

NOTES

Corrosion Proof Fittings v. EPA: ASBESTOS IN THE FIFTH CIRCUIT--A BATTLE OF UNREASONABLENESS

The Asbestos Ban and Phase Out Rule (ABPO), issued by the Environmental Protection Agency (EPA) in 1989, is essentially a three-stage ban of asbestos-containing products that was to be effectuated August 25th of the same year. The rule, issued under section 6 of the Toxic Substances Control Act (TSCA), was the result of a ten year study conducted by the EPA to determine the effects of asbestos on human health and the environment. The purpose of the rule was to prohibit the future manufacture, importation, processing, and distribution in commerce of asbestos-containing products, and to require warning labels on products subject to the bans. The ABPO rule was challenged by the asbestos industry. Subsequently, most of its mandates were remanded pursuant to a decision of the Fifth Circuit Court of Appeals on October 18, 1991. The court based its holding on two main premises: (1) the EPA committed a fatal procedural error by failing to provide an opportunity for public comment on the use of analogous exposure data; and (2) the EPA failed to select the least burdensome, reasonable regulation as mandated under TSCA by (a) failing to conduct a separate cost-benefit analysis for each of the regulatory alternatives listed in TSCA and (b) failing to adequately analyze the toxicity and availability of substitute materials. The EPA salvaged a small portion of the ban when, upon a motion for clarification, the court stated that the holding "applies only to products that were not being manufactured, imported, or processed on July 12, 1989, the date of the rule's promulgation." Under the court's holding, not only are asbestos-containing products that were no longer being produced or imported on that date subject to the rule but, by definition, future uses of asbestos are banned as well. The EPA was denied a Request for Rehearing, and the government did not file a petition for Writ of Certiorari to the United States Supreme Court. *Corrosion Proof Fittings v. Environmental Protection Agency*, 947

F.2d 1201 (5th Cir. 1991).

Judicial review of administrative rulemaking is guided by the Administrative Procedure Act (APA).¹ Formal agency rulemaking² is generally held to a substantial evidence standard of review, requiring that the rule be based on evidence "plainly sufficient to support a finding or conclusion."³ Informal rulemaking is usually reviewed under an arbitrary and capricious standard and requires only that the agency's rule be based upon a consideration of relevant factors.⁴ The court will not abrogate an informal rule unless there has been a clear

1. 5 U.S.C. §§ 551-706 (1988 and Supp. III 1991) [hereinafter *APA*].

2. Formal agency rulemaking involves trial-type procedures including a hearing, implementation of the rules of evidence, and cross-examination of witnesses. 5 U.S.C. §§ 553, 556, 557. This extensive record is held to a more rigorous judicial standard of review. *Id.* § 706(2)(E).

3. Matthew J. McGrath, Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541, 546 n.30 (1986), (quoting H.R. REP. NO. 1980, 79th Cong., 2d Sess. 45 (1945)), reprinted in ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 11, 233, 279 (1945). The substantial evidence standard does however possess some ambiguity as to the definition of "substantial." See, e.g., *Chemical Mfrs. Ass'n v. EPA*, 899 F.2d 344, 359 (5th Cir. 1990) (stating that "'substantial' is an inherently imprecise word"). However, 'substantial' is generally held to a reasonableness standard, i.e., would a reasonable mind accept it as adequate to support a conclusion. E.g., *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

5 U.S.C. § 706(2)(E) also provides that an agency action will be held unlawful if unsupported by substantial evidence in a case subject to §§ 556 and 557 of the same title.

