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JURISDICTION

The Court has jurisdiction pursuant to section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b).

ISSUE PRESENTED

Whether section 112 of the Clean Air Act, 42 U.S.C. § 7412 (1982), permits the EPA Administrator to consider cost and technological feasibility in setting emission standards for hazardous pollutants. 1/

STATEMENT OF THE CASE

The Clean Air Act ("CAA" or "the Act") establishes three principal means to achieve its stated purpose "to promote the public health and welfare and the productive capacity of [the] population." CAA § 101(b), 42 U.S.C. § 7401(b). First, section 109(b)(1) authorizes EPA to issue national ambient (outdoor) air quality standards "which in the judgment of the Administrator, . . . allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). These ambient standards

1/ Several cases now pending before this Court involve standards under section 112 of the Clean Air Act. NRDC v. Thomas, Nos. 84-1387 and consolidated cases; EDF v. Thomas, Nos. 84-1524 and consolidated cases; and NRDC v. Thomas, No. 86-1532, involve challenges to EPA's emission standards for benzene, radionuclides, and arsenic, respectively. NRDC v. EPA, No. 86-1010, involves whether EPA has a mandatory duty to promulgate emission standards for every source category of benzene. American Mining Congress v. EPA, Nos. 86-1628 and consolidated cases, involves challenges to EPA's work practice standards for radon emissions.

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are based on "criteria" set forth in section 108(a)(2), 42 U.S.C. § 7408(a)(2), and are implemented by the states through "state implementation plans," as set forth in section 110, 42 U.S.C. § 7410. To date, EPA has established ambient standards for six pollutants. 40 C.F.R. Part 50.

Second, section 111 of the Act, 42 U.S.C. § 7411, authorizes EPA to establish standards of performance for stationary sources. Under section 111(a)(1), EPA is specifically required to consider cost and technological feasibility in establishing standards of performance. EPA has issued standards of performance for more than fifty types of sources. 40 C.F.R. Part 60.

The third method of achieving the objectives of the Act is set forth in section 112, 42 U.S.C. § 7412, the subject of the present proceeding. Section 112(b)(1)(A) provides that EPA is to publish a list of "hazardous air pollutants" for which it intends to establish emission standards. A "hazardous air pollutant" is defined in section 112(a)(1) as a pollutant to which no ambient air quality standard applies and which, in the judgment of the EPA Administrator, is a serious threat to health. After it lists such a pollutant, EPA is to promulgate an emission standard for the pollutant "at the level which in [the Administrator's] judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant." CAA § 112(b)(1)(B).

EPA's approach has been consistent with respect to each of these three types of standards. In establishing performance standards under section 111, EPA has always considered cost and

feasibility, in accordance with the statutory mandate. 2/ In setting ambient air quality standards under section 109, however, EPA historically has not taken cost and feasibility into consideration, although these factors can be taken into account by the states in formulating their implementation plans. EPA has been able to identify an ambient air concentration level for each pollutant regulated under section 109 at which public health is not significantly threatened. 3/

EPA has adopted more conservative assumptions about health risks in setting emission standards for carcinogens under section 112. Accordingly, with respect to every carcinogen that EPA has regulated under section 112, the Agency has set an emission standard significantly below the level at which adverse health risks are known to occur. 4/ At the same time, EPA has also consistently believed that in establishing an appropriate margin of safety within the range of exposure levels for which substantial uncertainty regarding health risks exists, it is both permissible and appropriate to give limited consideration to cost and feasibility.

2/ See, e.g., 40 Fed. Reg. 33,155 (Aug. 6, 1975) (standards of performance for the phosphate fertilizer industry); 41 Fed. Reg. 2338 (Jan. 15, 1976) (standards of performance for primary copper smelters); 45 Fed. Reg. 66,751 (Oct. 7, 1980) (standards of performance for glass manufacturing plants).

3/ See, e.g., 43 Fed. Reg. 46,246 (Oct. 5, 1978) (ambient standard for lead); 44 Fed. Reg. 8202 (Feb. 8, 1979) (ambient standard for ozone).

4/ See emission standards for asbestos, 38 Fed. Reg. 8820 (Apr. 6, 1973); vinyl chloride, 41 Fed. Reg. 46,560 (Oct. 21, 1976); benzene, 49 Fed. Reg. 23,513 (June 6, 1984); radionuclides, 49 Fed. Reg. 43,906 (Oct. 31, 1984) and 50 Fed. Reg. 5194 (Feb. 6, 1985); and arsenic, 51 Fed. Reg. 27,956 (Aug. 4, 1986).

A number of scientific, technical, and judgmental factors have influenced this approach to setting emission standards for carcinogens under section 112. First is the scientific uncertainty in determining the carcinogenicity of pollutants in the ambient air. EPA must often place great reliance on the results of laboratory tests involving animals. In order to improve the detectability of carcinogenic effects, most animal tests must be conducted with much smaller numbers of subjects than the human populations they represent and at doses much higher than ambient exposure levels. See "National Emission Standards for Identifying, Assessing and Regulating Airborne Substances Posing a Risk of Cancer," 44 Fed. Reg. 58,642-58,661 (Oct. 10, 1979) (certified index to record J-9) (hereinafter "EPA Cancer Policy") at 58,644. The Agency also relies on studies of cancer risks in workers exposed to high concentrations of substances in the workplace. These studies also involve concentrations substantially higher than ambient exposure levels.

