the petition is barred by the doctrine of exhaustion of remedies. EPA Br. at 10-12. EPA misstates both the facts of this case and the applicable law.

The premise for EPA's argument is the claim that the issue of the Agency's authority to employ cost-benefit and technological feasibility tests in standard-setting under Section 112 was not raised in the rulemaking. This claim is flatly wrong. The legal issue was raised in the vinyl chloride rulemaking in the first instance by EPA itself as well as in comments by the Environmental Defense Fund (EDF).

This Court has stated that the exhaustion requirement is satisfied when another party or the agency itself has raised the issue that the petitioner presents for judicial review.[1/] Moreover, the doctrine's main purposes are (1) to assure that an agency is alerted to an issue and has the opportunity to consider it during the rulemaking, and (2) to assure that the Court will

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1/ "This court has emphasized that '[t]he purpose of exhaustion . . . is narrow . . . . So long as the appellant or some other party has put an objection on the record, the obligation to exhaust is discharged.'" Etelson v. Office of Personnel Management, 684 F.2d 918, 923 (D.C. Cir. 1982), quoting Safir v. Kreps, 551 F.2d 447, 452 (D.C. Cir. 1977) (emphasis added). "[I]t is not always necessary for a party to raise an issue, so long as the [agency] in fact considered the issue." Washington Ass'n for Television & Children v. FCC, 712 F.2d 677, 682 (D.C. Cir. 1983). The footnote to this sentence cited cases where the issue had been raised by FCC Commissioners or by other parties. Id. at 682-3 n. 10.

not be presented with the issue without the benefit of the agency's views.[2/] Both purposes were fully served by EPA's and EDF's consideration of the legal issue now in dispute.[3/]

EPA itself first raised the issue of its authority to employ cost-benefit or technological feasibility tests in the 1975 proposal of vinyl chloride standards. EPA stated:

2/ In Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984) (citations omitted), this Court set forth the four primary purposes of the exhaustion requirement:

> First, it carries out the congressional purpose in granting authority to the agency by discouraging the "frequent and deliberate flouting of the administrative processes [that] could
> * * *
> encourag[e] people to ignore its procedures." . . . Second, it protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise, exercise whatever discretion it may have been granted, and correct its own errors. Third, it aids judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding. Fourth, it promotes judicial economy by avoiding needless repitition of administrative and judicial factfinding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency.

The Court also stated that "the exhaustion requirement is in general not jurisdictional in nature . . . but rather must be applied in accord with its purposes." Id. (citations omitted).

3/ The following discussion focuses on the second and third of the Andrade purposes. Neither the first nor the fourth purpose is offended in this case either. This case presents a relatively rare situation in which both the agency and another party raised the issue in question; it is highly unlikely that allowing this petition to proceed would encourage parties to regularly bypass the administrative process. Also, the issue in this case is a legal one; there is no factfinding involved. Moreover, there is no reasonable prospect that comments by NRDC, echoing the legal issues raised in the comments of EDF, would have altered EPA's January 1985 withdrawal decision.

> EPA considered that section 112 might be interpreted to require a complete prohibition of emissions of any apparent non-threshold pollutant. This zero emission limitation would be the only emission standard which would offer absolute safety from ambient exposure. This interpretation was rejected, however, . . . based on the following considerations.[4/]

The notice then set forth the economic and technological considerations which led EPA to conclude that "setting zero emission limits would be neither desirable nor necessary."[5/] Discussing the legal issue further, the notice stated: "EPA recognizes that consideration of technology is not explicitly provided for in standard setting under section 112."[6/] Essentially the same discussion appears in the 1976 promulgation notice.[7/] Furthermore, the 1977 notice proposing the amendments to the standard stated: "The vinyl chloride standard has been criticized for allegedly placing unwarranted emphasis on technological rather than health considerations."[8/]

The legal issue was also clearly raised by EDF in its comments on the 1977 proposal. EDF emphasized that by supporting the proposed amendments as the product of a settlement it was not conceding the legal issue in any way:

> The proposed amendments represent a true compromise between what EDF could have pressed for in court and the existing standard. Section 112 of the Clean Air Act requires that emission standards for hazardous air

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4/ 40 Fed. Reg. at 59534 (col. 2).

5/ *Id.*

6/ *Id.* (col 3).

7/ 41 Fed. Reg. at 46561 (col. 3).

8/ 42 Fed. Reg. at 28154 (col. 2).

> pollutants, such as vinyl chloride, be set "at a level which in the judgment of the Administrator provides an ample margin of safety to protect the public health from such hazardous air pollutant." It clearly requires a health-linked, not a technology-based, standard. Yet, inconsistent with the statutory requirement, the original standards were based on what EPA believed industry could accomplish with best available technology . . . . EPA recognized that vinyl chloride is an "apparent non-threshold pollutant" which creates a risk to public health at all levels. Had the case gone to trial, EDF would have taken the position that §112 required a zero emissions standard, the only standard adequate to provide the required ample margin of safety for a non-threshold pollutant. Instead, EDF settled for a compromise which establishes a goal of zero emissions and requires industry to move one step closer to that goal.[9/]

EDF also stated: "[T]he statute EPA operates under requires regulations based on protection of health and not cost or technology concerns."[10/]

These passages show that EPA chose its ground fully alerted to the legal issue presented in this petition for review. EPA cannot seriously contend, given the explicitness with which the Agency itself raised the legal issue, and given these statements by EDF in 1977, that the Agency was not placed on notice of the issue NRDC has presented in this petition for review.

9/ Comments of the Environmental Defense Fund on the Proposed Amendments at 1-2 (Record, D-61).

10/ Id. at 12. Obviously, EDF's compromise had no binding effect on that organization, let alone on any other person, in the event that EPA failed to promulgate the proposed amendments. The settlement agreement specified that EDF retained the right to challenge final action and to raise "any relevant legal or factual arguments to challenge the adequacy of the final action taken by EPA." Joint Motion to Dismiss, ¶II.4 (Motion granted June 24, 1977) (Attachment A to this Brief.) Therefore, there is no basis for the suggestion by intervenor Vinyl Institute (Br. at 22) that EDF somehow conceded its legal position, let alone NRDC's, by settling the specific case and supporting the settlement in the subsequent rulemaking.

It is true that NRDC did not file comments on the vinyl chloride regulations. The exhaustion doctrine, however, requires only that someone have raised the issue presented for judicial review.[11] The Clean Air Act imposes no special requirement in this regard; it has never provided -- either prior to the 1977 amendments or since -- that a party seeking judicial review is limited only to issues that the party itself raised below.[12]

Moreover, in conflict with its recent past practice, EPA failed to give the public any notice or opportunity to comment when it decided, in January 1985, to make the major change of course involved in withdrawing the proposed amendments. In 1984, when EPA reached a similar decision to withdraw certain long-pending proposals for regulating another hazardous air pollutant (benzene), the Agency saw fit to propose the withdrawal and take public comment.[13] NRDC vigorously opposed the benzene withdrawals.[14] When the comment period closed on the proposed

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11/ See Etelson, Washington Ass'n for Television & Children, discussed in note 1, supra.

12/ Both EPA and the Vinyl Institute concede, as they must, that Section 307(d)(7)(B) of the Act, enacted in 1977, does not apply to this rulemaking, as it was commenced before the effective date of that provision. Even the exhaustion requirement created in that provision requires only that someone have raised the issue. The operative first sentence of the provision is written in the passive voice: "Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review." Notably, only the following sentences specifying a reconsideration procedure are written in the active voice, linking a specific person with a specific objection.

13/ See 49 Fed. Reg. 8386 (Mar. 6, 1984).

