Special Analysis

APPEALS COURT RULING OVERTURNING EPA ASBESTOS BAN: TAKING THE RUST OFF THE TOXIC SUBSTANCES CONTROL ACT

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In *Corrosion Proof Fittings v. EPA*,[2] the Fifth Circuit Court of Appeals overturned the Environmental Protection Agency's ban on asbestos-containing products under the Toxic Substances Control Act.[3]

The court's decision has been described by some as a "death knell" for TSCA,[4] and at least one senator has reportedly stated that the ruling proves that TSCA is weak and should be amended.[5]

To be sure, the Fifth Circuit's decision is without doubt one of the most significant environmental decisions in recent years. Contrary to the gloomy predictions of some, however, the effect of the court's decision will be to restore the original congressional goals for the TSCA program and to provide for more effective, principled, and rational regulation of hazardous substances under TSCA as well as other regulatory statutes. And, properly administered, TSCA remains a source of substantial EPA regulatory authority over chemical use.

EPA's Proceedings To Ban Asbestos

In 1976, with chemicals such as asbestos in mind, Congress enacted TSCA as a "gap-filling" or "umbrella" statute intended to coordinate government regulation of chemical substances that posed risks to workers as well as to the general public through many different environmental media.[6]

The concept was to give EPA plenary authority to take a variety of steps up to and including the imposition of product bans as necessary to deal most effectively with toxic substances. EPA's authority to take such steps was clear, provided that the agency had a "reasonable basis" for finding that current uses of a substance posed an "unreasonable risk," and that the regulatory measure chosen was the "least burdensome" that would "adequately" control the risk.[7]

When EPA formally commenced its asbestos proceeding in 1979,[8] asbestos seemed to be an ideal candidate for exercising the agency's authority under TSCA.[9]

Asbestos is the generic term for a group of naturally occurring, silicate fibers that exist in a variety of types and sizes and which have been used for decades in products because of their resistance to heat and fire, as well as their high tensile strength and flexibility. As of 1974, the United States was consuming more than 767,000 tons of asbestos annually,[10] which were used in as many as 3,000 separate consumer and industrial products.[11]

It has been known for decades that exposure to high levels of asbestos could lead to progressive pulmonary disease (asbestosis).[12] By the 1970s, asbestos also was recognized widely as a human carcinogen, shown by epidemiological studies to produce mesothelioma, lung cancer, and perhaps other malignancies.[13]

Evidence available to EPA suggested that as many as 10,000 people annually were dying from past exposure to asbestos fibers, mostly resulting from asbestos insulation products used in shipbuilding during World War II and the Korean War and thereafter during the postwar construction boom.[14]

It was against this background that EPA in 1979 launched a joint proceeding with the Consumer Product Safety Commission to ban, phase out, or otherwise regulate some or all of the many hundreds of commercial uses for asbestos.[15] Even before EPA's proceeding had begun, however, the commercial realities regarding asbestos use had begun to change. The products most responsible for the epidemic of asbestos disease had disappeared from the market, partially because manufacturers and industrial and commercial users became aware of the hazardous properties and potential liabilities of asbestos products, and partially because of the stringent regulatory measures imposed in the early 1970s.[16]

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[2] 947 F.2d 1202 (5th Cir. 1991).

[3] *See* 54 FR 29466 (1989).

[4] *See Environmentalists Say Asbestos Decision Proves TSCA Inadequate To Control Chemicals*, Chemical Regulation Reporter, Oct. 25, 1991, at 1020, 1021 (quoting Jacqueline Warren of the Natural Resources Defense Council and others).

[5] *See Special Analysis: Possible TSCA Changes, Pollution Prevention, Pesticide Re-registration Seen As Top 1992 Issues*, Chemical Regulation Reporter, Jan. 17, 1992, at 1497.

[6] *See* House Report No. 1341, 94th Cong., 2d Sess. 6 (1976) ("H.R. Rep. 1341"); Senate Report No. 698, 94th Cong., 2d Sess. 1 (1976) ("S. Rep. 698").

