(Scheduled for Oral Argument *en banc* April 29, 1987)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1150

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al*.,

Respondents.

Petition for Review of an Action of the
Environmental Protection Agency

SUPPLEMENTAL BRIEF ON REHEARING OF THE CHEMICAL MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF ON REHEARING OF
THE CHEMICAL MANUFACTURERS ASSOCIATION
AS AMICUS CURIAE

QUESTION PRESENTED

Is Section 112 of the Clean Air Act a zero-risk statute that requires EPA to completely prohibit all emissions of any pollutant for which a health effects threshold cannot clearly be defined (*i.e.*, an "apparent nonthreshold pollutant"), or does it permit the EPA Administrator to give limited consideration to feasibility in setting an emission standard which, in his judgment, provides an "ample margin of safety" by eliminating significant risks to public health?

STATEMENT OF THE CASE

Section 112 of the Clean Air Act, 42 U.S.C. § 7412 (1982) (the "Act") directs the Administrator of EPA to establish emission standards for hazardous air pollutants "at the level which in his judgment provides an ample margin of safety to protect the public health." In this case, petitioner Natural Resources Defense Council, Inc. ("NRDC") asks the Court to construe Section 112 as a zero-risk statute that precludes EPA from considering feasibility in any manner whatsoever. If adopted, this interpretation would overturn more than 15 years of administrative practice and could produce social and economic dislocations that Congress never intended.

In regulating apparent nonthreshold pollutants, EPA has consistently treated public health protection as the paramount consideration. Feasibility and related factors have played a limited, secondary role. As described in the Joint Brief of the American Petroleum Institute and the Chemical Manufacturers Association as Amicus Curiae, filed in this case on August 19, 1985 ("API-CMA 1985 Brief"), EPA's primary emphasis on public health protection is manifested in a number of ways, including the following:

- EPA presumes that there is no health effects threshold for carcinogens like vinyl chloride, even though cancer has not been shown to result from low level exposures to these pollutants.[1]

- EPA applies extremely conservative assumptions and methodologies in estimating population exposures to

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[1] See API-CMA 1985 Brief at 4-6, 8-9.

hazardous air pollutants and the potential public health risks presented by such exposures.[2/]

- In regulating apparent nonthreshold pollutants, EPA sets standards that reduce exposures below the levels at which adverse health effects are known to occur and that provide an "ample margin of safety" by eliminating significant risks to public health.[3/]

- EPA does _not_ treat feasibility as a _floor_ below which Section 112 standards will not be set. Rather, if the Agency determines that a significant risk to public health would remain even after all feasible controls are implemented, it may ban a product or activity that would result in emissions of the pollutant.[4/]

Thus, EPA treats public health protection as the "paramount" consideration in setting Section 112 standards.[5/] At the same time, however, when regulating at exposure levels where the existence of adverse health effects is uncertain, the Administrator gives limited consideration to feasibility and related factors in setting standards designed to eliminate significant risks.[6/] The question to be decided in this case is whether

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2/ _See id._ at 6.

3/ _See id._ at 7-8. For example, EPA's vinyl chloride standard reduces ambient concentrations of vinyl chloride to levels far below those at which adverse health effects have been demonstrated. _See id._ at 8-9.

4/ _See id._ at 6-7.

5/ _See id._ at 3-4.

6/ Among the factors considered in such cases are (i) the technology that is (or can be expected to be) available to reduce

[Footnote continued next page]

EPA's approach is reasonable, given the fact that Congress has neither mandated the promulgation of zero-risk standards under Section 112 nor provided specific guidance regarding the factors that EPA may consider in setting "ample margin of safety" standards for apparent nonthreshold pollutants.

SUMMARY OF ARGUMENT

In this case, the Court is asked to review EPA's interpretation of Section 112 of the Clean Air Act as applied to the regulation of apparent nonthreshold pollutants. Two basic questions are presented.

First, does Section 112 express a clear congressional mandate for EPA, in all cases, to set zero-risk standards that guarantee absolute safety by completely prohibiting all emissions of apparent nonthreshold pollutants, regardless of the consequences? The answer given to this question by all members of the panel in this case was "No."[7/] This is not surprising, since, as

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emissions of the pollutant from various source categories, (ii) the degree of emission (and associated risk) reduction that would result from the imposition of alternative controls, (iii) the cost of such controls, (iv) the overall population risk and the risk to the most exposed individuals that would exist under various control options, and (v) the potential risks that might be associated with alternative standards or the use of substitute products or materials. See id. at 7-10.

7/ Thus, even Judge Wright's dissent rejects a zero-risk interpretation of Section 112. See p. 17 & n.33, infra.

discussed in Part I of the Argument, the statutory language and legislative history clearly support an interpretation of Section 112 under which EPA has authority to set non-zero standards for apparent nonthreshold pollutants, as long as the standards, in the judgment of the Administrator, provide an "ample margin of safety" by eliminating significant risks to public health.

This raises the second question: Has EPA reasonably interpreted Section 112 as authorizing the Administrator to give limited consideration to feasibility in exercising his judgment to determine what level of emissions of an apparent nonthreshold pollutant is consistent with the elimination of significant risks? As shown in Part II of the Argument, Congress did not specifically address the question of how EPA should set Section 112 standards for apparent nonthreshold pollutants. It did not require zero-risk/zero-emissions standards, and it did not express a clear intent to preclude any consideration of feasibility whatsoever.

