

Roy T. Gottesman
Executive Director

July 2, 1985

To: Vinyl Institute Legal Committee
Vinyl Institute Manufacturing Practices Committee

Subject: Natural Resources Defense Council (NRDC) v. EPA 85-1150

Further to my memo of July on this subject, I now enclose for your information a copy of a letter from Peter de la Cruz to Neil J. King of Wilmer, Cutler & Pickering dated June 28, 1985 which is self-explanatory.

We will keep you advised of further developments on this as we learn of them.

Roy T. Gottesman
Roy T. Gottesman

RTG:g

Encl.

cc: Meredith Scheck
Peter L. de la Cruz (w/o. enc.)

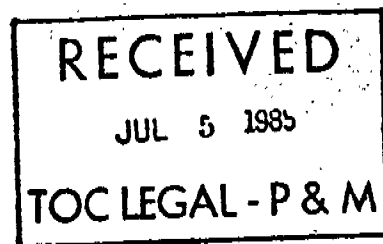
A Division of

THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

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Roy T. Gottesman
Executive Director



July 1, 1985

To: Vinyl Institute Legal Committee
Vinyl Institute Manufacturing Practices Committee

Subject: Natural Resources Defense Council v. EPA Brief

I attach a letter from Peter de la Cruz dated June 24 which reviews the brief filed by the Natural Resources Defense Council challenging EPA's withdrawal of the 1977 proposal to amend the VCM emission standard, provides information on the current briefing schedule and proposes a strategy for the Vinyl Institute's response in this matter. As Peter requests, please treat the latter information as confidential.

If you have any questions or comments, please contact Meredith Scheck or me.

Roy T. Gottesman
Roy T. Gottesman

cc: Meredith Scheck
Peter L. de La Cruz (w/o attach.)

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

NATURAL RESOURCES DEFENSE COUNCIL, Inc.

Petitioner,

v.

U.S. Environmental Protection Agency, et al.,

Respondents.

No. 85-1150

CERTIFICATE REQUIRED BY RULE 8(c) OF THE
GENERAL RULES OF THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned, counsel of record for the Petitioner, certifies that the following organizations have an interest in the outcome of this case:

Petitioner: Natural Resources Defense Council, Inc.

Respondent: U.S. Environmental Protection Agency and
Lee M. Thomas, Administrator

Intervenor: The Vinyl Institute, a division of
the Society of the Plastics Industry, Inc.

Petitioner is relying on the intervenor to certify its members, affiliates, etc., to the Court itself.

These representations are made in order that the judges of this Court, inter alia, may evaluate possible disqualification or recusal.

Respectfully submitted,



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June 17, 1985

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QUESTION PRESENTED

Whether the Environmental Protection Agency, despite the exclusive mandate of Section 112 of the Clean Air Act to protect public health with an ample margin of safety, may impose cost-benefit or technological feasibility tests on proposed standards for hazardous air pollutants.

Similar issues are involved in two other proceedings pending before the Court regarding regulation of hazardous air pollutants: Natural Resources Defense Council v. Thomas, Nos. 84-1387 et al. (benzene), and Environmental Defense Fund v. Thomas, Nos. 84-1524 et al., Natural Resources Defense Council v. Thomas, Nos. 85-1123 et al., and American Mining Congress v. EPA, Nos. 85-1285 et al. (radionuclides).

BASIS FOR JURISDICTION

The Court has jurisdiction to review this action pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. §7607(b)(1) (1982).

STATUTES AND REGULATIONS

The relevant statutory and regulatory provisions are set forth in Appendix A.

REFERENCES TO PARTIES AND RULINGS

Petitioner seeks review of a final action of the Administrator of the Environmental Protection Agency withdrawing proposed amendments to the national emission standards for the

hazardous air pollutant vinyl chloride. The proposed amendments which were withdrawn by this action were the product of a settlement agreement reached in Environmental Defense Fund v. EPA, No. 76-2045 (D.C. Cir., filed Nov. 19, 1976, settled and dismissed June 24, 1977).

This notice withdrawing the proposed amendments was published on January 9, 1985, at 50 Fed. Reg. 1182. The vinyl chloride standard, the proposed amendments thereto, and the notice of withdrawal of the proposed amendment, are reprinted in Appendix A.

Intervenor Vinyl Institute is not identified in the caption.

STATEMENT OF THE CASE

In January 1985 the Environmental Protection Agency (EPA) issued a notice withdrawing a set of amendments originally proposed in 1977 to strengthen the national emission standards for the cancer-causing air pollutant vinyl chloride. In withdrawing the proposed amendments EPA violated the law by employing cost-benefit and technological feasibility tests that are prohibited by the Clean Air Act. Section 112(b)(1)(B) of the Act, 42 U.S.C. §7412(b)(1)(B) (1982), instructs EPA to establish standards for each hazardous air pollutant at the level that "provides an ample margin of safety to protect the public health." This clear and exclusive mandate for protection of public health forbids EPA from importing cost-benefit or technological feasibility tests into standard-setting under Section 112. Because EPA violated the mandate of Section 112, the withdrawal of the proposed amendments should be vacated and the proceeding remanded to the agency.

A. Statutory Provisions

Section 112, enacted with the Clean Air Act Amendments of 1970,^{1/} provides for highly protective federal regulation of the most toxic air pollutants. The statute defines a "hazardous air pollutant" as any substance

which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in

^{1/} 84 Stat. 1676.

serious irreversible, or incapacitating
reversible, illness.

Section 112(a)(1), 42 U.S.C. §7412(a)(1).^{2/} Substances capable of causing serious, usually fatal diseases such as cancer obviously qualify as hazardous air pollutants. The EPA Administrator is directed to keep an up-to-date list of such pollutants. Section 112(b)(1)(A).

Within 180 days of listing a hazardous air pollutant, the Administrator must propose national emission standards for it.^{3/} Within a further 180 days, unless he finds that the substance "clearly is not" a hazardous pollutant, the Administrator must issue final standards. Section 112(b)(1)(B), 42 U.S.C. §7412(b)(1)(B).

The last sentence of Section 112(b)(1)(B) is the central statutory provision at issue in this case. It states: "The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to

^{2/} Except where otherwise indicated, citations henceforth are to the 1982 edition of the United States Code.