Because identifications of substances as probable human carcinogens have been based on studies of workers or animals exposed to relatively high doses of the substances, there is considerable scientific debate whether the smaller doses generally encountered in the ambient environment cause cancer, or instead, whether some "threshold" level of exposure may exist. A "threshold" level is a level below which exposure to a pollutant does not result in adverse health effects. As a matter of public health policy, EPA conservatively presumes for regulatory purposes that, in the absence of an identifiable threshold, a carcinogen poses some risk of cancer

at any exposure level above zero. 5/ Id. at 58,644-58,645.

Starting with this conservative, health-protective presumption of no threshold, EPA then applies its reasoned judgment to all the evidence on a pollutant in order to protect the public health.

In regulating non-threshold hazardous air pollutants under section 112, EPA has rejected a "risk-free" approach, which would require a total prohibition on all emissions. 6/ EPA has concluded that the adoption of a zero emissions standard in every case would inevitably lead to the end of many essential and familiar economic and social activities, since it is physically impossible for many of these activities to continue without some emissions of carcinogens. EPA Cancer Policy at 58,657. Among the important commercial activities affected would be the manufacturing of steel; the mining, smelting, and refining of most minerals; the manufacturing of synthetic organic chemicals; the refining, storage, and dispensing of petroleum products; and the generation of electricity from coal-burning and nuclear energy. Id. at 58,660. Dislocations would not be limited to these industrial activities. For example, carcinogenic radionuclides are emitted by minerals, soils, and even the human body. See 49 Fed. Reg. 43,911 (Oct. 31, 1984). Thus, plowing a field produces radionuclide emissions and thus, under EPA's presumptions, some risk of cancer. Similarly, carcinogenic

5/ For these purposes, EPA estimates risks based on a straight line extrapolation from known effects levels down to zero. Id. at 58,649.

6/ A "non-threshold" pollutant is a pollutant for which there is no known threshold level.

polycyclic organic matter is emitted from all activities involving burning, including such sources as residential stoves and fireplaces, automobiles, trucks, airplanes, forests, and incinerators. See 49 Fed. Reg. 31,680 (Aug. 8, 1984).

Based upon the consequences of eliminating all possible risks, as well as a legal analysis of congressional intent, EPA concluded that it should not prohibit all emissions of non-threshold hazardous air pollutants. EPA Cancer Policy at 58,659-58,661. EPA determined that while emission standards must be based primarily on the need to reduce risk to the public health, the Agency may also consider other social, economic, and technological factors in determining whether a given control level provides an ample margin of safety. These factors include the benefits of the activity or substance producing risk; the technological feasibility of achieving a specific standard; the availability and possible environmental risks of substitutes for the substance or activity; and the cost of incremental reductions in risk. EPA Cancer Policy at 58,661.

Also, EPA concluded that this publicly-delineated "judgmental" or "circumstantial" approach to determining ample margin of safety was reliable and far more reasonable than a predetermined rule that would specify a fixed target carcinogenic risk or incidence level, which is the inevitable result of an exclusive focus on risk. Id. at 58,658. 7/ EPA found that there are several drawbacks to such a predetermined rule. First, EPA noted that although

7/ As an example of a fixed target rule, EPA conceivably could regard a cancer risk of less than one in a million as an "ample margin of safety" in all cases.

current quantitative risk assessment techniques for chemical carcinogens are useful tools, considerable uncertainties are associated with these techniques at their current stage of development. Consequently, EPA determined that in using quantitative risk assessments, the Agency should generally be free to consider the varying degrees of uncertainty that actual cancer risks may be significantly above or below those predicted by the estimation procedures, and not be bound by a fixed target. Id.

Second, EPA found that a fixed target risk level would completely ignore the consequences of incremental reductions in risk to levels approaching zero. These consequences differ greatly among source categories and among air pollutants, and a fixed target fails to provide necessary flexibility. For example, where risks could be reduced beyond a target without unreasonable costs, EPA believed that it should have the flexibility to require such reduction. Similarly, where attainment of a target level would eliminate a highly beneficial activity, EPA believed that such a fact is relevant in assessing whether a less stringent standard is appropriate under the terms of section 112. Id.

EPA followed this judgmental approach in setting the emission standard for vinyl chloride and in deciding to withdraw the proposal that would have tightened that standard. The emission standard adopted in 1976 resulted in a 95 percent reduction in vinyl chloride emissions. 40 Fed. Reg. 59,543 (Dec. 24, 1975) (JA 13); 41 Fed. Reg. 46,560 (Oct. 21, 1976) (JA 23); 50 Fed. Reg. 1182 (Jan. 9, 1985) (JA 46). The standard reduced ambient concentrations to levels far below those at which actual adverse effects

on humans had been observed. 40 Fed. Reg. 59,533-59,534 (Dec. 24, 1975) (JA 3-4). EPA determined that the standard was appropriate despite initial capital costs to the industry of nearly \$200 million and annual costs of \$70 million, 41 Fed. Reg. at 46,561 (JA 24), and despite the fact that a 95 percent reduction in emissions was conservatively estimated to prevent only ten or eleven cases of cancer each year. 50 Fed. Reg. at 1182 (JA 46). EPA rejected, however, a total ban on vinyl chloride emissions. This decision was based upon the extremely marginal and uncertain health benefit that could be realized by eliminating the last five percent of emissions, the potential adverse health and environmental impacts of substitutes for vinyl chloride products, the beneficial uses of vinyl chloride products for which no substitutes were available, and the unemployment that would result from the closure of vinyl chloride plants. 41 Fed. Reg. at 46,561 (JA 24). At the same time, EPA also rejected the use of a cost-benefit analysis to set the emission standard. Id. at 46,562 (JA 25).