In these circumstances, EPA's decision to consider feasibility as a limited, secondary factor in deciding whether a Section 112 standard for an apparent nonthreshold pollutant eliminates significant risks to public health is perfectly reasonable and, under the principles articulated in <u>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</u>, 467 U.S. 837 (1984), should be respected by the Court.

ARGUMENT

Under Section 112, standards for hazardous air pollutants are to be set by the EPA Administrator "at the level which in his judgment provides an ample margin of safety to protect the public health." 42 U.S.C. § 7412(b)(1)(B) (1982). Placing the most extreme and absolute construction on this provision, NRDC asserts that in promulgating national emission standards under Section 112, EPA may not, in any circumstances, consider feasibility and related factors in any manner whatsoever. Instead, according to NRDC, Section 112 standards must completely eliminate all risk to public health, which means that there can be "no measurable emissions" of an apparent nonthreshold pollutant from any stationary source.8/

The first and most fundamental question that this Court must decide, then, is whether Section 112 is a zero-risk statute which requires EPA to adopt standards that guarantee absolute safety in all cases, regardless of the consequences. In deciding this question, the Court should be aware of the radical implications of NRDC's position.

8/ *See* Brief for Petitioner on Rehearing ("NRDC Br.") at 5, 26 n.47, 27 n.50. *See also id.* at 15 (arguing that there is no scope for the exercise of the Administrator's judgment in establishing an "ample margin of safety" for apparent nonthreshold pollutants).

With the single exception of mercury, every substance that EPA has regulated (or expressed an intent to regulate) under Section 112 is an apparent nonthreshold carcinogen.[9/] The application of zero-risk/zero-emissions standards to these substances (and to the more than 100 other compounds that have been identified as potential carcinogens)[10/] could have drastic social and economic consequences.

For example, EPA has listed radionuclides, an apparent nonthreshold carcinogen, as a hazardous air pollutant and has identified coal-fired utility and industrial boilers as sources of radionuclide emissions. Although emissions of radionuclides from coal-fired boilers already are controlled to a significant extent under other regulatory programs, radionuclide emissions

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9/ The seven substances in addition to mercury that EPA has listed as hazardous air pollutants (asbestos, benzene, beryllium, coke oven emissions, inorganic arsenic, radionuclides, and vinyl chloride), see 40 C.F.R. § 61.01(a) (1986), are all deemed to be carcinogens. The same is true of the nine compounds that EPA has expressed an intent to list under Section 112. See 50 Fed. Reg. 24317 (June 10, 1985) (chromium); 50 Fed. Reg. 32621 (August 13, 1985) (carbon tetrachloride); 50 Fed. Reg. 39626 (September 27, 1985) (chloroform); 50 Fed. Reg. 40286 (October 2, 1985) (ethylene oxide); 50 Fed. Reg. 41466 (October 10, 1985) (1,3-butadiene); 50 Fed. Reg. 41994 (October 16, 1985) (ethylene dichloride); 50 Fed. Reg. 42000 (October 16, 1985) (cadmium); 50 Fed. Reg. 52422 (December 23, 1985) (trichloroethylene); 50 Fed. Reg. 52880 (December 26, 1985) (perchloroethylene).

10/ The National Toxicology Program has identified more than 140 substances or groups of substances that are either known or may reasonably be anticipated to be carcinogenic. See U.S. Department of Health and Human Services, National Toxicology Program, Fourth Annual Report on Carcinogens (Summary, 1985).

from the combustion of coal cannot be eliminated entirely. Consequently, requiring a zero-risk/zero-emissions standard for radionuclides emitted from coal-fired boilers would force the closure of all coal-fired utility boilers (which produce one-half of the electric power generated in the United States) and the removal from service of more than 50,000 industrial boilers (used in virtually every industry in the country).11/

Similarly, as pointed out in the brief filed today by the American Iron and Steel Institute as Amicus Curiae, a zero-emissions standard applied to benzene and coke oven emissions in the steel industry would make it impossible to continue operating coke ovens and coke by-product recovery plants, thus forcing most major iron and steel making operations in the United States to close. By the same token, it would not be possible to comply with a zero-emissions benzene standard at petroleum refineries and chemical manufacturing plants where benzene is produced or used, thus leading to the closure of those operations as well.

More generally, as EPA recognized more than eight years ago:

> A requirement that the risk from atmospheric carcinogen emissions be reduced to zero would produce massive social dislocations, given the pervasiveness of at least

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11/ See Brief for Intervenor Chemical Manufacturers Association in No. 84-1524 and Consolidated Cases, D.C. Cir., filed January 13, 1986, at 15, 26.

minimal levels of carcinogenic emissions in key American industries. Since few such industries could soon operate in compliance with zero-emission standards, closure would be the only legal alternative. Among the important activities affected would be the generation of electricity from either coal-burning or nuclear energy; the manufacturing of steel; the mining, smelting, or refining of virtually any mineral (e.g., copper, iron, lead, zinc, and limestone); the manufacture of synthetic organic chemicals; and the refining, storage, or dispensing of any petroleum product.[12/]

A congressional intention to require regulatory action having consequences of this magnitude should not be presumed lightly. Rather, to paraphrase the Supreme Court: "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give . . . [EPA] the unprecedented power over American industry" that would result from NRDC's sweeping construction of the statute.[13/] Because Section 112 does not express any such clear mandate, NRDC's extreme position must be rejected.[14/]

12/ Proposed Airborne Carcinogen Policy, 44 Fed. Reg. 58642, 58660, cols. 2-3 (October 10, 1979).