14/ NRDC's petition for review of the benzene withdrawals is now pending before the Court. NRDC v. Thomas, No. 84-1387.

vinyl chloride amendments more than eight years ago, EPA appeared committed to promulgating the amendments. If EPA had given the same opportunity for comment for vinyl chloride as it had with respect to benzene, NRDC would have filed strenuous objections.15/

Furthermore, the implication that EPA has been caught by surprise by NRDC's challenge to its action on vinyl chloride is incredibly disingenuous.16/ In the five years prior to the 1985 withdrawal of the VC proposal at issue here, NRDC raised the issue of EPA's authority to consider costs or feasibility in no fewer than eight formal comments on Section 112 proposals,17/ in at least two submissions to EPA on the implementation of Section 112 generally,18/ in testimony before four congressional

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15/ The withdrawal, as explained in NRDC's opening brief, was couched inside a proposal of further amendments to the VC standard -- amendments that would weaken rather than stengthen the standard. Out of an abundance of caution, NRDC included with its comments on that proposal a petition for reconsideration of the withdrawal. NRDC did this even though Section 307(d)(7)(B)'s requirement for such petitions does not apply to this rulemaking. (See note 12, supra.) The petition for reconsideration raises once again the legal issue. NRDC has heard not one word from EPA.

16/ As the Fifth Circuit stated in City of Seabrook v. U.S. EPA, 659 F.2d 1349, 1361 n.20 (5th Cir. 1981): "[W]e find many of the EPA's claims that it was unaware of petitioners' objections to be disingenuous. It was clear that the EPA was aware of the legal delicacy of its conditional approval policy, and any claim that the agency was not "aware" that the statute passed by Texas might not provide legal authority to implement an inspection and maintenance program . . . rings false."

17/ NRDC filed comments on EPA's airborne carcinogen policy in 1979; on five proposals regarding benzene between 1980 and 1984; on proposed standards for radionuclides in 1982; and on proposed standards for arsenic in 1983.

18/ NRDC commented on two draft EPA "policy statements" on the (footnote continued) committees,[19] and in two face-to-face meetings with the EPA Administrator.[20]

The cases cited by EPA and the Vinyl Institute are either off-point or misapplied. Cases cited by EPA (Br. at 11) stating that an issue must have been raised below before it may be presented to a court have no bearing here because, as we have shown, the issue presented in this case was raised below. Moreover, all but one of the cited cases involve failure to raise factual issues before the agency; this case involves a purely legal issue.[21] The one exception was governed by a specific

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implementation of Section 112 in 1982 and 1983.

19/ NRDC's counsel testified on these issues on behalf of either NRDC or the National Clean Air Coalition (of which NRDC is a principal member) at four legislative and oversight hearings between 1981 and 1984. See e.g., Hearings on Clean Air Act Oversight before the Senate Comm. on Environment and Public Works (Part 3), 97th Cong., 1st Sess. (June 11, 1981); Hearings on EPA's Air Pollution Control Program before the Subcomm. on Oversight & Investigations of the House Comm. on Energy & Commerce, 98th Cong., 1st Sess. (Nov. 7, 1983).

20/ NRDC's counsel met to discuss these very issues twice with former Administrator Ruckelhaus in 1983 and 1984. NRDC also has communicated these same views in meetings with each of the four Assistant Administrators for Air and Radiation who have served over the past eight years. Finally, NRDC has met on these issues with current Administrator Thomas twice in 1985.

21/ Far East Conference v. United States, 342 U.S. 570, 574-575 (1952) (factual issues relating to an antitrust claim); Weinberger v. Bentex Pharmaceuticals, Inc. 412 U.S. 645, 654 (1973) factual issues relating to classification as "new" drugs); Glass Packaging Institute v. Regan, 737 F.2d 1083, 1093 (D.C. Cir. 1983) (factual issue of tamperability not raised in timely manner); Lorion v. NRC, 712 F.2d 1472, 1474 (D.C. Cir. 1983) (factual issues demonstrating need for Environmental Impact Statement not raised below); Oljato Chapter of Native Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975) (factual issues regarding pollution control capabilities not presented to agency); Quick v. Martin, 397 F.2d 644, 646-47 (D.C. Cir. 1968) (factual issue not raised).

statutory requirement for exhaustion of legal as well as factual issues.22/

EPA contends Nader v. NRC, 513 F.2d 1045 (D.C. Cir. 1975), and Environmental Defense Fund v. EPA, 598 F.2d 62 (D.C. Cir. 1978), broadly hold that a party which did not comment cannot petition for judicial review. EPA Br. at 12. Neither case actually supports so broad a proposition. Each falls squarely in the line of the exhaustion cases holding that a petitioner cannot present a factual issue which no one raised below.23/ Neither case involved a situation in which, as here, the issue is a legal one which another party, and the agency itself, did raise below.24/

The Vinyl Institute characterizes these two cases as providing that a party which did not comment lacks standing. Br. at 15-16. There is not a word about standing in these cases. In the absence of a specific statutory limitation, standing is

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22/ Green v. FCC, 447 F.2d 323, 329 (D.C. Cir. 1971) (specific exhaustion requirement of Section 405 of the Communications Act.)

23/ In the Nader case, the petitioner tried to present specific factual issues regarding emergency cooling of nuclear reactors which were not raised by anyone below. 513 F.2d at 1049. Likewise, in the EDF case, petitioner BASS attempted to present specific factual issues regarding a measurement technique which no one had raised below. 598 F.2d at 91.

24/ Anomalous results would occur if these cases were construed as EPA suggests. If Party A commented on Issue X, and Party B commented only on other issues, it is clear that Party B can present Issue X on review. If Party B may present Issue X on review despite his failure to comment on it, there is no reasonable basis to bar Party C, who did not file comments, from presenting the same issue on review. The purposes of the exhaustion requirement are served so long as someone raised the issue.

measured by whether the petitioner alleges injury in fact as the result of EPA's action. NRDC has members who live in the vicinity of vinyl chloride-emitting facilities subject who, as a result of EPA's withdrawal of the proposed amendments, are forced to continue breathing emissions of a known cancer-causing pollutant. This establishes injury in fact. The Clean Air Act imposes no tighter requirement.[25/]

Finally, as the predicate for arguing that the Court lacks jurisdiction, the Vinyl Institute mischaracterizes NRDC's petition as an untimely challenge to the 1976 standard. VI Br. at 16-22. The argument has no merit whatsoever. NRDC's petition challenges EPA's final action in January 1985 withdrawing the 1977 proposed amendments.[26/] The petition was filed, as required, within 60 days of that action. In Montana v. Clark, this Court held that "an agency decision not to amend longstanding rules after a notice and comment period is reviewable agency action." 749 F.2d 740, 744 (D.C. Cir. 1984) (footnote and citation omitted).

25/ Section 304, 42 U.S.C. §7604, pertaining to citizen suits, indicates Congress's intent to establish the broadest possible standing under the Clean Air Act, providing that "any person" may bring suit. Section 307(b), 42 U.S.C. §7607(b), regarding petitions for review of final actions, does not contain any requirement that a petitioner for review must have commented in the rulemaking.

26/ NRDC's opening brief specifically stated that the petition does not involve the EDF v. EPA settlement agreement. See NRDC Br. at 11-12 n.25. Nor does the petition involve the 1976 promulgation. It challenges the legal basis for the January 1985 withdrawal.

The Vinyl Institute claims that NRDC v. NRC, 666 F.2d 595 (D.C. Cir. 1981), prohibits any suit by an organization which could have sued when the rules were first issued, even when a new rulemaking has been conducted. The case does not say that; the case bars only "procedural" challenges, not "substantive" ones, if they could have been raised by the petitioner before. Id. at 602 (emphasis in original).[27/] Moreover, the Court further limited the NRDC case in Montana v. Clark:

> NRDC merely holds that a protestant, who could have but did not seek review, may not create the basis for a reviewable order by unilaterally petitioning for repeal or amendment of a regulation. . . .
>
> The concern is not present in the instant case. Montana did not contrive to restart the 60-day period by unilaterally seeking repeal of a long-standing regulation. Indisputably, the agency itself initiated rulemaking procedures . . . .

749 F.2d at 744. This is precisely the situation in this case.

In sum, neither EPA nor the Vinyl Institute can legitimately claim that any requirement of the law of exhaustion, standing, or jurisdiction has been violated.

