UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

May 18, 1977

OFFICE OF ENFORCEMENT

R&S 028942

SUBJECT: Concurrence with Proposed Amendments to the Vinyl Chloride Standard

TO: The Administrator

Because the Agency has already been committed to the subject Proposed Amendments by a court stipulation in the form of a "Joint Motion to Dismiss" the petition for review of this Agency's promulgation of the National Emission Standard for Vinyl Chloride (EDF v. Train, C.A.D.C. No. 76-2045; the circulation of this package for concurrence at this point appears to be only a pro forma exercise. This "Joint Motion" was signed by Counsel and filed March 24, 1977, without formal review and concurrence at the Assistant Administrator level.

Settlements of pending litigation are often advantageous for the Agency. However, with proper planning by Counsel, it would be highly unusual for time pressures to be so great as to necessitate commitments to proposed regulatory revisions to be made by Agency Counsel without following the usual procedures which are required for the proposed regulatory action itself. Involvement by Counsel of appropriate substantive staff personnel from the earliest stages of negotiations will undoubtedly expedite the concurrence procedure in making these commitments to the Courts. The length of time given for concurrence can be adjusted to fit the time requirements of each case. Accordingly, the procedure should not prove to be burdensom to Counsel.

A commitment under a court decree to propose a regulatory action in the Federal Register may effectively commit the Agency to a course of action regarding the subject matter. Accordingly, prior to the making of such a commitment, internal procedures should require review and concurrence of all appropriate offices. Following normal regulatory procedures in the settlement of law suits against the Agency is necessary to avoid the slightest appearance of collusive litigation as well as to ensure that regulatory actions resulting from court settlements reflect the same degree of care, quality, thorough staff work and consideration by top Agency management as do other Agency regulatory actions.

Stanley W. Legro

Stanley W. Legro

cc: Assistant Administrators
Office Directors

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1150

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents,

and

VINYL INSTITUTE, a Division of
The Society of the Plastics Industry,

Intervenor.

On Petition for Review of an Order
of the Environmental Protection Agency

BRIEF FOR INTERVENOR-RESPONDENT VINYL INSTITUTE

Gary H. Baise
Robert Brager
Brenda Mallory
Beveridge & Diamond, P.C.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 828-0200

Jerome H. Heckman
Peter L. de la Cruz
Keller & Heckman
1150 17th St., N.W., Suite 1000
Washington, D.C. 20036
(202) 457-1100

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 Vinyl Institute, a division of the Society of the Plastics Industry, Inc., certifies that the following listed organizations have an interest in the outcome of this case:

Petitioner: Natural Resources Defense Council, Inc.

Respondents: United States Environmental Protection Agency and Lee M. Thomas, Administrator

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

Members of the Vinyl Institute include Air Products & Chemicals, The BFGoodrich Chemical Group, Borden Chemical, CertainTeed, Dow Chemical U.S.A., Georgia Gulf, ICI Americas, Occidental Chemical, PPG Industries, Shell Chemical Co., Tenneco Polymers, Vista Chemical, and the Vinyl Council of Canada. Members of the Vinyl Institute account for approximately 82 percent of the domestic production of vinyl chloride and 63 percent of the domestic production of polyvinyl chloride.

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

Peter L. de la Cruz
Attorney of Record for Vinyl Institute,
a division of the Society of the
Plastics Industry, Inc.

August 19, 1985

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BRIEF FOR INTERVENOR-RESPONDENT
VINYL INSTITUTE

ISSUES PRESENTED

1. Does the Natural Resources Defense Council ("NRDC") have standing to bring this suit even though it did not participate in the rulemaking proceedings?

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2. Does this Court have jurisdiction over the instant case, despite Section 307(b)(1) of the Clean Air Act ("CAA" or "Act"), which precludes judicial review of the 1976 vinyl chloride ("VC") standard?

3. Are petitioner's claims cognizable in this proceeding even though the issues raised by NRDC were not being considered by the Environmental Protection Agency ("EPA" or "Agency") when it proposed the amendments to the VC standard in 1977, and were not the subject of public comments to that proposal?

4. Was the Agency's decision to withdraw the 1977 proposed amendments due to the considerable cost of additional control technology arbitrary and capricious even though the 1976 VC standard provides an "ample margin of safety to protect the public health"? 42 U.S.C. § 7412.

5. Was EPA's decision to withdraw the 1977 proposed amendments arbitrary and capricous even though those amendments could not lawfully be promulgated?

6. Was the Agency's decision to withdraw the 1977 proposed amendments arbitrary and capricious even though this decision corrected improper governmental action?

The pending case has not been before this or any other court under the same or similar title. Two other proceedings pending before this Court potentially involve issues similar to those raised in petitioner's brief but not this brief. They are:

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Natural Resources Defense Council v. Thomas, No. 84-1387 et al. (benzene); and Environmental Defense Fund v. Thomas, No. 84-1524 et al., Natural Resources Defense Council v. Thomas, No. 85-1123 et al., and American Mining Congress v. EPA, No. 85-1285 et al. (radionuclides).

STATEMENT OF JURISDICTION

Jurisdiction to review NRDC's petition is precluded by Section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1).

STATUTES AND REGULATIONS

The relevant statutes are the CAA, 42 U.S.C. § 7401, et seq., and the Administrative Procedure Act ("APA") 5 U.S.C. § 553. The relevant regulation is the emission standard for vinyl chloride, 40 C.F.R. § 61.61 et seq.

REFERENCE TO PARTIES AND RULINGS

See the Vinyl Institute's Statement of the Case.

STATEMENT OF THE CASE

On January 9, 1985 EPA withdrew a 1977 proposal to amend the national emission standard for vinyl chloride. The standard had been promulgated in 1976 under Section 112 of the Clean Air Act, 42 U.S.C. § 7412, which regulates hazardous air pollutants. See 50 Fed. Reg. 1182, 1183 (1985); 42 Fed. Reg. 28,154 (1977); and 40 C.F.R. §§ 61.60 to 61.71. The circumstances surrounding promulgation of the 1976 vinyl chloride standard, the 1977 proposal, and subsequent EPA action demonstrate that NRDC lacks standing to challenge EPA's withdrawal of the 1977 proposal, that this Court lacks jurisdiction to entertain the petition for review, and that the Agency's withdrawal of the proposed amendment was not arbitrary and capricious.