Later, and in accordance with a settlement agreement, EPA proposed a tightening of the vinyl chloride standard on June 2, 1977. 42 Fed. Reg. 28,154 (JA 40). EPA withdrew this proposal on January 8, 1985. 50 Fed. Reg. 1182 (JA 46). Estimating that only approximately one-half of one case of cancer per year was perhaps attributable to vinyl chloride emissions under the vinyl chloride standard in effect in 1985, EPA determined that the public interest did not require the vinyl chloride industry to adopt further controls that were not technologically feasible. Id. That withdrawal of the proposed rule is the subject of the present petition for review.

SUMMARY OF ARGUMENT

EPA may properly take cost and technological feasibility into account in a limited manner when regulating non-threshold hazardous air pollutants under section 112 of the Clean Air Act. Congress clearly never intended for EPA to ignore the catastrophic economic consequences that would result if all emissions of all such pollutants were banned. On the contrary, in the language of section 112, in the structure of the Act, and in the Act's legislative history, Congress delegated broad discretion to EPA to determine the appropriate level for emission standards. In exercising that discretion, EPA gives primary consideration to health concerns, but also takes into account to a limited degree evidence of economic consequences and technological feasibility. EPA's limited consideration of these factors is consistent with the language of section 112, the legislative history of that section, and the relevant case law.

ARGUMENT

I. STANDARD OF REVIEW

The applicable standard of review in this case is whether EPA's withdrawal of the proposed revision of the vinyl chloride standard was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. CAA § 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A). This is a deferential standard that presumes the validity of agency action. Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976).

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In Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843 (1984), the Supreme Court stated that "if the [Clean Air Act] is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Relying on Chevron, this Court has held that it may reverse EPA's interpretation of the Clean Air Act "only if it is either contrary to a clear congressional mandate or if it is an unreasonable construction of that mandate." NRDC v. Thomas, 805 F.2d 410, 420 (D.C. Cir. 1986). We show below that EPA's interpretation of section 112 is both consistent with, and a reasonable construction of, the congressional mandate to protect public health.

II. EPA MAY CONSIDER COST AND TECHNOLOGICAL FEASIBILITY
IN SETTING EMISSION STANDARDS FOR NON-THRESHOLD
POLLUTANTS UNDER SECTION 112 OF THE CLEAN AIR ACT.

A. Congress Did Not Intend To Eliminate All
Emissions of Hazardous Air Pollutants.

Section 112(b)(1)(B) of the Clean Air Act by its terms provides that the EPA Administrator is to establish an emission standard for a hazardous air pollutant "at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant." Although this language is broad and general, the normal import of these words manifestly is not one of a rigid zero-risk standard. Indeed, the evidence shows with some certainty that Congress did not intend EPA to prohibit all emissions of all non-threshold hazardous air pollutants.

"Safe" does not mean "risk-free." See Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607,

642 (1980). Section 112 does not contain language requiring the elimination of all possible risks associated with airborne carcinogens. Instead, the Administrator is to use his "judgment" to provide for an "ample margin." These are not the words from which a command to eliminate all risks can be implied.

Moreover, it is difficult to imagine that Congress could have intended the massive economic and social dislocations that would result from a requirement that carcinogenic emissions be reduced to zero in all cases. See pp. 5-6, supra. The legislative history of section 112 is devoid of any evidence that Congress contemplated closure of the nation's basic industries. In fact, the only reference to plant closures occurred in a statement by Senator Muskie during the post-conference Senate floor debate on the Clean Air Act:

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 allow for no measurable emissions. [Congressional Research Service of the Library of Congress, 93d Cong., 2d Sess., A Legislative History of the Clean Air Act Amendments of 1970, at 133 (Comm. Print 1974) (hereinafter "1970 Leg. Hist.").]

While this statement makes clear that EPA is empowered to set an emission standard that "could" result in a plant closing (or a zero emission standard in some cases), it certainly does not mandate that result for all of the hundreds or thousands of sources that emit non-threshold hazardous air pollutants. 8/

8/ NRDC cites Senator Muskie's remark as "explicit" evidence of the "legislative choice to exclude non-health factors from standard-setting under § 112." NRDC Br. Reh. at 22. Of course, Senator Muskie said no such thing.

If any doubt remained about congressional intent, it was set to rest during consideration of the 1977 Amendments to the Clean Air Act. Then, Congress expressly recognized that where threshold levels of safety cannot be identified, a total ban on emissions is socially undesirable. The lengthy discussion of this issue in the House Report focused on air quality standards under section 109, but is equally applicable to hazardous air pollutants under section 112:

The national primary [air quality] standards are based on the assumption that a no-effects threshold level exists and can be proved; in fact this assumption of a safe threshold appears to be false.

Some have suggested that since the standards are to protect against all known or anticipated effects and since no safe thresholds can be established, the ambient standards should be set at zero or background levels. Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical.

[H.R. Rep. No. 294, 95th Cong., 1st Sess. 110, 127 (1977), reprinted in Congressional Research Service of the Library of Congress, 95th Cong., 2d Sess., A Legislative History of the Clean Air Act Amendments of 1977, at 2577, 2594 (Comm. Print 1978) (hereinafter "1977 Leg. Hist.") (emphasis added).]