4. Informal rulemaking consists of minimal procedures and thus a lower standard of scrutiny is generally applied as compared to that for formal rulemaking. Cf. *supra* note 2. An informal rulemaking procedure begins with a published notice of the proposed rule in the *Federal Register* as to the time, place, and nature of the proceedings, the legal authority for the rule, and the substance of the rule or summary of the issues involved. Opportunity for comment by interested parties is also provided. McGrath, *supra*, note 3 at 541 n.3 (citing 5 U.S.C. § 553(b),(c) (1982)).

error of agency judgment.⁵ The APA grants virtually complete discretion to agencies for rule promulgation under informal rulemaking, in that the substantial evidence standard is not applied to such procedures under APA mandates.⁶ However, in an attempt to establish a more rigorous review of agency actions, Congress has incorporated the substantial evidence standard in various statutes where informal rulemaking is employed.⁷ TSCA's informal rulemaking procedures were assigned this standard of review.⁸ Yet TSCA's language imposes an additional burden. If the Administrator of the agency finds a reasonable basis to conclude that a product presents an unreasonable risk of harm, one or more of seven listed requirements *must* be applied to the agency's rule *using the least burdensome requirements*.⁹ These requirements are listed in hierarchial order from most to least burdensome and are to be imposed "to the extent necessary to protect

5. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971)(citing H.R. REP. NO. 1980, 79th Cong., 2d Sess. (1946), *reprinted in* APA LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 11, 233 (1946)). 5 U.S.C. § 706(2)(A)(1988) provides in part that:

The reviewing court shall . . . (2) hold unlawful and set aside agency action . . . found to be - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title (providing for trial-type or formal rulemaking) or otherwise reviewed on the record of an agency hearing provided by statute.

6. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1561 (1992).

7. McGrath, *supra* note 3, at 542 n.5 (citing: Federal Trade Commission Improvement Act of 1975 § 202(e)(3)(A), 15 U.S.C. § 57a(e)(3)(A)(1982); Securities Exchange Act of 1934 (1975 Amendments) § 25(b)(4), 15 U.S.C. § 78y(b)(4) (1982); Interstate Land Sales Full Disclosure Act § 1411(a), 15 U.S.C. § 1710(a) (1982); Consumer Products Safety Act § 11(c), 15 U.S.C. § 2060(c) (1982); Occupational Safety and Health Act § 6(f), 29 U.S.C. § 655(f) (1982)).

8. Toxic Substances Control Act § 19(c)(1)(B)(i), 15 U.S.C. § 2618(c)(1)(B)(i) (1988) [hereinafter TSCA].

9. *Id.* § 2605(a).

adequately" against the risk.¹⁰

10. *Id.* The requirements are set forth as follows:

(a) If the Administrator finds . . . an unreasonable risk of injury to health or the environment, the Administrator shall by rule apply one or more of the following requirements to such substance or mixture to the extent necessary to protect adequately against such risk using the least burdensome requirements:

- (1) A requirement (A) prohibiting the manufacturing, processing, or distribution in commerce of such substance or mixture, or (B) limiting the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce.
- (2) A requirement (A) prohibiting the manufacture, processing, or distribution in commerce of such substance or mixture for (i) a particular use or (ii) a particular use in a concentration in excess of a level specified by the Administrator in the rule imposing the requirement, or (B) limiting the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce for (i) a particular use or (ii) a particular use in a concentration in excess of a level specified by the Administrator in the rule imposing the requirement.
- (3) A requirement that such substance or mixture or any article containing such substance or mixture be marked with or accompanied by clear and adequate warnings and instructions with respect to its use, distribution in commerce, or disposal or with respect to any combination of such activities. The form and content of such warnings and instructions shall be prescribed by the Administrator.
- (4) A requirement that manufacturers and processors of such substance or mixture make and retain records of the processes used to manufacture or process such substance or mixture and monitor or conduct tests which are reasonable and necessary to assure compliance with the requirements of any rule applicable under this subsection.
- (5) A requirement prohibiting or otherwise regulating any manner or method of commercial use of such

As a result of the growth of the chemical industry in the last century. Approximately two million recognized chemical compounds exist in the United States.¹¹ Individuals are exposed daily to thousands of potential pollutants expelled into the environment by commercial manufacturers. The increase in public awareness of this chemical onslaught has elevated the concern for the dangers these products present. TSCA, enacted in 1976, was a congressional attempt to protect human health and the environment from unreasonable risks of harm associated with the manufacture, use and disposal of these

substance or mixture.