[7] 15 USC 2605(a) (1988).

[8] 44 FR 60061 (1979) (EPA Asbestos Advance Notice of Proposed Rule-making ("ANPR")).

[9] Asbestos was one of the substances Congress had in mind when it enacted TSCA. *See* House Report No. 1341, *supra* note 6, at 3.

[10] U.S. Dept. of Interior, Bureau of Mines, Mineral Industry Surveys 5 (April 18, 1986).

[11] 44 FR 60062.

[12] *See* Irving J. Selikoff & Douglas H. K Lee, *Asbestos and Disease* 22-25 (1978).

[13] *Id.* at 26-30.

[14] *See* 51 FR 3738 (Jan. 29, 1986).

[15] 44 FR at 60057 (CPSC ANPR); 44 FR 60061 (EPA ANPR).

[16] *See, e.g.*, 36 FR 10466 (1971) (OSHA sets 12 fiber/cubic centimeter occupational exposure standard for asbestos); 36 FR 23208 (1971) (OSHA lowers standard on an emergency basis to 5 f/cc); 37 FR 11318 (1972) (OSHA lowers asbestos standard again to 2 f/cc); 38 FR 8820 (1973) (EPA issued hazardous air pollutant standards for asbestos, effectively banning the use of asbestos in insulating products); 44 FR 60057 (1979) (CPSC ban on various asbestos products).

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By 1984, U.S. asbestos consumption was less than 35 percent of the 1974 total;[17] by 1990, it would be only 5 percent.[18] Most asbestos products that remained on the market as of 1979, when EPA's proceeding began, had the asbestos fibers encapsulated in or locked into a plastic, cement, tar, or other matrix that greatly diminished fiber release.[19]

Despite such changes in asbestos use and exposures, and after almost 10 years of policy reversals, EPA promulgated a final rule in July 1989 that banned essentially all asbestos products in three stages, concluding in 1996.[20] EPA calculated that its final regulation would prevent 202 cancer cases (or 148 cases if benefits were discounted from the time of first exposure). The total costs of the ban, expected to be incurred over a 13-year period, were estimated to be $459 million, assuming that the cost of asbestos substitutes decreased by 1 percent per year.[21] If the price of substitutes were not to decline, the total costs would reach $806 million.[22]

Of the 202 undiscounted cancer cases that EPA predicted the ban would avoid, about 144 were accounted for by friction products, most significantly including asbestos brake pads.[23] The industry maintained that these benefits were exaggerated because the fiber type used in asbestos brake pads (chrysotile) was not associated with mesothelioma and had proven far less potent in the relevant epidemiological studies.[24] Accordingly, they argued that EPA should have estimated benefits for the friction product industry based solely on the epidemiological evidence applicable to brake manufacturing, as various other countries had done in their regulation of asbestos.[25]

EPA rejected these contentions as well as the following three arguments made by the industry that would have undercut substantially the agency's benefits estimates.

First, EPA acknowledged that its bans would require asbestos in brakes to be replaced by other fibers that are themselves probable or possible carcinogens.[26] However, EPA determined that it was not able to make a "definitive assessment" of the risks from these substitute products.[27] Rather than attempting to approximate these risks, EPA chose to ignore them altogether in its cost-benefit calculations, thereby implicitly assuming the risks from substitute fibers were zero.[28]

Second, EPA refused to include consideration of the potentially increased safety risks *of* non-asbestos brakes in its cost-benefit calculations.[29] This issue had figured prominently in the 1986 hearings where auto manufacturers expressed concern that switching from asbestos would pose formidable re-engineering problems, especially for rear-wheel drum brakes, and that a serious safety issue might arise if EPA forced brakes originally designed for asbestos pads to be repaired with non-asbestos pads.[30] In 1987, EPA commissioned an expert report from the American Society of Mechanical Engineers (ASME) that largely confirmed the auto industry's concerns.[31] Despite further testimony that even a small decrease in safety from the use of non-asbestos pads could dwarf the health benefits estimated by EPA, the agency nonetheless elected to omit the safety issue from its benefits calculations.[32]