Senator Muskie also recognized during the Senate debate on the 1977 Amendments that zero emissions standards for non-threshold pollutants are inappropriate for "pragmatic" reasons:

The fact is, as testimony and documents disclose, the standards do not fully protect in accordance with the statutory language which gives the Administrator authority to provide for additional protection. He has had to make a pragmatic judgment in the face of the fact that he found there is no threshold on health effects, which makes it very difficult then to apply absolute health protection, and he has not

been able to do that. [123 Cong. Rec. S9426 (daily ed. June 10, 1977), reprinted in 1977 Leg. Hist. at 1038.] 9/

Accordingly, neither the language of section 112, its legislative history, the public interest, nor common sense requires EPA to prohibit all emissions of non-threshold air pollutants.

B. EPA's Consideration of Cost and Feasibility Is Consistent with Congressional Intent.

1. The Language and Structure of the Clean Air Act Confer Broad Discretion on EPA.

Section 112 is written in broad terms. It does not define "ample margin of safety," nor is that term self-defining. While we know that "safe" does not mean risk-free, Congress set forth no criteria for assessing risk or safety. Instead, Congress specifically left the level at which an emission standard should be set, in order to protect the public health, to "the judgment of the Administrator." Congress did not direct the Administrator how to exercise that judgment, and it certainly did not expressly prohibit consideration of cost and feasibility.

EPA's broad discretion is not limited to determining the emission level for a hazardous air pollutant. EPA also has broad discretion in determining whether a substance is a "hazardous air pollutant" in the first place. This is evident from the definition of that term in section 112(a)(1) as

9/ It is also significant that Judge Wright, in his dissenting opinion in the present case, recognized that section 112 does not prohibit all emissions of non-threshold pollutants. NRDC v. EPA, 804 F.2d 710, 736 (D.C. Cir. 1986), vacated, 810 F.2d 270 (D.C. Cir. 1987).

an air pollutant . . . which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness. [Emphasis added.]

Even when EPA determines that a substance is a hazardous air pollutant, the Act does not require promulgation of an emission standard for that substance. Section 112(b)(1)(A) provides only that the Administrator shall publish a list of hazardous air pollutants "for which he intends to establish an emission standard." Thus, if EPA believes that an emission standard is not warranted for a particular substance, the Agency can decide not to list it.

Furthermore, even if EPA believes that a dangerous air pollutant should be regulated, it has the discretion to proceed under different sections of the Act. Section 112 applies only to those air pollutants "to which no ambient air quality standard is applicable." CAA § 112(a)(1). Thus, EPA has the discretion to regulate dangerous air pollutants by setting ambient air quality standards under sections 108 and 109 of the Act. In addition, EPA can choose to regulate hazardous air pollutants under section 111, which governs standards of performance for stationary sources. 10/

10/ As noted at p. 2, supra, EPA is required to consider cost and technological feasibility in setting performance standards under section 111(a)(1).

The extent of EPA's discretion is also demonstrated by section 122 of the Act, 42 U.S.C. § 7422, which directs EPA to consider regulating arsenic, cadmium, polycyclic organic matter, and radioactive pollutants. Substantial evidence before Congress indicated that each of these pollutants was a carcinogen. H.R. Rep. No. 294 at 36-40, 1977 Leg. Hist. at 2503-07. Yet, Congress expressly left the decision whether to regulate these pollutants under section 109, 111, or 112, or not at all, to EPA's discretion.

To summarize, Congress expressly delegated EPA discretion to determine whether a substance is a hazardous air pollutant; if the substance is a hazardous air pollutant, whether to regulate it; if regulated, whether a substance should be regulated under an air quality standard, a performance standard, or an emission standard; and, if regulated under an emission standard, what that standard should be. In view of this broad general discretion that Congress conferred on EPA with respect to hazardous air pollutants, it is implausible that Congress intended to restrict the setting of emission standards in the narrow fashion advocated by NRDC. 11/

2. The Legislative History of the Clean Air Act
Allows Consideration of Cost and Feasibility.

- a. In Enacting Section 112 in 1970, Congress Rejected
Provisions that Would Have Limited Regulatory
Discretion.

Section 112 of the Clean Air Act resulted from an apparent compromise between the House and Senate bills. In the House bill,

11/ NRDC argues that three provisions in section 112 suggest a congressional intent that EPA consider cost and technological feasibility in applying emission standards but not in setting them. First, NRDC refers to section 112(c)(1)(B)(ii), which authorizes EPA to grant an existing source a waiver from an emission standard for up to two years if "necessary for the installation of controls." NRDC contends that "[s]ince Congress explicitly limited consideration of technological or economic factors to existing sources only, and explicitly limited the period of such waivers to a maximum of two years, there is no room for contending that EPA may give broader consideration to these factors in standard-setting itself." NRDC Br. Reh. at 16-17. NRDC's conclusion does not follow. Section 112(c)(1)(B)(ii) authorizes waivers on a case-by-case basis where a source is not able to comply with an emission standard, whether or not the standard is generally feasible; it does not even suggest that cost and feasibility are not appropriate factors in setting the emission standard in the first place. On the contrary,

[Footnote continued on next page]

EPA was to establish emission standards for new stationary sources that emitted pollutants that endangered public health. In setting such standards, EPA was to consider economic and technological

[Footnote continued from previous page]

the fact that cost and feasibility may be considered in granting a waiver from an emission standard suggests, if anything, that Congress did not intend to forbid those factors in standard setting itself.