II. THE STATUTE, LEGISLATIVE HISTORY, AND CASES ARE CLEAR THAT EPA MAY NOT CONSIDER ECONOMIC OR TECHNOLOGICAL FEASIBILITY WHEN SETTING STANDARDS UNDER SECTION 112

NRDC's opening brief showed that under the text of Section 112, its legislative history, and the case law, EPA has no authority to consider economic or technological factors when setting standards for hazardous air pollutants. EPA and amici American Petroleum Institute and Chemical Manufacturer

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27/ See Montana v. Clark, 749 F.2d at 744 n.8.

Association ("API/CMA") misconstrue and misrepresent the legislative and judicial materials in their attempt to show the contrary.[28/]

A. Nothing in Section 112 Can Be Construed to Authorize Cost-Benefit or Technological Feasibility Tests

Section 112(b)(1)(B) directs the Administrator to set standards for hazardous air pollutants "at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant." No word or phrase in this sentence can reasonably be read to authorize consideration of economic or technological feasibility when setting standards. EPA makes no attempt to dispute this.[29/] Instead,

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28/ Arguments in Part III of the Vinyl Institute's brief require no response because they are nothing more than a hypothetical challenge to an action EPA did not take, namely promulgation of the 1977 amendments. Moreover, the Vinyl Institute's arguments erroneously presume the relevance of feasibility factors.

29/ API/CMA contend that despite the exclusive public health focus of the operative words of Section 112(b)(1)(B), the Court should construe them to encompass feasibility considerations. They insist that the statute would have to be even more explicit to bar such factors from standard-setting. (Br. at 21.) They ignore, however, the Supreme Court's conclusion that "[w]here Congress intended the Administrator to be concerned about economic and technological feasibility, it expressly so provided." Union Electric Co. v. EPA, 427 U.S. 246, 257 n.5 (1976).

Amici refer to dicta about the term "safe" in Justice Stevens' opinion in Industrial Union Dep't v. American Petroleum Institute, 448 U.S. 607, 642 (1980). (Br. at 19.) They neglect to point out (1) that Justice Stevens' opinion commanded only three votes, (2) that the opinion explicitly avoids the question whether economic considerations may compromise occupational health standards, id. at 615, and (3) that the next year Justice Stevens joined a majority of the Court in holding that cost-benefit tests may not be employed in setting occupational health standards. American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981).

(footnote continued)

the Agency offers a series of extraordinarily weak arguments that other parts of Section 112 somehow take back what this language says.

EPA first claims that Section 112(e), which authorizes standards set in the form of work practice requirements instead of numerical emission limits in certain cases, implicitly makes feasibility relevant to determination of "an ample margin of safety." (EPA Br. at 17.) The text and legislative history of Section 112(e), however, are crystal clear that the authority to set work practice standards may not be used to compromise the degree of protection required under Section 112(b)(1)(B). The 1977 Senate Report specifically stated: "Design standards are not to be used where no margin of safety exists for a pollutant."30/ The Report emphasized that this amendment was intended to deal with special problems such as demolition of asbestos-containing buildings where, though work practices exist to prevent emissions, it is not practical either to duct the emissions through a central control device or to measure the amount of asbestos thrown into the air during demolition.31/

Amici also cite three pesticide cases. (Br. at 20 n.38.) These cases, however, conclude that Congress specifically commanded balancing economic factors with public health risks when making pesticide registration decisions. See, e.g., Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, ___ n.36 (D.C. Cir. 1971). Such a command is absolutely lacking with regard to Section 112.

30/ S. Rep. 127, 95th Cong., 1st Sess. 44, 3 Leg. Hist. 1418 ("1977 Senate Report").

31/ Id. On the specific limitations imposed by Congress on the term "not feasible," see Pet. Br. at 4 (note 3) and 20 (note 34). The Conference Report further emphasized these limitations. It described the Senate provision as dealing with (footnote continued)

There is absolutely no basis in this for concluding that the "ample margin of safety" test allows consideration of technological or economic factors.32/

EPA's second claim is that Section 112(c)(1)(B), which allows up to two years "for the installation of controls" by an existing source is deprived of meaning unless technological and economic factors can be considered in standard-setting. (EPA Br. at 17.) NRDC fails to see the logic in EPA's reasoning. There is no inconsistency between specifying that standards must achieve "no measurable emissions" (if the pollutant is hazardous to health at any level) and providing that this standard must be met through "installation of controls." The two-year waiver provision is the specific and exclusive means Congress provided for accommodating technological and economic concerns. Its presence strengthens, rather than weakens, the proof that these factors may not be considered in standard-setting.33/

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situations "where it is not possible or feasible to measure hazardous emissions or to capture them through appropriate devices for control." H.R. Rep. No. 564, 95th Cong., 1st Sess. 150 (1977), 3 Leg. Hist. 511 ("1977 Conference Report"). It underlined once more that the terms "not feasible" relate solely to EPA's ability to measure emissions and that do not authorize EPA to consider the feasibility for industry of controls: "The language in this section with respect to technological or economic limitations defines what is not feasible only for purposes of prescription or enforcement by EPA." Id. at 151, 3 Leg. Hist. 512 (emphasis added).

32/ We discuss this amendment further when replying to the assertion that Congress ratified the EPA construction in 1977. See pages __-__, infra.

33/ See Pet. Br. at 23-24, showing that the two-year waiver for individual existing sources was the only significant concession to non-health factors agreed to by the House and Senate conferees in 1970.

Third, EPA argues that to effectively preclude feasibility considerations from Section 112(b)(1)(B) Congress would have had to spell out factors in addition to the terms "ample margin of safety," as it did in Section 307(a) of the Clean Water Act. (EPA Br. at 18.[34/]) EPA, however, has confused the holding in Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978). The Court's holding that feasibility may not be considered under Section 307(a) did not depend on the presence of the additional factors referred to by EPA; it depended on the absence of "any term commonly used to denote a feasibility consideration, *e.g.*, feasibility, achievability, practicability, economic impact, or cost." *Id.* at 111. As the Court observed, Section 112 of the Clean Air Act and Section 307(a) of the Clean Water Act both reflect the same deliberate congressional intent to base standards for toxic pollutants on public health protection alone. *See* Pet. Br. at 25-26.

Fourth, EPA appears to make the amazing claim that the statute, by the use of the words "in his judgment," delegates to the Administrator the authority to define the legal meaning of the "ample margin of safety" test any way he sees fit. (EPA Br. at 18, 33.)[35/] This claim is plainly wrong. The clear function of the words "in his judgment" is to give the Administrator some discretion in the assessment of the facts presented by particular

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34/ Although EPA does not enumerate these factors, presumably the Agency is referring to such considerations as toxicity, persistence, degradability, etc. 33 U.S.C. §1317(a).

35/ The claim is made explicitly by API/CMA. (Br. at 20-21.)

hazardous air pollutants.[36/] The words do not give EPA carte blanche to decide what the legal criteria are; Congress decided that question already.[37/]

Finally, EPA makes a catch-all argument that the statement of purpose in Section 101(b)(1) authorizes cost-benefit and technological feasibility tests. (EPA Br. at 18-19.) EPA, however, cited this provision to support precisely the opposite

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36/ The use of the words "in his judgment" in the standard-setting provision of Section 112(b)(1)(B) dates from 1970. In 1977, explaining on the decision to use those words in the definition of a hazardous air pollutant (Section 112(a)(1)) and in other definitional section, the House Report made clear that the terms relate to the Administrator's discretion in the analysis of factual information. The Report stated:

> In 1975, the committee expressly rejected an amendment which would have deleted these words [where they were already used] and required a finding by the Administrator instead. Thus, the committee language is intended to emphasize the necessarily judgmental element in the task of predicting future health risks of present action and to confer upon the Administrator the requisite authority to exercise such judgment.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 51 (1977), 4 *Leg. Hist.* 2518 ("1977 House Report") (emphasis added). The Report's explanation of the words' function should be sufficient to answer the contention of API/CMA (Br. at 20-21) that our interpretation reads these words out of the statute. Here as elsewhere in their brief, *amici* make the mistake of assuming that *all* hazardous air pollutants would have to be regulated to a level of "no measurable emissions" under our reading of the statute. This is not so. Some hazardous air pollutants (*e.g.*, mercury) do appear to have thresholds below which they are not dangerous; for such pollutants it is possible to set standards under Section 112(b)(1)(B) that allow emissions. For vinyl chloride, however, EPA has concluded "there is no known threshold level of effects." 50 Fed. Reg. at 1183 (col. 1).

