U.S. Department of Justice

JUL 8 1985

MNS:MPF
90-5-2-3-1606

July 1, 1985

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

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

Dear Mr. Fisher:

Enclosed please find an original and two copies of respondent EPA's response to the motion of CMA and API to intervene.

Sincerely,

Assistant Attorney General
Land and Natural Resources Division

By: [signature]
Mark P. Fitzsimmons, Attorney
Environmental Defense Section

Enclosures

CMA 015332

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

NATURAL RESOURCES DEFENSE COUNCIL, INC., Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LEE THOMAS, ADMINISTRATOR, Respondents.	No. 85-1150

RESPONSE OF EPA TO MOTION TO INTERVENE

Respondents EPA et al. hereby respond to the motion to intervene of the American Petroleum Institute and the Chemical Manufacturers' Association in the above-captioned case. Respondents believe that movants do have interests at stake, and that their motion is well taken. However, because of this Court's decision in EDF v. EPA, 672 F.2d 42 (D.C. Cir. 1982) on the issue of attorneys fees, respondents cannot acquiesce in the motion for intervention. EPA asks that the motion be denied, or, in the alternative, that the intervention be limited to provide that respondents will not be liable to petitioners for attorneys fees (in the unlikely event that such fees are awarded) that petitioners incurred responding to arguments made by movants for intervention. Respondents also ask that this Court's Order

Order allowing the intervention of the Vinyl Chloride Institute be modified to provide a similar limitation.

Respectfully submitted,

MARK P. FITZSIMMONS, Attorney
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 633-2285

EARL SALO
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U.S. Environmental Protection Agency
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing response to motion to intervene was served upon the following counsel by first class mail, postage prepaid, this 1st day of July, 1985:

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MARK FITZSIMMONS

U.S. Department of Justice

JUL 8 1985

MNS:MPF
90-5-2-3-1606

Washington, D.C. 20530

July 3, 1985

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

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

Dear Mr. Fisher:

Enclosed please find an original and two copies of Motion for Amendment of Briefing Schedule.

Sincerely,

Assistant Attorney General
Land and Natural Resources Division

By: Mark Fitzsimmons

Mark P. Fitzsimmons, Attorney
Environmental Defense Section

Enclosures

CMA 015336

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

NATURAL RESOURCES DEFENSE COUNCIL, INC., Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LEE THOMAS, ADMINISTRATOR, Respondents.	No. 85-1150

MOTION FOR AMENDMENT OF BRIEFING SCHEDULE

Respondents United States Environmental Protection Agency et al. hereby move for the following amendment of the briefing schedule in the above case:

Respondents' brief due July 25, 1985 (presently due July 17, 1985).

Intervenors' brief in support of Respondents due August 19, 1985 (presently due August 1, 1985).

Petitioners' reply brief and Joint Appendix due September 3, 1985 (presently due August 15, 1985).

Final Printed briefs due September 17, 1985 (presently due August 29, 1985).

The reasons for this minor amendment in the briefing schedule are that the case presents a complex and important issue, so that more than the usual time to prepare briefs is necessary, and to accommodate conflicts in the schedules of counsel for the parties. Respondents believe that this minor

change would also not affect, and request that it do not affect, the scheduling of oral argument in this case.

Within the terms of the motion as set out above, counsel for petitioners and intervenors Vinyl Chloride Institute have instructed counsel for respondents to represent that they do not object to the respondents' motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Amendment of Briefing Schedule was served upon the following counsel by first class mail, postage prepaid, this _____ day of July, 1985.

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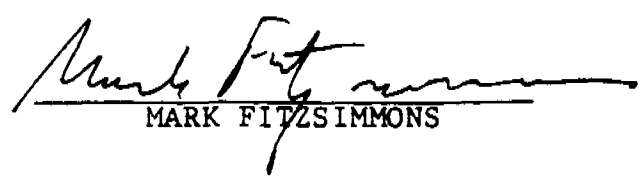
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MARK FITZSIMMONS

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

OPPOSITION OF NRDC TO MOTION
OF API AND CMA FOR LEAVE TO INTERVENE

Petitioner Natural Resources Defense Council (NRDC) opposes the motion for leave to intervene filed by the American Petroleum Institute (API) and the Chemical Mnaufacturers Association (CMA). Their motion should be denied on three grounds: (1) lack of standing, (2) failure to show inadequate representation, and (3) untimeliness.