13/ *See Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645 (1980).

14/ NRDC's position also should be rejected because the "sweeping delegation of legislative power" that it implies would raise constitutional questions that can be avoided by a less extreme interpretation. *Cf. id.* at 646.

NRDC suggests that the Court should feel free to place the most extreme and inflexible construction on Section 112,

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I. Rather than Requiring Absolute Safety, Congress Authorized EPA To Give Limited Consideration to Feasibility in Setting Section 112 Standards that Eliminate Significant Risks to Public Health.

To read NRDC's brief, one would assume that Section 112, like certain other federal statutes,[15/] expresses a clear zero-risk philosophy and mandates the imposition of inflexible requirements and prohibitions designed to achieve absolute safety, regardless of the consequences. In fact, however, Section 112 does not speak of "prohibiting" emissions of hazardous air pollutants. Instead, it directs the Administrator of EPA

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without regard to the consequences, because Congress always retains the power to amend a statute where necessary to prevent unacceptable social and economic dislocation. See NRDC Br. at 27-30. This suggestion displays a rather naive conception of the legislative process. Amending a statute like the Clean Air Act, which has such a broad impact and whose provisions reflect careful compromises of competing interests, is a long and difficult process. More importantly, the possibility (whether or not remote) that Congress could overturn an extreme judicial construction of a statute through the legislative process is no reason to ignore the consequences of such a construction in determining what Congress intended when it enacted the statute. Congress should not be presumed to have intended a statutory construction that produces absurd or irrational results. Cf. National Treasury Employees Union v. Devine, 733 F.2d 114, 120 (D.C. Cir. 1984); Commonwealth of Puerto Rico v. Blumenthal, 642 F.2d 622, 626 n.5 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981).

15/ For example, the Delaney Clause of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 348(c)(3)(A) (1982), provides simply and unequivocally that "no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal."

to "prescribe an emission standard" -- i.e., a requirement which "limits" emissions. 42 U.S.C. § 7602(k) (1982). And it instructs the Administrator to establish this emissions limit "at the level which in his judgment provides an ample margin of safety to protect the public health."16/

As the Supreme Court explained in the OSHA Benzene case, the term "safe" does not imply zero risk; instead, it contemplates regulatory action only when there is a "significant risk of harm."17/ Accordingly, while Section 112 standards must

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16/ 42 U.S.C. § 7412(b)(1)(B) (1982) (emphasis added). NRDC claims that there is no scope for the exercise of the Administrator's "judgment" in establishing an "ample margin of safety" for an apparent nonthreshold pollutant, presumably because, in NRDC's view, the standard must be set at zero. See NRDC Br. at 15. Since every substance other than mercury that EPA has listed (or expressed an intent to list) under Section 112 is an apparent nonthreshold pollutant (see p. 7 n.9, supra), NRDC's interpretation would, as a practical matter, preclude the Administrator from exercising his judgment in determining an "ample margin of safety" for any of the pollutants that are to be regulated under Section 112.

17/ See Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. at 639-40 & n.45, 641-42. NRDC suggests that the Supreme Court's decision in the OSHA Benzene case need not be taken seriously, because it was a plurality opinion. See Reply Brief for Petitioner, September 3, 1985, at 11 n.29. In fact, however, both the Supreme Court and the agency involved (OSHA) have treated the plurality's interpretation of the Occupational Safety and Health Act as the definitive construction of that statute. See American Textile Manufacturers Institute v. Donovan, 452 U.S. 490, 505 n.25 (1981); Occupational Exposure to Benzene, 50 Fed. Reg. 50512, 50514, cols. 1-2 (December 10, 1985). This Court, too, has applied the significant risk test in reviewing occupational health standards in the wake of the OSHA Benzene case. See United Steelworkers of America v. Marshall, 647 F.2d 1189, 1245-51 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981).

provide an "ample margin of safety," they need not prohibit all emissions of apparent nonthreshold pollutants in an effort to achieve zero risk.[18/]

The legislative history, like the statutory language of Section 112, suggests a congressional expectation that EPA will take a more reasonable and practical approach to regulating hazardous air pollutants than NRDC would have this Court believe.