^{3/} An "emission standard" is defined in section 302(k) of the Act as "a requirement established by . . . the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis. . . ." 42 U.S.C. §7602(k). Section 112(e)(1) also allows EPA to set a "design, equipment, work practice, or operational standard" if it is "not feasible to prescribe or enforce an emission standard." This infeasibility condition is specifically limited by Section 112(e)(2) to three narrow circumstances: (1) where the pollutant cannot be ducted through a centralized smokestack, control device, or other conveyance, (2) where use of such a centralized conveyance would conflict with other legal requirements, or (3) where measuring (as distinguished from controlling) emission rates, quantities, or concentrations is not technologically or economically practicable. 42 U.S.C. §7412(e)(1), (2).

protect the public health from such hazardous air pollutant." Like other sections of the Clean Air Act construed by this Court and the Supreme Court,^{4/} this sentence speaks exclusively of protecting public health. It makes no other factor relevant to setting standards. It precludes the Administrator from grafting cost-benefit or technological feasibility tests onto standard-setting under Section 112.

This legislative choice was deliberate. Congress explicitly considered and accepted the possibility that in order to protect public health, some facilities emitting hazardous air pollutants might have to be closed. As stated in floor debate by Senator Muskie (the chief sponsor and floor manager of the bill, chairman of the authorizing subcommittee, and later chairman of the Senate conferees): "The committee was presented with strong evidence that any level of emissions of certain pollutants may produce adverse effects that cannot be tolerated."^{5/} And as stated in the summary of the final legislation presented by Muskie in post-conference committee debate:

^{4/} See Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980), cert. denied 449 U.S. 1042 (1980), and American Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981), cert. denied 455 U.S. 1034 (1982) (the "adequate margin of safety" requirement in Section 109(b)(1), 42 U.S.C. §7409(b)(1), precludes cost-benefit or technological feasibility tests in setting National Ambient Air Quality Standards). See also Union Electric Co. v. EPA, 427 U.S. 246 (1976) (Section 110(a)(2), 42 U.S.C. §7410(a)(2), precludes such tests in reviewing State Implementation Plans).

^{5/} Cong. Rec. S16091 (daily ed., Sept. 21, 1970), reprinted in 1 A Legislative History of the Clean Air Act Amendments of 1970 227 (Senate Comm. on Public Works, 1974) (hereinafter cited as "Leg. Hist.").

Th standards must b 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.^{6/}

B. Factual Background

Vinyl chloride, or "VC," is a gaseous synthetic chemical used to manufacture polyvinyl chloride plastics. In 1974, vinyl chloride was discovered to be a potent human carcinogen. When the 1976 standard was set, vinyl chloride was known to cause an otherwise extremely rare form of liver cancer. This cancer, known as angiosarcoma of the liver, is always fatal.^{7/} The danger from vinyl chloride is now known to be even greater, as more recent studies have demonstrated that VC also causes brain cancer and may cause cancers of the lung and other organs as well. As stated by a senior scientist in EPA's Carcinogen Assessment Group: "[W]e now know that vinyl chloride has the potential of causing cancer at more sites than we knew about in 1975, but a numerical estimate of the increased risk cannot be made."^{8/}

^{6/} Summary of the Provision 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.

^{7/} See 40 Fed. Reg. 59532-33; 41 Fed. Reg. 46560.

^{8/} Memorandum from R.E. McGaughy, EPA Carcinogen Assessment Group, to J. Padgett, Director, EPA Office of Air Quality Planning and Standards (Jan. 5, 1984) at p. 1 (Record, B-27).

EPA has consistently recognized that no safe level of exposure to vinyl chloride can be identified. As stated in the January 1985 notice: "[T]here is no known threshold level of effects for VC."^{9/}

Vinyl chloride gas is manufactured from chemical raw materials at 17 plants (known as "EDC/VC plants") located in four states. It is transformed into polyvinyl chloride plastic resins at 39 plants (known as "PVC" plants") located in 18 states.^{10/} In 1975 EPA estimated that more than 4.6 million people lived within five miles of the then-operating plants.^{11/} Since then, the number of facilities and the annual production capacity of VC and PVC, as well as the population in the urban and industrialized areas where these facilities are located, have continued to grow.^{12/}

1. The 1976 Standards

In 1975 EPA designated vinyl chloride a hazardous air pollutant.^{13/} The agency proposed, and a year later promulgated, standards covering VC releases from emission points in the EDC/VC

^{9/} 50 Fed. Reg. 1183 (1985) (col. 1). See also, 42 Fed. Reg. 28154 (col. 2) (1977) (proposed amendments); 40 Fed. Reg. 59532-33 (1976) (original proposal). See generally, 49 Fed. Reg. 46294 (1984) (carcinogen risk assessment guidelines).

^{10/} EPA, Vinyl Chloride - A Review of National Emission Standards (EPA-450/3-82-003, Feb. 1982) at 2-9 through 2-11 (Record, A-25). The term "EDC/VC plant" comes from the acronym for the principal raw material, ethylene dichloride.

^{11/} 40 Fed. Reg. 59533 (col. 1).

^{12/} EPA, Vinyl Chloride Review, supra note 8, at 2-11.

^{13/} 40 Fed. Reg. 59532 (1975).

and PVC plants.^{14/} The standards, however, did not measure up to the statutory "ample margin of safety" test. Rather, they were developed with technological and economic factors explicitly in mind.

As noted above, EPA recognizes that there is no known safe level of exposure to vinyl chloride. Vinyl chloride, therefore, presented precisely the situation envisioned in the summary of the conference committee agreement, where compliance with the statutory "ample margin of safety" test required setting "emission standards which allowed for no measurable emissions."

But EPA declined to do this. In lieu of the statutory criterion, EPA substituted a new test: that the standards should

^{14/} Id. & 41 Fed. Reg. 46559 (1976), codified at 40 C.F.R. Part 61, Subpart F. The major requirements of the standards set in 1976 were:

(1) A prohibition on all preventable discharges of vinyl chloride to the air from the pressure relief valves on the large, pressurized reaction vessels (called "reactors") used for transforming vinyl chloride gas into polyvinyl chloride plastic resins. 40 C.F.R. §61.65(a);

(2) A limit of 10 parts per million (ppm) on the concentration of vinyl chloride allowed in emissions from vents on the reactors and other specified types of equipment. Id. §§61.62(a), 61.63(a), 61.64(a)(1) & (b)-(d), 61.65(b)(5) & (6);

(3) Limits on the amount of vinyl chloride allowed to escape when reactors or other vessels are opened (e.g., in order to remove newly-made PVC). Id. §§61.62(b), 61.64(a)(2), (e)(2). These limits are expressed in terms of grams of VC permitted to escape per kilogram of product;

(4) A program of inspecting and repairing leaks in the thousands of valves, pumps, compressors, and other equipment found in an EDC/VC or PVC plant. Id. §61.65(b); and

(5) Limits on the concentration of vinyl chloride allowed to remain in freshly manufactured PVC plastic resins. Id. §61.64(e) (requirements for "stripping" residual VC gas from the resins).

only require "emission reduction to the lowest level achievable by the use of the best available control technology." Before a control measure would be deemed "available," EPA imposed on itself the obligation of finding (1) that the control was already in use in the chemical industry and (2) that it would not impose costs the agency believed were "grossly disproportionate to the emission reduction achieved."^{15/} The standards were limited to control measures that passed these "availability" and cost screens.^{16/}

Even after compliance with the standards, millions of pounds of vinyl chloride gas still escape into the air from these facilities each year. The population surrounding the plants remains exposed to a cancer-causing air pollutant with no safe level. The public, still is not protected with an ample margin of safety.