A. The Existing 1976 Vinyl Chloride Standard

Vinyl chloride is used to produce polyvinyl chloride ("PVC"), a plastic that is fabricated into blood transfusion bags, medical devices, records, water and sewer pipes, food wrap, bottles and many other items. The Vinyl Institute, a division of the Society of the Plastics Industry, Inc. ("SPI"), represents the major producers of VC and PVC.[1/]

Prompted by industry health reports and animal studies, EPA established a task force in February 1974 to examine the environmental impact of the manufacture and use of vinyl chloride and polyvinyl chloride. 40 Fed. Reg. 59,532 (1975). On December 24, 1975, EPA designated vinyl chloride as a hazardous air pollutant and published a proposed standard for vinyl chloride. *Id.* As

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1/ Members of the Vinyl Institute are listed in the Rule 8(c) Certificate. SPI, the major national trade association of the plastics industry, is a corporation organized under the Not-for-Profit Corporation Law of the State of New York. Its 1,700 member companies and individuals and 49 operating units include those who supply raw materials, process or manufacture plastics or plastic products, and engineer or construct molds or similar accessory equipment for the plastics industry. The majority of SPI members are the processors and converters of plastic resins into end products which represent 75 percent of the dollar volume sales of plastics in this country.

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indicated in the preamble to the proposal and the background documents, VC was "implicated as a causal agent" of certain carcinogenic and other disorders "in people with occupational exposure and in animals with experimental exposure to vinyl chloride." In the Agency's view, extrapolations from these findings raised the prospect that vinyl chloride in the ambient air might cause or contribute to the same or similar disorders.[2/] EPA acknowledged, however, that "no community cases of angiosarcoma have been verified as being caused by ambient exposure to vinyl chloride. Thus there is no proof that vinyl chloride ambient concentrations cause cancer, teratogenesis and mutagenesis."[3/]

Counsel for NRDC has acknowledged the difficulty of rationally regulating VC. In his 1978 article on the regulation of vinyl chloride,[4/] counsel stated:

> The hazardousness of non-occupational exposures to VC is even less well understood than the risk to the workers. The danger from inhaling extremely low concentrations of VC, or from single or sporadic exposures to high VC concentrations, is unknown. Similarly, the relative risks of ingesting and inhaling VC are unknown. Thus the urgency of reducing or eliminating these sources of exposure is impossible to assess.

2/ Standard Support and Environmental Impact Statement: Emission Standard for Vinyl Chloride at 1-1 (Oct. 1975) (SSEIS) Certified List of Documents ("C.L.") A-3.

3/ 2 SSEIS at 2-13, C.L. A-9.

4/ David D. Doniger, Federal Regulation of Vinyl Chloride: A Short Course in the Law and Policy of Toxic Substances Control, Ecology Law Quarterly, Vol. 7, 1978 at p. 534, C.L. I-19.

Before promulgating the 1976 VC standard, EPA considered three alternative regulatory frameworks: banning VC emissions, reducing emissions to the extent possible using best available control technology, and reducing emissions less than the maximum amount possible. EPA rejected the first option because of the serious adverse consequences resulting therefrom. The Agency opted instead for requiring use of the best available control technology, because to do so would reduce vinyl chloride emissions by 95 percent or more, and it did not "seem prudent to reduce emissions by the remaining percentage and take the risk of introducing new untested chemicals into the environment." 41 Fed. Reg. 46,560, 46,561 (1976).

The standard promulgated in 1976 is a comprehensive regulatory scheme for minimizing emissions of vinyl chloride from ethylene dichloride plants, vinyl chloride plants, and polyvinyl chloride plants. The standard places controls on the manufacturing process, requires a leak detection and elimination program, and sets limitations on permissible emissions when manufacturing vessels are opened. In addition, residual VC in PVC products must be reduced (stripped) to the part per million range to minimize potential emissions when PVC is further processed. To ensure compliance, the standard requires certain emission tests and emission monitoring, semi-annual and other reports as well as recordkeeping requirements.

B. EDF Litigation, Settlement, and Proposal of the Amendments to the VC Standard

In November 1976, one month after EPA promulgated the vinyl chloride standard, the Environmental Defense Fund ("EDF") filed a petition for review in this Court. Environmental Defense Fund, Inc. v. Train, No. 76-2045 (Petition filed Nov. 19, 1976). Over the objections of the Government, SPI and some of its members intervened in that action. EDF's petition raised the same arguments presented by NRDC here--that Section 112 prohibited consideration of the cost and feasibility of control technology and required a zero emission standard for vinyl chloride. In March, 1977, EDF and EPA filed a Joint Motion to Dismiss These Proceedings based on a settlement agreement they had reached. SPI and the industry intervenors were barred from the settlement discussions and did not consent to the terms of the settlement.

Under the settlement, EPA agreed to propose amendments to the vinyl chloride standard that would further reduce--although still permit--emissions of VC. The standard was to remain based on best available control technology, although EPA agreed to state the ultimate goal of zero vinyl chloride emissions and the Agency's intention to reduce emissions towards that limit. While EDF reserved the right to seek judicial review of EPA action that departed significantly from the agreed terms, EDF pledged that "in any such action, EDF shall be precluded from challenging the existing [1976] standard."[5/] EPA satisfied the settlement by proposing amendments to the VC standard on June 2, 1977.

C. Comments and Hearings on the 1977 Proposal

A review of the comments filed indicates that they were dominated by submissions from industry.[6/] Notably, petitioner NRDC did not file comments in response to the 1977 proposal.

EDF both presented testimony at hearings held on July 19, 1977 and September 8, 1977, and filed written comments.[7/] In its testimony, EDF supported the proposed rules. EDF stated that if it had litigated its petition for review challenging the 1976 proposal, it "would have pressed for a standard of zero emissions."[8/] However, EDF chose not to pursue that position in litigation and elected to accept a settlement which would allow industry to continue to operate.[9/] EDF also agreed that existing technology could not meet a zero emission level and stated that the "whole purpose of this approach is to force the development of new technology" to reduce emissions.[10/]

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5/ Joint Motion to Dismiss These Proceedings at 3, Environmental Defense Fund v. Train, No. 76-2045.

6/ See C.L. D-1 to D-142.

7/ See C.L. K-1, K-2 and D-61.

8/ Transcript of Proceedings at 50 (July 19, 1977) (Statement of Robert Rauch, EDF).

9/ Id. at 51; see also EDF Comments at 1-2 (Sept. 23, 1977), C.L. D-61.

10/ Transcript of Proceedings at 52 (Statement of Robert Rauch, EDF).