- (6) (A) A requirement prohibiting or otherwise regulating any manner or method of disposal of such substance or mixture, or of any article containing such substance or mixture, by its manufacturer or processor or by any other person who uses, or disposes of, it for commercial purposes.
(B) A requirement under subparagraph (A) may not require any person to take any action which would be in violation of any law or requirement of, or in effect for, a State or political subdivision, and shall require each person subject to it to notify each State and political subdivision in which a required disposal may occur of such disposal.
- (7) A requirement directing manufacturers or processors of such substance or mixture (A) to give notice of such unreasonable risk of injury to distributors in commerce of such substance or mixture and, to the extent reasonably ascertainable, to other persons in possession of such substance or mixture or exposed to such substance or mixture, (B) to give public notice of such risk of injury, and (C) to replace or repurchase such substance or mixture as elected by the person to which the requirement is directed.

11. S. REP. NO. 698, 94th Cong. 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4491, 4493. The text of the legislative history states that it is estimated that nearly 250,000 new compounds are produced each year, 1,000 of which will enter the market and subsequently into the environment. *Id.*

products.¹² TSCA grants the EPA authority to control existing and future industrial chemicals.¹³ It was meant to assure premarket scrutiny and safety testing while no longer allowing the public to serve as the testing ground.¹⁴

Asbestos is a well-recognized, well-documented carcinogen to which humans are exposed in both occupational and non-occupational settings.¹⁵ Section 6 of TSCA authorizes the EPA to promulgate rules prohibiting or limiting a chemical substance "[i]f the Administrator finds that there is a reasonable

12. 15 U.S.C. § 2601(a)(1)-(3). Section 6 of TSCA was used by the Environmental Protection Agency (EPA) in an attempt to reduce the risk to human health posed by exposure to chemicals. *Final Rule: Asbestos; Manufacture, Importation, and Distribution in Commerce Prohibitions*, 54 Fed. Reg. 29,460, 29,460 (1989) (to be codified at 40 C.F.R. pt. 763) [hereinafter *Asbestos Ban and Phase Out Rule*]. The EPA's ten year process toward the rule began by issuing an Advance Notice of Proposed Rulemaking in the Federal Register October 17, 1979 and issuing a reporting rule on July 30, 1982 to collect information on industrial and commercial uses of asbestos. *Id.*

13. Francis H. Irwin, *An Integrated Framework for Preventing Pollution and Protecting the Environment*, 22 ENVTL. L. 1, 3 (1992). TSCA was the last of three efforts to provide controls and regulations for national environmental policies. The other two were the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370c (1988), and the establishment under NEPA of the Council on Environmental Quality (CEQ), created to advise the President and issue annual reports. *Id.* (citing NEPA, 42 U.S.C. §§ 4321-4370(c) (1988)).

14. S. REP. NO. 698 *supra* note 11, at 3, reprinted in 1976 U.S.C.C.A.N. at 4493. The legislative history quoted a section of a speech given by Russell E. Train, the Administrator of the EPA:

Most Americans had no idea, until relatively recently, that they were living so dangerously. They had no idea that when they went to work in the morning . . . ate their breakfast . . . did the things they had to do to earn a living and . . . things as ordinary, as innocent and as essential to life as eat, drink, breathe or touch, they could in fact be laying their lives on the line. They had no idea that, without their knowledge or consent, they were often engaging in a grim game of chemical roulette whose result they would not know until many years later.

Id.