2. The 1977 Proposed Amendments

Upon the promulgation of the standards, the Environmental Defense Fund filed suit in this Court.^{17/} The case was not litigated, however, because the parties reached a settlement

^{15/} 40 Fed. Reg. at 59534.

^{16/} See, e.g., the notice of proposal's explanation of the basis for the 10 ppm limit on VC emissions from reactors and other equipment, 40 Fed. Reg. 59536 (col. 2) ("In EPA's judgment, an outlet concentration of 10 ppm represents the best available control technology for these sources . . ."). See also the explanation of the relaxed limit for the oxychlorination reactor, *id.* (col.3) (Cost of incinerating gas stream from these reactors "would be grossly disproportionate to the emission reduction achieved").

^{17/} Environmental Defense Fund v. Train, No. 76-2045 (D.C. Cir., filed Nov. 19, 1976).

agreement under which EPA obligated itself to propose regulatory amendments to strengthen the standards in specific ways.^{18/}

The contemplated amendments were proposed on June 2, 1977.^{19/} The notice of proposal restated the conclusion that vinyl chloride has no known threshold of effect and endangers public health at any level of exposure. Thus, it continued, in order to protect public health as intended by the Clean Air Act, EPA was establishing a "zero emissions goal."^{20/} The Agency stated:

In order to insure that the standard continues to approach the only level of emissions which is known to be absolutely protective of health, namely zero emissions, EPA is proposing amendments which require more efficient use of existing control technology at existing plants, and which encourage technology to reach this goal without banning vinyl chloride.^{21/}

The proposal included four major amendments to lower the emissions allowed by the 1976 standards.^{22/} It also stated that

^{18/} Id. (settled and dismissed, June 24, 1977).

^{19/} 42 Fed. Reg. 28154 (1977).

^{20/} Id. (col. 2).

^{21/} Id. (col. 3).

^{22/} The following changes were proposed:

(1) Lowering from 10 ppm to 5 ppm the limit on VC concentration in emissions from vents on reactors, etc. The proposed 5 ppm limit would take effect immediately for new sources and within three years for existing sources. Proposed 40 C.F.R. §§61.62(a), 61.63(a), 61.64(a)-(d), 61.65(c), 42 Fed. Reg. 28157-58;

(2) For new oxychlorination reactors, eliminating the special 0.2 g/kg limit and requiring them to meet the 5 ppm limit. Proposed 40 C.F.R. §61.62(b), 42 Fed. Reg. 28157 (col. (footnote continued))

within three years of the promulgation of these amendments, EPA would begin a study to review information on control developments "to determine what further changes might then be appropriate to move toward the goal of zero vinyl chloride emissions."^{23/}

3. The 1985 Withdrawal of the Proposed Amendments

Despite repeated requests that EPA act,^{24/} the amendments were never promulgated. More than seven years later, in the action here under review, EPA reneged on the substance of the settlement agreement and withdrew the proposal.^{25/}

2). This could be accomplished, EPA found, by incinerating the exhaust, using oxygen, rather than air, as a feedstock. Id. at 28155 (cols. 1-2);

(3) For new PVC resins -- resins not previously made at a facility -- cutting the vinyl chloride concentrations allowed to remain in freshly manufactured resins to one fourth the levels allowed by the 1976 standard. Proposed 40 C.F.R. §61.64(e), 42 Fed. Reg. 28158; and

(4) Requiring new vinyl chloride emissions to be offset by emission reductions at an existing plant when a new VC source is built within 5 miles of an existing one. Proposed 40 C.F.R. §61.73, 42 Fed. Reg. 28159.

^{23/} 42 Fed. Reg. 28156 (col. 2).

^{24/} In the years following the proposal, the Environmental Defense Fund repeatedly urged EPA to promulgate the amendments. See, e.g., letters from Robert Rauch, EDF Staff Attorney, to Douglas Costle, EPA Administrator (Feb. 3, 1978) (Record, D-91); Rauch to David Hawkins, EPA Assistant Administrator for Air, Noise, and Radiation (Aug. 15, 1979) (Record, D-95); Larry Corcoran, EDF Staff Attorney, to Costle (Apr. 18, June 13, 1980) (Record, D-99, 100).

^{25/} 50 Fed. Reg. 1182 (Jan. 9, 1985). The January 1985 notice had two parts. First, it contained a final action withdrawing the 1977 proposal. The January notice also contained new proposals to change the 1976 standards; the effect of these changes is to weaken the 1976 standards' prohibition on preventable discharges from PVC reactors and other equipment, as well as their requirements for controlling leaks and for reporting of releases to EPA and the states. See Comments of Natural Resources Defense Council (Mar. 25, 1985). See also, (footnote continued)

The January 1985 notice first sets forth, in even starker terms than before, a strict cost-benefit test for standards under Section 112. The cost-benefit test is stated most explicitly in the notice's characterization of EPA's actions in 1976. It states: "The current [1976] VC standard was established based on judgments concerning the costs and benefits of the standard to society."^{26/}

Not only does the January 1985 notice abandon the 1977 proposal, it even drops the minimum requirement for use of "best available control technology" articulated in the 1976 standard and states an even more demanding technological feasibility test. In 1976 EPA had stated that "best available control technology" would include measures in use elsewhere in the chemical industry, so long as they were "generally adaptable" to EDC/VC or PVC plants.^{27/} In 1977 EPA had gone a step further by proposing to require the industry to improve the performance of existing control devices to levels that could reasonably be expected given a firm regulatory requirement and appropriate

"E.P.A. Proposes Allowing Emissions of Cancer-Causing Substances," New York Times, Mar. 29, 1985, p. ____ (An EPA official stated: "there will definitely be more vinyl chloride in the air and we will be able to take much fewer enforcement actions. . . . [T]he effect is a loosening of the regulations.").