SPI commented that no new or old information would justify lowering the existing standard based on health data.[11/] Professor Richard Wilson of Harvard University estimated that the risk of living within five miles of a polyvinyl chloride plant for one year is equivalent to the risk of contracting cancer from eating one-half of a tablespoon of peanut butter, or to the risk of contracting cancer from increased cosmic radiation during a three-day visit to Denver, Colorado, or to the hazards from smoking 1/15 of a cigarette. He concluded that the reductions in the proposal would "save one hypothetical cancer every twenty years at a maximum."[12/]

SPI and its members maintained that the 1976 standard successfully addressed any risk that might occur due to vinyl chloride in the ambient air. Collectively, these comments argued that there was no health information demonstrating adverse health risks from exposure to vinyl chloride in the ambient air, that the purported reductions from the proposal would have little if any effect, and that the proposed amendments were not technologically or economically feasible.[13/]

No one commented that Section 112 precluded the Agency from considering economic or technological feasibility in establishing

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11/ *See* SPI Comments (Sept. 26, 1977), C.L. D-65.

12/ *Id.* at 13-14.

13/ *See, e.g.*, Comments of Air Products and Chemicals (Aug. 19, 1977), C.L. D-37.

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emission standards under Section 112. Nor did anyone contend that EPA was required by Section 112 to establish a zero emission level for vinyl chloride. The only comment to the 1977 proposal remotely similar to that submitted by NRDC here was EDF's support for a zero emissions "goal."[14/]

High level EPA personnel articulated the same concerns about the 1977 proposal expressed by industry. For example, a May, 1977 memorandum from the EPA Assistant Administrator for Research and Development to the Administrator[15/] states:

> The proposed standards are an attempt to force private sector research and development to focus on reducing emissions by increasing the efficiency of presently installed control equipment. It must be emphasized that there is no data available to support the technical feasibility of attaining these standards and in fact the regulations have been designed to accommodate the fact that manufacturers may not be able to achieve the proposed level, but may be able to achieve some intermediate level of control. Although there is emphasis placed on the one alternate technology for new sources there is no data justifying the claim that the recycle oxygen process for producing ethylene dichloride will meet the emission limit proposed or whether the economics of the process are viable. There is also an uncertainty about the safety of the process.

14/ Besides EDF and industry, the other persons filing comments were: U.S. Department of Interior (C.L. D-15), National Legal Center for the Public Interest (C.L. D-34 and D-54), West Virginia Citizen Action Group (C.L. D-41), J. Tarr (C.L. D-55), Texas Air Control Board (C.L. D-78). A number of inquiries and comments from Senators and Representatives were also received (C.L. D-35, 42-50, 62-64, 66-70, 73-75, 82, 83, 90). None of these challenged EPA's right to consider economic or technological feasibility or stated that Section 112 required a zero emission limitation for vinyl chloride.

15/ This memorandum, not contained in the Certified List, is attached in the Appendix.

On the other hand, the proposal states that if emissions from existing sources are already below the emission level applicable, this proposed amendment would give a credit for the difference between the emission limit and the actual emission level. This rationale is inconsistent with the stated goals of prohibiting an increase of ambient levels of vinyl chloride.

The amendment states the effects of reducing vinyl chloride emissions is less than one percent. The basis for these calculations is unclear and should be made explicit. If this statement is true, the net benefit of this amendment is questionable.

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D. Post Comment-Period Developments

Pursuant to Section 112 of the Act, in 1980 EPA undertook a comprehensive review of the vinyl chloride standard. This review included contracting with TRW, Inc. to evaluate emission control technologies, existing sources not covered by the standard, new sources not identified during the original study, and enforcement experience at federal and state levels. TRW reported on all these factors as well as current industry performance and the impact of other regulations.[16/] The industry's cost of compliance for the ten-year period from 1977-1986 was estimated to be $765.7 million in 1977 dollars.[17/] EPA subsequently issued revised figures showing total annual air pollution control costs of $1.2 billion during the 1981-1990 period for industry compliance with the vinyl chloride standard.[18/]

16/ *See* Vinyl Chloride--A Review of National Emission Standards (Feb., 1982), C.L. A-25.

17/ *Id.* at 2-11.

18/ EPA, The Cost of Clean Air and Water Report to Congress 1984, Table A5.2.4 (May, 1984).

Separately, EPA's Carcinogen Assessment Group ("CAG") examined recent information concerning cancer risks associated with vinyl chloride. CAG concluded that there had been no new studies or information which would prompt EPA to "significantly change the risk estimate for vinyl chloride" upon which the 1976 standard had been based.[19/]

E. The 1985 Withdrawal and Proposal

In January, 1985, EPA published a notice withdrawing the 1977 proposal and simultaneously proposing a new set of revisions to the standard. 50 Fed. Reg. 1182. The new changes were proposed as a result of the Agency's general review of the vinyl chloride standard.

In the preamble, EPA noted that the 1976 standard was designed to minimize the health risks associated with vinyl chloride through the use of reasonable control measures, and briefly outlined the standard's history and the development of EPA's carcinogen policy. That policy "articulated the EPA's conclusion that Section 112 does not express an intent to eliminate totally all risks from emissions of airborne carcinogens." Id. at 1183. Based on its multi-year review of the vinyl chloride standard, EPA did not believe it appropriate to promulgate amendments based on the 1977 proposal or to leave the proposal pending. Thus, the proposal was withdrawn.

19/ See memorandum from Robert E. McGaughy to Joseph Padgett (Jan. 5, 1984), C.L. B-27.

Subsequently, NRDC filed a petition for review commencing this action and the Vinyl Institute intervened.

SUMMARY OF ARGUMENT

NRDC lacks standing to challenge EPA's withdrawal of the 1977 proposed amendments to the vinyl chloride standard because it did not participate in the rulemaking proceedings. Moreover, because NRDC attacks the 1976 VC standard, not the withdrawal of the 1977 proposed amendments to that standard, this Court lacks jurisdiction to review its petition. Pursuant to Section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1), any challenge to the 1976 standard must have been raised on or before November 20, 1976.

Assuming for the sake of argument that NRDC attacks the withdrawal of the 1977 proposed amendments, this challenge must also be rejected. NRDC's petition rests on one argument: that EPA must promulgate a "no measurable emissions" limit for VC, and cannot consider the cost or feasibility of control technology when it acts under Section 112 of the Clean Air Act. Neither the appropriateness of a zero emissions limit nor the legitimacy _vel non_ of considering the cost or feasibility of control technology was before the Agency when it proposed the amendments nor was either issue subsequently placed before EPA during the comment period. Pursuant to Section 307(d)(7)(B) of the Act and hornbook administrative law, these issues cannot be litigated here. Because they are the only issues presented by NRDC's petition, that petition should be dismissed.