15. *Asbestos Ban and Phase Out Rule*, 54 Fed. Reg. at 29,468. *See also, supra* notes 3-8 and accompanying text.

basis to conclude that . . . a chemical substance . . . presents or will present an unreasonable risk of injury"¹⁶ To determine whether the risk presented by a chemical substance is unreasonable, TSCA requires the EPA to balance the probability of harm from asbestos products against the loss to society if these products are limited or removed from commerce.¹⁷ The following factors are used: (1) Effects of the substance on human health, and magnitude of exposure; (2) Effects of the substance on the environment and magnitude of exposure;¹⁸ (3) Benefits of the substance for various uses and availability of substitutes; and (4) Reasonably ascertainable economic consequences of the rule.¹⁹

Pursuant to this congressional authorization, the EPA conducted several studies and surveys of the risks posed to human health by asbestos exposure.²⁰ Upon analysis of these factors, the EPA concluded that asbestos presents an

16. 15 U.S.C. § 2605(a) (1988); see also *Asbestos Ban and Phase Out Rule*, 54 Fed. Reg. 29, 460, 29,466-67.

17. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1223 (1991) (citing 54 Fed. Reg. at 29,467.

18. 15 U.S.C. § 2605(c)(1). Although the EPA acknowledged concern for and briefly considered the effects of asbestos on the physical environment, the ABPO rule is based almost exclusively on risks to human health. See 54 Fed. Reg. at 29,480.

19. 15 U.S.C. § 2605(c)(1). The balancing of these factors required a tort-like analysis in which the probability of harm is the product of likelihood of harm and its degree. Thus the high potency of asbestos coupled with injuries such as cancer, asbestosis, and other diseases created a heavily weighted harm side of the analysis. EPA determined that potential substitutes for asbestos would alleviate the loss on the benefit side of the balance. 54 Fed. Reg. 29,467. However, the court felt EPA's analysis of these substitutes was inadequate. See, e.g., *Corrosion Proof Fittings*, 947 F.2d at 1226, 1228. EPA defended its analysis, stating that additional data as to asbestosis, loss of work, medical care costs, and some unquantifiable costs were omitted and, if included, actually would have presented a stronger justification for finding an unreasonable risk. 54 Fed. Reg. at 29,485.

20. *Asbestos Ban and Phase Out Rule*, 54 Fed. Reg. at 29,461. The record which was the basis for EPA's actions consists of over 45,000 pages of analyses, testimony, correspondence, comments, and other materials. *Id.* In fact, the public was given the opportunity to comment on at least four separate occasions, and the EPA analyzed over 200 comments. *Id.*

unreasonable risk to human health and imposed the three-stage ban.²¹ The EPA estimated that the APBO rule would save 148-202 lives at a cost of approximately \$450-800 million dollars, based on a thirteen year projection using discounted benefits and cost of substitutes.²² The three stages of the ban were to take effect from August 27, 1990 to August 26, 1996, allowing the sale of existing stock of products, yet imposing labeling requirements on all products subject to stages 2 and 3.²³ The EPA, applying the "least burdensome" requirement of TSCA, though absent a supporting cost-benefit analysis, determined the ban to be the only one of TSCA's seven alternatives²⁴ that would be adequate to control the risk.²⁵

In the noted case, the Fifth Circuit vacated and

21. *Corrosion Proof Fittings*, 947 F.2d at 1208 n.2 (1991).

Products subject to the ban are categorized into the three stages:

Manufacture, Import, and Processing Ban

Stage 1 - August 27, 1990

Stage 2 - August 25, 1993

Stage 3 - August 26, 1996

Asbestos Ban and Phase Out Rule, 54 Fed. Reg. at 29,461.

Distribution in Commerce Ban

Stage 1 - August 25, 1992

Stage 2 - August 25, 1994

Stage 3 - August 25, 1997

Product Labeling Deadlines

Stage 1 - August 27, 1990

Stage 2 - August 25, 1992 (Most of the stage 2 products)

Stage 3 - August 25, 1995

Id. at 29,463. Therefore, a manufacturer, importer, or processor of a product banned in stage 2 must label all stock as of Aug. 25, 1992 and cease manufacturing and distribution by Aug. 25, 1993 and Aug. 25, 1994 respectively.

