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JUL 1 1985

June 28, 1985

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

Re: Natural Resources Defense
Council v. EPA, No. 85-1150

Dear Mr. Fisher:

Enclosed for filing in the above-referenced case are the original and three copies of the Joint Motion of the American Petroleum Institute and the Chemical Manufacturers Association for Leave to Intervene as Respondents Out of Time. Copies of the Joint Motion have been served today, by hand, on all counsel.

If you have any questions concerning the Joint Motion, please contact me or Neil King, counsel for the Chemical Manufacturers Association.

Sincerely,

Arthur F. Sampson III

Arthur F. Sampson, III

Counsel for the American
Petroleum Institute

maj

Enclosure
cc: All Counsel

CMA 015322

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

JOINT MOTION OF THE
AMERICAN PETROLEUM INSTITUTE AND
THE CHEMICAL MANUFACTURERS ASSOCIATION
FOR LEAVE TO INTERVENE AS RESPONDENTS OUT OF TIME

Pursuant to Rules 15(d) and 26(b) of the Federal Rules of Appellate Procedure, the American Petroleum Institute ("API") and the Chemical Manufacturers Association ("CMA") hereby move for leave to intervene in order to protect the substantial interests of their members in the disposition of this action. The grounds for this motion are the following:

1. In this action, petitioner Natural Resources Defense Council, Inc. ("NRDC") seeks review of the final decision of respondent Environmental Protection Agency ("EPA") withdrawing proposed amendments to the Agency's standard for vinyl chloride under Section 112 of the Clean Air Act,

42 U.S.C. § 7412 (1982). Petitioner's opening brief ("Pet. Br.") broadly challenges EPA's interpretation of Section 112, contending that the Agency has no authority to consider costs or technological feasibility in regulating hazardous air pollutants and must "set standards which allow no measurable emissions." Pet. Br. at 3-6, 14-16.

2. As petitioner acknowledges, "[s]imilar issues are involved in two other proceedings pending before the Court" in which challenges have been brought against EPA decisions under Section 112 concerning the regulation of two other pollutants. Pet. Br. at 1. The first of these cases involves EPA's June 6, 1984 decisions concerning the regulation of benzene.1/ NRDC v. Thomas, Nos. 84-1387, et al. The second group of related cases involves challenges to a series of EPA decisions under Section 112 concerning radionuclides.2/ Environmental Defense Fund v. Thomas, Nos. 84-1524, et al.; NRDC v. Thomas, Nos. 85-1123, et al.; American Mining Congress v. EPA, Nos. 85-1285, et al.

3. API's members are engaged in the exploration for and production of petroleum and in the refining,

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1/ See 49 Fed. Reg. 23498-23520 & 23558-23566 (June 6, 1984).

2/ See 49 Fed. Reg. 43906 (October 31, 1984); 50 Fed. Reg. 5190 (February 6, 1985); 50 Fed. Reg. 15386 (April 17, 1985).

transportation and marketing of petroleum products. CMA's members are engaged in the production of basic industrial chemicals. Both groups regularly represent their members in proceedings before all branches of the federal government, including agency rulemaking proceedings and litigation involving federal regulations.

4. Various members of API and CMA are major users or producers of benzene or products containing benzene. Accordingly, API and CMA participated in EPA's rulemaking proceedings for the regulation of benzene under Section 112 of the Clean Air Act and are parties to the litigation challenging EPA's final actions in those proceedings. A ruling on the broad issues pressed by NRDC in this proceeding could have a direct bearing on the outcome of the benzene case, since the same "ample margin of safety" standard applies to the regulation of all hazardous air pollutants under Section 112.

5. A variety of petroleum or chemical industry emissions other than benzene also may be subject to regulatory proceedings under Section 112, and the broad issues that NRDC presses here are common to all such proceedings. In order to protect their members' interests in the appropriate interpretation and implementation of Section 112, API and CMA not only participated in the benzene proceedings, but also have filed comments in EPA proceedings dealing with other hazardous air pollutants, including radionuclides and

vinyl chloride.3/ API and CMA also have participated as parties in litigation relating to those proceedings.4/ Moreover, API and CMA were among the major participants in generic EPA rulemaking proceedings concerning the construction and application of Section 112,5/ and those generic proceedings played a significant role in the EPA decision on vinyl chloride which is challenged in this action. See 50 Fed. Reg. 1182, 1183 cols. 1-2 (January 9, 1985).

6. API and CMA did not seek to intervene in this case earlier because, until NRDC filed its brief last week, it was not apparent that participation in the vinyl chloride proceeding would be necessary in order to protect the interests of their members in the issues pending in the benzene case. For one thing, the instant vinyl chloride challenge was the last of the three related groups of Section 112

3/ Both API and CMA filed comments in the benzene and radionuclides proceedings, and CMA (which was called the Manufacturing Chemists Association at the time) filed comments on the proposed vinyl chloride amendments, the withdrawal of which is challenged in the present case.