Finally, the industry argued that most of EPA's predicted benefits from banning asbestos friction products could be achieved simply by imposing tighter engineering controls on brake repair operations.[33]

Accounting for nearly 75 percent of the benefits cited by EPA, asbestos exposure from brake repair operations was being studied by the Occupational Safety and Health Administration on remand from the D.C. Circuit.[34] In advance of OSHA's proceedings, the National Institute for Occupational Safety and Health had conducted a number of studies of engineering controls that showed that asbestos exposures could be reduced far below current levels in brake repair shops.[35]

Despite industry arguments that the imposition of such controls by OSHA or EPA must be considered as a "less burdensome" regulatory alternative under TSCA, EPA refused to alter its benefits estimate or to calculate the alternative benefits that would be achieved by such engineering controls.[36]

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[17] Total asbestos consumption in 1984 was 226,000 tons, down from 767,000 tons in 1974. *See* U.S. Dept. of Interior, *supra* note 10, at 5.

[18] Total U.S. asbestos consumption in 1989 was 35,000 tons. *See* U.S. Department of Interior, Bureau of Mines, *Asbestos 1990* 3 (1991).

[19] *See* Joint Brief of Petitioners Asbestos Information Association/North America and The Asbestos Institute at 19, *Corrosion Proof Fittings*, (5th Circuit 1991) (No. 89-4596) (hereinafter AIA/AI Joint Brief).

[20] 54 FR 29466 (1989).

[21] 54 FR at 29485.

[22] *Id.*

[23] *Id.* (Table VIII). Disc and drum brake pads were the major asbestos "friction" products included in the EPA ban. Other friction products included automatic transmission components and clutch facings.

[24] *See* Comments of the Asbestos Information Association/North America and the Asbestos Institute on EPA's New Case, Vol. IX, at 16-[illegible] (June 30, 1988) (EPA Docket No. OPTS 62036D) (hereinafter AIA/AI Comments on New Case). *See also* B.T. Mossman, *et al.*, *Asbestos: Scientific Developments and Implications for Public Policy*, 247 Science 294, 296 (1990); G. Berry & M.L. Newhouse, *Mortality of Workers Manufacturing Friction Materials Using Asbestos*, 40 Br. J. Indus. Med. 1, 3-4 (1983).

[25] *See* AIA/AI Comments on New Case, *supra* note 24, at 16-17.

[26] *See* 54 FR 29480. EPA admitted that the use of substitutes "may potentially result in some exposures that exceed exposures from asbestos" and might present unquantified carcinogenic risks. *Id.* at 29482.

[27] *Id.* at 29481-82.

[28] *Id.* at 29482.

[29] *Id.* at 29494-95.

[30] *See* AIA/AI Comments on New Case, *supra* note 24, at 35-40.

[31] *See* American Society of Mechanical Engineers, Analysis of the Feasibility of Replacing Asbestos in Automobile and Truck Brakes (April 15, 1987).

[32] For example, Dr. Robert Crandall testified that a 1 percent increase in U.S. annual traffic fatalities would result in an additional 500 immediate traffic fatalities *per year* — far outweighing the 143.7 statistical cancer cases prevented which EPA projected over the next *50 years* as a result of the ban on asbestos products. *See* Robert W. Crandall, The Cost-Effectiveness of EPA's Proposed Ban and Phase-Out of Asbestos Products, AIA/AI Comments on New Case, *supra* note 24, Vol. X. App. B3, at 32.

[33] *See* Opening Written Comments of the Asbestos Information Association/North America and the Asbestos Institute, Vol. I, at 97-98 (June 29, 1986) (EPA Docket No. OPTS 62036) (hereinafter AIA/AI Opening Comments).

[34] *See Building & Construction Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258 (D.C. Cir. 1988).

[35] NIOSH found that by using new technology it was possible to reduce average worker exposures to 0.004 f/cc — 1/50th of the then current OSHA PEL. *See* AIA/AI Joint Brief at 66.