The rule also contains a requirement that products subject to a manufacture, importation, and processing ban, but not yet subject to a ban on distribution in commerce, be labeled in the manner also described in the regulation at 40 C.F.R. § 763.171. 54 Fed. Reg. at 29,461.

22. *Corrosion Proof Fittings*, 947 F.2d at 1208.

23. *Id.*

24. See *supra* note 10.

25. *Corrosion Proof Fittings*, 947 F.2d at 1230.

remanded the EPA's asbestos rule.²⁶ The court stated that "a reviewing court shall hold unlawful and set aside . . . [a rule] . . . not supported by substantial evidence."²⁷ Although the court agreed with the EPA's determination that asbestos is a hazardous substance and acknowledged the agency's authority under TSCA to ban toxic substances,²⁸ the court held that the ABPO rule was unsupported by the necessary substantial evidence required by TSCA's standard of judicial review.²⁹ More specifically, the court found that the EPA had failed to establish asbestos as an *unreasonable* risk, and to promulgate the least burdensome rule to protect against such a risk.³⁰

The court used the substantial evidence standard of review both in determining the reasonableness of an agency's actions,³¹ as well as analyzing the unreasonableness of the risk resulting from a potentially harmful substance.³² It was indeed necessary for the court to determine if asbestos posed an unreasonable risk to human health, as well as to determine whether the EPA had a reasonable basis for promulgating the rule.

TSCA requires an unreasonable risk of harm and as such a reasonable basis to promulgate appropriate rules.³³ The EPA is required to consider the costs and benefits of proposed actions in that analysis.³⁴ Upon review of the EPA's analysis, the court held that although asbestos was adequately

26. *Id.* at 1215.

27. *Id.* at 1213 (citing 15 U.S.C. § 2618(c)(1)(B)(i)). *See also, supra* notes 2-3 and accompanying text.

28. *Corrosion Proof Fittings*, 947 F.2d at 1216.

29. *Id.* at 1215.

30. *Id.* at 1217.

31. *Id.* at 1212.

32. *See id.* at 1223.

33. *Corrosion Proof Fittings*, 947 F.2d at 1222-23. The court asserted that "[t]he requirement that the risk be 'unreasonable' necessarily involves a balancing test . . . The regulation may issue if the severity of the injury that may result from the product, factored by the likelihood of the injury, offsets the harm the regulation imposes upon manufacturers and customers." *Id.* at 1222 (quoting *Forester v. CPSC*, 559 F.2d 774, 789 (D.C. Cir. 1977)).

34. 15 U.S.C. § 2605(c)(1)(C) and (D) (1988).

determined to be a harmful substance, the EPA did not have a reasonable basis to promulgate the APBO rule.³⁵ The court stated that the potential substitutes used by the EPA in mitigating societal costs that the ban would create were either unavailable or potentially harmful.³⁶ According to the court, the inclusion of these unknown and unsafe factors rendered the EPA's cost-benefit analysis faulty, inadequate, and unreasonable.³⁷ The court agreed with Congress, and rejected the notion that EPA should pursue asbestos elimination at all costs.³⁸ The court stated that until an agency can provide "substantial evidence that the benefits to be achieved by [a regulation] bear a reasonable relation to the costs imposed by the reduction,"³⁹ the rule cannot be issued.

Further, the EPA's quantitative cost-benefit ratio estimate, as high as \$74 million per life saved,⁴⁰ was determined by the court to be an inadequate ratio upon which to conclude that asbestos is an unreasonable risk.⁴¹ The court stated that "such high costs are rarely, if ever, used to support a safety regulation."⁴²

The most significant holding of *Corrosion Proof Fittings* is in the court's analysis of the EPA's burden under TSCA to promulgate the least burdensome regulation. The court interpreted TSCA's language as imposing a "least-to-most-burdensome hierarchy,"⁴³ which requires the EPA, once a product has been identified as potentially harmful, to begin with the least burdensome requirement and proceed to evaluate the costs and benefits of a potential regulation under *each*

35. *Id.* at 1215.