This case challenges the final action withdrawing the 1977 proposal. This case does not involve the EDF v. EPA settlement agreement, because the agreement was technically satisfied when the 1977 proposal was issued, even though EPA finally repudiated the substance of the agreement. This case also does not involve the new proposals, since no final action has yet been taken on them.

^{26/} Id. at 1183 (col. 3).

^{27/} 40 Fed. Reg. 59534 (cols. 2-3) (1975).

leadtime.^{28/} In the withdrawal notice, however, EPA now asserts that before an emission limit may be established, the agency must show it has already been "consistently achieved" in the past at operating EDC/VC or PVC facilities.^{29/}

The notice then concludes that the amendments proposed in 1977 do not pass these cost-benefit and technological feasibility tests.^{30/} Because the amendments are no longer considered "appropriate," the notice continues, "the June 2, 1977, proposal is withdrawn."^{31/}

This petition for review followed.

^{28/} 42 Fed. Reg. 28154 (col. 3) (1977). Cf. Natural Resources Defense Council v. EPA, 655 F.2d 318 (1981), cert. denied 454 U.S. 1017 (1981) (technology-forcing standards for diesel automobiles).

^{29/} 50 Fed. Reg. 1184 (col. 3).

^{30/} Id. at 1184-85 (dismissal of proposed reduction of the 10 ppm emission limit to 5 ppm, proposed 5 ppm emission limit for oxychlorination reactor, and proposed limits on content of residual vinyl chloride in PVC resins).

^{31/} Id. at 1183 (col. 2).

SUMMARY OF THE ARGUMENT

The Supreme Court and this Court have ruled that an agency charged with setting standards to protect public health from dangerous pollutants cannot engage in cost-benefit analysis or take technological or economic considerations into account unless the statute expressly so provides. American Textile Mfrs. Ass'n v. Donovan, 452 U.S. 490 (1981); Union Electric Co. v. EPA, 427 U.S. 246 (1976); Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980), cert. denied 449 U.S. 1042 (1980).

Section 112 of the Clean Air Act and its legislative history demonstrate a specific and unqualified intention that the only factor which the Environmental Protection Agency (EPA) may consider when setting standards for hazardous air pollutants is protection of public health. Section 112(b)(1)(B) states that these standards must be set at the level which "provides an ample margin of safety to protect the public health." These words may not reasonably be read to make any factor other than health protection relevant to standard setting. They preclude EPA from compromising public health protection by employing cost-benefit and technological feasibility tests in standard setting.

The legislative history demonstrates unequivocally that Congress understood some pollutants may cause death or serious illness at any level of exposure. For such pollutants the legislative history shows Congress specifically intended EPA to set standards that will protect persons from illness or death even if that requires prohibiting emissions. Congress explicitly mandated such standards even if they cause facilities to close.

Interpreting the contemporaneous and closely parallel "adequate margin of safety" test in Section 109 of the Act, this Court has ruled that EPA may base standards on no factor other than protection of public health. Technological or economic feasibility may not be considered. Lead Industries Ass'n, supra. This Court reached the identical conclusion interpreting the "ample margin of safety" test as used in both Section 112 of the Clean Air Act and Section 307 of the Clean Water Act. Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978).

EPA is likely to argue that its contrary construction of Section 112 should be deferred to by this Court. But no deference is due if the statute and legislative history show that the intention of Congress is specific and clear. Chevron, U.S.A. v. Natural Resources Defense Council, 104 S.Ct. 2778 (1984). EPA asserts that Congress did not discuss how the Agency should regulate a pollutant which is hazardous to health at any level. This is flatly wrong. In this situation Congress specifically directed EPA to set standards which allow no measurable emissions.

EPA reaches the opposite conclusion, that it may employ cost-benefit and technological feasibility tests under Section 112, only by disavowing the traditional tools of statutory construction and reasoning backwards from its view of appropriate public policy. In its view, to preclude the agency from employing these tests would be unwise. Substituting its view of appropriate policy for that of Congress, EPA has seen fit to employ these tests anyway. But under our system of government,

only Congress can change the law. TVA v. Hill, 437 U.S. 153 (1978); Lead Industri s Ass'n, supra.

Because EPA has violated the mandate of Section 112 of the Clean Air Act to set standards for vinyl chloride that protect the public health with an ample margin of safety, the January 1985 withdrawal of the amendments to the standards proposed in 1977 must be vacated. In view of the hazard to public health, EPA's eight-year delay in taking action, and the 180-day statutory deadline for promulgating proposed standards, this Court should remand the proceedings to EPA with instructions to complete further rulemaking in accordance with law within 180 days of the issuance of the Court's mandate.

ARGUMENT

The Supreme Court has held: "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." American T xtile Mfrs. Inst. v. Donovan, 452 U.S. 490, 510 (1981).

Likewise, construing the Clean Air Act itself, the Supreme Court stated: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." Union Electric Co. v. EPA, 427 U.S. 246, 257 n.5 (1976). And as this Court stated when it ruled that the closely parallel "adequate margin of safety" requirement in Section 109 of the Clean Air Act precludes considerations of technological or economic feasibility:

[W]hen Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of its statutory authority by taking other factors into account. . . . A policy choice such as this is one which only Congress, not the courts and not the EPA, can make.

Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1150 (D.C. Cir. 1980), cert. denied 449 U.S. 1042 (1980).^{32/}

No provision for applying cost-benefit or technological feasibility tests can be found on the face of Section 112 or in its legislative history. To the contrary, the statutory text and the legislative history affirmatively show that no factor other

^{32/} Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (A rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider. . . .").

than protection of public health is to affect the Administrator's decisionmaking when regulating hazardous air pollutants.

A. Section 112 Directs EPA to Consider No Factor Other Than Protection of Public Health

Section 112(b)(1)(B) directs EPA to set each hazardous air pollutant emission standard "at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant." The exclusive focus of these words on protection of health is clear on their face. There is no word or phrase in this sentence which can reasonably be read to authorize EPA to qualify public health protection by considering economic or technological factors.

The "ample margin of safety" requirement is contemporaneous with and closely parallel to the "adequate margin of safety" test in Section 109(b)(1).^{33/} That provision requires EPA to set health-based "primary national ambient air quality standards" at the level which is "requisite to protect the public health with an adequate margin of safety." After reviewing the "adequate margin of safety" requirement and its legislative history, this Court concluded:

We are unable to discern here an congressional intent to require, or even permit, the Administrator to consider economic or technological factors in promulgating air quality standards.