As NRDC points out, Section 115 of S.4358, the Senate bill from which NRDC claims Section 112 was largely derived, spoke in terms of prohibiting emissions of hazardous air pollutants.[19/] But even that provision would not have required EPA to prohibit emissions entirely without any consideration of the consequences of such action.[20/] In any event, Section 115 of

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18/ These points are discussed in more detail at pages 17-22 of the API-CMA 1985 Brief, which shows that this Court, too, has approved a "significant risk" test for regulation under the Clean Air Act. See id. at 32 n.61, citing Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976). Indeed, even under the apparently all-encompassing language of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(s) (1982), this Court has held that the FDA has discretion to refrain from regulating a substance as a food additive when it makes a finding of insignificance. See Monsanto Co. v. Kennedy, 613 F.2d 947, 955 (D.C. Cir. 1979); cf. Scott v. FDA, 728 F.2d 322, 324-325 (6th Cir. 1984) (holding that FDA has discretion to find a color additive containing a carcinogenic constituent to be "safe," as long as the agency determines that use of the additive would not create an unreasonable risk of harm).

19/ See NRDC Br. at 20.

20/ Thus, the Senate Committee on Public Works indicated that emission prohibitions were not to be required for source

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the Senate bill was not adopted. In place of Section 115's prohibition on emissions of hazardous air pollutants, the Conference Committee substituted the present scheme, calling for the adoption of "emission standards" that reflect EPA's "judgment" regarding the existence of an "ample margin of safety." In so doing, the Conference Committee "changed" "the thrust of . . . the Senate bill"[21/] in an effort "to do what is feasible and to do what is reasonable."[22/]

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categories where "complete control . . . may not be necessary or practicable." S. Rep. No. 1196, 91st Cong., 2d Sess. 20 (1970), reprinted in A Legislative History of the Clean Air Act Amendments of 1970, Senate Comm. on Public Works, 93d Cong., 2d Sess. 420 (Comm. Print 1974) (hereinafter referred to as "1970 Leg. Hist.") (emphasis added). NRDC suggests that this statement was intended to indicate only that complete control would not be necessary for pollutants believed to have a health effects threshold. See NRDC Br. at 26 n.47. While this could explain the word "necessary," it does not explain the word "practicable." Obviously, the Senate Committee contemplated that emissions of a hazardous pollutant would not have to be prohibited (even though that might be "necessary" in order to provide absolute safety), if it would not be "practicable" to do so.

21/ Statement of Senator Spong, one of the Senate Conferees, in Senate Consideration of the Report of the Conference Committee (December 18, 1970), 1970 Leg. Hist. at 146.

22/ Statement of Congressman Staggers in House Consideration of the Report of the Conference Committee (December 18, 1970), 1970 Leg. Hist. at 111.

Even Judge Wright's dissent from the panel opinion in this case concedes that the substitution of "ample margin of safety" standards for emission prohibitions in the Conference Committee supports the hypothesis that the Administrator was being given authority "to consider feasibility in setting emission standards." See Natural Resources Defense Council, Inc. v.

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By the same token, in later deliberations relating to the Clean Air Act Amendments of 1977, Congress gave every indication that it endorsed the flexible, non-zero approach that EPA had been taking in the regulation of apparent nonthreshold pollutants.23/

For example, when it promulgated the asbestos standard in 1973, EPA explicitly considered and rejected "the possibility

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U.S. EPA, 804 F.2d 710, 734 (D.C. Cir. 1986), vacated and scheduled for rehearing en banc by order dated January 28, 1987 (hereinafter referred to as "Vinyl Chloride"). Judge Wright believed such a hypothesis was belied by the simultaneous insertion of Section 112(c)(2), the presidential waiver provision. See id. However, as discussed at page 20 below, Judge Wright is incorrect in asserting that Section 112(c)(2) would be "unnecessary unless the 'ample margin of safety' language otherwise bars consideration of available technology." Id.

While a statement by Senator Muskie indicates his understanding that in some cases, Section 112 standards might require the closing of "a plant" or the allowance of "no measurable emissions" (see NRDC Br. at 25), this is a far cry from a congressional mandate that zero-risk/zero-emissions standards must be promulgated for apparent nonthreshold pollutants in all cases. There is a big difference between the possible closure of a plant and the closure of entire industries. Indeed, perhaps the most striking thing about the legislative history of the 1970 Clear Air Act Amendments is the absence of any discussion of broad scale, industry-wide closure. Surely Congress would not have enacted a requirement that it expected would have such drastic consequences without extensive and explicit discussion of the matter.

The 1970 Legislative History is discussed in greater detail at pages 22-27 of the API-CMA 1985 Brief.

23/ See API-CMA 1985 Brief at 27-32.

of banning production, processing, and use of asbestos or banning all emissions of asbestos into the atmosphere . . . ."24/ Yet, in discussing the Clean Air Act Amendments of 1977, the Senate Environment and Public Works Committee stated explicitly that new Section 112(e) of the Act, 42 U.S.C. § 7412(e) (1982), "would fully authorize the present EPA regulations governing asbestos,"25/ even though Committee members were aware that asbestos is an apparent nonthreshold pollutant.26/

This is important, since, as NRDC observes, standards promulgated under Section 112(e) are required to provide "an ample margin of safety," just like standards promulgated under Section 112(b)(1)(B).27/ Consequently, the Senate Committee's declaration that Section 112(e) "would fully authorize" EPA's asbestos standard (even though that standard did not ban all emissions of asbestos) demonstrates a congressional understanding that non-zero Section 112 standards for apparent nonthreshold pollutants are consistent with an "ample margin of safety."

