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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R&S 028954

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conclusion in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), *cert. denied* 449 U.S. 1042 (1980).[38/] EPA cannot be allowed to have it both ways.[39/]

The only argument from the statutory text that has not already been discussed is API/CMA's claim relating to Section 302(k), which defines "emission standard" for general purposes of the Act as a requirement which "limits" emission rates. The *amici* contend that if Congress had held our interpretation of Section 112, it would have used a word such as "prohibits." (API/CMA Br. at 18.) This argument is specious. The *amici* ignore the express legislative purpose for Section 302(k). It was adopted, and the word "limits" was chosen, specifically to

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38/ Summarizing the *Administrator's* argument why technological and economic factors may not be considered under the "adequate margin of safety" test of Section 109, the Court stated:

> The Administrator begins by pointing out that the Act's stated goal is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population[.] . . .

647 F.2d at 1152. It was the *Administrator's* conclusion from this passage, as well as other legislative history, that

> Congress made it abundantly clear that considerations of economic or technological feasibility are to be subordinated to the goal of protecting the public health *by prohibiting any consideration of such factors*.

Id. at 1153 (emphasis added).

39/ Moreover, if EPA's present assertion were correct, then the same purpose would control all other sections of the law. This proposition would require overruling the holding of the Supreme Court in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), this Court's holding in *Lead Industries*, and this Court's construction of Section 112 in *Hercules*, *supra*.

ratify court decisions holding that techniques such as dispersing emissions (rather than controlling them) were not valid emission standards.[40] It was not adopted to make a fine distinction between "limits" and "prohibits."[41]

B. The Legislative History Fully Supports the Statutory Preclusion of Economic and Technological Factors

The discussion of legislative history in NRDC's opening brief demonstrated that Congress (1) directed EPA to set hazardous air pollutant standards on the basis of health considerations alone, (2) rejected authority to consider economic and technological factors originally present in the House bill, (3) understood that some pollutants are intolerably hazardous at any level, and (4) explicitly determined that standards for such pollutants must protect public health even if that required sources to close.

In the attempt to dispute this, EPA and API/CMA place principal reliance on a passage from the 1970 Senate Report which neither quotes in full. (EPA Br. at 19-20; API/CMA Br. at 23-24.) We quote it in full here, along with the important paragraph which follows it:

> The Committee recognizes that some of these hazardous air pollutants, such as cadmium and beryllium, are present in nearly all raw materials. Thus, beryllium and cadmium appear as trace impurities in

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40/ See 1977 Senate Report at 94-95, 3 Leg. Hist. 1468-69.

41/ Moreover, Section 302(k) is the general definition of an emission standard; it applies to all types of emission standards throughout the Act. "Limits" is the appropriate general purpose word.

> steel making and other raw material processes, in addition to the processing at beryllium and cadmium plants. Recognizing that complete control of beryllium from steel plants, for example, may not be necessary or practicable, the Committee has provided the [Administrator] with authority to differentiate among categories of sources in establishing prohibitions under section 115.
>
> After public hearings and within six months of the publication of such proposed prohibition, the [Administrator] would be required to promulgate such prohibition, unless he found on the basis of a preponderance of the evidence, that the air pollution agent was not, in fact, hazardous to the health of persons -- or that a greater than zero emission could be permitted without presenting a hazard to health.[42/]

From the excerpts of the first paragraph which EPA quotes, the Agency draws the conclusion that "the Senate bill assumed that feasibility would be considered" even for pollutants hazardous at any level of exposure. (EPA Br. at 19.) That is not what these passages provide.

The fact is that in 1970, when these comments were written, neither beryllium nor cadmium was believed to lack a threshold of effect and to be hazardous at any level of exposure.[43/] Since trace emissions of beryllium or cadmium were not believed to be hazardous, the Committee's comment that their complete removal "may not be necessary or practicable" was fully consistent with the Committee's policy of prohibiting emissions of pollutants hazardous at any level.

42/ S. Rep. No. 1196, 91st Cong., 2d Sess. 20 (1970), 1 Leg. Hist. 420 ("1970 Senate Report").