37/ EPA's contention goes beyond even the overbroad plea for judicial deference tendered earlier in its brief. A statute which really provided the Administrator a blank check to make any factors relevant that he saw fit probably would be an unconstitutional delegation even by today's standards.

conclusion in Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980), cert. denied 449 U.S. 1042 (1980).[38] EPA cannot be allowed to have it both ways.[39]

The only argument from the statutory text that has not already been discussed is API/CMA's claim relating to Section 302(k), which defines "emission standard" for general purposes of the Act as a requirement which "limits" emission rates. The amici contend that if Congress had held our interpretation of Section 112, it would have used a word such as "prohibits." (API/CMA Br. at 18.) This argument is specious. The amici ignore the express legislative purpose for Section 302(k). It was adopted, and the word "limits" was chosen, specifically to

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[38] Summarizing the Administrator's argument why technological and economic factors may not be considered under the "adequate margin of safety" test of Section 109, the Court stated:

> The Administrator begins by pointing out that the Act's stated goal 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[.] . . .

647 F.2d at 1152. It was the Administrator's conclusion from this passage, as well as other legislative history, that

> Congress made it abundantly clear that considerations of economic or technological feasibility are to be subordinated to the goal of protecting the public health by prohibiting any consideration of such factors.

Id. at 1153 (emphasis added).

[39] Moreover, if EPA's present assertion were correct, then the same purpose would control all other sections of the law. This proposition would require overruling the holding of the Supreme Court in Union Electric Co. v. EPA, 427 U.S. 246 (1976), this Court's holding in Lead Industries, and this Court's construction of Section 112 in Hercules, supra.

ratify court decisions holding that techniques such as dispersing emissions (rather than controlling them) were not valid emission standards.[40] It was not adopted to make a fine distinction between "limits" and "prohibits."[41]

B. The Legislative History Fully Supports the Statutory Preclusion of Economic and Technological Factors

The discussion of legislative history in NRDC's opening brief demonstrated that Congress (1) directed EPA to set hazardous air pollutant standards on the basis of health considerations alone, (2) rejected authority to consider economic and technological factors originally present in the House bill, (3) understood that some pollutants are intolerably hazardous at any level, and (4) explicitly determined that standards for such pollutants must protect public health even if that required sources to close.

In the attempt to dispute this, EPA and API/CMA place principal reliance on a passage from the 1970 Senate Report which neither quotes in full. (EPA Br. at 19-20; API/CMA Br. at 23-24.) We quote it in full here, along with the important paragraph which follows it:

> The Committee recognizes that some of these hazardous air pollutants, such as cadmium and beryllium, are present in nearly all raw materials. Thus, beryllium and cadmium appear as trace impurities in

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40/ See 1977 Senate Report at 94-95, 3 Leg. Hist. 1468-69.

41/ Moreover, Section 302(k) is the general definition of an emission standard; it applies to all types of emission standards throughout the Act. "Limits" is the appropriate general purpose word.

> steel making and other raw material processes, in addition to the processing at beryllium and cadmium plants. Recognizing that complete control of beryllium from steel plants, for example, may not be necessary or practicable, the Committee has provided the [Administrator] with authority to differentiate among categories of sources in establishing prohibitions under section 115.
>
> After public hearings and within six months of the publication of such proposed prohibition, the [Administrator] would be required to promulgate such prohibition, unless he found on the basis of a preponderance of the evidence, that the air pollution agent was not, in fact, hazardous to the health of persons -- or that a greater than zero emission could be permitted without presenting a hazard to health.[42/]

From the excerpts of the first paragraph which EPA quotes, the Agency draws the conclusion that "the Senate bill assumed that feasibility would be considered" even for pollutants hazardous at any level of exposure. (EPA Br. at 19.) That is not what these passages provide.

The fact is that in 1970, when these comments were written, neither beryllium nor cadmium was believed to lack a threshold of effect and to be hazardous at any level of exposure.[43/] Since trace emissions of beryllium or cadmium were not believed to be hazardous, the Committee's comment that their complete removal "may not be necessary or practicable" was fully consistent with the Committee's policy of prohibiting emissions of pollutants hazardous at any level.

42/ S. Rep. No. 1196, 91st Cong., 2d Sess. 20 (1970), 1 Leg. Hist. 420 ("1970 Senate Report").

43/ This view of beryllium, for example, is reflected in the notice accompanying EPA's 1973 standard, which concluded that an ambient level of 0.01 micrograms per cubic meter represented "a safe level of exposure" to beryllium. 38 Fed. Reg. 8820, 8823 (col. 2).

The purpose of the proposed provision allowing differentiation among source categories, then, was not to permit some industries to continue emitting dangerous levels of hazardous pollutants. The purpose was to allow EPA, when dealing with a hazardous pollutant which exhibits a health effects threshold, to establish different standards for different types of sources depending whether their emissions caused the threshold to be exceeded.[44]

The next paragraph of the Report, which EPA and API/CMA did not quote, repeats the bill's unambiguous command that when a pollutant _is_ hazardous at any level of exposure, emissions must be prohibited. Even if the statement that complete removal of beryllium or cadmium impurities "may not be necessary or practicable" had concerned non-threshold pollutants, this clear command would take precedence. As shown in NRDC's opening brief (Pet. Br. at 20-24), Congress clearly contemplated that if control measures sufficient to protect public health with an ample margin of safety were impractical, then the offending sources would have to close.

API/CMA argue that the Conference Committee retreated from the Senate bill when it chose the "ample margin of safety" test in place of the Senate bill's presumptive prohibition. (API/CMA Br. at 24.) We have already shown that there is no basis for this claim. (Pet. Br. at 23 n.41.) The "ample margin of safety" test in Section 112 is an amplified version of the "adequate

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44/ The provision authorizing EPA to differentiate among categories, moreover, was removed by the Conference Committee.

margin of safety" test employed in Section 109. As this Court has held, the "adèquate margin of safety" test cannot be construed to permit EPA to consider economic or technological feasibility. Lead Industries, 647 F.2d at 1150. It is inconceivable that the Conference Committee could have intended any lesser restriction on consideration of feasibility when it adopted the amplified version of the same test in Section 112.

EPA and the amici next attempt to fend off Senator Muskie's key summary of the Conference Committee agreement. Muskie, the Act's chief sponsor and chairman of the Senate conferees, summarized Section 112 in post-conference floor debate as follows:

> The 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.[45]

EPA and the amici suggest that the use of the word "could" actually gave EPA discretion to consider feasibility factors even when dealing with pollutants which are hazardous to health at any level of exposure. (EPA Br. at 21; API/CMA Br. at 26.) Once again, however, they have ignored the fact that not all hazardous air pollutants lack thresholds of effect and are hazardous at any level. In such a case the ample margin of safety test can be

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45/ Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970, Exhibit 1 to Statement of Sen. Muskie, Cong. Rec. S20601 (daily ed., Dec. 18, 1970), 1 Leg. Hist. 133.

satisfied while still allowing emissions.[46/] Senator Muskie's use of the word "could" reflects this distinction between the treatment required for threshold and non-threshold hazardous air pollutants. The clear import of his statement is to emphasize that for "certain pollutants" which he earlier described as intolerably dangerous at "any level of emissions,"[47/] the public health is to be protected even if it means emissions must be effectively prohibited and that plants must close.