Second, NRDC refers to section 112(c)(2), which provides that the President may exempt any source from emission standards "if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security." NRDC reasons that "none of these restrictions on the Presidential exemption would make sense if feasibility considerations were broadly permissible in standard-setting" since "[a]ny situation in which the Presidential exemption might come into play undoubtedly would already have been accommodated during EPA's broader consideration of feasibility when the standard was set." NRDC Br. Reh. at 17. Once again, NRDC's conclusion is a non sequitur. Just because EPA may take feasibility into account in setting emission standards does not at all mean that in every case EPA will adopt a standard that is technologically feasible for every source. In a case where a standard is not feasible for a particular source, section 112(c)(2) allows the President to grant an exemption on the basis of national security.

Third, NRDC refers to section 112(e), which authorizes EPA to promulgate a design, equipment, work practice, or operational standard in lieu of an emission standard "if in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard," e.g., it is not practicable to measure emissions. NRDC argues that the "extreme care" with which Congress defined the term "not feasible" in section 112(e) "would make no sense if EPA were already authorized to consider a more general notion of feasibility when setting standards." NRDC Br. Reh. at 17, 18-19. NRDC reads too much into this provision. Section 112(e) says nothing about what factors can be considered in setting emission standards. Moreover, subsection (e) does "make sense" even though EPA is authorized to consider technological feasibility in setting emission standards. Whether or not an emission standard is technologically feasible, it may not be practicable to measure emissions, in which case EPA may adopt the subsection (e) approach. NRDC's position is completely refuted by the fact that identical authority to promulgate work practice standards exists in section 111(h), 42 U.S.C. § 7411(h), even though Section 111 expressly provides for technology-based standards.

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feasibility. EPA could also prohibit construction of new sources of pollutants that were extremely hazardous to health, as well as grant specific exemptions to such a prohibition. See H.R. 17255, 91st Cong., 2d Sess. § 5(a) (1970); 1970 Leg. Hist. at 195-96 (Conference Report).

The Senate bill contained separate provisions for standards of performance applicable to new stationary sources and for standards applicable to sources of pollutants "hazardous to the health of persons." EPA was directed to publish proposed regulations prohibiting emissions of such pollutants from any existing or new stationary source, unless it found that the pollutant was not hazardous to health or that some amount could be emitted without endangering the health of persons, in which case EPA was to set an "emission standard" for such pollutant. See S. 4358, 91st Cong., 2d Sess. § 6(b) (1970); 1970 Leg. Hist. at 196 (Conference Report). 12/

The conference committee adopted neither the Senate version nor the House version. Rather, the conference substitute required the Administrator to publish a list of hazardous pollutants and to set emission standards "at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant." CAA § 112(b)(1)(B); 1970 Leg. Hist. at 196 (Conference Report). The Conference Report contains no further explanation of the conference substitute. However, in presenting the conference bill to the House, Rep. Staggers stated:

12/ Recognizing that complete control of certain hazardous air pollutants "may not be necessary or practicable," the Senate bill provided EPA with the authority to differentiate among categories of sources in establishing prohibitions. S. Rep. No. 1196, 91st Cong., 2d Sess. 20 (1970), reprinted in 1970 Leg. Hist. at 420.

The conferees have been guided by two principles: to do what is feasible and to do what is reasonable.

The bill passed by the other body incorporated many provisions which had not been included in the bill as passed by the House. The House conferees scrutinized carefully each of these provisions and applied to them the tests of reasonableness and feasibility. On the basis of these two tests, many of these Senate provisions have been revised. [1970 Leg. Hist. at 111.]

NRDC contends that the final legislation follows "the structure and content of the Senate bill," NRDC Br. Reh. at 21, and that, therefore, Congress intended to exclude consideration of cost and feasibility. This is not true. The conference committee abandoned the regulatory approach of the Senate bill--whereby EPA would completely prohibit emissions of hazardous air pollutants unless it found that there was some safe level of emissions--and instead adopted procedures that, as demonstrated at pp. 13-15, supra, give broad discretion to EPA. In the absence of any legislative history supporting its view, NRDC's assertion that Congress intended to prohibit consideration of cost and feasibility is pure speculation. 13/

- b. The 1977 Amendments to the Clean Air Act Reflect Congressional Endorsement of EPA's Approach.

Congress amended and reauthorized the Clean Air Act in

13/ Judge Wright, in his dissenting opinion, acknowledged that cost is a relevant factor in setting standards. "[C]ourts should be reluctant to . . . mandate pointless expenditures of effort," and . . . 'there is likely a basis for an implication of de minimis authority to provide exemption when the burdens of regulation yield a gain of trivial or no value.'" 804 F.2d at 736 (quoting Alabama Power Co. v. Costle, 636 F.2d 323, 360-61 (D.C. Cir. 1979)) (emphasis added).

1977, without changing the "margin of safety" standard in section 112. The 1977 Amendments reflect congressional recognition that cost and feasibility factors play an inevitable role in the regulation of air pollutants.

As discussed at p. 12, supra, Congress concluded in 1977 that economic, social, and feasibility factors may dictate tolerating some risk associated with non-threshold pollutants under section 109 of the Act. Because Congress recognized that these factors affect a decision whether to prohibit all emissions of non-threshold pollutants for purposes of the ambient air quality standards, it just as surely recognized that the same factors play a justifiable role in setting emission standards for non-threshold hazardous air pollutants.

Moreover, the 1977 Amendments implicitly ratified EPA's interpretation of section 112 by reauthorizing that section without altering the Agency's construction. Deference to an agency's interpretation of a statute it administers is particularly appropriate where the interpretation "involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." United States v. Rutherford, 442 U.S. 544, 554 (1979). In addition,

once an agency's statutory construction has been "fully brought to the attention of the public and the Congress," and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." [Id. at n.10 (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 487-89 (1940)).]