[36] 54 FR 29489.

Apart from asbestos friction products, most of the other benefits claimed by EPA were spread over the dozen or so products that had survived from the nearly 3,000 asbestos product uses a decade earlier. Three of the most important product categories in terms of current asbestos use were asbestos cement ("A/C") pipe, A/C shingles and asbestos roof coatings.[37] The respective benefits and costs of banning those three products are summarized in the table below, accepting EPA's substitute price decline assumption, and discounting benefits nominally from the time of first exposure.

Table: Cost-Effectiveness Of Ban Of Three Asbestos Product Categories — Assuming Discounting of Benefits And No Annual Decline In Price Of Substitutes

Product Category	Benefits (Cancer Cases) Prevented)	Costs (Million $)	Cost-Per-Cancer Case Prevented (Million $)
A/C Pipe	3.17	227.33	71.7
A/C Shingles	0.23	34.18	151.5
Roof Coatings	1.08	177.40	164.3

Far greater differences are seen if benefits are discounted from the onset of expected disease rather than from the time of exposure.[38]

EPA's estimates for these and the other products covered by its ban were challenged on grounds analogous to those regarding asbestos friction products. Most significantly, the industry argued that A/C pipe would be replaced either by polyvinyl chloride or iron ductile pipe, both of which posed carcinogenic risks comparable to A/C pipe.[39] EPA acknowledged that the risks from both of these substitutes were significant but it nonetheless refused to make approximate quantitative estimates or otherwise discount the relatively small benefits the agency claimed would result from banning A/C pipe.[40]

Similar arguments were rejected by EPA regarding other substitutes that would be used to replace asbestos in many other products.[41]

Reversal Of The Asbestos Ban

Confronted with this record, the Fifth Circuit reversed EPA's ban on asbestos products, but significantly with little of the usual delving into technical and scientific issues that frequently characterize intrusive "hard look" judicial reversals.[42]

Although expressly anchored in TSCA and its "substantial evidence" test, the court's opinion focused broadly on the overall unreasonableness of the result reached by EPA. Thus, the court viewed its role as that of determining whether EPA's decision rested upon what "a *reasonable* mind might accept as adequate to support [its] conclusion."[43] Invoking TSCA's admonition that EPA act in a "reasonable and prudent manner,"[44] the court cautioned that the "burden remains on the EPA" to "offer a *rational* connection between the facts found and the choice made."[45]

First and foremost, the court concluded that EPA must engage in "a balancing test like that familiar in tort law."[46] Although such "balancing" need not include "an exhaustive, full-scale cost-benefit analysis," it would call for "a generalized balancing of costs and benefits."[47]

EPA accordingly was required to show that "benefits to be achieved by" its product ban "bear a reasonable relationship to the costs imposed."[48] While stating its reluctance to decide "what an appropriate expenditure is to prevent someone from incurring the risk of an asbestos-related death," the court opined that the benefits estimated by EPA for products such as those in the previously described table "seem far outweighed by the astronomical costs."[49] The court's confidence in this conclusion was bolstered by the fact that its "review of EPA case law reveals [that] such high costs are rarely, if ever, used to support a safety regulation."[50] As further support, the court cited a recent study showing that deaths from "ingested toothpicks" over the same period would be nearly double those predicted by EPA from banning "asbestos pipe, shingles and roof coatings."[51]

The court also faulted EPA for failing to consider regulatory alternatives less burdensome than a total product ban. EPA thus "presented only two comparisons ... a world with no regulation ..., and a world in which no manufacture of asbestos would take place."[52]

In calculating the benefits of its ban, EPA had "explicitly refused to compare it to an improved workplace in which currently available control technology is utilized," and had thereby "artificially inflat[ed] the purported benefits." Accordingly, EPA was required to show "that there is not some intermediate state of regulation that would be superior to both the currently regulated and completely banned world."[53] For asbestos friction products, where petitioners had come forward with evidence of the relative efficacy of brake shop engineering controls, "EPA's failure to consider the regulatory alternatives" was a critical ground leading to reversal of EPA's product ban.[54]

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[37] In 1990, these three products accounted for over 70 percent of all domestic consumption of asbestos not used in friction products. *See* U.S. Dept. of Interior, *supra* note 18, at 3.