Assuming *arguendo* some issues remain before the Court, the Court should limit its inquiry consistent with Section 307(b)(1), and presume that the 1976 VC standard is valid and therefore provides an ample margin of safety to protect the public health. Under Section 112 of the Act, the Administrator may consider many factors, including the cost and feasibility of control technology, in deciding whether and how to revise an existing, valid emission standard; such action was not arbitrary and capricious.

Promulgation of the 1977 amendments would have been arbitrary and capricious. Such action would have ignored seven and one-half additional years of data supporting withdrawal, and would have denied industry the opportunity to comment on and utilize the persuasive force of such data. Because promulgation of the 1977 proposed amendments would have been unlawful, withdrawal was appropriate.

Finally, it should be noted that proposal of the amendments was an improper governmental act. The proposed amendments were not based on any new information, the process leading up to the proposal excluded the regulated community and relevant EPA personnel, and disregarded standard agency procedures. Correction of this improper governmental act was neither arbitrary nor capricous.

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ARGUMENT

I. NRDC LACKS STANDING TO CHALLENGE EPA'S WITHDRAWAL OF THE 1977 AMENDMENTS BECAUSE IT DID NOT PARTICIPATE IN THE RULEMAKING PROCEEDINGS.

This lawsuit is NRDC's introduction to the regulation of vinyl chloride. Petitioner did not comment on the initial proposal to regulate VC in 1975 or on the 1977 proposal to amend the already promulgated standard. NRDC apparently believes that it is under no obligation to participate in the rulemaking process, but instead may complain about the results after that process is completed. Petitioner is mistaken.

In Nader v. NRC, 513 F.2d 1045, 1055 (D.C. Cir. 1975), this Court held that "those who refrain from participation in rulemaking proceedings may not obtain direct judicial review of the regulations resulting." The Court's reasoning was instructive:

> We have long adhered to the view that it is incumbent "upon an interested person to act affirmatively to protect himself" in administrative proceedings, and that "[s]uch a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated." As we have admonished, "[t]o permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation."

Id. at 1054-55.

Subsequently, in Environmental Defense Fund v. EPA, 598 F.2d 62, 91 (D.C. Cir. 1978) this Court dismissed the petition of the Bass Anglers Sportsmen Society ("BASS") challenging EPA's

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PCBs regulations. The Court held: "Because BASS did not participate in EPA's PCBs proceedings, its petition must be dismissed." NRDC has not participated in any rulemaking proceedings for vinyl chloride; accordingly, its petition for review must be dismissed.

II. NRDC'S PETITION SHOULD BE DISMISSED BECAUSE THE REVIEW SOUGHT IS BARRED BY SECTIONS 307(b)(1) AND 307(d)(7)(B) OF THE CAA.

A. NRDC's Attempt to Review the Legitimacy of the 1976 Vinyl Chloride Standard is Barred by Section 307(b)(1) of the Clean Air Act.

The vinyl chloride standard was promulgated on October 21, 1976, after more than 32 months of study. The standard permits *de minimis* emissions of vinyl chloride,[20/] and was designed to reduce emissions by 95 percent.[21/] As NRDC has acknowledged, industry has met and surpassed this requirement,[22/] although at great cost--more than $235 million initial investment for control equipment and $75 million per year in operating costs in 1977 dollars.[23/] If NRDC believed the standard was deficient despite the enormous reduction in emissions and the substantial costs

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20/ NRDC tries to inflate the amount of VC emitted by providing the Court with yearly totals. NRDC Brief at 9, 32 n.52. Unlike many pollutants, VC dissipates very quickly--it has a half-life of six hours--which precludes any long-term buildup. The amount of vinyl chloride emitted daily by each plant is minimal.

21/ 50 Fed. Reg. 1182 (1985).

22/ NRDC Brief at 33.

23/ EPA, The Cost of Clean Air and Water to Congress, C.L. I-29.

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associated with pollution control, it could have filed a petition for review in 1976. Instead of doing so, NRDC waited more than eight years after promulgation of the standard and brought this suit.[24/] As a matter of law and equity, the Court should reject NRDC's attempt to challenge the 1976 standard and instead should dismiss this litigation.

When the vinyl chloride standard was promulgated in 1976, Section 307(b)(1) of the Act required that all petitions for review be filed within 30 days of promulgation. 42 U.S.C. § 7607(b)(1). National Association of Demolition Contractors, Inc. v. Costle, 565 F.2d 748, 749 n.2 (D.C. Cir. 1977). Although the time to file a petition has been enlarged to 60 days, this provision is still in effect. See Group Against Smog and Pollution, Inc. v. EPA, 665 F.2d 1284, 1289 n.39 (D.C. Cir. 1981). Section 307(b)(1) is jurisdictional--a petitioner may not challenge an emission standard after the time to file has expired, unless that challenge is "based solely on grounds arising after such [60th] day." Id.; see also United States v. Ethyl Corporation, 761 F.2d 1153 (5th Cir. 1985). No new grounds

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24/ The Environmental Defense Fund ("EDF") challenged the standard in 1976. EDF v. Train, No. 76-2045 (D.C. Cir. filed Nov. 19, 1976). EPA proposed the amendments at issue here to settle that litigation. NRDC claims that EPA "reneged on the substance of the settlement agreement" and that EDF "repeatedly urged EPA to promulgate the amendments." NRDC Brief at 11. EDF, the only party with standing to allege that EPA breached the agreement, has not done so; indeed, as NRDC acknowledges, EDF has not asked EPA within the last five years to promulgate the proposed amendments. NRDC Brief at 11.

for challenging the 1976 standard have been submitted by NRDC to EPA, and none are cited in NRDC's brief. Consequently, to the extent NRDC seeks review of the 1976 emission standard for vinyl chloride, its challenge is barred by Section 307(b)(1). Id.

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It is clear from the arguments contained in and omitted from NRDC's brief that petitioner attacks the VC standard promulgated in 1976, and does not challenge the agency action that might be reviewable here--withdrawal of the proposed amendments. Petitioner has framed the issue presented here in terms of the 1976 standard,[25/] attacks the promulgation of that standard,[26/] and seeks, instead of promulgation of the 1977 amendments, a remand to the agency for "further rulemaking proceedings."[27/] Moreover, NRDC's single argument--that Section 112 of the Clean Air Act requires a "no measurable emissions" standard for all substances whose threshold of safety is unknown,[28/] and precludes

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25/ NRDC Brief at 1. NRDC contends that the issue presented involves EPA application of cost benefit analyses in "proposed standards," rather than whether the withdrawal of proposed amendments to an existing standard was arbitrary and capricious.

26/ NRDC Brief at 7-9.

27/ NRDC Brief at 36.