4/ Both API and CMA are parties to the benzene litigation, and two weeks ago, this Court granted CMA's Motion for Leave To Intervene in the radionuclides litigation. See Order of June 14, 1985 in Environmental Defense Fund v. Thomas, Nos. 84-1524 and 84-1630. API, too, is contemplating the filing of a motion to intervene in the radionuclides litigation.

5/ See EPA's Proposed Airborne Carcinogen Policy, 44 Fed. Reg. 58642 (October 10, 1979).

cases to be filed,6/ and there was every reason to anticipate that the benzene or radionuclides cases would be briefed and argued at least contemporaneously with, if not sooner than, the vinyl chloride case. It is now apparent, however, that this case will be briefed, and may be decided, before the other two cases.7/

7. Moreover, until the filing of NRDC's opening brief last week, it was not clear that broad interpretative questions regarding Section 112 would be presented in this case. Instead, this case could very well have focused on issues unique to vinyl chloride, such as EPA's assessment of the health risks, the technical merits of the 1977 proposed amendments that EPA has now withdrawn, or the impact of the 1976 settlement agreement between EPA and the Environmental Defense Fund that led to the 1977 proposal. See 50 Fed. Reg. 1182-83 (January 9, 1985). As discussed above, however, the brief filed by NRDC last week raises broad

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6/ The two petitions seeking review of EPA's benzene decisions were filed on August 3, 1984 (Nos. 84-1387 and 84-1391), and the first radionuclides challenge was filed on October 29, 1984 (No. 84-1524). In contrast, the NRDC petition here was filed on March 8, 1985 (No. 85-1150).

7/ The briefing schedule for this case comes to a close on August 15, and argument is scheduled for the Court's November/December sitting. In contrast, the briefing schedule in radionuclides extends through November, and argument has not been scheduled. Briefing in the benzene case has been suspended altogether because of the pendency of an administrative Petition for Reconsideration.

questions concerning EPA's overall interpretation and implementation of Section 112.

8. In short, with the filing of NRDC's opening brief, it is evident that broad interpretative issues, which may be critical to the disposition of the pending benzene and radionuclides cases, may be resolved first, and perhaps definitively, in the present action. Consequently, the disposition of this case may as a practical matter impair the ability of API and CMA to protect the direct and substantial interests of their members in the resolution of the broad questions raised by NRDC. Cf. Fed. R. Civ. P. 24(a)(2). If, for example, the Court accepts NRDC's construction of Section 112, the Court's opinion in this case could have a direct bearing on any subsequent disposition of the pending benzene challenges. Alternatively, EPA might withdraw some or all of its June 1984 benzene decisions for administrative reconsideration in light of the Court's opinion.

9. The interests API and CMA seek to protect are not adequately represented by any of the other parties in this litigation. Obviously, neither EPA (the agency charged to implement Section 112) nor NRDC (which seeks more stringent controls than even EPA considers necessary) can represent the interests of the petroleum or chemical industries in the disposition of this case. And while an industry group, the Vinyl Institute, has already intervened in this case, that group's interests are considerably narrower than those of

API and CMA. In particular, the Vinyl Institute has no substantial interest in the regulation of benzene, did not participate in the rulemaking proceedings on that substance, and is not a party to the benzene litigation. On a broader scale, the Vinyl Institute does not represent the wide variety of chemical manufacturing operations that CMA does, and does not represent any segment of the petroleum industry.

10. Finally, intervention by API and CMA in this proceeding would in no way prejudice the rights of the parties or delay the Court's decision on the merits. Cf. Fed. R. Civ. P. 24(b).8/ API and CMA plan to file a joint brief and intend to abide by the briefing schedule already established. Moreover, since the joint brief of API and CMA as intervenors would be filed after respondents' brief, it will be possible to minimize needless overlap with EPA as well.

8/ Although the normal 30-day period for motions to intervene has already passed (see Fed. R. App. P. 15(d)), this Court is authorized to enlarge that period "for good cause shown." Fed. R. App. P. 26(b). There is more than ample cause for applying Rule 26(b) here for, as already mentioned, it has only recently become evident that key issues in the pending benzene case may be resolved in this proceeding.

WHEREFORE, API and CMA respectfully request that this Court enter an order granting them leave to intervene in support of respondents in this action.

Respectfully submitted,

Neil Jay King (afs)

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June 28, 1985

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion of the American Petroleum Institute and the Chemical Manufacturers Association for Leave to Intervene as Respondents Out of Time were served this date, by hand delivery to:

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June 28, 1985

CMA 015331