24/ *See* 38 Fed. Reg. 8820, col. 2 (April 6, 1973).

25/ *See* S. Rep. No. 127, 95th Cong., 1st Sess. 44 (1977), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1977, Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess. 1418 (Comm. Print 1978) (hereinafter referred to as "1977 Leg. Hist.").

26/ *See* Statement of Senator Muskie in Senate debate on S.252 (June 8, 1977), 1977 Leg. Hist. at 740.

27/ *See* NRDC Br. at 18 & n.30.

Similarly, in its 1976 deliberations on amendments to the Clean Air Act, the House Committee on Interstate and Foreign Commerce expressly recognized that vinyl chloride is carcinogenic and that no safe level of exposure could be defined for the substance. Yet, rather than suggesting that a zero-emissions standard was needed, the Committee urged EPA to promulgate without delay the vinyl chloride standard it had proposed in December 1975,[28/] even though that proposal expressly rejected a zero-risk/zero-emissions requirement in favor of limited consideration of feasibility.[29/]

In these and other respects, Congress, at the time of the 1977 Amendments, made clear its understanding that a "no-risk philosophy" is "impractical," and, if adopted, would turn the "margin of safety concept" into an "illusion."[30/] At the same time, Congress took steps to reassert its expectation that EPA would exercise "a substantial element of judgment" in setting standards under Section 112 and, in the process, stated its intent to apply a "significant risk" test "to all . . . sections of the act relating to public health protection."[31/]

28/ *See* H.R. Rep. No. 1175, 94th Cong., 2d Sess. 23-24 (1976), 1977 Leg. Hist. at 6572-73.

29/ *See* Proposed Vinyl Chloride Standards, 40 Fed. Reg. 59532, 59534, cols. 2-3 (December 24, 1975).

30/ *See* API-CMA 1985 Brief at 31.

31/ *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 47-49, 1977 Leg. Hist. at 2514-2516. The fact that Congress amended the

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In sum, the statutory language and legislative history of Section 112 fully support an interpretation under which the Administrator has authority to set non-zero standards for apparent nonthreshold pollutants, as long as the standards eliminate "significant risks" to public health.[32/] This "significant risk" interpretation of Section 112 does not appear to be subject to judicial controversy.[33/] The only real question, then, is

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Clean Air Act (including Section 112) in a variety of respects in 1977 without making any pertinent change in the standard-setting provision of Section 112(b)(1)(B) "is persuasive evidence that the interpretation [that EPA had placed on that provision] is the one intended by Congress." See NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974). Accord, Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245, 3255 (1986). This is particularly true since, as discussed above, EPA's application of Section 112 to apparent nonthreshold pollutants had been "fully brought to the attention of . . . Congress" in the form of the asbestos and vinyl chloride standards. See United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979), quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 487-89 (1940).

32/ Even taken most favorably to NRDC, the legislative history could only be viewed as ambiguous on the question at issue here. But, as the Supreme Court observed in another context, "ambiguous legislative history . . . falls far short of showing that the [agency's] interpretation of the Act is unreasonable." Pattern Makers' League of North America, AFL-CIO v. NLRB, 473 U.S. 95, 112 (1985).

33/ Even Judge Wright's dissent from the panel decision in this case accepted the proposition that the "ample margin of safety" language of Section 112 must be read as contemplating the elimination of "significant risks" to public health, not the creation of a risk-free environment that would be implied by an absolute ban on emissions of nonthreshold pollutants. See Vinyl Chloride, 804 F.2d at 736 (Congress "did not clearly require an absolute ban on non-threshold pollutant emissions . . . [but instead left EPA] limited discretion to refuse to regulate 'insignificant' harms").

whether EPA has reasonably interpreted Section 112 as authorizing the Administrator to give limited consideration to feasibility and related factors in determining what level of emissions is consistent with the elimination of significant risks and the provision of an "ample margin of safety."

II. EPA's Approach To Developing "Ample Margin of Safety" Standards for Apparent Nonthreshold Pollutants Represents a Reasonable Application of Section 112 to a Regulatory Question that Congress Did Not Specifically Address.

As discussed above, Congress authorized the Administrator of EPA to set non-zero emission standards which, in his judgment, provide an "ample margin of safety" by eliminating significant risks to public health presented by emissions of apparent nonthreshold pollutants. Congress did not, however, specifically address the question of precisely what considerations should guide the exercise of the Administrator's judgment in setting such standards. Although the complete elimination of all risk clearly was not required, Congress did not specify what constitutes a significant risk for these purposes and did not delineate the factors that the Administrator may or must consider in making this determination.

While Section 112 does not specifically identify feasibility as a factor to be considered in setting emission standards for hazardous air pollutants, there is no clear expression of congressional intent to preclude EPA from giving limited consideration to feasibility in determining whether a standard eliminates significant risks to public health in individual cases. To the contrary, as discussed above, congressional action in 1970 and 1977 reflects an expectation that EPA would implement the statute in a reasonable and feasible manner, as it had in adopting and proposing Section 112 standards for asbestos and vinyl chloride.