28/ NRDC's argument that a "no measurable emissions" standard must be applied to vinyl chloride, NRDC Brief at 7-9, 29-30, is without merit. EPA has determined that vinyl chloride is a pollutant with no known absolute threshold of safety. This determination rests on VC's carcinogenic capabilities at high doses, and the inability to study its effects at low doses because the carcinogenic effects, if any, are miniscule. For example, EPA has determined that the risk of getting angiosarcoma of the liver from VC at levels permitted by the standard is one in twenty million. A study designed to prove a lower risk would require at least forty million laboratory animals. Consequently, although epidemi-
(Cont'd)

EPA consideration of the cost and availability of control technology--is merely a thinly concealed assault on the existing standard.29/ EPA specifically considered and rejected NRDC's interpretation of Section 112 when the VC standard was promulgated in 1976 because of the severe adverse consequences flowing from this interpretation.30/ NRDC cannot raise these issues now, eight years later. Id.

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ological studies of thousands of workers with low VC exposure have shown no cases of angiosarcoma attributable to VC, and no case of angiosarcoma due to VC in the ambient air has ever arisen, EPA cannot determine with absolute certainty that there is a safe threshold or where that threshold lies.

NRDC's call for a "no measurable emissions" standard is a leap from the limitations of science to the security of ideology; contrary to petitioner's contentions, there is nothing in Section 112, its legislative history, or interpretative case law that requires EPA to assume that no threshold exists merely because it is impossible to establish. In fact, Section 112 requires that controls be established "at a level which in [the Administrator's] judgment provide for an ample margin of safety to the public health." 42 U.S.C. § 7412(b)(1)(B) (emphasis added). Contrary to NRDC's assertion that a "no measurable emissions" standard is required as a matter of law, determining the level of emissions that provides an ample margin of safety is left to the broad discretion of the Administrator. See, e.g., American Petroleum Institute v. Costle, 665 F.2d 1176, 1186-87 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1162-63 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980); Hercules, Inc. v. EPA, 598 F.2d 91, 114 (D.C. Cir. 1978). This is especially true when the threshold is unknown. Nat'l Ass'n of Demolition Contractors, Inc. v. Costle, 565 F.2d at 751.

29/ NRDC Brief at 14-36. As EPA has acknowledged, this interpretation of Section 112 would force the shutdown of all facilities regulated by the standard because it is impossible to eliminate all vinyl chloride emissions. 50 Fed. Reg. 1182-83.

30/ 41 Fed. Reg. 46,560-561 (1976). These consequences include, inter alia: the unavailability of substitutes for some products made from polyvinyl chloride, such as blood bags and other medical equipment, the flammability of available substitutes that pose a risk to public health not caused by use of PVC, and the potential adverse health and environmental risks of PVC substitutes that had not been thoroughly studied.

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If NRDC believed EPA's consideration of the cost and feasibility of control technology was unlawful, it should have brought suit when the standard was promulgated in 1976, before industry relied on the validity of the standard and invested hundreds of millions of dollars in control technology. As this Court has noted in a similar suit brought by this petitioner, Section 307(b)(1) "serves the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of the regulatees who conform their conduct to the regulations." NRDC v. NRC, 666 F.2d 595, 602 (D.C. Cir. 1981). NRDC cannot now "be heard to complain of [the invalidity of the VC regulations] on grounds fully known to [petitioner] at the time of their issuance." Id. at 602-03.

It is also evident from the arguments omitted from NRDC's brief that petitioner herein attempts to challenge the 1976 standard. With the exception of one passing note in the statement of facts,[31/] NRDC's brief does not even mention the 1977 proposed amendments. The substance of those proposed amendments is barely discussed by NRDC; the amendments are nowhere mentioned in the argument portion of petitioner's brief, and NRDC cannot and does not contend that promulgation of the amendments is necessary to provide the public with an ample margin of safety.[32/]

31/ NRDC Brief at 10 n.22 and accompanying text.

32/ Any contention that the VC standard does not provide the public with an ample margin of safety would be without merit. (Cont'd)

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Indeed, petitioner believes promulgation of the 1977 amendments would be illegal because they would not establish the "no measurable emissions" limit NRDC contends is required and were based in part on EPA's assessment of the feasibility of control technology.[33/] NRDC therefore has not requested that the amendments be promulgated, and instead seeks "further rulemaking proceedings in compliance with the law."[34/] NRDC seeks this relief to challenge the validity of an emission standard promulgated more than eight years ago without complying with the statutory requirement that any such challenge be based on new

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According to the risk assessment performed by EPA before promulgating the VC standard, that standard reduced the probability of an individual getting angiosarcoma of the liver from vinyl chloride emissions to one in twenty million. EPA has asserted that current data do not provide a basis for changing this risk assessment. 50 Fed. Reg. at 1182. Industry contended in 1976 and 1977 that EPA's risk assessment was several orders of magnitude too high. *See, e.g.*, SPI comments, C.L. D-65. This assertion has been confirmed by the ICI Angiosarcoma Registry (a registry of all known occupational angiosarcoma deaths worldwide). Regardless, even assuming that EPA's risk assessment is accurate, the risk posed by VC to people in neighborhoods surrounding vinyl chloride and polyvinyl chloride facilities is equivalent to the risk of smoking 1/15 of a cigarette or eating one tablespoon of peanut butter per year. The numerical levels provided by the VC standard are within the "zone of reasonableness," afforded the Administrator by the CAA, and the standard thus provides the public with an ample margin of safety. American Petroleum Institute v. Costle, 665 F.2d at 1186-87; Hercules, Inc. v. EPA, 598 F.2d at 107. *See also* note 28, *supra*.

33/ 50 Fed. Reg. at 1182-84.

34/ NRDC Brief at 36.

information. 42 U.S.C. § 7607(b)(1). Accordingly, this litigation should be dismissed for lack of jurisdiction. NRDC v. NRC, 666 F.2d at 602-03; Group Against Smog and Pollution, Inc. v. EPA, 665 F.2d at 1289.

B. Any Challenge to EPA's Withdrawal of the 1977 Amendments Based Upon the Arguments in NRDC's Brief Is Barred by Section 307(d)(7)(B) of the CAA and Traditional Concepts of Administrative Law.

NRDC may contend that its legal arguments concerning a "no measurable emissions" standard and the legitimacy vel non of EPA's consideration of economic and technological feasibility may be revisited here, alleging that issues underlie the withdrawal of the 1977 amendments. Such a contention would be frivolous. When EPA first proposed to regulate vinyl chloride in 1975, it studied several alternative bases for regulating VC, including the no measurable emissions standard sought by NRDC. 40 Fed. Reg. at 59,533-534. EPA specifically rejected this alternative, opting instead to reduce emissions based on best available control technology. Id. EDF challenged the VC regulations on the very grounds alleged by NRDC--that Section 112 required a no measurable emissions standard as a matter of law, and that EPA could not consider the cost or feasibility of control technology in promulgating an emission standard under Section 112. Environmental Defense Fund v. Train, No. 76-2045. These issues were resolved when EDF and EPA settled that litigation.