43/ This view of beryllium, for example, is reflected in the notice accompanying EPA's 1973 standard, which concluded that an ambient level of 0.01 micrograms per cubic meter represented "a safe level of exposure" to beryllium. 38 Fed. Reg. 8820, 8823 (col. 2).

The purpose of the proposed provision allowing differentiation among source categories, then, was not to permit some industries to continue emitting dangerous levels of hazardous pollutants. The purpose was to allow EPA, when dealing with a hazardous pollutant which exhibits a health effects threshold, to establish different standards for different types of sources depending whether their emissions caused the threshold to be exceeded.[44/]

The next paragraph of the Report, which EPA and API/CMA did not quote, repeats the bill's unambiguous command that when a pollutant <u>is</u> hazardous at any level of exposure, emissions must be prohibited. Even if the statement that complete removal of beryllium or cadmium impurities "may not be necessary or practicable" had concerned non-threshold pollutants, this clear command would take precedence. As shown in NRDC's opening brief (Pet. Br. at 20-24), Congress clearly contemplated that if control measures sufficient to protect public health with an ample margin of safety were impractical, then the offending sources would have to close.

API/CMA argue that the Conference Committee retreated from the Senate bill when it chose the "ample margin of safety" test in place of the Senate bill's presumptive prohibition. (API/CMA Br. at 24.) We have already shown that there is no basis for this claim. (Pet. Br. at 23 n.41.) The "ample margin of safety" test in Section 112 is an amplified version of the "adequate

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44/ The provision authorizing EPA to differentiate among categories, moreover, was removed by the Conference Committee.

margin of safety" test employed in Section 109. As this Court has held, the "adequate margin of safety" test cannot be construed to permit EPA to consider economic or technological feasibility. Lead Industries, 647 F.2d at 1150. It is inconceivable that the Conference Committee could have intended any lesser restriction on consideration of feasibility when it adopted the amplified version of the same test in Section 112.

EPA and the amici next attempt to fend off Senator Muskie's key summary of the Conference Committee agreement. Muskie, the Act's chief sponsor and chairman of the Senate conferees, summarized Section 112 in post-conference floor debate as follows:

> The standards must be set to provide an ample margin of safety to protect the public health. This could mean, effectively, that a plant would be required to close because of the absence of control techniques. It could include emission standards which allowed for no measurable emissions.45/

EPA and the amici suggest that the use of the word "could" actually gave EPA discretion to consider feasibility factors even when dealing with pollutants which are hazardous to health at any level of exposure. (EPA Br. at 21; API/CMA Br. at 26.) Once again, however, they have ignored the fact that not all hazardous air pollutants lack thresholds of effect and are hazardous at any level. In such a case the ample margin of safety test can be

R&S 028983

45/ Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970, Exhibit 1 to Statement of Sen. Muskie, Cong. Rec. S20601 (daily ed., Dec. 18, 1970), 1 Leg. Hist. 133.

satisfied while still allowing emissions.46/ Senator Muskie's use of the word "could" reflects this distinction between the treatment required for threshold and non-threshold hazardous air pollutants. The clear import of his statement is to emphasize that for "certain pollutants" which he earlier described as intolerably dangerous at "any level of emissions,"47/ the public health is to be protected even if it means emissions must be effectively prohibited and that plants must close.

Other 1970 legislative history cited by API/CMA is blatantly quoted out of context. They assert: "[A]s explained by the [1970 Senate Report], the combination of emission prohibitions under Section 115 of the Senate bill and emission standards under Section 114 of the bill was intended to provide effective control of 'stationary source emissions that pose any significant danger to public health or welfare.'" (API/CMA Br. at 23, emphasis supplied by them.) They imply that the Commitee established a "significance" test that hazardous pollutants must pass before EPA may regulate them. This is flatly a distortion of the Senate Report. The full paragraph of the Report states:

> In writing a relatively restrictive definition of hazardous agents, the Committee recognized that a total

46/ This is conformity with the Senate bill which, as evidenced by the quotations at page 18, supra, contemplated that for such pollutants EPA would establish a "greater than zero" emission limit.

47/ When presenting the hazardous air pollutant provisions of the Senate bill to the Senate floor, Muskie stated: "The committee was presented with strong evidence that any level of emissions of certain pollutants may produce adverse effects which cannot be tolerated." Cong. Rec. S16091 (daily ed., Sept. 21, 1970), 1 Leg. Hist. 227.