Here, prior to the 1977 Amendments, EPA had published in the Federal Register a proposed emission standard and a final

emission standard for vinyl chloride. 40 Fed. Reg. 59,532 (Dec. 24, 1975) (JA 2); 41 Fed. Reg. 46,560 (Oct. 21, 1976) (JA 23). The preambles to these notices clearly articulated that the vinyl chloride standard reduced emissions "to the level attainable with the best available technology" and that, while "section 112 does not explicitly provide for consideration of costs," EPA could take costs into account for the limited purpose of "assur[ing] that the costs of control technology are not grossly disproportionate to the amount of emission reduction achieved." Id. at 46,560, 46,562 (JA 23, 25). 14/

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978). That presumption should be even stronger where the agency has published its interpretation in the Federal Register. See Kirkhuff v. Nimmo, 683 F.2d 544, 550 (D.C. Cir. 1982) (citing publication of an agency interpretation in the Federal Register in support of a finding that Congress had ratified that interpretation by failing to change it). 15/ Here, Congress'

14/ EPA had also published in the Federal Register a revision to the emission standard for the carcinogen asbestos, which made it clear that the standard reflected "the best available emission control methods." 40 Fed. Reg. 48,295 (Oct. 14, 1975). See National Ass'n of Demolition Contractors, Inc. v. Costle, 565 F.2d 748 (D.C. Cir. 1977).

15/ As noted in Kirkhuff, 683 F.2d at 550 n.8, "'appearance of rules and regulations in the Federal Register gives legal notice of their contents,'" quoting Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947). See also 44 U.S.C. § 1507; United States v. Sun & Sand Imports, Ltd., Inc., 725 F.2d 184, 187 n.3 (2d Cir. 1984); Bennett v. Director, Office of Workers' Compensation, 717 F.2d 1167, 1169 (7th Cir. 1983).

reenactment of the "margin of safety" standard in section 112 in the face of EPA's clearly articulated interpretation of that standard constitutes implicit ratification of that interpretation.

Yet, it is not necessary to presume congressional awareness of EPA's interpretation since actual knowledge is reflected in the legislative history of the 1977 Amendments. In 1976, both houses of Congress passed bills to amend the Clean Air Act. The House version contained a provision that would have required EPA to promulgate standards for four pollutants, including vinyl chloride. H.R. 10498, 94th Cong., 2d Sess. § 101(a) (1976). The House Report explained that despite EPA's existing proposal to regulate vinyl chloride, "[v]inyl chlorides continue to be mentioned in the bill to emphasize the committee's concern that the standards be promulgated without delay." H.R. Rep. No. 1175, 94th Cong., 2d Sess. 23-24 (1976), reprinted in 1977 Leg. Hist. at 6572-73. The Conference Committee adopted the House provision, see H.R. Rep. No. 1742, 94th Cong., 2d Sess. 25-26 (1976), reprinted in 1977 Leg. Hist. at 4311-4312, but the threat of a filibuster prevented final enactment.

In 1977, after EPA had promulgated the final rule establishing a vinyl chloride emission standard, both houses reintroduced legislation to amend the Clean Air Act. The House bill contained a provision "nearly identical" to section 101 of the 1976 House bill, except that vinyl chloride was deleted from the list of pollutants required to be regulated and radionuclides were included. H.R. Rep. No. 294 at 3, reprinted in 1977 Leg. Hist. at 2470. The House explained that vinyl chloride was deleted because "[d]uring the past year the Administrator promulgated final regulations for

the control of vinyl chloride." Id. This provision passed the House and was adopted in relevant part at conference, see H.R. Rep. No. 564, 95th Cong., 1st Sess. 141-42 (1977), reprinted in 1977 Leg. Hist. at 521-22, then was enacted into law as section 122 of the Clean Air Act, 42 U.S.C. § 7422.

The foregoing legislative history clearly demonstrates that Congress had actual knowledge of the vinyl chloride standard when it enacted the 1977 Amendments. 16/ This standard was plainly based on EPA's view that section 112 permitted consideration of cost and feasibility in setting emissions standards for non-threshold pollutants. Accordingly, Congress' reenactment of section 112 constituted ratification of EPA's interpretation. 17/

C. EPA's Interpretation of Section 112 Is Consistent with the Applicable Case Law.

The relevant case law allows consideration of cost and feasibility in setting emission standards under section 112.

16/ Congress also had actual knowledge of EPA's asbestos standard. In explaining the addition of subsection (e) to section 112, the Senate stated that "[t]his limited provision would fully authorize the present EPA regulations governing asbestos." S. Rep. No. 127, 95th Cong., 1st Sess. 44 (1977), reprinted in 1977 Leg. Hist. at 1418. See note 14, supra.

17/ The panel majority gave only "modest weight" to Congress' failure to repudiate EPA's interpretation of section 112 because the majority felt that the House's awareness of the vinyl chloride standard could not confidently be attributed to the entire Congress and it was not clear whether the House had examined the content of the vinyl chloride standard or the theory or level of the controls imposed. 804 F.2d at 721. In our view, the majority's approach gives insufficient weight to the publication of two separate Federal Register notices explaining EPA's interpretation of section 112. Moreover, the House's actual awareness can confidently be attributed to the Senate since the Senate passed the conference version of section 122 of the Clean Air Act, which was supported by the House Report that specifically explained the reason for deleting vinyl chloride from the list of pollutants required to be regulated.