Lead Industries Ass'n, supra, 647 F.2d at 1150. If there is any difference between the "ample margin of safety" and "adequate

^{33/} 42 U.S.C. §7409(b)(1).

margin of safety" tests, it is that an even greater concern for protection of public health is mandated by Section 112.

The exclusive health focus intended for standards set under Section 112(b)(1)(B) is further emphasized by the remainder of Section 112. First, the term "hazardous air pollutant" itself is defined in words admitting of no other concern: A substance causing or contributing to air pollution "which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." Section 112(a)(1).

Second, the statute provides only one basis on which EPA may decline to set national emission standards: If it determines that the pollutant, after all, "clearly is not a hazardous air pollutant." Section 112(b)(1)(B). That inquiry is obviously limited to the public health protection factors relevant under the definition of a hazardous air pollutant quoted above.

Third, the statute specifically provides for limited consideration of economic and technological factors in the application of the standards to particular existing sources. Under Section 112(c)(1)(A)(i), all new sources must comply with hazardous air pollutant standards from the moment they commence operating. Under Section 112(c)(1)(A)(ii), however, the Administrator may grant an existing source a waiver permitting up to two years of operation out of compliance with the hazardous air pollutant standard if he finds

that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to

assure that the health of persons will be protected from imminent endangerment.

Since Congress has explicitly limited consideration of technological or economic factors to existing sources only, and has explicitly limited the period of such waivers to a maximum of two years, there is no room for contending that EPA may give broader consideration to these factors in standard-setting itself.^{34/}

B. The Legislative History Reinforces the Exclusive Health Focus of Section 112

The legislative history shows a specific, unqualified congressional intent that when developing hazardous air pollutant standards EPA should consider only what is required to protect public health and no other factor. Section 112 originated in 1970 in Section 115 of the Senate bill.^{35/} Section 115(b) defined a hazardous air pollution agent in essentially identical terms as the final law -- as a substance

^{34/} Additional evidence that technological and economic factors may not be considered under Section 112 is found in the extreme care with which the term "feasible," as found in the 1977 amendments authorizing design or work practice standards, is defined. Under Section 112(e)(1), such a standard is permitted only if an emission standard (a standard directly limiting emission rates) is "not feasible." Under Section 112(e)(2), an emission standard is not feasible only (1) if it is technically impossible to convey the pollution through a centralized smokestack or vent, (2) if doing so would violate another law, or (3) if it is technologically or economically impracticable to measure (as opposed to control) the emissions in question. See note 3, supra. The care Congress took to limit the relevant considerations in this use of the term "feasible" underscores the limitation on considering economic or technological feasibility of controls when setting standards under Section 112(b)(1)(B).

^{35/} S. 4358, §115, 91st Cong., 2d Sess. (1970) (as reported by the Senate Committee on Public Works), reprinted at 1 Leg. Hist. 565-69.

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whose presence, chronically or intermittently, in trace concentrations in the ambient air, either alone or in combination with other agents, will cause, or contribute to, an increase in mortality or an increase in serious irreversible or incapacitating reversible damage to health.

The bill then required EPA^{36/} to set standards protecting public health and considering no other factor. Under Section 115(a)(2), within 180 days of listing such a pollutant, EPA was required to publish "a proposed prohibition of emissions of each such agent or combination of agents from any stationary source" (emphasis added). Within six months thereafter EPA was required to promulgate the prohibition, unless he found either (a) that the pollutant in fact was "not hazardous to the health of persons," or (b) "that a departure from such prohibition . . . will not be hazardous to the health of persons" (i.e., that the pollutant had a threshold below which it could be safely breathed). If the Agency made either of these findings, it was required to set emission limits in lieu of the prohibition.^{37/} The prohibition

^{36/} The Senate and House bills, and the committee reports, actually referred to the Secretary of Health, Education, and Welfare, who, until the creation of EPA by executive organization later in 1970, was responsible for implementing federal air pollution control laws. For convenience, we refer to EPA as the implementing agency in discussing these bills and reports.

^{37/} If EPA found, under subparagraph (A), that the pollutant was not hazardous, then Section 115(a)(3) directed the Agency to set standards under Section 114 or the bill, which provided for standards for "selected agents" causing other, less severe, health effects. These standards, applicable to both new and existing sources, also were required to protect public health, although their effective date could be postponed for up to two years after promulgation. See 1 Leg. Hist. 560-65.

If EPA found, under subparagraph (b), that a departure from (footnote continued)

(or emission standards in the case thes findings were made) became effective for both new and existing sources immediately on promulgation. Section 115(a)(6).

Describing Section 115 the Senate Report stated that EPA "would be required to publish a proposed prohibition of emissions of such agents or combination of such agents from any stationary source." The Report continued that 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."^{38/}

Explaining these requirements to the full Senate, Senator Muskie, the Act's chief sponsor and floor manager, stated: "The committee was presented with strong evidence that any level of emissions of certain pollutants may produce adverse effects that cannot be tolerated."^{39/} It is hard to imagine a clearer intention that EPA consider health factors alone.

The House bill provided for a prohibition on emissions of "extremely hazardous" air pollutants from new sources. For pollutants which substantially endanger public health, EPA was to set performance standards for new sources; in setting these

a prohibition on emissions would not be hazardous, then it was required to set a standard limiting emissions to levels that were not hazardous. Section 115(a)(4).

^{38/} S. Rep. No. 1196, 91st Cong., 2d Sess. 20 (1970), 1 Leg. Hist. 420 (hereinafter cited as "1970 Senate Report") (emphasis added).

^{39/} Cong. Rec. S16091 (daily ed. Sept. 21, 1970), 1 Leg. Hist. 227.

standards EPA was instructed to consider technological and economic factors. But Section 112(b)(1) of the bill stated:

If such emissions are extremely hazardous to health, no new source of such emissions shall be constructed or operated, except where (and subject to such conditions as he deems necessary and appropriate) the [Administrator] makes a specific exemption with respect to such construction or operation.^{40/}

Had it been enacted, of course, this language would have limited regulation of hazardous pollutants to new sources and would have allowed EPA to make specific exemptions from prohibitions, presumably on the basis of non-health considerations. But this bill was not enacted.

The final legislation fashioned by the Conference Committee followed the Senate bill, explicitly rejecting the authority proposed in the House bill to make exceptions based on non-health factors.^{41/} The final legislation also followed the Senate bill

^{40/} H.R. 17255, §5 (proposing new §112(b)(1)), 91st Cong., 2d Sess. (1970) (as reported by the House Committee on Interstate and Foreign Commerce), 2 Leg. Hist. 921.