> prohibition on emissions is a step that ought to be taken only where a danger to health, as defined, exists. It should be noted that emission standards for pollutants which cannot be considered hazardous (as defined in section 115) could be established under section 114. Thus, there should be no gaps in control activities pertaining to significant danger to public health or welfare.48/

This paragraph quite clearly says the opposite of API/CMA's assertion: That pollutants meeting the definition of "hazardous" must be regulated under what eventually became Section 112 of the Act, and that other pollutants which pose less serious but still significant dangers must be regulated under other provisions of the Act.49/

48/ 1970 Senate Report at 20, 1 Leg. Hist. 420. See further discussion of API/CMA's alleged "significance" test at page 27, n.55, infra.

49/ API/CMA also point to the statement of Senator Spong that the Conference Committee changed the "thrust" of Section 112. (API/CMA Br. at 24-25.) Spong's comments, however, do not give any basis for concluding that the conferees changed the provision's exclusion of non-health factors. Spong merely summarized the change from requiring a prohibition unless safe exposure levels were established to requiring an ample margin of safety. 1 Leg. Hist. 146. By saying that this was a change in "thrust," Spong said no more than that this was a change in how the requirement was expressed. Muskie and Spong were allies in the debate. There is no indication in Spong's comments of any conflict with Muskie.

Finally, amici quote a statement by Representative Staggers that "many" of the Senate bill's provisions were modified by the Conference Committee to reflect "reasonableness and feasibleness" concerns. The House conferees did obtain some concessions on other matters (e.g., more time for auto emission controls, deletion of a preconstruction permit process). See the rest of Staggers's statement, 1 Leg. Hist. 111-112. On Section 112, however, the only concessions the House obtained were the provisions modestly delaying the compliance date for certain existing sources. See Pet. Br. at 23-24.

C. <u>All the Cases Confirm That Non-Health Factors May Not Be Considered</u>

The cases reviewed in our opening brief hold (1) that authority for cost-benefit or feasibility tests must be explicit and (2) that no such authority can be found in Section 112. EPA cannot refute or distinguish these cases.

EPA attempts to sell the idea that all of the cases we cited can be explained merely as deferrals to agencies' legal interpretations. EPA implies that the Supreme Court and this Court would have reached opposite holdings in each of these cases if only the agencies had urged them to. (EPA Br. at 23-24.) This will not wash. In three of these cases, while noting the principle of deference, the courts went on to holdings that the statutes in question specifically preclude consideration of economic or technological factors. In <u>Union Electric</u> the Supreme Court held that Section 110 unequivocally barred consideration of feasibility. 427 U.S. at 265 (opinion for Court), 269-70 (concerning opinion of Justice Powell). In <u>Lead Industries</u> this Court could not find in Section 109 "any congressional intent to require, <u>or even permit</u>," consideration of such factors. 647 F.2d at 1150 (emphasis added). In <u>Hercules</u>, the Court found a specific congressional intent to preclude consideration of such factors under Section 112. 598 F.2d at 111-112. The fourth case, <u>American Textile Mfrs.</u>, contains not a word about deference.[50/] The Supreme Court held in that case that the

R&S 028986

50/ This is not surprising in view of the fact that the agency had switched sides, from opposing an interpretation allowing cost-benefit analysis to supporting it. <u>See</u> 452 U.S. at 505 (footnote continued)

Occupational Safety and Health Act specifically bars cost-benefit analysis. 452 U.S. at 509, 512. The same result would have been reached in each case regardless of the position urged by the agency, because in each case the statute commanded the outcome that the courts reached.

EPA also misreads National Ass'n of Demolition Contractors v. Costle, 565 F.2d 748 (D.C. Cir. 1977). (EPA Br. at 22.) That case presented the narrow issue whether, having granted an industry request to weaken the asbestos standard as it applied in freezing weather, EPA was under any obligation to weaken the standard as it applied in milder weather. The Court rejected the industry's claim that EPA's concession for cold weather

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n.25.