Other 1970 legislative history cited by API/CMA is blatantly quoted out of context. They assert: "[A]s explained by the [1970 Senate Report], the combination of emission prohibitions under Section 115 of the Senate bill and emission standards under Section 114 of the bill was intended to provide effective control of 'stationary source emissions that pose any <u>significant danger</u> to public health or welfare.'" (API/CMA Br. at 23, emphasis supplied by them.) They imply that the Commitee established a "significance" test that hazardous pollutants must pass before EPA may regulate them. This is flatly a distortion of the Senate Report. The full paragraph of the Report states:

> In writing a relatively restrictive definition of hazardous agents, the Committee recognized that a total

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46/ This is conformity with the Senate bill which, as evidenced by the quotations at page 18, *supra*, contemplated that for such pollutants EPA would establish a "greater than zero" emission limit.

47/ When presenting the hazardous air pollutant provisions of the Senate bill to the Senate floor, Muskie stated: "The committee was presented with strong evidence that any level of emissions of certain pollutants may produce adverse effects which cannot be tolerated." Cong. Rec. S16091 (daily ed., Sept. 21, 1970), 1 *Leg. Hist.* 227.

> prohibition on emissions is a step that ought to be taken only where a danger to health, as defined, exists. It should be noted that emission standards for pollutants which cannot be considered hazardous (as defined in section 115) could be established under section 114. Thus, there should be no gaps in control activities pertaining to significant danger to public health or welfare.48/

This paragraph quite clearly says the opposite of API/CMA's assertion: That pollutants meeting the definition of "hazardous" must be regulated under what eventually became Section 112 of the Act, and that other pollutants which pose less serious but still significant dangers must be regulated under other provisions of the Act.49/

48/ 1970 Senate Report at 20, 1 Leg. Hist. 420. See further discussion of API/CMA's alleged "significance" test at page 27, n.55, infra.

49/ API/CMA also point to the statement of Senator Spong that the Conference Committee changed the "thrust" of Section 112. (API/CMA Br. at 24-25.) Spong's comments, however, do not give any basis for concluding that the conferees changed the provision's exclusion of non-health factors. Spong merely summarized the change from requiring a prohibition unless safe exposure levels were established to requiring an ample margin of safety. 1 Leg. Hist. 146. By saying that this was a change in "thrust," Spong said no more than that this was a change in how the requirement was expressed. Muskie and Spong were allies in the debate. There is no indication in Spong's comments of any conflict with Muskie.

Finally, amici quote a statement by Representative Staggers that "many" of the Senate bill's provisions were modified by the Conference Committee to reflect "reasonableness and feasibleness" concerns. The House conferees did obtain some concessions on other matters (e.g., more time for auto emission controls, deletion of a preconstruction permit process). See the rest of Staggers's statement, 1 Leg. Hist. 111-112. On Section 112, however, the only concessions the House obtained were the provisions modestly delaying the compliance date for certain existing sources. See Pet. Br. at 23-24.

C. All the Cases Confirm That Non-Health Factors May Not Be Considered

The cases reviewed in our opening brief hold (1) that authority for cost-benefit or feasibility tests must be explicit and (2) that no such authority can be found in Section 112. EPA cannot refute or distinguish these cases.

EPA attempts to sell the idea that all of the cases we cited can be explained merely as deferrals to agencies' legal interpretations. EPA implies that the Supreme Court and this Court would have reached opposite holdings in each of these cases if only the agencies had urged them to. (EPA Br. at 23-24.) This will not wash. In three of these cases, while noting the principle of deference, the courts went on to holdings that the statutes in question specifically preclude consideration of economic or technological factors. In Union Electric the Supreme Court held that Section 110 unequivocally barred consideration of feasibility. 427 U.S. at 265 (opinion for Court), 269-70 (concerning opinion of Justice Powell). In Lead Industries this Court could not find in Section 109 "any congressional intent to require, or even permit," consideration of such factors. 647 F.2d at 1150 (emphasis added). In Hercules, the Court found a specific congressional intent to preclude consideration of such factors under Section 112. 598 F.2d at 111-112. The fourth case, American Textile Mfrs., contains not a word about deference.[50/] The Supreme Court held in that case that the

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50/ This is not surprising in view of the fact that the agency had switched sides, from opposing an interpretation allowing cost-benefit analysis to supporting it. See 452 U.S. at 505 (footnote continued)

Occupational Safety and Health Act specifically bars cost-benefit analysis. 452 U.S. at 509, 512. The same result would have been reached in each case regardless of the position urged by the agency, because in each case the statute commanded the outcome that the courts reached.

EPA also misreads National Ass'n of Demolition Contractors v. Costle, 565 F.2d 748 (D.C. Cir. 1977). (EPA Br. at 22.) That case presented the narrow issue whether, having granted an industry request to weaken the asbestos standard as it applied in freezing weather, EPA was under any obligation to weaken the standard as it applied in milder weather. The Court rejected the industry's claim that EPA's concession for cold weather

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n.25.

EPA attempts to avoid the holding of this case by claiming that the agency is not "maintaining that section 112 requires cost-benefit analysis." (EPA Br. at 24.) This statement is flatly contradicted by the 1985 withdrawal notice, which states that the 1976 standard, and implicitly the 1985 withdrawal, were "established based on judgments concerning the costs and benefits of the standard to society." 50 Fed. Reg. at 1183 (col. 3).

EPA admits that the OSHA statute is "more specific" in that it includes an explicit "to the extent feasible" proviso. EPA nonetheless claims that the "ample margin of safety" test implies a similar feasibility criterion. (EPA Br. at 24-25.) In another approach to the Textile case, API/CMA argue that the case has no bearing here because, they say, it merely concerned how economic and technological factors should be taken into account. (API/CMA Br. at 36.) Both arguments are wholly unconvincing, especially in light of the principle of both Textile and Union Electric that when Congress wanted economic and technological factors considered at all, it said so explicitly.

Justice Rehnquist observed in Textile that without the deliberate inclusion of the feasibility proviso, the OSHA statute would clearly specify an exclusive focus on health factors only. 452 U.S. at 545 (dissenting opinion); see also Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 681-82 (1980), (concurring opinion). That is precisely what Congress provided in Section 112.

constituted a determination that the weaker standard is all that is necessary to protect public health with an ample margin of safety. Id. at 753. The Court was not presented with the issue whether Section 112 precludes consideration of technological or economic factors, and nothing in the Court's decision addressed that issue.51/

EPA's effort to distinguish Union Electric, Lead Industries, and Hercules is especially unconvincing. (EPA Br. at 25-28.) EPA argues that the first two cases should be disregarded because they construe other sections of the Clean Air Act (Sections 109 and 110), but the Agency can point to no significant differences between the sections. EPA claims Section 112 is unique because it covers both the setting of standards and their implementation all in one section. In fact, Sections 109 and 110 together establish the ambient air quality standards and provide for their implementation. Neither allows for consideration of costs or feasibility. In those sections as well as in Section 112, Congress has reserved consideration of those factors for itself. As for Hercules, EPA merely attempts to dismiss the case's clear and accurate analysis of Section 112 as uninformed dicta.52/

51/ There is no basis for EPA's claim (Br. at 23) that Justice Stevens "approved the approach" of setting Section 112 standards based on feasibility considerations in his dissent in Adamo Wrecking Co. v. U.S., 434 U.S. 275 (1978). He wrote: "If a total prohibition had been adopted, it unquestionably would have conformed to the statutory mandate." Id. at 297.

52/ We have already responded to EPA's erroneous contention that the holding in Hercules depends on the presence of special factors specified in Section 307(a). See page 14, supra.

