

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

No. 85-1150

NATURAL RESOURCES DEFENSE COUNCIL, INC.

Petitioner,

v.

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

Respondents.

Petition for Review of an Action of the
Environmental Protection Agency

REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT

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

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

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

Nothing in the statutory language supports EPA. Section 112(e), authorizing work practice standards in certain cases instead of numerical emission limits, grants no authority to consider feasibility when determining what is required to protect health with an ample margin of safety. Section 112(c)(1)(B), authorizing a two-year waiver for existing sources to install controls, is the statute's exclusive concession to feasibility concerns; it does not allow feasibility considerations to enter

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into the setting of the standard. There is absolutely no basis for the claim that the words "in his judgment" in Section 112(b)(1)(B) delegate to EPA the authority to define the legal meaning of the "ample margin of safety" test any way it sees fit. Finally, the statutory purpose cited here by EPA to justify feasibility considerations was cited by EPA to preclude the very same considerations in Lead Industries; EPA cannot have this both ways.

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

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

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

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

EPA makes the ridiculous argument that it is not enough for a petitioner to show that an agency decision was fundamentally compromised by a legally impermissible factor. Rather, EPA asserts the petitioner must prove the decision would be different if it had been made in accordance with law. This is an absurd proposition of law. Moreover, in this case it is obvious that the decision would have been different; the only bases given for

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the January 1985 withdrawal were cost-benefit and technological feasibility tests that are plainly illegal.

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