1. Standing. API and CMA allege no interest in this case which gives them standing. Neither of these trade associations alleges that it represents the manufacturers of vinyl chloride or polyvinyl chloride who are subject to the standards involved in this litigation. Rather, they assert that they represent firms manufacturing or using a wholly different substance, benzene, which is not regulated by the rules under review in this case. The manufacturers of vinyl chloride and polyvinyl chloride are already represented in this case by the intervenor Vinyl Institute, a trade association formed by these manufacturers

specifically to represent them in regulatory proceedings regarding vinyl chloride.

Since neither API nor CMA represents companies subject to the regulation in question, they could not suffer any "injury in fact" should NRDC prevail and thus they have no standing. Warth v. Seldin, 422 U.S. 490, 498-99 (1975).[1]

All API and CMA have alleged is that the legal issues involved in the instant case are also involved in the separate litigation over benzene (NRDC v. Thomas, No. 84-1387), a pollutant emitted by companies they do represent.[2] An abstract interest in a legal question is insufficient to give a party standing. Warth v. Seldin, supra. See also Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 151-54 (1970).[3]

2. Adequate Representation. Even if API's and CMA's interest in advancing purely legal arguments regarding the construction of Section 112 of the Clean Air Act were sufficient to confer standing, that interest is adequately represented by

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[1] Some manufacturers of vinyl chloride and polyvinyl chloride belong to API or CMA, but not for the purpose of API's or CMA's representing them in regulatory matters pertaining to vinyl chloride. That is what the Vinyl Institute is for. In order to have standing, a trade association must exist for the purpose of representing its members in the matter which is the subject of the litigation; the fact that API or CMA may be chartered to represent some of the members of the Vinyl Institute on other matters does not confer standing in this matter.

[2] Both associations are intervenors in that case.

[3] The abstract interest alleged by API and CMA is of the type usually presented to a court, if at all, in the form of an amicus curiae brief.

the Environmental Protection Agency (EPA) and the Vinyl Institute. EPA and the Vinyl Institute have the opportunity and motivation to make the same arguments about EPA's authority under Section 112 as API and CMA proffer that they would make.[4/] Indeed, EPA has already made these arguments in the January 1985 Federal Register notice announcing the action which is here under review.[5/]

3. Timeliness. The motion to intervene was filed almost three months late.[6/] It comes after the case is well underway, after the filing of Petitioner's brief. It is noteworthy that API and CMA do not contend they were ignorant of the existence of

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[4/] "When the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner [for intervention] must demonstrate adversity of interest, collusion, or nonfeasance." Commonwealth of Virginia v. Westinghouse Electric Corp., 542 F.2d 214, 216 (4th Cir. 1976), quoted in International Tank Terminals, Ltd v. M/V Aracdia Forest, 579 F.2d 964, 967-68 (5th Cir. 1978). Cf. 7A Wright J. Miller §1909: "At the other extreme are cases in which the interest of the absentee is identical with that of one of the existing parties. . . . In those situations representation will be presumed adequate unless special circumstances are shown."

[5/] The fact that API and CMA wish to make a generic legal argument identical to that which EPA and the Vinyl Institute can be expected to make distinguishes this case from NRDC v. Costle, 561 F.2d 904 (D.C. Cir. 1977). That case involved a regulatory proceeding spanning 65 chemicals and 21 different industrial categories. The Court held that two companies applying for intervenor status were not adequately represented by a third company because they operated in different industrial categories and could not be expected to exhibit equal interest in the various factual issues involved in the proceeding. Id. at 913. But here there is only one chemical and one industrial category involved, and the issues in the case are legal, not factual. There is no reason for the Vinyl Institute to have different interests on these legal issues than API or CMA.

[6/] The 30-day period for timely intervention under F.R.A.P. Rule 15(d) expired on April 7, 1985.

this case; indeed, the filing of the case was reported in a widely-read trade publication.[7/] Rather, they claim to have expected Petitioner NRDC to make a different line of argument than NRDC has in fact made. This claim is disingenuous. API and CMA have long known exactly what issues NRDC intended to raise with regard to EPA's hazardous air pollutant regulations. There is no basis for excusing the untimeliness of the filing.

Conclusion

API and CMA have no connection to the regulatory proceeding under review which gives them standing; they have alleged only an abstract interest in legal issues and no injury in fact. Their abstract legal interest is adequately represented by EPA and the existing intervenor. Their motion is months untimely and no reasonable excuse has been offered for their tardy filing. For these reasons, the motion should be denied.

Respectfully submitted,

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July 3, 1985

7/ Inside EPA, Mar. 22, 1985, p. 10.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July 1985, I have served copies of the enclosed Opposition of NRDC to Motion of API and CMA For Leave to Intervene by messenger to the following:

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