EPA attempts to avoid the holding of this case by claiming that the agency is not "maintaining that section 112 requires cost-benefit analysis." (EPA Br. at 24.) This statement is flatly contradicted by the 1985 withdrawal notice, which states that the 1976 standard, and implicitly the 1985 withdrawal, were "established based on judgments concerning the costs and benefits of the standard to society." 50 Fed. Reg. at 1183 (col. 3).

EPA admits that the OSHA statute is "more specific" in that it includes an explicit "to the extent feasible" proviso. EPA nonetheless claims that the "ample margin of safety" test implies a similar feasibility criterion. (EPA Br. at 24-25.) In another approach to the Textile case, API/CMA argue that the case has no bearing here because, they say, it merely concerned how economic and technological factors should be taken into account. (API/CMA Br. at 36.) Both arguments are wholly unconvincing, especially in light of the principle of both Textile and Union Electric that when Congress wanted economic and technological factors considered at all, it said so explicitly.

Justice Rehnquist observed in Textile that without the deliberate inclusion of the feasibility proviso, the OSHA statute would clearly specify an exclusive focus on health factors only. 452 U.S. at 545 (dissenting opinion); see also Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 681-82 (1980), (concurring opinion). That is precisely what Congress provided in Section 112.

constituted a determination that the weaker standard is all that is necessary to protect public health with an ample margin of safety. Id. at 753. The Court was not presented with the issue whether Section 112 precludes consideration of technological or economic factors, and nothing in the Court's decision addressed that issue.[51/]

EPA's effort to distinguish Union Electric, Lead Industries, and Hercules is especially unconvincing. (EPA Br. at 25-28.) EPA argues that the first two cases should be disregarded because they construe other sections of the Clean Air Act (Sections 109 and 110), but the Agency can point to no significant differences between the sections. EPA claims Section 112 is unique because it covers both the setting of standards and their implementation all in one section. In fact, Sections 109 and 110 together establish the ambient air quality standards and provide for their implementation. Neither allows for consideration of costs or feasibility. In those sections as well as in Section 112, Congress has reserved consideration of those factors for itself. As for Hercules, EPA merely attempts to dismiss the case's clear and accurate analysis of Section 112 as uninformed dicta.[52/]

51/ There is no basis for EPA's claim (Br. at 23) that Justice Stevens "approved the approach" of setting Section 112 standards based on feasibility considerations in his dissent in Adamo Wrecking Co. v. U.S., 434 U.S. 275 (1978). He wrote: "If a total prohibition had been adopted, it unquestionably would have conformed to the statutory mandate." Id. at 297.

52/ We have already responded to EPA's erroneous contention that the holding in Hercules depends on the presence of special factors specified in Section 307(a). See page 14, supra.

EPA closes its analysis of cases with a patently overbroad plea that the Court disregard all these holdings and just defer to the Agency. (EPA Br. at 29.) The Supreme Court has made clear, however, that deference has limits. Agencies cannot invoke the deference principle to "emasculate[]" judicial review. Security Industry Ass'n v. Board of Governors, 104 S.Ct. 2979, 2983 (1984). The courts will not defer when the statute and its legislative history are clear, and the threshold determination whether the law is clear is for the courts to decide. Chevron, U.S.A. v. NRDC, 104 S.Ct. 2778 n.9 (1984). "[T]raditional tools of statutory construction" (*id.*) can yield only one answer in this case: Congress intended EPA to set hazardous air pollutant standards on health factors alone and barred the Agency from considering technological or economic feasibility.

D. Congress Has Not Ratified EPA's Interpretation

Lastly, EPA makes a meritless argument that Congress ratified EPA's construction of the law in the 1977 amendments. EPA misstates the case law on what is necessary for a ratification to occur. EPA fails to show that Congress knew of or intended to approve of the Agency's consideration of non-health factors under Section 112. In fact, the 1977 amendments and legislative history shows that Congress explicitly abstained from any expression of approval of EPA's interpretation. Before discussing the cases, we respond to EPA's erroneous characterization of congressional action in 1977.