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In proposing the 1977 amendments, EPA rejected the "no measurable emissions" limitation sought here by NRDC, proposed a different amount of measurable emissions, e.g., 5 ppm instead of 10 ppm, and based the amendments upon a reevaluation of the reduction in emissions that could be achieved at little additional cost by efficient use of control devices already required by the 1976 standard. 42 Fed. Reg. 28,154. The issues being considered by EPA were the level of emissions to be permitted and the additional costs, if any, that would be imposed, not whether economic and technological feasibility could be considered under Section 112, or whether a "no measurable emissions" standard was required. Indeed, if NRDC's "no measurable emissions" limit had been the subject of the proposed rulemaking, the Agency would have discussed the implications of such a limit, e.g., who would have done the measuring, with what technology, in what circumstances, and in what locations. As the Supreme Court has stated, "review of administrative decisions is to be confined to 'consideration of the decision of the agency'. . . ." FPC v. Transcontinental Gas Pipe Line Corporation, 423 U.S. 326, 331 (1976). Because the issues presented here by NRDC were not under consideration by EPA, they are not subject to review here.

Furthermore, neither NRDC nor any other party objected to the 1977 proposed amendments on the grounds raised here, viz., that EPA was required to promulgate a "no measurable emissions" limit for VC and could not consider the costs or feasibility of control technology. Judicial review of these issues here would violate the policy of Section 307(d)(7)(B) of the Act[35/] and traditional concepts of administrative law, which prohibit review of matters not placed before the Agency during the comment period. As this Court has consistently held, "only those contentions subjected to agency scrutiny during the administrative process [may] be entertained on judicial review." Lorion v. NRC, 712 F.2d 1472, 1474 (D.C. Cir. 1983), rev'd on other grounds 105 S.Ct. 1598 (1985); American Petroleum Institute v. Costle, 665 F.2d 1176, 1190-91 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); Lead Industries Association v. EPA, 647 F.2d 1130, 1172-73 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980). Because the issues raised by NRDC were not before the Agency when it proposed the 1977 amendments and were not placed before EPA by NRDC during the period provided for public comment, they are not subject to judicial review in this proceeding. Id.; see also D.C. Transit System, Inc. v. WMATC, 466 F.2d 394, 413-14 (D.C. Cir.), cert. denied, 409 U.S. 1086 (1972); 42 U.S.C. § 7607(d)(7)(B).

NRDC does not otherwise challenge the withdrawal of the 1977 proposed amendments; it only raises issues that should have

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35/ Section 307(d)(7)(B) provides in pertinent part: "Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any hearing) may be raised during judicial review." 42 U.S.C. § 7607(d)(7)(B). This section became applicable to proposals made by the Agency after October 30, 1977. Because the amendments at issue here were proposed on June 2, 1977, Section 307(d)(7)(B) is not technically applicable. However, NRDC's petition contravenes both the policy embodied in that subsection and the case law in this circuit.

been presented in a petition for review of the 1976 VC standard or submitted in comments to EPA when it proposed the amendments in 1977. Accordingly, NRDC's petition should be dismissed for lack of jurisdiction.

III. EPA'S WITHDRAWAL OF THE 1977 PROPOSED AMENDMENTS WAS NEITHER ARBITRARY NOR CAPRICIOUS AND THEREFORE SHOULD BE AFFIRMED.

NRDC's petition not only is jurisdictionally deficient; it also is meritless. As EPA has convincingly argued, the Agency may consider technological and economic feasibility in establishing emission standards under Section 112.[36] This argument is fully supported by the brief of the Chemical Manufacturers Association and the American Petroleum Institute, and need not be further explored here. The Vinyl Institute supports the Agency's position, and believes any decision on the merits should affirm EPA's interpretation of the Act. As set forth below, the Institute believes there are three additional reasons why EPA's decision to withdraw the 1977 proposed amendments should be affirmed.

A. EPA's Withdrawal of the 1977 Proposed Amendments Was Not Arbitrary and Capricious Because Section 112 Permits EPA to Consider the Cost and Feasibility of Pollution Control Technology.

As EPA's brief conclusively shows, the Agency could properly consider economic and technological feasibility in establishing

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36/ EPA Brief at 12-42.

and amending emission standards under Section 112. Additionally, nothing in that section, its legislative history, or relevant case law suggests that the Administrator cannot consider a variety of factors--including those at issue here--in the course of deciding not to amend a valid emission standard. The VC standard currently in effect "is presumed to be valid in the absence of a substantial showing to the contrary." NAACP v. FCC, 682 F.2d 993, 997 (D.C. Cir. 1982). See also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) (agency action presumed to be valid); Environmental Defense Fund Inc. v. Costle, 657 F.2d 275, 292 (D.C. Cir. 1981); National Association of Demolition Contractors, Inc. v. Costle, 565 F.2d at 750 n.2. Such a showing cannot possibly be made here because review of the 1976 VC standard--including whether the standard provides an ample margin of safety--is precluded by Section 307(b)(1) of the Act.37/ Because the 1976 VC standard must be presumed to satisfy

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37/ The Administrator's decision that an emission standard provides an ample margin of safety may, as a practical matter, be challenged either by asserting that the data before the agency do not support the Administrator's assessment of the risk posed by a substance, or by contending that the margin of safety provided is insufficient as a matter of law. It is the latter contention that is made by NRDC in this action; this argument could have been made by NRDC when the standard was promulgated in 1976 or, at the latest, when the amendments were proposed in 1977, and therefore is precluded by Sections 307(b)(1) and 307(d)(7)(B) of the CAA. Of course, if new information arose that would alter the Administrator's assessment of the risk posed by VC, NRDC could ask EPA to review its risk assessment. This court would have jurisdiction to review the final action EPA took on this request. See, e.g., Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216, 1219 (D.C. Cir. 1983). Because this suit is not based on the submission of new information, the margin of safety provided by the 1976 VC standard may not be challenged here.

