

(Scheduled for Oral Argument En Banc April 29, 1987)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

85-1150

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioner,

v.

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

Respondents

On Petition for Review of an Action of the
Environmental Protection Agency

BRIEF OF THE
AMERICAN IRON AND STEEL INSTITUTE
AS AMICUS CURIAE
ON REHEARING

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April 13, 1987

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether Section 112 of the Clean Air Act, 42 U.S.C. § 7412 (1982), is a zero-risk statute that requires EPA to ban all emissions of a pollutant when health effects are uncertain, or whether, when health effects are uncertain, it permits the EPA Administrator to give limited consideration to technological feasibility and cost in setting emission standards for hazardous air pollutants at a level which, in his judgment, eliminates significant risks to public health.

RULE 8(b) STATEMENT

This case was decided by a panel of this Court on November 4, 1986. 804 F.2d 710 (D.C. Cir. 1986). The panel's opinion and judgment were vacated (and rehearing en banc was granted) by order dated January 28, 1987. Similar issues

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relating to EPA's regulation of hazardous air pollutants are presented in the following proceedings presently pending before this Court: Natural Resources Defense Council, Inc. v. Thomas, Nos. 84-1387, et al. (benzene); and Environmental Defense Fund, Inc. v. Thomas, Nos. 84-1524, et al., NRDC v. Thomas, Nos. 85-1123, et al., and American Mining Congress v. Environmental Protection Agency, Nos. 85-1285, et al., (radionuclides). In addition, a petition to review EPA's Section 112 standard for inorganic arsenic has been filed in this Court. Natural Resources Defense Council, Inc. v. Thomas, No. 86-1532. We do not know what issues are raised in that action.

STATEMENT OF THE CASE

Section 112 of the Clean Air Act, 42 U.S.C. § 7412 (1982), 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 rule that Section 112 is a zero-risk statute that should be read in the most extreme and absolute manner possible, so as to preclude EPA from considering feasibility or cost in any way whatsoever when promulgating national emission standards for hazardous air pollutants, even in situations where the health effects are

uncertain. When health effects are uncertain (as they are, for example, in the case of apparent nonthreshold pollutants), NRDC contends that EPA must set standards "which allow no measurable emissions," even if that means that major facilities or entire industries must close.^{1/}

The fundamental question in this case, then, is whether Section 112 requires EPA to promulgate standards that guarantee absolute safety in all cases, regardless of the consequences. In particular, when regulating apparent nonthreshold pollutants such as vinyl chloride, must EPA adopt zero-risk/zero-emissions standards without evaluating the magnitude of any public health benefits that may be expected or the extent of the economic and social dislocation that may result? We believe that Congress has not mandated such action. Instead, the Administrator of EPA has been given discretion to avoid imposing extreme requirements to deal with uncertain risks, as long as the standard that he adopts provides an "ample margin of safety" by eliminating "significant risks" to public health.

In deciding this case, the Court should be aware of the impact that NRDC's interpretation of Section 112 could have on a broad spectrum of American industries and, derivatively, on the workers employed in those industries and the communities in which

^{1/} See Brief for Petitioners on Rehearing at 5, 26 n.47, 27 n.50.

they live. The situation confronting the steel industry is illustrative.

The domestic steel industry is a critical but deeply troubled segment of the American economy. Domestic steel shipments have declined from a level of 88.5 million tons in 1981, the last year in which domestic steelmaking operations were profitable, to 70.3 million tons in 1986. Employment in the steel industry has suffered a corresponding decline. Average employment in the industry in January 1987 was 150,000 persons. This represents a decline of 23 percent from the corresponding level of January 1986 and a decline of more than 60 percent from the level prevailing in 1981. During this same period, a number of steel companies have filed for protection under the bankruptcy laws.

In short, the domestic steel industry is not in a position to absorb a further major shock. But regulatory actions that might be required under NRDC's zero-risk/zero-emissions interpretation of Section 112 could administer just such a shock, causing major disruptions to steelmaking operations and consequent financial loss.

In order to produce iron and steel, member companies of the American Iron and Steel Institute ("AISI") first produce coke by carbonizing bituminous coal at high temperatures in by-product coke ovens. At various stages during the coking process,

emissions (termed "coke oven emissions") are released into the atmosphere. In addition, gases evolved during the coking process are routed to by-product recovery plants, where they are cooled and separated into various components, including light oil which contains approximately 70 percent benzene.

EPA has proposed Section 112 standards regulating benzene emissions at coke by-product recovery plants.^{2/} While the proposed standards would require drastic reductions in benzene emissions at by-product recovery plants, they would not entirely prohibit all such emissions. However, if NRDC's zero-risk/zero-emissions position were adopted, EPA might feel compelled to promulgate a final standard that prohibits all benzene emissions at these facilities. Compliance with such a standard would not be possible if the plants are to remain operational.