[38] If benefits are discounted from the onset of expected disease, the total benefits of EPA's ban of non-brake asbestos products is less than one expected cancer reduction for the next century. *See* Crandall, *supra* note 32, at 13. EPA's contrary assumption that benefits should be discounted from the time of exposure rather than the expected onset of disease "is equivalent to assuming that the average victim would be indifferent between contracting cancer immediately upon exposure ... or waiting 30 to 40 years for the cancer to occur." *Id.* at 10.

[39] *See* AIA/AI Opening Comments, *supra* note 33, Vol. I, at 62-63.

[40] 54 FR 29497-98.

[41] *Id.* at 29481-83.

[42] *See generally* William H. Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 57 Geo. L.J. 699 (1979); Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986).

[43] *Id.* at 1213 (emphasis added).

[44] 15 USC 2601(c) (1988). (emphasis added)

[45] 947 F.2d at 1214-15 (emphasis added).

[46] *Id.* at 1222.

[47] *Id.*

[48] *Id.* at 1223.

[49] *Id.* at 1219, 1222.

[50] *Id.* at 1223.

[51] *Id.* at 1223 n.23.

[52] *Id.* at 1216.

[53] *Id.* at 1217.

[54] *Id.* at 1226.

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Zero Risk Argument Rejected

EPA excused its failure to consider such intermediate measures on the grounds that no such measure would be "completely" effective since "there is no known level of asbestos exposure below which there is no risk." [55] The court rejected this "zero risk" argument on the ground that EPA's goal, instead, should be that of achieving "the minimum reasonable risk." [56]

Thus, it was EPA's job to strive, not for a risk-free world, but rather to determine "an acceptable level of non-zero risk," and then to "choose the least burdensome method of reaching that level." [57]

These defects in the agency's analysis were compounded by EPA's failure to give any weight whatsoever to the health and safety risks posed by the products that would substitute for asbestos. While acknowledging that EPA does not have "an affirmative duty to seek out and test every workplace substitute," the court nonetheless held that a duty to consider substantial risks does arise "once interested parties introduce credible studies and evidence." [58] With respect to asbestos friction products, the court faulted EPA for overlooking credible evidence from health studies and the ASME Report that "substitute products actually might increase fatalities" due to "cancer deaths from the other fibers used and highway deaths occasioned by less effective, non-asbestos brakes." [59]

Likewise, the court reversed EPA's A/C pipe ban partially because EPA "refused to assess the risks of substitutes," despite conceding that "the increased cancer risks" associated with both PVC and ductile iron pipe were "both credible and known." [60]

Just as important as what the court did do is what it did not do. While the court overturned the agency's regulation for failure to apply the general principles of reasoned decisionmaking noted above, the court expressly eschewed as inappropriate any review of EPA's technical or scientific findings.

For example, the court rejected the petitioner's challenge that EPA had decided unreasonably to treat all types of asbestos the same,[61] even though there is strong evidence that different fiber types and sizes present very different risks.[62] In declining to scrutinize EPA's reasoning on such technical issues, the court summarized its reviewing role as follows: "On these, and many similar points, the petitioners merely seek to have us reevaluate the EPA's initial evaluation of the evidence.... Decisions such as the EPA's decision to treat various types of asbestos as presenting similar health risks properly are better left for agency determination ...." [63]

Similarly, the court refused to second-guess the agency's procedural choices within the bounds of statutory requirements, stating that "an agency's choices concerning its rule-making procedures are entitled to great deference, as the agencies are 'best situated to determine how they should allocate their finite resources.'" [64]

Some Implications Of The Decision

Corrosion Proof Fittings does not spell the "death knell" of regulation under Section 6 of TSCA. To the contrary, the Fifth Circuit's decision reflects Congress' understanding in enacting TSCA that maximizing health protection against toxic substances can be achieved only by efficient allocation of regulatory resources. This, in turn, requires that benefits and costs be compared, that substitute risks be considered, that alternatives be evaluated, and that regulation of trivial risks be avoided. These principles, embodied in TSCA, increasingly are being reflected in judicial decisions under a wide variety of other environmental statutes.