NRDC contends that a clear congressional intent to preclude any consideration of feasibility in setting standards under Section 112(b)(1)(B) can be inferred from Section 112(c)(1)(B)(ii) of the Act, 42 U.S.C. § 7412(c)(1)(B)(ii) (1982), which allows the Administrator to grant a two-year waiver to an existing source "if he finds that such period is necessary for the installation of controls," and Section 112(c)(2), 42 U.S.C. § 7412(c)(2) (1982), which authorizes the President to exempt a stationary source from compliance with a Section 112 standard for renewable two-year periods "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." Contrary to NRDC's contention, these provisions do not demonstrate that there is no basis for considering feasibility "in standard-setting itself."[34/]

34/ *See* NRDC Br. at 16-17.

Thus, Section 112(c)(1)(B)(ii) can reasonably be read as authorizing the Administrator to grant a waiver to a source which requires additional time to install controls that EPA has found to be feasible in setting the standard. Similar concerns are addressed by Section 112(c)(2). For example, feasible technology might exist but, because of production limitations or other problems, may not be immediately available for all covered sources. By the same token, a standard might be technologically feasible for a source category generally, but not for a particular source within the category. Or, since EPA does not treat feasibility as a floor in taking regulatory action under Section 112, the Agency may set a standard below the level of technological feasibility if the Administrator determines that such action is necessary to eliminate significant risks to public health. In any of these cases, Section 112(c)(2) would be necessary when operation of the source is required for reasons of national security, even though limited consideration was given to feasibility when the standard was set in the first instance.[35/]

NRDC also contends that a congressional intent to preclude consideration of feasibility under Section 112(b)(1)(B) is demonstrated by "the extreme care with which the terms 'not

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35/ Furthermore, neither Section 112(c)(1)(B)(ii) nor Section 112(c)(2) specifically addresses the question of economic feasibility, which also may play a limited role in setting standards under Section 112(b)(1)(B).

feasible' are defined under § 112(e) . . . ."[36/] In fact, the use of the term "feasible" in Section 112(e) demonstrates no such thing.[37/] To the contrary, as discussed above, congressional statements regarding the application of Section 112(e) to EPA's asbestos standard indicate that feasibility can be considered in setting "ample margin of safety" standards under Section 112(e) and Section 112(b)(1)(B).

NRDC also attempts to suggest that Section 112 reflects a technology-forcing philosophy that is inconsistent with considering feasibility in any way whatsoever.[38/] But there is nothing extraordinary about considering feasibility under a technology-forcing statute.[39/] Furthermore, there is a big

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36/ See NRDC Br. at 17.

37/ The "feasibility" to which Section 112(e)(1) refers does not relate to compliance with the standard. Rather, it refers to situations in which emissions of a pollutant cannot be captured or practicably measured. See Section 112(e)(2), 42 U.S.C. § 7412(e)(2) (1982). It simply authorizes EPA to establish equipment, work practice, or operational standards in those situations in which a standard could not effectively be expressed or enforced in terms of an emissions limitation. This does not imply that feasibility may not be considered in setting a standard under Section 112(b)(1)(B) when emissions of the pollutant can be captured and measured.

38/ See NRDC Br. at 28-29.

39/ For example, Section 111 of the Clean Air Act, 42 U.S.C. § 7411 (1982), specifically contemplates consideration of technological feasibility and cost, even though the provision is viewed as technology-forcing in nature. See Sierra Club v. Costle, 657 F.2d 298, 364 (D.C. Cir. 1981), citing Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 391 (D.C. Cir.

[Footnote continued next page]

difference between technology forcing and the establishment of a zero-emissions requirement that can be met only by shutting down an entire industry.

In short, here, as in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,[40/] "Congress has not directly addressed the precise question at issue . . . ." Section 112 articulates a broad public health objective. But it neither mandates the promulgation of zero-risk standards nor provides specific guidance on precisely how EPA is to go about setting non-zero standards that provide an "ample margin of safety" in the case of apparent nonthreshold pollutants. Instead, it directs the Administrator to exercise his judgment in setting

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[Footnote continued from preceding page]

1973), cert. denied, 423 U.S. 1025 (1975). The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651, et seq., which directs OSHA to adopt "feasible" standards, also is viewed as a technology-forcing statute. See, e.g., United Steelworkers of America v. Marshall, 647 F.2d 1189, 1264 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981); AFL-CIO v. Brennan, 530 F.2d 109, 121 (3d Cir. 1975); Society of the Plastics Industry, Inc. v. OSHA, 509 F.2d 1301, 1309 (2d Cir.), cert. denied, 421 U.S. 992 (1975).

The fact that Section 112 is phrased in terms of broadly-stated public health objectives and does not prescribe specific feasibility criteria such as those set forth in Section 111 does not mean that feasibility cannot be considered in any way under Section 112. Rather, the textual distinction indicates that, in contrast to Section 111 standards, feasibility need not be the floor on Section 112 standards in cases where more stringent requirements are necessary to provide an "ample margin of safety."

40/ 467 U.S. 837, 843 (1984).