The only changes made to Section 112 in 1977 were (1) the authorization of work practice standards and (2) the adoption of a precautionary formula for defining a hazardous pollutant. We have already shown that the first of these amendments confers no authority to consider technological or economic factors when setting standards. See pages 12-13, supra.[53/]

The other amendment, inserting into Section 112(a)(1) the words "in the judgment of the Administrator . . . may reasonably be anticipated to" cause death or illness, was intended to adopt and extend the precautionary approach to identifying public health hazards set forth in Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) (en banc), cert. denied 426 U.S. 941 (1976).[54/] In the House Report's statement of the six purposes for making this change there is not a word to suggest the relevance of feasibility considerations.[55/]

53/ When the Senate stated that this amendment would "fully authorize" the present asbestos standard (1977 Senate Report at 44, 3 Leg. Hist. 1418), all it intended to do was settle the legal controversy over the enforceability of work practice requirements.

54/ See 1977 House Report at 43-51, 4 Leg. Hist. 2510-18. EPA (Br. at 33) fails to mention the last five words of this amendment and misrepresents the first three words as intending to delegate to the Agency the authority to define the legal meaning of "ample margin of safety." This is a gross misconstruction of the amendment. See pages 14-15, supra.

55/ Id. at 49-50, 4 Leg. Hist. 2516-17. API/CMA (Br. at 32) grossly misrepresent this legislative history, choosing single words or phrases and reassembling them into completely different thoughts than those the Committee expressed. We cannot even find the key word "significant" on the referenced pages, except in an unrelated usage in the footnote on page 50.

In what may be a preview of the benzene and radionuclides litigation to be briefed later this year, the amici also grossly (footnote continued)

EPA admits that "there is no specific discussion of the feasibility factor under section 112 in the 1977 legislative history. . . ." Nonetheless EPA asserts that the Court should "assume" Congress had a detailed awareness of previous EPA's handling of the issue with asbestos and vinyl chloride and silently ratified it. (Br. at 36.) EPA, however, has misrepresented (1) its treatment of the feasibility issue in the regulation of asbestos in 1973 and (2) Congress's treatment of vinyl chloride in the unenacted 1976 amendments.

On asbestos, EPA asserts that it clearly based the 1973 standard on feasibility considerations. This is not so. EPA relies principally on statements about feasibility in the 1971 notice of proposal. (Br. at 31.) But the 1973 promulgation notice, which EPA quotes incompletely, tells a different story. The promulgation notice stated that the asbestos standard "was not based on economic considerations."56/ In the final notice EPA took the position that asbestos could be treated as having a

misrepresent this Court's decision in Ethyl. (API/CMA Br. at 32 n.61.) In Ethyl the Court held that when public health is at stake, EPA may regulate when there is uncertainty rather than sit idly by awaiting certain proof. The Court used this term "significant risk of harm" to characterize the conclusion flowing from data which strongly indicates, though not conclusively proves, danger to public health. 541 F.2d at 12-32. The Court did not hold that there must be some specific number of lives lost or illnesses caused by a pollutant before EPA may regulate it. EPA however, has adopted just such a test in the benzene and radionuclides rulemakings and has labelled it the "significant risk" test. EPA's test has no foundation in Ethyl and it was not adopted by Congress when Congress ratified the Ethyl decision in 1977.

56/ 38 Fed. Reg. at 8822 (col. 2) (emphasis added).

threshold of effect.[57/] Consequently, EPA concluded that "the available evidence relating to the health hazards of asbestos does not suggest that [a] prohibition is necessary to protect public health."[58/] In sum, EPA's action on asbestos, which the Agency claims put Congress on notice EPA's legal interpretation, in fact rested on the assertion that low levels of asbestos were not hazardous and that the decision was based on health factors rather than "economic considerations."[59/]

R&S 028992

On vinyl chloride, the amendment proposed in 1976 was intended solely to force Agency action. The 1976 House Report explicitly stated that the committee did not intend to comment on the adequacy of the then-pending vinyl chloride proposal:

> In adopting this section, the Committee does not intend to specify the degree of emission reduction which should be required. With respect to vinyl chlorides, arsenic, cadmium, and POM's, the Administrator should apply the appropriate means and extent of regulation under <u>the existing statutory criteria</u> -- i.e., ambient standards (section 109 and 110), new and existing source performance standards (sec. 111), and hazardous emission standards (sec. 112).[60/]

[57/] EPA cited evidence which the Agency concluded "suggests that there are levels of asbestos exposure that will not be associated with any detectable risk. . . . [T]he available evidence does not indicate that levels of asbestos in most community air causes asbestotic disease." <u>Id</u>. at 8820 (col. 2).

