

DOE / file Vinyl chloride
CLEARY, GOTTlieb, STEEN & HAMILTON
1752 N STREET, N. W.
WASHINGTON, D. C. 20036
(202) 728-2700

J. T. Henderson
J. K. Spata
F. J. Long D

RECEIVED
SEP 15 1987
J. K. SPATA

July 29, 1987

ALERT MEMORANDUM

Re: Court of Appeals decision on §112 of the Clean Air Act.

The Court of Appeals for the District of Columbia Circuit in an en banc opinion has unanimously (11 to 0) granted a petition to review EPA's proposed modified standard for vinyl chloride that had been withdrawn and directed EPA to reconsider the standard. The thrust of the Court's opinion places increased reliance on risk assessment in setting standards under §112 and confines the role of economic and technological factors to determining the "ample margin of safety" - control of the residual risk to further protect the public health after a determination of a safe level of emissions based on health factors only. (NRDC v. EPA (D.C.Cir. #85-1150, decided July 28, 1987).

The Court rejected both

- the NRDC position that §112 required a finding prohibiting all emissions for a non-threshold pollutant such as a carcinogen, and
- the EPA position that an emission standard can be based on best available control technology for an apparent non threshold air pollutant whenever the cost of closure of plants (prohibition of emissions) is disproportionate to the health benefits.

AP00051269

The court concluded that §112 involves a three stage process:

First. The Court distinguished between "non-threshold" pollutants and "apparent non threshold" pollutants. For a "non-threshold" pollutant there is no uncertainty and a finding of safety at a specific emission level cannot be made. For an "apparent non-threshold" pollutant the determination involves uncertainty; a threshold level cannot be determined with certainty; a determination of a "safe" level involves extrapolation and hence uncertainty and must, therefore, be judgmental based on the science.

Second. EPA is required to use health considerations only to determine a "safe" level of exposure to a carcinogen at a particular emission level. That determination does not require a finding that "safe" means "risk free"; the Court equated "safe" with an "acceptable" or "non significant" level of risk.

This determination of safety must rely on health based considerations only.

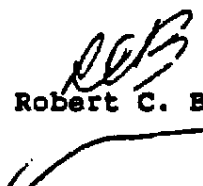
Third. "Once 'safety' is assured", the Administrator in determining an "ample margin of safety" may (but is not required to) consider economic and technology factors in order "to protect the public health" by setting the "standard at the lowest feasible level."

Note: If EPA determines that the "safe" level also provides "an ample margin of safety", the finding must be based

on health considerations only; economics and technology can be considered only to diminish the risk at the safe/acceptable level in order to further protect the public health.

The Court specifically refrained from determining what is "safe" and what is an "ample margin of safety." The Court said it was deciding only when the Administrator "can" consider economic and technology factors, not whether he is "required" to do so.

The Court concluded that EPA had substituted technological feasibility for health as the primary consideration in withdrawing a tougher proposed vinyl chloride standard. The Court ordered timely reconsideration of the proposed rule (that was withdrawn) in accordance with the opinion.


Robert C. Barnard