While such principles undoubtedly limit the discretion of agencies to squander public resources on inconsequential health issues, they simultaneously help to focus and channel agency action on spending societal resources wisely and cost-effectively on the most pressing and solvable environmental problems.

Regarding TSCA, the Fifth Circuit thus took seriously the congressional mandate that "[c]osts are not to be incurred unless they are offset by benefits of at least the same magnitude." [65] By authorizing EPA only to regulate substances under Section 6(a) of TSCA that present an "unreasonable risk," Congress specifically intended to require "a balancing of risks and benefits." [66]

While Congress, like the Fifth Circuit, did not require "an exhaustive, full-scale cost-benefit analysis," [67] the court rigorously applied the congressional requirement that the benefits of a regulatory action under TSCA must exceed the costs. Unsupported, conclusory statements to this effect are not sufficient, and thus EPA's unexplicated conclusion that costs exceeding $30 million to $40 million per life saved were justified was rejected by the court as "meaningless" and a "cavalier" disregard of the agency's "duty to consider the economic effects of its decisions." [68]

The Fifth Circuit's embracement of TSCA's requirement that EPA balance costs and benefits comports with the trend of recent judicial decisions accepting the need to weigh costs and benefits as a necessary precondition of "rational" or "reasonable" agency regulation of environmental, health, and safety risks.[69]

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[55] Brief for Respondent EPA, at 96, 98, *Corrosion Proof Fittings* (5th Cir. 1991) (No. 89-4596).

[56] 947 F.2d at 1215.

[57] *Id.*

[58] *Id.* at 1221.

[59] *Id.* at 1224.

[60] *Id.* at 1227.

[61] *Id.* at 1229. The court also refused to entertain petitioners' technical challenges to EPA's cost and benefit calculations, stating that "[d]ecisions such as these are better left to the agency's expertise." *Id.* at 1224.

[62] *See supra* note 33.

[63] *Id.* at 1229.

[64] *Id.* at 1211 (quoting *Superior Oil Co. v. FERC*, 563 F.2d 191, 201 (5th Cir. 1977)). Thus, the court refused to entertain most of petitioners' procedural challenges to the EPA rule. *Id.* The court however did review procedural defects in EPA's rule-making that were contrary to specific statutory requirements, such as the need to allow cross-examination of the agency's evidence and the need to give public notice on the agency's last minute use of "analogous exposure" data from other substances to estimate exposures from asbestos products. *Id.* at 1211-13.

[65] Senate Report 698 at 13.

[66] *Id.* at 12; *accord* House Report 1341 at 14.

[67] *Corrosion Proof Fittings*, 947 F.2d at 1222.

[68] Id. at 1223.

[69] *See e.g., International Union v. OSHA*, 938 F.2d 1310, 1319-21 (D.C. Cir. 1991); *National Grain & Food Ass'n v. OSHA*, 866 F.2d 717, 733 (5th Cir. 1989); *Love v. Thomas*, 858 F.2d 1347 (9th Cir. 1988); *United States v. General Motors*, 656 F.Supp. 1555, 1579 (D.D.C. 1987), *aff'd* 841 F.2d 400 (D.C. Cir. 1988); *Center for Science in the Public Interest v. Dept. of Treasury*, 797 F.2d 995, 1003 (D.C. Cir. 1986); *American Mining Congress v. Thomas*, 772 F.2d 617, 632 (10th Cir. 1985); *American Financial Ser-*

This trend reflects maturation of society's understanding of the nature of health and safety risks since the first major environmental statutes were enacted over 20 years ago. In the early years of health and safety regulation, only a few substances were seen as environmental or occupational carcinogens, and the objective was to eliminate these few substances regardless of cost.[70] This simplistic and mistaken understanding was questioned in TSCA, and now has been rejected broadly as more and more natural and manmade substances are recognized as potential carcinogens. It no longer is realistic to attempt to eliminate carcinogens completely; rather, there need to be limiting principles such as cost-benefit balancing and its derivative principles to determine the appropriate level of regulation.