EPA closes its analysis of cases with a patently overbroad plea that the Court disregard all these holdings and just defer to the Agency. (EPA Br. at 29.) The Supreme Court has made clear, however, that deference has limits. Agencies cannot invoke the deference principle to "emasculate[]" judicial review. Security Industry Ass'n v. Board of Governors, 104 S.Ct. 2979, 2983 (1984). The courts will not defer when the statute and its legislative history are clear, and the threshold determination whether the law is clear is for the courts to decide. Chevron, U.S.A. v. NRDC, 104 S.Ct. 2778 n.9 (1984). "[T]raditional tools of statutory construction" (*id.*) can yield only one answer in this case: Congress intended EPA to set hazardous air pollutant standards on health factors alone and barred the Agency from considering technological or economic feasibility.

D. Congress Has Not Ratified EPA's Interpretation

Lastly, EPA makes a meritless argument that Congress ratified EPA's construction of the law in the 1977 amendments. EPA misstates the case law on what is necessary for a ratification to occur. EPA fails to show that Congress knew of or intended to approve of the Agency's consideration of non-health factors under Section 112. In fact, the 1977 amendments and legislative history shows that Congress explicitly abstained from any expression of approval of EPA's interpretation. Before discussing the cases, we respond to EPA's erroneous characterization of congressional action in 1977.

The only changes made to Section 112 in 1977 were (1) the authorization of work practice standards and (2) the adoption of a precautionary formula for defining a hazardous pollutant. We have already shown that the first of these amendments confers no authority to consider technological or economic factors when setting standards. See pages 12-13, supra.53/

The other amendment, inserting into Section 112(a)(1) the words "in the judgment of the Administrator . . . may reasonably be anticipated to" cause death or illness, was intended to adopt and extend the precautionary approach to identifying public health hazards set forth in Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) (en banc), cert. denied 426 U.S. 941 (1976).54/ In the House Report's statement of the six purposes for making this change there is not a word to suggest the relevance of feasibility considerations.55/

53/ When the Senate stated that this amendment would "fully authorize" the present asbestos standard (1977 Senate Report at 44, 3 Leg. Hist. 1418), all it intended to do was settle the legal controversy over the enforceability of work practice requirements.

54/ See 1977 House Report at 43-51, 4 Leg. Hist. 2510-18. EPA (Br. at 33) fails to mention the last five words of this amendment and misrepresents the first three words as intending to delegate to the Agency the authority to define the legal meaning of "ample margin of safety." This is a gross misconstruction of the amendment. See pages 14-15, supra.

55/ Id. at 49-50, 4 Leg. Hist. 2516-17. API/CMA (Br. at 32) grossly misrepresent this legislative history, choosing single words or phrases and reassembling them into completely different thoughts than those the Committee expressed. We cannot even find the key word "significant" on the referenced pages, except in an unrelated usage in the footnote on page 50.

In what may be a preview of the benzene and radionuclides litigation to be briefed later this year, the amici also grossly (footnote continued)

EPA admits that "there is no specific discussion of the feasibility factor under section 112 in the 1977 legislative history. . . ." Nonetheless EPA asserts that the Court should "assume" Congress had a detailed awareness of previous EPA's handling of the issue with asbestos and vinyl chloride and silently ratified it. (Br. at 36.) EPA, however, has misrepresented (1) its treatment of the feasibility issue in the regulation of asbestos in 1973 and (2) Congress's treatment of vinyl chloride in the unenacted 1976 amendments.

On asbestos, EPA asserts that it clearly based the 1973 standard on feasibility considerations. This is not so. EPA relies principally on statements about feasibility in the 1971 notice of proposal. (Br. at 31.) But the 1973 promulgation notice, which EPA quotes incompletely, tells a different story. The promulgation notice stated that the asbestos standard "was not based on economic considerations."[56/] In the final notice EPA took the position that asbestos could be treated as having a

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misrepresent this Court's decision in Ethyl. (API/CMA Br. at 32 n.61.) In Ethyl the Court held that when public health is at stake, EPA may regulate when there is uncertainty rather than sit idly by awaiting certain proof. The Court used this term "significant risk of harm" to characterize the conclusion flowing from data which strongly indicates, though not conclusively proves, danger to public health. 541 F.2d at 12-32. The Court did not hold that there must be some specific number of lives lost or illnesses caused by a pollutant before EPA may regulate it. EPA however, has adopted just such a test in the benzene and radionuclides rulemakings and has labelled it the "significant risk" test. EPA's test has no foundation in Ethyl and it was not adopted by Congress when Congress ratified the Ethyl decision in 1977.

56/ 38 Fed. Reg. at 8822 (col. 2) (emphasis added).

threshold of effect.57/ Consequently, EPA concluded that "the available evidence relating to the health hazards of asbestos does not suggest that [a] prohibition is necessary to protect public health."58/ In sum, EPA's action on asbestos, which the Agency claims put Congress on notice EPA's legal interpretation, in fact rested on the assertion that low levels of asbestos were not hazardous and that the decision was based on health factors rather than "economic considerations."59/

On vinyl chloride, the amendment proposed in 1976 was intended solely to force Agency action. The 1976 House Report explicitly stated that the committee did not intend to comment on the adequacy of the then-pending vinyl chloride proposal:

> 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, arsenic, cadmium, and POM's, the Administrator should apply the appropriate means and extent of regulation under the existing statutory criteria -- i.e., ambient standards (section 109 and 110), new and existing source performance standards (sec. 111), and hazardous emission standards (sec. 112).60/

57/ EPA cited evidence which the Agency concluded "suggests that there are levels of asbestos exposure that will not be associated with any detectable risk. . . . [T]he available evidence does not indicate that levels of asbestos in most community air causes asbestotic disease." *Id.* at 8820 (col. 2).

58/ *Id.* at 8820 (col. 2).

59/ We now know that EPA was wrong and that asbestos is dangerous at levels in community air. But in 1973, in the notice that EPA sets up as the predicate for its ratification argument, the Agency took the opposite view.

60/ H.R. Rep. No. 1175, 94th Cong., 2d Sess. 26, 6 Leg. Hist. 6675 ("1976 House Report") (emphasis added).

EPA quotes this passage without recognizing what it means. The passage does not endorse any Agency interpretation; it states that the hazardous emission standard for vinyl chloride must be governed by "the existing statutory criteria."[61]

Likewise, there is no basis for EPA's conclusion that the dropping of the amendment when the vinyl chloride standard was issued constituted congressional endorsement of its content. If the House Committee explicitly refrained from expressing approval of the proposal when affirmatively acting, it can hardly be concluded that the deletion of the amendment was a ratification of the final standard.

If any silent ratification can be said to have occurred on the basis of what it is "assumed" Congress knew, then what counts is EPA's position when Congress actually amended the Clean Air Act, in August 1977. At that time, the most up-to-date EPA interpretation of Section 112 was contained in the June 1977 proposed amendments to the vinyl chloride standard, proposed pursuant to the settlement agreement with EDF. The proposal articulates a "zero emissions goal." The flawed logic of EPA's ratification argument, if carried through the full chronology of events leading up to the 1977 amendments, would lead to the conclusion that this is the interpretation Congress ratified.

61/ The other passage quoted by EPA (Br. at 35, quoting 1976 House Report at 23-24) likewise cannot be construed as a ratification of the proposal's content or EPA's legal interpretation. The passage merely says that the amendment is necessary to assure that final action will be taken promptly. The passage in fact suggests that the coverage of EPA's proposal may have been too narrow.

The history on asbestos and vinyl chloride illustrates the treacherous nature of the ratification theory advanced by EPA. EPA cites several cases which state, without elaboration, that reenactment of a law without change constitutes ratification of an agency interpretation.[62/] Professor Davis has commented: "Such statements are obviously unsound, because the committees or subcommittees of Congress may or may not know of outstanding interpretations when they are considering reenactment; they do not approve what they know nothing about."[63/] Other cases, (including several cited by EPA) appropriately recognize that "it may not always be realistic" to infer a reenactment "from congressional silence alone," and that a reliable case is made only when the agency's construction is "'fully brought to the attention of the public and the Congress'" and engenders no move to disapprove it. United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) (citation omitted).[64/] In Zuber v. Allen, 396 U.S. 168, 193 (1969), the Supreme Court refused to find a reeactment where, as here, there were no "hearings that suggest that Congress acted with the particular administrative construction

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62/ E.g., Chemehuevi Tribe v. FPC, 420 U.S. 395 (1975); Commissioner v. Noel Estate, 380 U.S. 678 (1965).