In National Ass'n of Demolition Contractors, Inc. v. Costle, 565 F.2d 748 (D.C. Cir. 1977), this Court affirmed EPA's consideration of technological feasibility in revising the emission standard for asbestos under section 112. Specifically, EPA had adopted different requirements for controlling asbestos emissions during demolition, based upon best available control methods at different temperatures. The petitioner, NADC, challenged EPA's approach on the basis that asbestos emissions do not vary with temperature and therefore what was "an ample margin of safety" at subfreezing temperatures was necessarily an "ample margin of safety" at temperatures above freezing. This Court rejected NADC's challenge and expressly affirmed EPA's reliance on control technology:

Protection of the public with "an ample margin of safety" may necessitate use of different control measures, including use of the "best available control methods," in different conditions Under the circumstances, the Administrator's choice to employ alternative methods was well within the bounds of his discretion. [565 F.2d at 753.]

Thus, this Court has held that feasibility is a relevant factor in establishing a margin of safety under section 112.

The cases relied on by NRDC do not require a contrary result. In Union Electric Co. v. EPA, 427 U.S. 246 (1976), the Supreme Court reviewed a claim that EPA was required to consider economic and technological feasibility in reviewing state implementation plans ("SIPs") under section 110(a)(2) of the Clean Air Act, 42 U.S.C. § 7410(a)(2). The Court held that "the language of § 110(a)(2)(B) provides no basis for the Administrator ever to reject a state implementation plan on the ground that it is economically or technologically infeasible." 427 U.S. at 265.

Union Electric is different from this case for two important reasons. First, the statutory mandate in section 110(a)(2) is quite different from that in section 112. As the Court stated:

[Section 110(a)(2)] sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified, and none of the eight factors appears to permit consideration of technological or economic infeasibility. [427 U.S. at 257 (citation omitted).]

In sharp contrast to the specific criteria set forth in section 110(a)(2), section 112 does not command the Administrator to take a particular action if he makes particular findings, but instead defers to the "judgment of the Administrator" for determination of an ample margin of safety.

Second, the Supreme Court went out of its way in Union Electric to explain that it did "not hold that claims of infeasibility are never of relevance in the formulation of an implementation plan," 427 U.S. at 266, and to discuss the "ample opportunity for consideration of claims of technological and economic infeasibility." Id. at 268. Specifically, the Court explained that economic and technological feasibility can be considered by the state agency formulating a SIP, since, so long as the national standards are met, "the State may select whatever mix of control devices it desires, and industries with particular economic or technological problems may seek special treatment in the plan itself." Id. at 266 (citation omitted). The Court further explained that if an

industry is not adequately protected by a SIP, it can seek a variance from the state and, if unsuccessful, "take its claims of economic or technological infeasibility to the state courts." Id. at 266-67. Thus, the Court recognized that feasibility can be fully considered before controls are imposed under section 110. It is entirely consistent to hold that feasibility may also be considered in setting standards under section 112. 18/

EPA's discretion to consider cost and feasibility under section 112 is also consistent with this Court's prior decisions cited by NRDC. In Hercules Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978), petitioner challenged EPA regulations limiting discharges of toxic pollutants under section 307 of the Clean Water Act, 33 U.S.C. § 1317, on the grounds that EPA had failed to consider economic and technological feasibility. Section 307(a)(4) provides that effluent standards shall be set "at that level which the Administrator determines provides an ample margin of safety." The

18/ The other Supreme Court case relied on by NRDC is also inapposite. In American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 510 (1981), the Court stated: "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." EPA, however, has not engaged in cost-benefit analysis here. "Cost-benefit analysis means weighing the marginal gain against the marginal cost of each increment of further regulation and then setting the level of regulation at the point at which the latter exceeds the former." 804 F.2d at 727. Here, to the extent EPA considers costs at all, it is only to ensure that costs are not grossly disproportionate to benefits and then only if public health is nevertheless protected. In fact, EPA specifically rejected a cost-benefit approach in promulgating the vinyl chloride standard. See 41 Fed. Reg. 46,562 (Oct. 21, 1976) (JA 25). Nor does consideration of feasibility necessarily entail cost-benefit analysis. See American Textile, 452 U.S. at 509 ("cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is").

Court agreed with EPA's interpretation that section 307 did not require the Agency to consider cost and feasibility factors.

Hercules is easily distinguishable. First, the Court's decision was based principally on the ground that section 307(a)(2) enumerated six specific factors to be taken into account in setting standards for toxic water pollutants, none of which involved economic or technological criteria. 598 F.2d at 111. No comparable criteria appear in section 112. Moreover, Hercules merely held that section 307 does not require consideration of economic and technological factors. Indeed, the Court specifically acquiesced in EPA's consideration of feasibility in a manner strikingly similar to that adopted by the Agency under section 112. EPA had explained its approach under section 307 as follows:

[T]he statutory "ample margin" concept is an elastic one which . . . allows for considerable exercise of judgment by the Administrator in setting the standards. In any case where a discharge is allowed, on the spectrum ranging from certain safety (a prohibition) to that uncertain point where harmful effects are caused and safety ends, a logical break point is struck where the very best that control technology can do is required. [598 F.2d at 114 n.45 (quoting 42 Fed. Reg. 2597).]