[58/] <u>Id</u>. at 8820 (col. 2).

[59/] We <u>now</u> know that EPA was wrong and that asbestos <u>is</u> dangerous at levels in community air. But <u>in 1973</u>, in the notice that EPA sets up as the predicate for its ratification argument, the Agency took the opposite view.

[60/] H.R. Rep. No. 1175, 94th Cong., 2d Sess. 26, 6 <u>Leg. Hist.</u> 6675 ("1976 House Report") (emphasis added).

EPA quotes this passage without recognizing what it means. The passage does not endorse any Agency interpretation; it states that the hazardous emission standard for vinyl chloride must be governed by "the existing statutory criteria."61/

Likewise, there is no basis for EPA's conclusion that the dropping of the amendment when the vinyl chloride standard was issued constituted congressional endorsement of its content. If the House Committee explicitly refrained from expressing approval of the proposal when affirmatively acting, it can hardly be concluded that the deletion of the amendment was a ratification of the final standard.

If any silent ratification can be said to have occurred on the basis of what it is "assumed" Congress knew, then what counts is EPA's position when Congress actually amended the Clean Air Act, in August 1977. At that time, the most up-to-date EPA interpretation of Section 112 was contained in the June 1977 proposed amendments to the vinyl chloride standard, proposed pursuant to the settlement agreement with EDF. The proposal articulates a "zero emissions goal." The flawed logic of EPA's ratification argument, if carried through the full chronology of events leading up to the 1977 amendments, would lead to the conclusion that this is the interpretation Congress ratified.

61/ The other passage quoted by EPA (Br. at 35, quoting 1976 House Report at 23-24) likewise cannot be construed as a ratification of the proposal's content or EPA's legal interpretation. The passage merely says that the amendment is necessary to assure that final action will be taken promptly. The passage in fact suggests that the coverage of EPA's proposal may have been too narrow.

The history on asbestos and vinyl chloride illustrates the treacherous nature of the ratification theory advanced by EPA. EPA cites several cases which state, without elaboration, that reenactment of a law without change constitutes ratification of an agency interpretation.62/ Professor Davis has commented: "Such statements are obviously unsound, because the committees or subcommittees of Congress may or may not know of outstanding interpretations when they are considering reenactment; they do not approve what they know nothing about."63/ Other cases, (including several cited by EPA) appropriately recognize that "it may not always be realistic" to infer a reenactment "from congressional silence alone," and that a reliable case is made only when the agency's construction is "'fully brought to the attention of the public and the Congress'" and engenders no move to disapprove it. United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) (citation omitted).64/ In Zuber v. Allen, 396 U.S. 168, 193 (1969), the Supreme Court refused to find a reeactment where, as here, there were no "hearings that suggest that Congress acted with the particular administrative construction

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62/ E.g., Chemehuevi Tribe v. FPC, 420 U.S. 395 (1975); Commissioner v. Noel Estate, 380 U.S. 678 (1965).

63/ K. Davis, 2 Administrative Law Treatise §7:14 (p. 67) (2d ed. 1979).

64/ See also, National Muffler Dlrs. Ass'n v. U.S, 440 U.S. 472, 477 (1979) (strength of a reenactment argument depends on "the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute"); Wilderness Society v. Morton, 479 F.2d 842, 867 (D.C. Cir. 1973), cert. denied 411 U.S. 917 (1973) ("'Legislative silence cannot mean ratification unless, at a minimum, the existence of the administrative practice is brought home to the legislature."').

before it" and the adminstrators failed "to communicate their understanding to the drafters of the committee report."65/ Even when one committee was informed of the agency interpretation, the Supreme Court refused "to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents." SEC v. Sloan, 436 U.S. 103, 121 (1978).66/ On the facts of this case, there is no basis for concluding that Congress ratified

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65/ The only change in Section 112 requested by EPA Administrators in testimony before Congress in its consideration of the 1977 amendments was authority to set design or work practice standards when numerical measurement of emissions is impractical. See Hearings on Clean Air Act Amendments - 1975 before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 41 (1975) (statement of Russell Train); Hearings on Implementation of the Clean Air Act - 1975 before the Subcomm. on Environmental Pollution of the Senate Comm. on Public Works, 94th Cong., 1st Sess. 151 (1975) (statement of Russell Train); Hearings on Clean Air Act Amendments of 1977 before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 1678 (1977) (statement of Douglas Costle).