^{41/} It may be argued that by substituting the "ample margin of safety" test in place of the prohibition on emissions (barring findings that some emissions can be allowed without hazard), the final legislation somehow retreated from the exclusive public health focus of the Senate bill. Such an argument does not withstand analysis. As the Supreme Court has held, authority to consider cost-benefit or technological infeasibility arguments must be explicit on the face of the statute. American Textile Mfrs. Inst., supra; Union Electric Co., supra. And as shown above, on their face the words "ample margin of safety" cannot be read to admit of any concern other than protecting health.

Moreover, the Conference Committee consciously chose to employ an amplified version of the "adequate margin of safety" test in Section 109 of the Act, which originated in the Senate bill and which was clearly intended to preclude technological and economic infeasibility arguments. See the legislative history of the "adequate margin of safety" test, traced in Lead Industries Ass'n, 647 F.2d at 1149-50 and quoted infra at 27-28. TEN 3981

in applying these health protection requirements to existing sources as well as new ones, with only three, specifically limited modifications: (a) the allowance of a 90-day delay in the effective date of a hazardous air pollutant standard as it applies to existing source, (b) the provision for a two-year waiver of compliance for specific existing sources, and (c) the provision for presidentially-granted national security waivers.^{42/}

This legislative choice to exclude non-health factors from standard-setting was made most explicit by Senator Muskie, now the chairman of the Senate conferees, during Senate consideration of the final legislation. As he stated in the summary of the Conference Committee agreement presented to the Senate, the requirement to protect public health with an ample margin of safety "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."^{43/} EPA may not void this legislative choice.

C. The Case Law Confirms That Non-Health Factors May Not Be Considered Under Section 112

As noted above, the Supreme Court has clearly held that authority for cost-benefit or technological feasibility tests

^{42/} Section 112(c). See the Conference Report's description of the final legislation. H.R. Rep. No. 1783, 91st Cong., 2d Sess. 56-57 (1970), 1 Leg. Hist. 196-97 (hereinafter cited as "1970 Conference Report").

^{43/} Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970, supra not 5.

must be explicit. American Textile Mfrs. Ass'n, supra; Union Electric Co., supra. Arguments for grafting such tests onto statutes which do not provide for them must be rejected. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

This Court has thrice held that EPA has no authority to consider non-health factors under "margin of safety" tests. In Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978), the Court held that the "ample margin of safety" requirement in Section 307(a) of the Clean Water Act^{44/} (dealing with "toxic water pollutants") precludes consideration of feasibility factors. The opinion addresses Section 112 of the Clean Air Act in detail and concludes that it has the identical meaning. In Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980), cert. denied 449 U.S. 1042 (1980), this Court held that technological and economic factors may not be considered under the "adequate margin of safety" test of Section 109(b)(1). Accord, American Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981), cert. denied 455 U.S. 1034 (1982). Hercules and Lead Industries Ass'n are directly on point.

In Hercules, the Court stated that Section 307(a) of the Clean Water Act (like Section 112 of the Clean Air Act) lacks "any term commonly used to denote a feasibility consideration, e.g., feasibility, achievability, practicability, economic impact, or cost." 598 F.2d at 111. Referring to the Clean Air Act, the Court continued:

^{44/} 33 U.S.C. §1317.

Th legislativ background explains why Congress focused on public and environmental protection, rather than discharge control technology, in the setting of toxic standards. The regulatory scheme is similar to that of the Clean Air Act Amendments of 1970, . . . which distinguish between pollutants subject to technology-based regulation under section 111, and hazardous substances, subject to health-based regulation under section 112. Recognizing that "certain pollutants" required special treatment because of risk to health, Congress enacted section 112, dealing with hazardous pollutants, without provision for considerations of feasibility.

598 F.2d at 112. The Court then specifically cited the remarks of Senator Muskie quoted supra at 22 & 24.^{45/} The Court continued:

[T]he congressional selection of factors is a legislative determination that the need of the public and the environment for protection from toxic chemicals is more important than the problems of stringent regulation. This congressional determination is a rational response to the dangers presented by toxic substances. The meaning of the statute being clear, it is not this court's prerogative to impose considerations of feasibility.

Id. (citing TVA v. Hill, 437 U.S. 153 (1978) and Union Electric Co. v. EPA, 427 U.S. 246 (1976)). Despite the fact that Hercules explicitly rejects the construction of Section 112 asserted by EPA in the vinyl chloride regulation, the Agency persists in following it.

In Lead Industries Ass'n, this Court rejected claims that technological or economic feasibility could be considered under the "adequate margin of safety" test in Section 109. Citing the

^{45/} 1 Leg. Hist. 133, 227.

rule from Union Electric that authority to consider such factors must be explicit, the Court stated: "Section 109(b) speaks only of protecting public health Nothing in its language suggests that the Administrator is to consider economic or technological feasibility in setting ambient air quality standards." 647 F.2d at 1148-49. The Court then reviewed the legislative history buttressing that conclusion, noting especially the following passages from the 1970 Senate Report:

The protection of public health -- as required by the national ambient air quality standards . . . -- will require major action throughout the Nation. Many facilities will require major investments in new technology and new processes. Some facilities will need altered operating procedures . . . Some may be closed.

. . .

In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.

The Report concluded:

Therefore, the Committee determined that existing sources of pollution either should meet the standard of the law or be closed down, and in addition that new sources should be controlled to the maximum extent possible to prevent atmospheric emissions.

647 F.2d at 1149, quoting 1970 Senate Report at 2-3.^{46/}

^{46/} 1 Leg. Hist. 402-03.

The petitioners in that case claimed that a requirement to consider economic and technological feasibility could be found in the Senate Report's statement that: "Margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified."^{47/} As quoted above, however, the Court could not discern "any congressional intent to require, or even permit, the Administrator to consider economic or technological factors in promulgating air quality standards." 647 F.2d at 1150. The Court added:

[I]f there is a problem with the economic or technological feasibility of the lead standards, . . . [an affected party] must take its case to Congress, the only institution with the authority to remedy the problem.

Id. (footnote omitted).