The Fifth Circuit also recognized that EPA's cost-benefit weighing could not be valid unless *all* significant costs and benefits were included in the balance.

The need for such a comprehensive balancing meant that EPA could not provide a "reasonable basis" for banning asbestos without considering the health risks of substitute products, like PVC and ductile iron pipe and non-asbestos brakes.[71]

Again, this holding is consistent with a series of recent decisions under other statutes recognizing that rational decisionmaking about health and safety risks necessitates that the agency consider the inevitable public health tradeoffs involved in such regulatory decisions.[72]

Least Burdensome Alternatives

In enacting TSCA, Congress also required EPA to choose the "least burdensome" alternative for regulating hazardous substances that present an unreasonable risk.[73]

Congress provided EPA with a hierarchy of possible regulatory options that ranges from labeling toxic substances to the most extreme option of a product ban.[74] The Fifth Circuit's decision clarified that EPA may adopt a product ban, characterized as the "death penalty alternative," only if the agency first considers and rejects as inadequate the less burdensome alternatives in the congressionally specified menu of regulatory options.[75] While stated explicitly in TSCA, this requirement parallels the general duty under the Administrative Procedure Act that agencies always must consider, and provides a reasoned basis for rejecting alternative regulatory approaches.[76]

Finally, the Fifth Circuit's holding echoes Congress' admonition that EPA should not strive for a "risk-free world"[77] and that it accordingly should limit itself to addressing "significant risks."[78] As with other aspects of the Fifth Circuit's decision, this holding reflects a judicial acceptance that the overall health protection goals pursued by EPA and other agencies are defeated—rather than fostered—by regulating insignificant risks.[79]

Critics, of course, will say that EPA cannot regulate at all if it is required to satisfy the principles of reasoned decisionmaking about risk that are embodied in the Fifth Circuit's decision. That surely is not true. Were EPA confronted today with many of the now-discontinued asbestos products, such as asbestos insulation and fireproofing materials, or various uses of lead now discontinued such as lead paint or leaded gasoline, there is no doubt that the agency could have developed a case to support its ban authority under Section 6 of TSCA. Similar cases for product bans still may exist—the many uses of chlorofluorocarbons would seem to have been an ideal candidate for action under TSCA had that issue not been dealt with separately under the Montreal Protocol on Substances that Deplete the Ozone Layer .[80]

Looking Beyond Product Bans

Far too much attention, however, has been focused on product bans, EPA's "nuclear weapon," and not enough on TSCA's unique and original purpose as the single statute administered by the environmental agency that allows it to coordinate its own regulatory actions and those of other agencies on a multienvironmental media basis. This authority is manifest in Section 6(c) and Section 9 of the statute and is exhaustively documented in TSCA's legislative history.[81]

EPA in recent years has taken important steps in exercising this plenary authority to coordinate regulatory risk

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vices v. FTC, 767 F.2d 957, 986 (D.C. Cir. 1985); *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984); *Asbestos Information Assn./North America v. OSHA*, 727 F.2d 415, 428 (5th Cir. 1984); *Donovan v. Castle & Cooke Foods*, 692 F.2d 641, 647-49 (9th Cir. 1982).

[70] *See, e.g.*, Richard A. Merrill, *FDA's Implementation of the Delaney Clause: Repudiation of Congressional Choice or Reasoned Adaptation to Scientific Progress?*, 5 Yale J. Reg. 1, 15-18 (1988); James C. Robinson & William S. Pease, *From Health-Based to Technology-Based Standards for Hazardous Air Pollutants*, 81 Am. J. Pub. Health 1518, 1518 (1991).

[71] 947 F.2d at 1221-22.