66/ Other cases cited by EPA involve situations where the agency did clearly bring its interpretation home to Congress, Haig v. Agee, 453 U.S. 280, 299 (1981), or where the legislative history shows that Congress carefully considered the issue, NLRB v. Bell Aerospace Co., 416 U.S. 267, 279-84 (1974).

Finally, other cases cited by EPA state only that Congress will not be assumed to have silently overturned court decisions interpreting statutes. See Chemical Mfrs. Ass'n v. NRDC, 105 S.Ct. 1102, 1109 (1985) (footnote omitted): "Congress was undoubtedly aware of [the Court's decision in E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977)], and absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." The same principle holds in Merrill Lynch, Pierce, Fenner & Smith v. Curran, 436 U.S. 353, 379 (1982), and Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979). An agency interpretation does not have the same stature.

consideration of non-health factors in setting standards under Section 112.[67/]

III. THE REQUESTED RELIEF IS APPROPRIATE

EPA argues that no remand is in order even though the Agency considered legally irrelevant factors because NRDC has not proved the vinyl chloride standard would be different if EPA were limited to the relevant factors. (EPA Br. at 37-41.) This argument is ridiculous. Obviously the standard would be different if only health factors were considered. EPA is on record that there is no known threshold for vinyl chloride's

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67/ EPA and API/CMA also assert that EPA's interpretation deserves deference because it is long-standing. It must be remembered, however, that between 1970 and 1984 (save for several minor modifications of the asbestos standard) EPA took but two final actions on hazardous air pollutants: the issuance of standards for asbestos, beryllium, and mercury in one notice in 1973 and the issuance of the vinyl chloride standard in 1976. Until now there simply has not been an opportunity to litigate the legal issue presented here. Consequently, EPA can claim no authority from its past actions.

No one sued in 1973 because, as shown above, EPA's actions then did not raise the issue presented in this case. The promulgation notice stated that each standard "was not based on economic considerations," that each pollutant had a threshold of effecs, and that a total prohibition therefore was not "necessary to protect public health." *See* pages 28-29, *supra*. The issue was squarely raised in 1976 in the vinyl chloride standard, and EDF brought suit. The issue was not judicially resolved, however, because of the settlement agreement and EPA's delay in taking any reviewable final action.

After 1976 EPA did not take another reviewable final action under Section 112 until the 1984 benzene decisions and the 1984-85 radionuclide decisions. Both of these are the subject of petitions for review now pending before this Court. None of the many proposals cited by EPA or API/CMA are entitled to any deference as long-standing interpretation, because none was a final action. They neither officially committed the agency nor allowed aggrieved parties a day in court.

carcinogenic effect. The 1985 withdrawal was clearly based on technological and economic factors. If EPA had not considered these factors, it would not have rejected the amendments proposed in 1977.68/

Finally, EPA briefly contests NRDC's request that the Court order action on remand within 180 days. (EPA Br. at 41, note.) We stand on the argument for such relief set forth in the opening brief (at 36-37) with one additional comment. EPA errs in stating that all the cases we cited are ones in which there was no regulation already in place. In the principal case we cited, Sierra Club v. EPA, 719 F.2d 436 (D.C. Cir. 1983), cert. denied 104 S.Ct. 3571 (1984), there were tall stack regulations in place. The Court found them legally inadequate and, in view of the original statutory deadline and the long administrative delay, ordered new final action within 180 days. 719 F.2d at 469-70. This case presents exactly the same situation.

68/ Moreover, EPA counsel's claim that the decision would be the same if made on the legally relevant factors is pure post hoc rationalization.

CONCLUSION

For the reasons given in NRDC's opening brief and this brief, the January 1985 withdrawal should be vacated and the requested relief should be granted.

Respectfully submitted,

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APPENDIX A