EPA undoubtedly will argue that the Court should defer to its interpretation of Section 112. But no deference is due when, as here, the statutory terms and their legislative history show a clear congressional intent. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Chevron, U.S.A. v. Natural Resources Defense Council, 104 S.Ct. 2778, 2782, n.9 (1984). See American Methyl Corp. v. EPA, 749 F.2d 826, 833-34 (D.C. Cir. 1984). The threshold question whether congressional intention is clear is for the Court to decide; an agency cannot bootstrap its

^{47/} 1970 Senate Report at 10, 1 Leg. Hist. 410.

way to deference by asking the Court to defer to its claim that the law is unclear. Deference does not even begin until the agency establishes the absence of congressional intent.^{48/}

EPA's argument for the absence of intention rests on the assertion that "Congress never discussed the particular problem associated with apparent non-threshold pollutants" -- pollutants with no known safe levels of exposure.^{49/} But this assertion is flatly wrong. The legislative history reviewed above shows that Congress clearly understood some pollutants are intolerably hazardous at any level of exposure. In this situation, Congress determined protection of the public health with an ample margin of safety required standards permitting no measureable emissions, even if that meant pollution sources would close. See the statements of Senator Muskie, quoted at pages 22 and 24 supra. Neither statement drew the slightest qualification from any member. There is, therefore, absolutely no predicate for a deference claim.

D. By Limiting the Factors EPA May Consider, Congress Promotes Both Better Pollution Control and More Democratic Decisionmaking

EPA's only remaining argument is that precluding administrative consideration of cost-benefit and technological feasibility factors is, in its view, not an appropriate public

^{48/} Cf. Security Industry Ass'n v. Board of Governors of the Federal Reserve System, 104 S.Ct. 2979, 2983 (1984): "[D]eference is not to be a device that emasculates the significance of judicial review." See also Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968).

^{49/} 40 Fed. Reg. 59534 (col. 3) (1975) (original vinyl chloride proposal).

policy. EPA speculates, without any attempt having been made, that the vinyl chloride industry could never meet a no measurable emissions standard. Thus, EPA conjectures, enforcement of the law would cause the industry to close. Even though Congress contemplated just such a result when the public is exposed to a pollutant which is hazardous at any level of exposure, EPA overrides the law and substitutes a policy of cost-benefit analysis.

Apart from the fundamental legal proposition that in our system of government only Congress has the authority to change the law, TVA v. Hill, 437 U.S. at 194-95; Lead Industries, 647 F.2d at 1150, there are three persuasive answers to EPA's policy argument.

First, Congress does not share EPA's extraordinary technological pessimism. Unlike EPA, Congress knows better than to trust an industry's prediction of failure before an effort is even made. Counting on American technical ingenuity to produce remarkable results if made to focus on pollution control by standards that truly protect health, Congress chose a "technology-forcing" policy. In Section 112, as in other key parts of the Clean Air Act, Congress set high targets, often in advance of current technological capabilities, precisely in order to force the development and implementation of improved controls and substitute processes and products. As the Supreme Court noted in Union Electric:

[T]he 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution. . . .

These requirements are of a "technology-forcing character" . . . and are expressly designed to forced regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.

427 U.S. at 256-57.

Where it has been implemented, technology-forcing has paid off handsomely. Consider the case of automobile emission controls. In 1970 Congress set standards based on public health protection despite industry predictions that they could not be met. The standards were met. Consider another example, driven not by legislation but by tragedy. Just two weeks ago, DuPont announced a new process for the manufacture and use of methyl isocyanate ("MIC") -- the chemical which killed more than two thousand people in Bhopal, India, last December. MIC now can be continuously manufactured and converted into pesticides in a single closed system. There is no longer any need to make huge batches of the chemical at one plant, store them, and ship them to other plants for conversion to pesticides; there need never be more than two pounds of the substance present in the system. In a plant using this process, another Bhopal will be impossible.^{50/}

EPA's assumption of failure cuts off the attempt to force technical innovation even before it starts. The vinyl chloride industry has never been placed in a situation where it must devote a real effort to eliminating emissions. EPA has not even

^{50/} Washington Post, June 8, 1985, p. D-1. (The company spokesman said: "With our new process . . . the product is manufactured in a continuous, 'close-coupled' system that produces MIC and consumes it immediately. There is never more than two pounds of methyl isocyanate present in the system.")

required the industry to make full use of currently available controls. The Agency's own analyses contradict its official pessimism and show that vinyl chloride emissions from certain equipment already can be dramatically curbed^{51/} and that some emission points already can be made leak-free.^{52/} Even the

^{51/} EPA's own background documents contradict the Agency's January 1985 withdrawal notice and show that the measures proposed in 1977 are feasible. For instance, the January notice rejects the proposed reduction in the vent emission limit from 10 ppm to 5 ppm, claiming the 5 ppm level has not been "consistently achieved." But according to EPA's principal background document:

- A series of incineration tests at one plant in Kentucky demonstrated VC levels consistently at 0.26 ppm or below, less than six percent of the proposed 5 ppm limit. EPA, Vinyl Chloride -- A Review of National Emission Standards, p. 4-8 (Record, A-25).

- A B.F. Goodrich solvent absorption system is reported to recover 99.99 percent of VC from exhaust vent streams. The Review states that the solvent is "proprietary, commercially available, inexpensive, and reported to be low in toxicity." Id. at 4-14 through 4-15.

- Tenneco has developed a process of reacting VC with ozone in the presence of activated carbon which reduces VC to less than 1 ppm from streams containing between 10 and 10,000 ppm VC. Id. at 4-16 through 4-17.

The January notice also dismisses the proposed requirement to incinerate exhaust from the oxychlorination vent at EDC/VC plants even though a memorandum from an EPA consultant reports that three of the four plants already incinerate the exhaust. Memo from K.K. Fidler, Radian Corp., to file, "Survey of Control Technology Used on Oxychlorination Vents at EDC/VC Plants" (Aug. 31, 1984) (Record, B-51).

^{52/} An estimated 109 megagrams per year (120 tons) of vinyl chloride still leaks from the hundreds of valves and other connections in the piping of a typical PVC plant. 50 Fed. Reg. 1184 (Table 1). Almost all emissions from valves could be eliminated, however, by using "sealed bellows" valves -- a commercially available design EPA has elsewhere concluded is essentially leak-free: "The main advantage of these valves is that they can be designed to withstand high temperatures and pressures so that leak-free service can be provided at operating temperatures beyond the limits of [conventionally-used] diaphragm (footnote continued)

industry is more upbeat than EPA; as stated by the industry's representative during hearings before EPA's technical advisory committee: "Experience has shown that the industry has surpassed the expectation of the original standard in reducing vinyl chloride emissions."^{53/}

The second response to EPA's argument is that for a policy of technology-forcing to really work, the power to relax the health-based requirement or extend the time for achieving it must rest with Congress, not EPA. Congress recognized that to make industries take these high targets seriously and make maximum efforts to meet them, the targets could not be easily changed by EPA. Rather, the credibility and efficacy of this strategy requires the industries to understand that relaxing the requirements would be difficult because Congress must be convinced to change the law. The importance of this is recognized in the concluding comments of the Supreme Court in Union Electric (specifically regarding the State Implementation Plan process, but equally applicable to Section 112):

Allowing such claims [of economic and technological infeasibility] to be raised by appealing the Administrator's approval of an implementation plan . . . would frustrate congressional intent. It would permit a proposed plan to be struck down as infeasible before it is given a chance to work, even

valves." See EPA, Benzene Fugitive Emissions -- Background Information for Proposed Standards, p. 4-19 (EPA-450/3-80-032a, Nov. 1980) (emphasis added).