63/ K. Davis, 2 Administrative Law Treatise §7:14 (p. 67) (2d ed. 1979).

64/ See also, National Muffler Dlrs. Ass'n v. U.S, 440 U.S. 472, 477 (1979) (strength of a reenactment argument depends on "the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute"); Wilderness Society v. Morton, 479 F.2d 842, 867 (D.C. Cir. 1973), cert. denied 411 U.S. 917 (1973) ("'Legislative silence cannot mean ratification unless, at a minimum, the existence of the administrative practice is brought home to the legislature."').

before it" and the adminstrators failed "to communicate their understanding to the drafters of the committee report."[65] Even when one committee was informed of the agency interpretation, the Supreme Court refused "to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents." SEC v. Sloan, 436 U.S. 103, 121 (1978).[66] On the facts of this case, there is no basis for concluding that Congress ratified

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65/ The only change in Section 112 requested by EPA Administrators in testimony before Congress in its consideration of the 1977 amendments was authority to set design or work practice standards when numerical measurement of emissions is impractical. See Hearings on Clean Air Act Amendments - 1975 before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 41 (1975) (statement of Russell Train); Hearings on Implementation of the Clean Air Act - 1975 before the Subcomm. on Environmental Pollution of the Senate Comm. on Public Works, 94th Cong., 1st Sess. 151 (1975) (statement of Russell Train); Hearings on Clean Air Act Amendments of 1977 before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 1678 (1977) (statement of Douglas Costle).

66/ Other cases cited by EPA involve situations where the agency did clearly bring its interpretation home to Congress, Haig v. Agee, 453 U.S. 280, 299 (1981), or where the legislative history shows that Congress carefully considered the issue, NLRB v. Bell Aerospace Co., 416 U.S. 267, 279-84 (1974).

Finally, other cases cited by EPA state only that Congress will not be assumed to have silently overturned court decisions interpreting statutes. See Chemical Mfrs. Ass'n v. NRDC, 105 S.Ct. 1102, 1109 (1985) (footnote omitted): "Congress was undoubtedly aware of [the Court's decision in E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977)], and absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." The same principle holds in Merrill Lynch, Pierce, Fenner & Smith v. Curran, 436 U.S. 353, 379 (1982), and Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979). An agency interpretation does not have the same stature.

consideration of non-health factors in setting standards under Section 112.67/

III. THE REQUESTED RELIEF IS APPROPRIATE

EPA argues that no remand is in order even though the Agency considered legally irrelevant factors because NRDC has not proved the vinyl chloride standard would be different if EPA were limited to the relevant factors. (EPA Br. at 37-41.) This argument is ridiculous. Obviously the standard would be different if only health factors were considered. EPA is on record that there is no known threshold for vinyl chloride's

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67/ EPA and API/CMA also assert that EPA's interpretation deserves deference because it is long-standing. It must be remembered, however, that between 1970 and 1984 (save for several minor modifications of the asbestos standard) EPA took but two final actions on hazardous air pollutants: the issuance of standards for asbestos, beryllium, and mercury in one notice in 1973 and the issuance of the vinyl chloride standard in 1976. Until now there simply has not been an opportunity to litigate the legal issue presented here. Consequently, EPA can claim no authority from its past actions.

No one sued in 1973 because, as shown above, EPA's actions then did not raise the issue presented in this case. The promulgation notice stated that each standard "was not based on economic considerations," that each pollutant had a threshold of effecs, and that a total prohibition therefore was not "necessary to protect public health." *See* pages 28-29, *supra*. The issue *was* squarely raised in 1976 in the vinyl chloride standard, and EDF brought suit. The issue was not judicially resolved, however, because of the settlement agreement and EPA's delay in taking any reviewable final action.

After 1976 EPA did not take another reviewable final action under Section 112 until the 1984 benzene decisions and the 1984-85 radionuclide decisions. Both of these are the subject of petitions for review now pending before this Court. None of the many *proposals* cited by EPA or API/CMA are entitled to any deference as long-standing interpretation, because none was a final action. They neither officially committed the agency nor allowed aggrieved parties a day in court.

carcinogenic effect. The 1985 withdrawal was clearly based on technological and economic factors. If EPA had not considered these factors, it would not have rejected the amendments proposed in 1977.[68]

Finally, EPA briefly contests NRDC's request that the Court order action on remand within 180 days. (EPA Br. at 41, note.) We stand on the argument for such relief set forth in the opening brief (at 36-37) with one additional comment. EPA errs in stating that all the cases we cited are ones in which there was no regulation already in place. In the principal case we cited, Sierra Club v. EPA, 719 F.2d 436 (D.C. Cir. 1983), cert. denied 104 S.Ct. 3571 (1984), there were tall stack regulations in place. The Court found them legally inadequate and, in view of the original statutory deadline and the long administrative delay, ordered new final action within 180 days. 719 F.2d at 469-70. This case presents exactly the same situation.

68/ Moreover, EPA counsel's claim that the decision would be the same if made on the legally relevant factors is pure post hoc rationalization.

CONCLUSION

For the reasons given in NRDC's opening brief and this brief, the January 1985 withdrawal should be vacated and the requested relief should be granted.

Respectfully submitted,

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September 3, 1985

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2045

ENVIRONMENTAL DEFENSE FUND INC.,

Petitioner,

v.

RUSSELL E. TRAIN,

Respondent,

and

THE SOCIETY OF THE PLASTICS INDUSTRY, INC., et al.,

Intervenors.

JOINT MOTION TO DISMISS THESE PROCEEDINGS

Petitioner, Environmental Defense Fund, Inc., and Respondent, Environmental Protection Agency, hereby move this Court, pursuant to Rules 27(a) and 42(b), Federal Rules of Appellate Procedure, to dismiss these proceedings, in accordance with the terms and conditions hereinafter set forth.

I. Statement of Facts

On October 21, 1976 the Environmental Protection Agency (EPA) promulgated a national emissions standard for vinyl chloride. 41 Fed. Reg. 46560. On November 19, 1976 the Environmental Defense Fund, Inc. (EDF) filed the present petition for review of the standard. Motions to intervene were subsequently filed on behalf of the Society of the Plastics Industry, Inc., the Goodyear Tire and Rubber Company and Air Products and Chemicals, Inc. (collectively, the "Intervenors") and were granted by order of the Court dated January 18, 1977.

Negotiations designed to settle this litigation have been underway between EDF and EPA since early January. On Friday, February 18, 1977 EDF and EPA reached tentative agreement on a mutually satisfactory settlement of this litigation.

II. Terms of the Settlement and Conditions for Dismissal

EDF and EPA have agreed to the following settlement conditions and terms for the voluntary dismissal of this action:

1. EPA shall propose amendments to the National Emissions Standard for Vinyl Chloride incorporating the terms set out in Attachment A.

2. The proposed amendments shall be published in the Federal Register no later than June 1, 1977. EPA shall make every effort to take final action by January 1, 1978.

3. Dismissal of this action shall be effective upon publication of the proposed amendments.

4. To the extent that the final action taken by EPA departs significantly from the terms set out in Attachment A, EDF reserves the right to petition this Court for review of that action. In any such action, EDF shall be precluded from challenging the existing standard. However, EDF shall retain the right to raise any relevant legal or factual arguments to challenge the adequacy of the final action taken by EPA.

5. Each party shall bear its own costs.

III. Protection of the Rights of other Parties

Intervenors have been apprised of the terms of the attached settlement and the conditions of this motion by both Petitioner and Respondent. Since the settlement does not alter the existing standard (and indeed precludes a later challenge to that standard), but merely supplements it, Intervenors are in no way prejudiced by the dismissal of this case. Moreover, Intervenors retain the right to participate fully in the ensuing rulemaking proceeding and to provide whatever comments they may have on the proposed amendments. To the extent that Intervenors are unhappy with the final action taken by EPA as a result of that rulemaking proceeding, Intervenors also retain the right to seek judicial review at that time. Intervenors' rights are thus fully protected by the proposed settlement and dismissal of this case.