"ample margin of safety" standards -- i.e., standards that eliminate significant risks to public health. Thus, Congress, at least implicitly, has delegated to EPA authority to fill the legislative gap by reasonably interpreting Section 112 in order to implement the statutory program.41/

In these circumstances, EPA's interpretation of Section 112 and its resolution of the policy question of what constitutes a significant risk42/ should be accepted by the Court, as long as it is reasonable and not clearly contrary to congressional intent.43/ This is true even if the Court believes that a "more natural reading of the statutory phrase" would limit EPA to considering health-related factors alone,44/ and even if EPA's

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41/ See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. at 843-44.

42/ See Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. at 655-56 n.62 (agency "determination that a particular level of risk is 'significant' will be based largely on policy considerations"); 50 Fed. Reg. 45530, 45541, col. 2 (October 31, 1985) ("selection of an insignificant level of risk [under the Federal Food, Drug, and Cosmetic Act] is . . . a policy question that must be answered by weighing a number of subjective considerations").

43/ See Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. at 843 n.11 (permissible agency construction should be upheld even if it is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding"); United States v. City of Fulton, 106 S. Ct. 1422, 1428 (1986) (agency interpretation must be upheld "if the statute yields up no definitive contrary legislative command and if the agencies' approach is a reasonable one"); Natural Resources Defense Council, Inc. v. Thomas, 805 F.2d 410, 420 (D.C. Cir. 1986).

44/ See National Coalition Against the Misuse of Pesticides v. Thomas, 809 F.2d 875, 881-82 (D.C. Cir. 1987).

"interpretation is at the outer bounds of permissible choice."45/

In the present case, the Court need not concern itself with the "outer bounds of permissible choice," because EPA's decision to give limited consideration to feasibility in setting non-zero standards that eliminate "significant risks" in the case of apparent nonthreshold pollutants is eminently reasonable. The majority of the three-judge panel in this case described EPA's consideration of feasibility as "natural, perhaps inevitable,"46/ and even Judge Wright acknowledged that, unless it has been unambiguously precluded by Congress, it would "seem reasonable to consider feasibility here . . . ."47/ As shown at pages 18-22 above, Congress has not unambiguously precluded consideration of feasibility in setting Section 112 standards for apparent nonthreshold pollutants. Consequently, what the majority found to be "natural, perhaps inevitable" and what Judge Wright conceded would "seem reasonable" surely qualifies as a permissible interpretation of Section 112.

45/ See Orloski v. Federal Election Commission, 795 F.2d 156, 167 (D.C. Cir. 1986).

46/ Vinyl Chloride, 804 F.2d at 722.

47/ Id. at 728. Judge Wright also implied that Section 112 might allow limited consideration of feasibility in making "significant risk" determinations, so long as this does not involve "discretion to examine technological and economic feasibility under all circumstances . . . ." See id. at 736.

This is particularly true in light of the fact that EPA's standards for vinyl chloride and other apparent nonthreshold pollutants are set below the level at which any adverse health effects are known to exist. Thus, in contrast to standard setting under Section 111 of the Act, 42 U.S.C. § 7411 (1982) (where feasibility sets a floor on the degree of control that can be required), public health remains the paramount consideration under EPA's interpretation of Section 112, with feasibility being considered as a secondary factor only in the range of exposures where adverse health effects are unknown. If feasibility and related factors could not be considered at all even in these limited circumstances, industries could be closed and vast public and private resources could be expended to achieve the uncertain or "marginal benefits of increasing increments of protection against the unknown."48/

In sum, Congress has not specifically addressed the question of how EPA should set Section 112 standards for apparent

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48/ See Vinyl Chloride, 804 F.2d at 723. For example, even if it did not ban radionuclide emissions entirely, a standard which required additional controls on radionuclide emissions from coal-fired boilers would force the expenditure of more than $4 billion annually in order to avoid one hypothetical cancer death, the existence of which is subject to scientific uncertainty. See Brief for Intervenor Chemical Manufacturers Association in No. 84-1524 and Consolidated Cases, D.C. Cir., filed January 13, 1986, at 16-17. Surely, this is relevant information to consider in determining whether further controls are needed to protect the public health against a significant risk of harm associated with emissions of radionuclides.

nonthreshold pollutants, choosing instead to leave "it to the Administrator to pour content into [the] broad concepts" embodied in the statutory text.[49/] EPA has responded in a reasonable manner by emphasizing public health as the primary factor, while giving limited consideration to feasibility in setting standards that provide an "ample margin of safety" by eliminating significant risks. The Agency's decision to consider feasibility in these circumstances is "reasonable" and "permissible" and should be respected by the Court.[50/]

49/ See United States v. Ethyl Corp., 761 F.2d 1153, 1155 (5th Cir. 1985), cert. denied, 106 S. Ct. 830 (1986).

50/ See National Coalition Against the Misuse of Pesticides v. Thomas, 809 F.2d at 881-82 (holding, on the basis of Chevron, that EPA can give limited consideration to the impact of its pesticide rules on foreign economies under a statutory provision directing the Agency to consider "relevant factors" in setting pesticide tolerances "to the extent necessary to protect the public health"); Center for Auto Safety v. National Highway Traffic Safety Administration, 793 F.2d 1322, 1338-40 (D.C. Cir. 1986) (upholding the agency's decision to consider consumer demand in determining the "maximum feasible" levels for a fuel economy standard, even though consumer demand is not identified as a relevant factor in the statute); cf. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940) (upholding agency authority to select appropriate factors for consideration in implementing statutory standards when Congress has been less than explicit in detailing precisely what factors should be considered); Black Citizens for a Fair Media v. FCC, 719 F.2d 407, 410-13 (D.C. Cir. 1983), cert. denied, 467 U.S. 1255 (1984).