36. *Id.* at 1224-28 (analyzing friction products, asbestos-cement pipe products, and gaskets, roofing, shingles and paper products).

37. *See id.* at 1230.

38. *Corrosion Proof Fittings*, 947 F.2d at 1222.

39. *Id.* at 1223 (quoting *American Petroleum Inst. v. OSHA*, 581 F.2d 493, 504 (5th Cir. 1978)).

40. *See id.* at 1222. *See supra* note 18.

41. *Corrosion Proof Fittings*, 947 F.2d 1222-23.

42. *Id.* at 1223.

43. *Id.* at 1217.

option.⁴⁴ Therefore, in order to impose the total asbestos ban, the option at the apex of the hierarchy, the court's holding requires the EPA to show, via these independent cost-benefit analyses, that *each* less-burdensome alternative was insufficient. Although the EPA considered alternatives to the rule, the court found that the Agency had failed to adequately analyze whether any of the other requirements would be less burdensome than either the currently-regulated or a completely-banned world.⁴⁵ In the court's opinion, the EPA failed to meet its burden under the language of TSCA to promulgate a reasonable rule that would adequately reduce the risk.⁴⁶

The court also held that the EPA had committed a fatal procedural error in failing to give adequate public notice of the use of analogous exposure data,⁴⁷ which denied interested parties the right to comment on the use of this information. While recognizing that administrative agencies are given somewhat limited review of rulemaking procedures,⁴⁸ the court stated that a procedural error of this type meets the applicable test and "so subverts the process of judicial review that invalidation of the regulation is warranted."⁴⁹

Corrosion Proof Fittings is a tragedy for the EPA. It has created an unprecedented and unreasonable burden on the agency's ability to promulgate rules under TSCA. The following analysis is not an effort to place blame upon the judiciary or the legislature for the results of this case. However, a critical analysis is necessary to gain insight for reconciliation of the ramifications and harmful effects that this holding has placed on the EPA's ability to protect society from toxic substances.

44. *Id.*

45. *Id.*

46. *See id.* at 1217.

47. *Id.* at 1212-13.

48. *See, e.g.,* *Superior Oil Co. v. FERC*, 563 F.2d 191, 201 (5th Cir. 1977).

49. *Corrosion Proof Fittings*, 947 F.2d at 1211-12 (quoting *Superior Oil*, 563 F.2d at 201 (quoting *Alabama Ass'n of Ins. Agents v. Bd. of Governors of the Fed. Reserve Sys.*, 533 F.2d 224, 236-37 (5th Cir. 1976))).

TSCA was enacted by Congress in an effort to provide the EPA with greater statutory authority to control the increasing levels of public exposure to toxic chemicals.⁵⁰ Congress incorporated into TSCA a basic reasonableness standard for determining whether a substance presents a harmful risk to human health.⁵¹ Yet, Congress also recognized that an unbridled mandate for EPA to promulgate substance controls would undoubtedly result in overly burdensome regulations on the manufacturers and distributors of these products. The least-to-most-burdensome requirements in TSCA⁵² are an obvious effort to alleviate potential economic hardship on these entities and provide a format for the EPA to conduct a reasonable analysis in promulgating a rule under the Act.

The Fifth Circuit considered TSCA's seven requirements to be a finite hierarchy, not a list of alternatives. The court stated that TSCA requires the EPA to analyze each requirement in order, and to promulgate rules under the least burdensome requirement that will adequately protect human health against unreasonable risks.⁵³ It is doubtful that Congress, by adopting the "least burdensome requirements" language, intended to create the judicial interpretation like that in *Corrosion Proof Fittings*.⁵⁴ Thus, the Fifth Circuit's analysis

50. 15 U.S.C. § 2601(b)(2) (1988).

51. *Id.* at § 2604(f).