IV. Conclusion

Because the foregoing settlement agreement resolves all outstanding issues between the EDF and EPA, they respectfully request this action be dismissed subject to the terms outlined above.

Respectfully submitted,

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Attachment A

Proposed Amendments to the National
Emission Standard for Vinyl Chloride

EPA's proposed amendments to the National Emission Standard for Vinyl Chloride, 40 C.F.R. Part 61 Subpart F, shall embody the following concepts:

A. The ultimate goal of zero vinyl chloride emissions and EPA's intention to reduce emissions toward this limit will be expressed.

B. The 10 ppm limitation under the existing standard will be proposed to be tightened to 5 ppm based on EPA's judgment that technology required by the existing standard can achieve the lower standard, with the following additional proposed features:

1. The 5 ppm standard will be applied to existing sources no later than three years from promulgation of the amendments;

(a) Existing sources may institute a review procedure before EPA if the 5 ppm standard cannot be met on the expected compliance date;

(i) the review procedure may be initiated by the source notifying EPA in writing no later than one year from the expected compliance date that compliance will not take place; the notification must contain written documentation why compliance is impossible, what interim steps the source will take to reach the 5 ppm standard, and a suggested compliance schedule for reaching the 5 ppm goal;

(ii) within thirty days, EPA will confer with the source to consider any oral testimony; the public will be invited to testify or submit written documentation at the conference;

(iii) within sixty days after the conference, EPA will (a) deny the source's request or (b) fashion a schedule for the source's compliance with the 5 ppm standard, accompanied by interim emission limitations if warranted;

2. New sources will be subject to the 5 ppm standard no later than six months from the promulgation of the amendments, but no procedure for relief from this deadline (such as that for existing sources) will be proposed.

C. Emission limitations for the oxychlorination process and the stripping of dispersion resins, requiring more control of these procedures than the existing standard, will be proposed for new sources.

D. It will be proposed that existing facilities will not be permitted to expand unless increased vinyl chloride emissions are offset by equivalent reductions in vinyl chloride emissions at the expanding facility.

E. EPA will undertake a full-scale review of Subpart F of 40 C.F.R. Part 61 beginning three years from the promulgation of any amendments to determine what further changes might then be appropriate to move toward the goal of zero vinyl chloride emissions. In the study EPA will consider recent health data and information concerning technological advances in the control of vinyl chloride emissions.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2045 September Term, 1976

Environmental Defense Fund, Inc.,
Petitioner

v.

Russell E. Train, Administrator
Environmental Protection Agency,
Respondent

Society of the Plastics Industry, Inc., et al.,
Intervenors

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 24 1977

GEORGE A. FISHER
CLERK

BEFORE: Bazelon, Chief Judge and Wright, Circuit Judge

O R D E R

Upon consideration of the joint motion by petitioner and respondent to dismiss, and of the responses filed with respect thereto, it is

ORDERED by the Court that the aforesaid motion is granted and the petition for review herein is dismissed.

The Clerk is directed to transmit a certified copy of this order to the Environmental Protection Agency as promptly as the business of his office permits.

Per Curiam

CMA 015017

CERTIFICATE OF SERVICE

I hereby certify that this 3rd day of September, 1985, the enclosed Reply Brief for Petitioner was served by first class mail to the counsel listed below:

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Notices

Federal Register
Vol. 50, No. 158
Thursday, August 15, 1985

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Southern Pine Beetle Suppression, Southern Region; Intent To Prepare an Environmental Impact Statement

Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, the Forest Service, Department of Agriculture, will prepare an environmental impact statement on Southern Pine Beetle suppression for Federal and non-Federal lands in the Southern Region. This will include the states of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and a portion of West Virginia.

The statement will include an analysis and disclosure of environmental effects of suppressing Southern Pine Beetle in Wilderness areas with additional site specific analysis on those in Alabama, Arkansas, Louisiana, Mississippi and Texas.

The Southern Pine Beetle suppression environmental impact statement is being prepared to provide an evaluation of current treatment alternatives or combination of alternatives, so that a fully documented, up-to-date, visible decision can be presented to all affected or interested parties.

A reasonable range of alternatives will be formulated by an interdisciplinary team. One of these will be a no-action alternative. Other alternatives will consider various combinations of all or some of the various Integrated Pest Management techniques such as no action with monitoring for spot growth, cut and remove, cut and leave, cut and treat with insecticide, as well as new methodology that is being developed. The selected alternative will guide the Southern Pine Beetle Program f the Southern Region through establishment of treatment standards and guidelines.

Early in the environmental analysis, Federal and State agencies, organizations, and individuals who may be interested in or affected by the decision will be invited to participate in a scoping process. This process will include: (a) Identification of those issues to be addressed; (b) identification of those issues to be analyzed in depth; and (c) elimination from detailed study those issues which are not significant, or which have been covered by prior environmental review. To accomplish this scoping effort, the Southern Region will publish an announcement in August 1985 in appropriate newspapers and send information packets to and solicit comments from: Federal and State agencies; Indian tribes; a cross-section of user groups; and individuals and organizations who have expressed an interest in the past.

John E. Alcock, Regional Forester, Southern Region, Atlanta, Georgia, is the responsible official.

The analysis is expected to take about eight months. The Draft Environmental Impact Statement should be available for public review by November 1985. The Final Environmental Impact Statement is scheduled to be completed by February 1986.

Written comments and suggestions concerning the analysis should be sent to Regional Forester, Southern Region, 1720 Peachtree Road, N.W., Atlanta, Georgia 30367.

Questions about the proposed action and Environmental Impact Statement should be directed to Kirby Brock, Environmental Impact Statement Team Leader, Southern Region, Phone 404 881-2787.

Dated: August 5, 1985.

John E. Alcock,

Regional Forester, R-8.

[FR Doc. 85-19607 Filed 8-14-85; 8:45 am]

BILLING CODE 3410-11-M

Inyo National Forest Grazing Advisory Board; Meeting

The Inyo National Forest Grazing Advisory Board will meet at 10 a.m. on September 17, 1985, in the Inyo National Forest Conference Room in Bishop, California. The purpose of the meeting is to:

Review FY 85 range accomplishments.

Update FY 86 range management projects.

Receive Grazing Advisory Board recommendations.

Establish sub-committees.

Establish next meeting date.

The meeting will be open to the public. Persons who wish to attend may notify Inyo National Forest—telephone (619) 873-5841. Written statements may be filed with the committee before or after the meeting. Members of the public wishing to speak at the meeting will be recognized by the committee chairman at the appropriate time.

Dated: August 7, 1985.

Leon R. Silberberger,

Acting Forest Supervisor.

[FR Doc. 85-19484 Filed 8-14-85; 8:45 am]

BILLING CODE 3410-11-M

Soil Conservation Service

Environmental Statements; Copper Basin Critical Area Treatment Measure Fannin County, GA

AGENCY: Soil Conservation Service, USDA.

ACTION: Notice of a Finding of No Significant Impact.

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Guidelines (40 CFR Part 1500); and the Soil Conservation Service Guidelines (7 CFR Part 650); the Soil Conservation Service, U.S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for Copper Basin Critical Area Treatment Measure, Fannin County, Georgia.

FOR FURTHER INFORMATION CONTACT: B.C. Graham, State Conservationist, Soil Conservation Service, Federal Building, Box 13, 355 East Hancock Avenue, Athens, Georgia 30601; telephone: 404-546-2273.

SUPPLEMENTARY INFORMATION: The environmental assessment of this federally assisted action indicates that the project will not cause significant local, regional, or national impacts on the environment. As a result of these findings, B.C. Graham, State Conservationist, has determined that the preparation and review of an environmental impact statement is not needed for this project.

CMA 015019