Section 112,[38/] the Administrator was free to consider a variety of factors in deciding whether and how to revise that standard. *See Hercules, Inc. v. EPA*, 598 F.2d 91, 114 (D.C. Cir. 1978). In the absence of a statutory directive to the contrary, the Administrator's decision to do so cannot be considered an abuse of discretion warranting remand. *See Chevron U.S.A. v. NRDC*, 467 U.S.______, 104 S.Ct. 2778, 81 L.Ed. 2d 694, 703-04 (1984).[39/]

Moreover, it was appropriate for the Administrator to consider the cost and feasibility of control technology because these factors are directly related to the public health. For example, there is an average of one death due to industrial

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38/ Even if the Court decides to ignore Section 307(b)(1) and determine whether the VC standard provides an ample margin of safety, it must reject NRDC's request for a zero emission standard and uphold the risk that the Administrator found acceptable. As the Supreme Court has stated, "'safe' is not the equivalent of 'risk free.' There are many activities that we engage in every day--such as driving a car or even breathing city air--that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities 'unsafe.'" Industrial Union Dept. AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 642 (1980). The Administrator's promulgation of a standard that carries a one in twenty million risk provides an ample margin of safety, is reasonable, and must be affirmed. American Petroleum Institute v. Costle, 665 F.2d at 1186-87. *See also*, notes 28 and 32, *supra*.

39/ It is undisputed that Section 112 requires EPA to regulate hazardous substances in a manner that "in [the Administrator's] judgment, provides an ample margin of safety to protect the public health." 42 U.S.C. § 7412(b). What constitutes an ample margin of safety is left by Section 112 to the judgment of the Administrator. Thus, review of most final agency actions under Section 112 will be resolved by determining whether the Administrator abused his discretion by finding that a particular standard provided an ample margin of safety. *See, e.g.*, American Petroleum Institute v. Costle, 665 F.2d at 1186-87; Lead Industries Ass'n v. EPA, 647 F.2d at 1162-63.

accident for every $33,000,000 of capital expenditures.[40/] Promulgating amendments to an emission standard that would require several hundred million dollars in capital expenditures to decrease hypothetically an already miniscule risk would be arbitrary and capricious; the regulation would cost more in human life than it would protect.[41/] It is ludicrous to assert that the Administrator cannot consider the cost of and benefits from additional control equipment in deciding whether to amend a valid emission standard.

Additionally, if technological or economic infeasibility is not reviewed by the Administrator, an emission standard might force an entire industry to shut down. As EPA noted, such a shut

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40/ S.C. Black, F. Niehaus "How Safe is Too Safe?" Intl. Atomic Energy Agency Bulletin, Vol. 22, No. 1, pp. 45-46 (1980).

41/ NRDC erroneously asserts that EPA has revised its criteria for regulating under Section 112, and now will require only those emission reductions that have been "consistently achieved." NRDC Brief at 13. EPA conducted a thorough audit of industry compliance with the VC standard when it reviewed the standard. As a result of this audit, EPA learned that (1) the control devices at virtually all plants reduce emissions to below 1 ppm most of the time; (2) periodically, due to emission fluctuations beyond the control of the facilities, the percentage of vinyl chloride exiting the control devices is in the 5-10 ppm range; (3) a 5 ppm standard was unnecessary to ensure efficient operation of control equipment because absent episodic emission fluctuations, industry was already consistently reducing emissions to 1 ppm; (4) to achieve a 5 ppm limit all of the time, as would be required by the amendments proposed in 1977, backup incineration would be required, at a cost of $150-300 million and 5-10 lives due to industrial accident; and (5) this economic and human cost was unwarranted because backup incineration would have only a tiny effect on the amount of VC discharged and was unnecessary in order to provide an ample margin of safety. _See_, _e.g._, C.L. A-24, A-25, and A-28.

down could give rise to substitute products, the manufacture or use of which might be more dangerous than the product banned. 50 Fed. Reg. at 1183-84. Furthermore, the banned substance may be used to make important, life-saving products for which there are no satisfactory substitutes, such as the blood bags and other medical equipment made from PVC. A regulation effectively banning a substance on the basis of a miniscule risk to the public health, when the substance is vital to the manufacture of products that save or improve countless lives, would be arbitrary and capricious. It certainly would be arbitrary and capricious for the Agency to refrain from considering, in the name of public health, the impact of regulations banning this substance. NRDC's argument that the Administrator cannot consider the cost and technological feasibility of control equipment must be rejected. See Hercules, Inc. v. EPA, 598 F.2d at 114.

B. EPA's Withdrawal of the 1977 Proposed Amendments Was Not Arbitrary and Capricious Because Promulgation in 1985 Would Have Been Unlawful.

The 1977 proposed amendments were pending for over eight years before their withdrawal on January 9, 1985. During the seven and a half years after the notice and comment period for the 1977 proposed amendments was officially closed, EPA received a plethora of new information concerning the health effects of vinyl chloride, the methods the regulated community was using to reduce emissions, and the efficiency of the emission control

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equipment.[42/] This information strongly supports withdrawal of the proposed amendments. Promulgation of the 1977 proposed amendments--in the face of this significant information--would have been arbitrary and capricious, and would have unlawfully deprived industry of its right to comment as provided for by Section 307 of CAA and Section 553 of APA. EPA's only lawful option, to withdraw the proposed amendments, therefore was not arbitrary and capricious.

It cannot be disputed that the information placed on the docket in this case from October of 1977 through the Administrator's withdrawal of the proposed amendments in 1985 was critical to EPA's decision withdrawing the proposed amendments. That information shows that the VC standard continues to provide an ample margin of safety to the public health[43/] and that the changes proposed in 1977 would not have had their intended effect, namely to ensure more efficient use of pollution control devices.[44/] No rational decision concerning the proposed

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42/ The comment period closed on September 23, 1977. 42 Fed. Reg. 44,822 (1977). Between October 1, 1977 and January 9, 1985, 321 documents relating to this issue were placed in the docket.

43/ As stated earlier, the new health information does not provide a basis for changing the VC risk assessment. 50 Fed. Reg. at 1182.

44/ As shown in note 41, *supra*, this information shows that the 1977 proposed amendments would not have had their intended effect--to ensure efficient use of control devices--because the control devices were being operated as efficiently as possible anyway. If promulgated, the amendments would have required backup control equipment at all vinyl chloride and polyvinyl chloride plants. Such a result would not be consistent with the purpose of the proposed amendments.

amendments could have been made without consideration of the additional information before the Agency;[45] any decision made in 1985 that excluded this information therefore would have been arbitrary and capricious. See, e.g., Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 44 (1983), ("[A]n agency rule would be arbitrary and capricious if the agency. . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency . . .").