52. *See supra* notes 9-10 and accompanying text.

53. *Corrosion Proof Fittings*, 947 F.2d at 1217.

54. The House Conference Report contains comments from the Senate Bill, the House Amendment, and the Conference Committee. H.R. CONF. REP. No. 1679, 94th Cong., 2d Sess. 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4539, 4540. The Senate Bill advocated a need to "impose specified requirements as is necessary to adequately protect against the risk" and further, to use the "least burdensome controls." *Id.* at 72, 1976 U.S.C.C.A.N. at 4557. The Conference Committee stated "requirements shall be imposed to the extent necessary to protect against the risk" and that the "requirements must be the least burdensome feasible for those subject to the requirements." *Id.* at 75, 1976 U.S.C.C.A.N. at 4560. However, the House amendment only stated "the Administrator shall impose requirements as necessary to protect against the risk," and did not include language for a least burdensome

demands scrutiny.

Although TSCA directs that the EPA "shall by rule apply one or more" of the listed requirements,⁵⁵ TSCA does not direct EPA to do a cost-benefit analysis at *any* stage of this determination. In fact, the statute is void of any mandated standard of analysis. Yet, the Fifth Circuit held that the EPA must consider each regulatory option beginning with the least burdensome, and the *costs and benefits* of the rule at issue under each option.⁵⁶ In fact, the court expressly criticized the EPA for not doing so.⁵⁷ Although the court is perhaps justified in its concern that a standard of review for the EPA's choice of requirements is absent in TSCA, imposing the necessity of a cost-benefit analysis for each of the seven options places an unreasonable and ominous burden upon the agency. To promulgate rules under this standard, an agency will often lack the necessary resources to perform these analyses. In *Corrosion Proof Fittings* the public is ultimately harmed. A substance which has been identified as potentially harmful ultimately remains in commerce while an extensive review is being completed. If an agency lacks resources, such as time and money, to perform such a tedious and costly review, the substance may remain in the market indefinitely, meanwhile risking harm to human health and the environment. Protection from exposure to this harm is expressly what TSCA set out to achieve.⁵⁸ The Fifth Circuit's holding may be seen as a usurpation of the jurisdiction of the EPA. Although there is a broad standard of review for determining that a substance is unreasonable, the standards of review under TSCA are notably more stringent and narrow than those in other

requirement. *Id.* at 74, 1976 U.S.C.C.A.N. at 4559. It must be noted that the Senate Bill was passed in lieu of the House Bill, however, the limited discussion as to this standard seems to indicate that Congress may not have been aware of its serious ramifications. 1976 U.S.C.C.A.N. 4491.

55. 15 U.S.C. 2605(a).

56. *Corrosion Proof Fittings*, 947 F.2d at 1217.

57. *Id.*

58. S. REP. NO. 698 at 1, reprinted in 1976 U.S.C.C.A.N. at 4491.

statutes.⁵⁹ Although informal rule-making is employed, the substantial evidence standard is applied.⁶⁰ Additionally, Congress mandated the EPA to choose at least one of the seven alternatives when promulgating a rule under TSCA.⁶¹ These additional and substantially burdensome procedures imposed by *Corrosion Proof Fittings* seem beyond the scope of what Congress intended under TSCA. In *Chemical Mfrs. Ass'n v. EPA*,⁶² the Fifth Circuit stated that since the language and legislative history of TSCA contains no definition of "substantial,"⁶³ Congress is deemed to have delegated the power to interpret its definition to the EPA.⁶⁴ The court stated it would support the EPA's definition if rational and consistent with TSCA's scheme and legislative history.⁶⁵ Similarly, the court in *Corrosion Proof Fittings*, although failing to subsequently follow its own dictates, stated that an agency's choice of rulemaking procedures is entitled great deference,⁶⁶ and that courts should give great weight to any reasonable construction of a statute by the agency charged with its enforcement.⁶⁷ The court went further by stating that all agency rules are given a presumption of validity and placing the burden on the challenger to prove an agency action is invalid.⁶⁸ If this standard were applied to the instant case, the

59. See *supra* notes 7-8 and accompanying text.

60. *Id.* at 1213-14.