^{53/} Statement of W.C. Holbrook, B.F. Goodrich Co., representing the Vinyl Institute, at the meeting of the National Air Pollution Control Techniques Advisory Committee (NAPCTAC) on Aug. 30, 1984. See NAPCTAC, Minutes of Meeting, August 29 and 30, 1984, at p. VII-24 (U.S. EPA, Oct. 1, 1984) (Record, B-50).

though Congress clearly contemplated that some plans would be infeasible when proposed. . . . Technology forcing is a concept somewhat new to our national experience and necessarily entails some risks. But Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking.

427 U.S. at 268-69. As the vinyl chloride rulemaking demonstrates, it is all too easy to persuade EPA not to stick to its guns. The technology-forcing strategy was short-circuited the moment EPA first allowed technological feasibility and cost-benefit tests into the picture in 1975.

Yet Congress's door is open. Congress can adjust the law's requirements if, after the attempt to comply, a compelling case is made. As Senator Muskie stated regarding the automobile industry:

I think that we have an obligation to lay down the standards and requirements of this bill.

I think that the industry has an obligation to try to meet them. If, in due course, it cannot, then it should come to Congress and share with Congress -- the representatives of the people -- the need to modify that policy.^{54/}

As stated by a noted commentator, William Rodgers:

[EPA's] tendency to resist enforcement of the law as written on grounds of social catastrophe is not unknown in environmental legal circles. The position presupposes that a "better" policy choice or decision analysis requires a consideration of factors other than those specified legislatively. This may very well be true, but there is no reason why Congress cannot selectively allocate

^{54/} Cong. Rec. S16093 (daily ed. Sept. 21, 1970), 1 Leg. Hist. 232.

responsibilities for any "ideal" decision, charging EPA with making a health-based judgment but r serving for another agency or itself choices of utilitarian override. It is important to keep in mind that a dynamic, as opposed to a static theory of legislation would view an EPA "final" order anticipating shutdown of a source under Section 112 as simply one stage of an ongoing process that gives different answers to different questions at different times.^{55/}

The third response to EPA's argument follows from the second. If an industry has made the effort to eliminate its hazardous emissions, and if that effort does not succeed completely, the final decision what to do should rest with the people's elected representatives. Presented with an industry seeking relief from the requirements of Section 112, Congress can evaluate, case-by-case, whether the industry tried in good faith and with sufficient effort to curb its emissions. Congress can determine, in a particular case, whether an industry should be closed in order to protect public health, or whether protection of public health should be delayed or compromised to keep the industry going.

Placing this most sensitive determination in the hands of Congress, rather than EPA, promotes both greater protection of public health and greater political legitimacy for final decisions. Greater pollution control results because Congress will grant fewer exceptions from protection with an "ample margin of safety," and on stiffer terms, than will EPA. In particular instances, Congress will determine that public health concerns

^{55/} W. Rodgers, Environmental Law (West Pub. Co., 1984 Supplement) at 161 (footnote omitted).

take precedence over an industry's claims. In other instances, Congress may decide the reverse. By contrast, under EPA's cost-benefit and technological feasibility tests, industries' claims always take precedence over protection of public health.

Greater political legitimacy results because the decisions are made by elected representatives, not by an agency bureaucracy. Both types of decisions -- to close an industry or to compromise public health protection -- are sensitive determinations with both pragmatic and moral consequences. It is precisely these decisions which in our system of government Congress best reserves, as it did in Section 112, to itself.

REQUEST FOR RELIEF

By employing cost-benefit and technological feasibility tests which are proscribed by the specific mandate of Section 112 of the Clean Air Act, EPA has violated law. The January 1985 withdrawal of the amendments proposed to the vinyl chloride standards in 1977 should be vacated, and the matter remanded to the Agency for further rulemaking proceedings in compliance with the law.

Because of the continuing hazard to public health from vinyl chloride emissions, and because of EPA's extraordinary delay in taking action on the 1977 proposal, this Court should establish a specific deadline completion of the proceedings on remand. The 1977 proposal languished within EPA for nearly eight years despite the deadline in Section 112(b)(1)(B) of 180 days for moving from proposal to promulgation of a hazardous air pollutant

standard. Meanwhile, more than 4.6 million people living near vinyl chloride-emitting facilities have been exposed to a potent human carcinogen in violation of the law. In view of the health hazard, the statutory deadline, and the history of delay, petitioner submits that this Court should order EPA to complete the rulemaking on remand no later than 180 days after the issuance of the Court's mandate.

In previous instances where EPA has coupled illegal action with long delay, this Court has issued judicial deadlines to govern action on remand. For example, in Sierra Club v. EPA, 719 F.2d 436 (D.C. Cir. 1983), cert. denied 104 S.Ct. 3571 (1984), this Court wrote:

Congress thought EPA could solve all problems [to write tail stack regulations] in six months and the agency has had six years. We think it appropriate to direct EPA to promulgate new final regulations that remedy the defects this court has found within six months from the issuance of our mandate, the period originally specified by Congress.

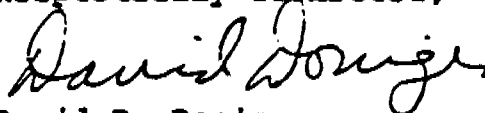
Id. at 469-70.^{56/}

^{56/} See also, Sierra Club v. Gorsuch, 715 F.2d 653, 661 (D.C. Cir. 1983) (decision on strip mine regulation within 90 days); Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1158-59 (D.C. Cir. 1983) (proposal of OSHA standard required within 30 days; promulgation "expected" within one year).

CONCLUSION

For the foregoing reasons, th January 1985 withdrawal of the amendments to the vinyl chloride standards proposed in 1977 should be vacated, and the proceeding should be remanded by EPA to complete rulemaking in accordance with the Clean Air Act within 180 days from the issuance of the Court's mandate.

Respectfully submitted,



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June 17, 1985