III. The Decisions of the Supreme Court and this Court on Which NRDC Relies Do Not Preclude EPA from Giving Limited Consideration to Feasibility in Setting Section 112 Standards for Apparent Nonthreshold Pollutants.

NRDC contends that the Supreme Court's decisions in Union Electric Co. v. EPA, 427 U.S. 246 (1976), and American Textile Manufacturers Institute v. Donovan, 452 U.S. 490 (1981), and this Court's decisions in Lead Industries Association v. EPA, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980), and Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978), preclude EPA from giving any consideration whatsoever to feasibility in setting Section 112 standards for apparent nonthreshold pollutants. This is simply not so.

The Court in Union Electric did not decide what factors can be considered in setting Clean Air Act standards. Instead, the question was whether EPA can reject a state implementation plan submitted for approval under Section 110(a)(2) of the Act, 42 U.S.C. § 7410(a)(2) (1982), on the ground that it is economically or technologically infeasible.51/ Since Section 110(a)(2) stated that the Administrator "shall approve" a state plan if eight specific conditions (none of which pertained to feasibility) were met,52/ the Court upheld EPA's contention that

51/ See 427 U.S. at 256.

52/ See id. at 250 n.1.

it could not be concerned with other factors.[53/] Section 112, by contrast, does not direct EPA to take specified action when designated conditions are met. Instead, it commits to the Administrator's judgment the determination of what constitutes an "ample margin of safety." Moreover, Section 112 differs from Section 110 in terms of its legislative history[54/] and in the implications of an interpretation that would preclude any consideration of feasibility whatsoever.[55/]

American Textile Manufacturers also is not on point. The question involved in that case was whether OSHA is required to use *cost-benefit analysis* in setting occupational health standards under a statute that specifically provides for *feasibility analysis*.[56/] Since the question there was *how*, not *whether*, feasibility should be taken into account, *American Textile Manufacturers* has no application here, where NRDC asserts that EPA may not take feasibility into account *in any way whatsoever*.

53/ *See id.* at 256-257. The Court was bolstered in its conclusion by the legislative history and the fact that claims of economic and technological feasibility could be raised in other contexts relating to implementation of an ambient air quality standard under Section 110. *See id.* at 258-269.

54/ *See* pp. 12-16, *supra*.

55/ *See* pp. 6-9, *supra*. In any event, *Union Electric* at most suggests that EPA is not *required* to consider feasibility unless Congress expressly so provides. *See Vinyl Chloride*, 804 F.2d at 727.

56/ *See* 452 U.S. at 509.

The Lead Industries decision (which involved ambient air quality standards under Section 109 of the Clean Air Act, 42 U.S.C. § 7409) and the Hercules decision (which involved effluent standards under Section 307 of the Clean Water Act, 33 U.S.C. § 1317) also do not control the present case. As pointed out in the API-CMA 1985 Brief,[57/] Lead Industries and Hercules are distinguishable from the present case on a number of grounds, including the following:

- In both of those cases, the question was whether EPA is required to consider feasibility in setting standards, while the question in the present case is whether EPA is permitted to do so.

- In both of those cases, the Court deferred to EPA's interpretation, while NRDC asks the Court to reject EPA's interpretation in the present case.

- This case, in contrast to Lead Industries and Hercules, expressly presents the question of how a "margin of safety" should (or may) be applied to an apparent nonthreshold pollutant.

- The implications of precluding consideration of feasibility in setting a standard under Section 112 are very different from the implications of precluding consideration of feasibility in setting standards under Section 109.

- Section 307 of the Clean Water Act, in contrast to Section 112 of the Clean Air Act, enumerates specific factors (none of which relates to feasibility) that EPA is directed to consider as the basis for developing effluent standards for toxic water pollutants.

57/ See API-CMA 1985 Brief at 36-41.

In short, _Lead Industries_ and _Hercules_ clearly are distinguishable from the present case. Moreover, as shown in the Supplemental Brief on Rehearing for the American Petroleum Institute as Amicus Curiae, _Lead Industries_ and _Hercules_ cannot fairly be read to preclude all consideration of feasibility even in setting standards under Section 109 of the Clean Air Act and Section 307 of the Clean Water Act. Accordingly, they would not preclude EPA from giving limited consideration to feasibility under Section 112 even if they were on point.

CONCLUSION

For the reasons discussed above, the Court should find that EPA has acted reasonably and lawfully in giving limited consideration to feasibility in setting Section 112 standards that provide an "ample margin of safety" by eliminating significant risks to public health in the case of apparent nonthreshold pollutants.

Respectfully submitted,

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Certificate of Service

I, Neil J. King, hereby certify that on this 13th day of April 1987, I caused copies of the foregoing Supplemental Brief on Rehearing of the Chemical Manufacturers Association as Amicus Curiae to be served, by first-class mail, postage prepaid, on the following:

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