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A decision made to promulgate the 1977 proposed amendments despite the information obtained by the Agency after close of the comment period would have been equally unlawful: the regulated community would have been denied its right to comment on and effectively utilize the persuasive force of the new data. See Kennecott Corporation v. EPA, 684 F.2d 1007, 1019 (D.C. Cir. 1982) (EPA's refusal to convene a new round of public comment was reversible error where new data was placed in the docket one week before promulgation of regulations and there was no opportunity

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45/ Indeed, to do so would undermine the very purpose of the administrative process. See, e.g., Brown Express, Inc. v. United States, 607 F.2d 695, 701 (5th Cir. 1979): "Congress realized that an agency's judgment would be only as good as the information upon which it drew. It prescribed these procedures to ensure that the broadest base of information would be provided to the agency by those most interested--and perhaps best informed--on the subject of the rulemaking at hand." See also Nat'l Tour Brokers Ass'n v. United States, 591 F.2d 896 (D.C. Cir. 1978).

for notice and comment); State of New Jersey, Department of Environmental Protection v. EPA, 626 F.2d 1038, 1049 (D.C. Cir. 1980) (The procedural requirements embodied in both the APA, 5 U.S.C. § 553, and the CAA, 42 U.S.C. § 7607(d), are "designed to ensure that affected parties have an opportunity to participate in and influence agency decision making. . . ."). Because promulgation of the 1977 proposed amendments would have been unlawful, the Administrator's decision to withdraw them should be affirmed.

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C. EPA's Withdrawal of the 1977 Proposed Amendments Was Not Arbitrary and Capricious Because It Corrected Improper Agency Action.

The withdrawal of the 1977 proposed amendments cannot be considered arbitrary and capricious; it merely terminated improper agency action. The proposed amendments were the result of an agreement to settle Environmental Defense Fund v. Train, supra. The settlement process was unfair and unjust; the Government had opposed the regulated community's intervention in that lawsuit and, both before and after intervention was granted by the Court, deliberately and systematically excluded industry from participating in settlement negotiations.46/

Industry was not the only interested party excluded from the process; numerous EPA personnel were similarly treated. For

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46/ See SPI's Suggestion of Mootness in Environmental Defense Fund v. Train, No. 76-2045 (filed March 31, 1977).

example, the Assistant Administrator for Enforcement criticized the settlement because it "was signed by Counsel and filed March 24, 1977 without formal review and concurrence at the Assistant Administrator level." He decried EPA's failure to "follow normal regulatory procedures" in settling the case, stating that without these procedures there was no way "to ensure that regulatory actions resulting from court settlements reflect the same degree of care, quality, thorough staff work and consideration by top Agency management as do other Agency regulatory actions."47/

This concern was echoed by the Assistant Administrator for Research and Development, who "concur[red] with comment to the proposed amendments. . . [i]n order for the Agency to meet the conditions of [the] settlement agreement reached with the Environmental Defense Fund." (Emphasis in original.)48/ His comments were decidedly negative; he pointed out that "there is no data available to support the technical feasibility of attaining [the proposed] standards" and that "the net benefit of this amendment is questionable."

The proposed amendments were not based on any new information; they resulted only from EPA's desire to avoid litigation. This desire overwhelmed any interest in fairness to the regulated

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47/ This memorandum, not contained in the Certified List, is attached in the Appendix.

48/ *See* note 15, *infra*.

community, prevented EPA from submitting the settlement to the Assistant Administrators for review, and precluded proper substantive review of the amendments prior to their proposal. EPA's decision to withdraw the 1977 proposed amendments merely corrects this improper agency action and was neither arbitrary nor capricious. Cf. Union of Concerned Scientists v. NRC, 711 F.2d 370, 379-81 (D.C. Cir. 1981) (agency's failure to follow its own regulations in promulgating rules was arbitary and capricious).

CONCLUSION

For the foregoing reasons, this Court should either dismiss this petition or affirm EPA's decision to withdraw the 1977 proposed amendments to the vinyl chloride standard.

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Respectfully submitted,

Robert Brager

Gary H. Baise
Robert Brager
Brenda Mallory
Beveridge & Diamond, P.C.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 828-0200

Peter L. de la Cruz

Jerome H. Heckman
Peter L. de la Cruz
Keller & Heckman
1150 17th St., N.W., Suite 1000
Washington, D.C. 20036
(202) 457-1100

Attorneys for Respondent-Intervenor, the Vinyl Institute

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief for Respondent-Intervenor have been served this 19th day of August, 1985 on the following:

David D. Doniger
Natural Resources Defense Council
1350 New York Avenue, N.W., Suite 300
Washington, D.C. 20005

Mark P. Fitzsimmons
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

Earl Salo
Office of General Counsel
LE 132A (Air and Radiation)
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Neil Jay King
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

David F. Zoll, Esq.
Fredric P. Andes, Esq.
Chemical Manufacturers Association
2501 M Street, N.W.
Washington, D.C. 20037

Arthur F. Sampson, III
Kirkland & Ellis
655 15th Street, N.W.
Washington, D.C. 20005

Stark Ritchie, Esq.
Martha Beauchamp, Esq.
Arnold Block, Esq.
American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005

Robert Brager

Robert Brager

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 23 1977

OFFICE OF
RESEARCH AND DEVELOPMENT

SUBJECT: Proposed Amendments to the Vinyl Chloride Standard

FROM: Assistant Administrator for Research and Development (RD-672)

TO: The Administrator

THRU: AX (A-102)

In order for the Agency to meet the conditions of a settlement agreement reached with the Environmental Defense Fund, requiring notice of this action be in the Federal Register by June 1, 1977, I will concur with comment to the proposed Amendments for the Vinyl Chloride Standard.

The proposed standards are an attempt to force private sector research and development to focus on reducing emissions by increasing the efficiency of presently installed control equipment. It must be emphasized that there is no data available to support the technical feasibility of attaining these standards and in fact the regulations have been designed to accommodate the fact that manufacturers may not be able to achieve the proposed level, but may be able to achieve some intermediate level of control. Although there is emphasis placed on the one alternate technology for new sources there is no data justifying the claim that the recycle oxygen process for producing ethylene dichloride will meet the emissions limit proposed or whether the economics of the process are viable. There is also an uncertainity about the safety of the process.

On the other hand, the proposal states that if emissions from existing sources are already below the emission level applicable, this proposed amendment would give a credit for the difference between the emission limit and the actual emission level. This rationale is inconsistent with the stated goals of prohibiting an increase of ambient levels of vinyl chloride.

The amendment states the effects of reducing total vinyl chloride emissions is less than one percent. The basis for these calculations is unclear and should be made explicit. If this statment is true, the net benefit of this amendment is questionable.

for Wilson K. Talley

cc: Assistant Administrator for Air and Waste Mangement