61. 15 U.S.C. § 2605(a).

62. 899 F.2d 344 (5th Cir. 1990).

63. *Id.* at 354. Although the discussion of "substantial" in this case focused on its use under § 4(1)(B)(i) of TSCA, 15 U.S.C. § 2603(1)(B)(i), which deals with testing requirements of chemical substances, the court and the parties would have indicated if "substantial" had received a special definition or legislative discussion for *any* purpose under TSCA. Any reference in the legislative history would have evidenced that the legislature had taken note of the term and was aware of the consequences of its definition.

64. *Id.* at 354.

65. *Id.*

66. *Corrosion Proof Fittings*, 947 F.2d at 1211.

67. *Id.* at 1210 (citing *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626-27 (1971)).

68. *Id.* at 1214.

APBO Rule would be held valid, because the challenger would be unable to find statutory language in TSCA which requires the EPA to perform an individual cost-benefit analysis on each requirement.

Finally, it must be noted that the EPA did not include in its analysis of asbestos any possible environmental effects. Although this is required by TSCA,⁶⁹ the EPA dedicated only 136 words of the approximately 100,000 in the proposed regulation to commentary on environmental effects.⁷⁰ The text does not indicate any reason for this omission. The language in TSCA consistently refers to the interests to be protected under the statute as "the risks to human health or the environment."⁷¹ The indication is that the EPA could have included the environmental benefits of the ban in their cost-benefit analysis. Such an inclusion would further offset the ban's costs to manufacturers and distributors, which would remain exactly the same. Absent an explicitly stated reason for this decision to exclude environmental effects, EPA's judgment seems to have resulted in a fatal omission.⁷²

After ten years of tedious and expensive data collection and analysis, the Fifth Circuit's decision in *Corrosion Proof Fittings* leaves the EPA with only a small handful of asbestos-containing products subject to the ban. Since a product is not subject to the ban if a manufacturer, processor, or distributor can prove that the product was in commerce on July 12, 1989, these entities are trying desperately to prove that their products are exempt from ban.⁷³ Presently, the EPA is soliciting

69. 15 U.S.C. § 2605(a).

70. *Asbestos Ban and Phase Out Rule*, 54 Fed. Reg. at 29,480.

71. 15 U.S.C. § 2601(a)(1), (b)(emphasis added). See also § 2605(c)(1)(A), (B), (D).

72. This information would most likely have provided the EPA with a stronger argument as to the reasonableness of its proposed legislation. However, it seems the EPA would probably have been held responsible for seven cost-benefit analyses, and have been required to show the application of the above information into each of those seven calculations.

73. Manufacturers, distributors, and processors are presently submitting customs receipts, sales receipts, inventory statements, and any other documents that lend proof to the existence of their product in commerce on

comments in an attempt to subject more products to the ban.⁷⁴

The holding of *Corrosion Proof Fittings* has created a formidable burden on the EPA for rulemaking under TSCA. Meanwhile, asbestos-containing products, which are undeniably harmful to human health according to the Fifth Circuit, remain in commerce. Since a Writ of Certiorari was not filed, the EPA as well as society can only hope that another judicial circuit, or perhaps the legislature, will review this issue.

LINDA STADLER

that date.

74. The EPA published a notice in the Federal Register of April 2, 1992, requesting information on the commercial status of eleven product categories which EPA believes were out of commerce and therefore subject to the ban. Asbestos; Manufacture, Importation, Processing and Distribution Prohibitions; Effect of Court Decision. 54 Fed. Reg. 11,364-65 (1992) to be codified at 40 C.F.R. 763. Since the EPA discontinued data gathering in 1986 and the rule was vacated in 1989, no data exists for this three year gap.