The Court held: "[T]he fact that EPA considered evidence about feasibility does not require that the regulations be vacated." Id. at 114. 19/

19/ Hercules also contains dicta noting similarities between the Clean Water Act and the Clean Air Act and stating that "Congress enacted section 112 . . . without provision for

[Footnote continued on next page]

Finally, we turn to Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980), in which the Court rejected a claim that EPA is required to consider economic impact and technological feasibility in prescribing national primary air quality standards under section 109 of the Act. NRDC asserts that Lead Industries means that EPA is prohibited from considering cost and technology in setting emission standards under section 112. NRDC Br. Reh. at 10-12.

Several factors distinguish Lead Industries. First, the only issue before the Court in Lead Industries was whether EPA was required to consider economic and technological feasibility. While there is concededly substantial dicta in Lead Industries relating to whether EPA had the authority to consider economic and technological factors, that discussion nevertheless did not address the question presented and briefed in this case, and remains dicta.

Second, as discussed at pp. 24-25, supra, in the context of Union Electric, economic and technological feasibility may be

[Footnote continued from previous page]

considerations of feasibility." Id. at 112. As the panel majority in the present case stated: "We may accept the health-based/technology-based distinction put forth by the Hercules court and still accept the EPA's use of economic and technological feasibility in standard setting under section 112. Health, not technology, is both the starting point and the overriding consideration under the EPA's construction of section 112. The EPA must set its standard at a level which eliminates known adverse health effects of the hazardous substance. It is only when those health effects become unknowable that the EPA turns to economic and technological feasibility to decide the level of emissions to permit. We do not think that this incidental consideration of non-health factors makes the withdrawal of the proposed standards pursuant to the EPA's construction of section 112 technology-based, rather than health-based." 804 F.2d at 726.

considered at a number of junctures before controls are set under the ambient air quality program. See Lead Industries, 647 F.2d at 1149 n.37. Section 112, however, collapses all stages of the ambient air quality program into a single regulatory action by EPA. Therefore, it is consistent to allow cost and feasibility factors similarly to be considered before emission controls are imposed under the hazardous air pollutant program.

Third, the court in Lead Industries found that the statutory structure and legislative history of section 109 were adverse to consideration of cost and feasibility. The statutory structure and legislative history of section 112, on the other hand, reflect EPA's broad discretion in setting emission standards. See pp. 13-18, supra. This is not surprising, given the different processes by which 109 and 112 standards are implemented.

Fourth, with respect to pollutants regulated under section 109, EPA has been able to identify ambient air quality levels at which public health is not significantly threatened. Most pollutants regulated under section 112, on the other hand, lack known or theoretical thresholds. As discussed at pp. 3-9, supra, a reasonable method of determining a "margin of safety" for such non-threshold pollutants includes limited consideration of cost and feasibility.

The Lead Industries court stated that Congress deliberately intended to subordinate concerns about economic and technological feasibility to the achievement of health goals. 647 F.2d at 1149. That, in fact, is what EPA has done in setting emission standards for hazardous air pollutants by giving primary consideration to

health risk factors and secondary consideration to cost and feasibility factors. Thus, neither Lead Industries nor any of the other cases relied on by NRDC precludes EPA from considering cost and feasibility in setting emission standards under section 112. 20/

D. EPA's Interpretation of Section 112 Is Reasonable and Therefore Entitled to Deference by this Court.

As we have shown, Congress gave EPA broad discretion to implement section 112 but did not expressly address what role cost and feasibility factors should play. However, the structure and legislative history of the Act are consistent with EPA's limited consideration of cost and feasibility under section 112. EPA has adopted a conservative, health-protective approach to setting emission standards under section 112. EPA presumes that, in the absence of an identifiable threshold, a carcinogen poses some risk at any exposure level above zero. At the same time, EPA's interpretation of section 112 as allowing limited consideration of cost and feasibility recognizes that Congress clearly did not intend to eliminate all emissions of hazardous air pollutants.

Against this statutory and policy backdrop, EPA's reading of section 112 is eminently reasonable. When dealing with non-threshold pollutants, it makes sense to consider cost and feasibility to set a precise standard after health risk-

20/ If the Court concludes that Lead Industries cannot be distinguished, EPA respectfully requests that the decision be overruled to the extent that it purportedly holds that EPA is not permitted to consider cost and technological feasibility under section 112.

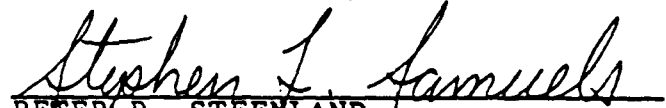
Related factors have been given primary consideration in arriving at a range of acceptable exposure levels. Also, in contrast to the statutory and regulatory procedures under section 109 of the Act--where cost and feasibility considerations are factored in through the formulation and administration of state implementation plans, see Union Electric Co. v. EPA, 427 U.S. at 266-68--there is no separate mechanism under section 112 for ensuring that emission standards are rational and achievable. EPA's approach to section 112 is both rational and solidly anchored in congressional intent. Accordingly, EPA's interpretation must be followed by a reviewing court. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).

CONCLUSION

For the foregoing reasons, EPA's interpretation of section 112 of the Clean Air Act as permitting consideration of cost and technological feasibility should be affirmed and the petition for review should be denied.

Respectfully submitted,

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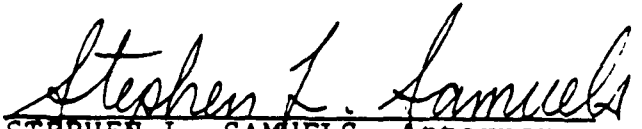
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