[72] *See Competitive Enterprise Inst. v. NHTSA*, 956 F.2d 321 (D.C. Cir. 1992) (agency must consider safety tradeoffs of stricter fuel economy standards); *Consumer Federation of America v. CPSC*, 833 F.2d 1073, 1079 (D.C. Cir. 1989) (CPSC decision not to regulate methylene chloride because of increased risks from substitutes upheld); *Buildings & Construction Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258, 1274 (D.C. Cir. 1988) (OSHA properly decided against requiring use of air supplied respirators because of increased risk of accidents eroded the benefits of such use); *Environmental Defense Fund v. EPA*, 510 F.2d 1292, 1303 (D.C. Cir. 1975) (EPA must consider substitute risks before banning pesticides); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 385 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (requiring EPA "to take into account counter-productive environmental effects of a proposed standard"). *See also* OSHA, "Air Contaminants: Proposed Rule," 57 FR 26001, 26005-09 (June 12, 1992) (discussing "risk-risk" tradeoffs).

[73] 15 USC 2605 (1988).

[74] *Id.*

[75] 947 F.2d at 1215-17.

[76] *See e.g., Motor Vehicle Manufacturers Ass'n, Inc. v. State Farm Mutual Automobile Insurance Co*, 463 U.S. 29, 43 (1983); *Building & Construction Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258, 1269 (D.C. Cir. 1988); *Center for Science v. Dept. of Treasury*, 797 F.2d 995, 1003 (D.C. Cir. 1986); *International Ladies' Garment Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983); National Citizens Committee for Broadcasting v. FCC, 567 F.2d 1095, 1112-13 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

[77] *See* House Report 1341 at 15.

[78] 947 F.2d at 1228.

[79] *See Industrial Union Department, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 639 (1980); *Chemical Manufacturers Ass'n v. EPA*, 899 F.2d 344, 359 (5th Cir. 1990); *Building & Construction Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258, 1271 (D.C. Cir. 1988); *Environmental Defense Fund v. EPA*, 636 F.2d 1267, 1283-84 (D.C. Cir. 1980); *United States v. General Motors*, 656 F.Supp. 1555, 1579 (D.D.C. 1987), *aff'd*, 841 F.2d 400 (D.C. Cir. 1988).

[80] *See* Montreal Protocol on Substances that Deplete the Ozone Layer, 26 I.L.M. 1540 (1987) (entered into force Jan. 1,1989). A ban on "aerosol propellant" uses of CFCs was adopted by EPA under TSCA in 1978. *See* 40 CFR Part 762.

[81] *See* TSCA Section 6(c), 15 USC 2605(c) (1988); TSCA sections 9, 15 USC. 2608 (1988); H.R. Conf. Rep. No. 1302, 94th Cong., 2d Sess. 76, 84-85 (1976).

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reduction activities for a number of substances and generically in its various pollution prevention initiatives.[82]

It is in this connection that the broad, indeed unprecedented, authority granted to EPA under Section 6 is likely to be put to its most effective use.

Section 6 allows, for example, EPA to regulate workplaces that are exempted from OSHA regulation,[83] and to take a variety of regulatory steps short of product bans that are not permitted under any other statute administered by EPA. In addition, using its TSCA authority, EPA significantly can influence the regulatory agendas of OSHA and the Consumer Product Safety Commission, and other EPA program offices. None of this is to say that product bans under Section 6 should never be employed. But to suggest that Section 6 of TSCA is a "dead letter" simply ignores the immense opportunity that the statute offers as a means of coordinating not only EPA's regulatory agenda for toxic substances, but that of other agencies as well.

[82] For example, EPA has used its TSCA authority to refer regulation of various chemicals such as 1,3-butadiene and glycol ethers to OSHA. *See* 50 FR 41393 (1985) (EPA referral of 1,3-butadiene and glycol ethers to OSHA).

[83] *See, e.g.*, 40 CFR 763, Subpart G (establishing requirements for asbestos abatement projects by State and local governments which are exempt from similar OSHA regulations).