Similarly, EPA has added coke oven emissions to the list of hazardous air pollutants under Section 112^{3/} and is expected to propose Section 112 standards for coke oven emissions in the near future.^{4/} If the Agency promulgates a standard that completely prohibits any coke oven emissions, compliance would

^{2/} See 49 Fed. Reg. 23522 (June 6, 1984).

^{3/} See 49 Fed. Reg. 36560 (September 18, 1984).

^{4/} See EPA Regulatory Agenda, 51 Fed. Reg. 38904, 33954 (October 27, 1986).

not be possible unless the ovens are shut down, thereby effectively crippling the steelmaking operations of most major domestic producers. The impact of such action on domestic steel companies, on steelworker employment, and on steelmaking communities could be devastating, and a ripple effect undoubtedly would be felt throughout the economy.

While we are most sensitive to the impact that a zero-risk/zero-emissions interpretation of Section 112 could have on the steel industry, the implications of NRDC's position would be felt much more broadly. As EPA observed when it proposed its Airborne Carcinogen Policy 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 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.^{5/}

^{5/} Proposed Airborne Carcinogen Policy, 44 Fed. Reg. 58642, 58660, cols. 2-3 (October 10, 1979).

Section 112 should not be construed to require regulatory action that produces such a result.

ARGUMENT

In this case, NRDC asks the Court to embrace an extreme interpretation of Section 112 that would completely preclude EPA from considering feasibility in any way, under any set of circumstances, and would require the promulgation of zero-risk/zero-emissions standards whenever the existence of adverse health effects is uncertain, as is the case when apparent nonthreshold pollutants are being regulated. As indicated above, such a sweeping construction of Section 112 could have the most drastic social and economic consequences. Yet Congress never gave the slightest indication that Section 112 would require the promulgation of standards having such consequences.

To the contrary, as demonstrated in the Supplemental Brief on Rehearing of the Chemical Manufacturers Association as Amicus Curiae (which we adopt and incorporate herein by reference), the statutory text and legislative history show that Congress did not intend Section 112 to be a zero-risk statute. Instead, Congress, at least implicitly, delegated to EPA authority to interpret and implement the statutorily undefined term "ample margin of safety." By emphasizing public health protection as the primary factor, while giving limited consideration to

feasibility in setting standards designed to eliminate significant risks where the existence of adverse health effects is uncertain, EPA has exercised this authority in a reasonable manner that should be respected by the Court.

NRDC contends that EPA's construction of Section 112 must be rejected on the basis of decisions interpreting Section 109 of the Clean Air Act^{6/} (which directs the Agency to promulgate national ambient air quality standards that provide an "adequate margin of safety") and Section 307 of the Clean Water Act.^{7/} Those decisions, however, should not be read as holding that feasibility may never be considered to any extent in setting national ambient air quality standards under Section 109 of the Clean Air Act or effluent standards for toxic pollutants under Section 307 of the Clean Water Act. Rather, as demonstrated in the Supplemental Brief on Rehearing for the American Petroleum Institute as Amicus Curiae ("API Brief"), pragmatic considerations clearly entered into the decisionmaking process leading to the adoption of the standards that were challenged in the cases on which NRDC relies.

For this reason and others discussed in the API Brief, the decisions that NRDC claims to be controlling here cannot

^{6/} 42 U.S.C. § 7409 (1982).

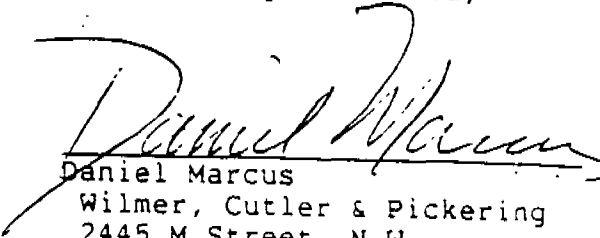
^{7/} 33 U.S.C. § 1317 (1982). See Brief for Petitioner on Rehearing at 9-12.

fairly be read as completely barring EPA from taking practical considerations into account in setting standards under Section 109 of the Clean Air Act or Section 307 of the Clean Water Act. In any event, as shown in the Joint Brief of the American Petroleum Institute and the Chemical Manufacturers Association as Amicus Curiae, filed on August 19, 1985, those decisions clearly are distinguishable and do not control the present case.

CONCLUSION

As shown in the briefs filed in this case by the American Petroleum Institute and the Chemical Manufacturers Association, NRDC's interpretation of Section 112 is wrong. Moreover, it could have drastic social and economic consequences that Congress never intended. Accordingly, NRDC's position should be rejected, and EPA's action in withdrawing the proposed amendments to the vinyl chloride standard should be sustained.

Respectfully submitted,



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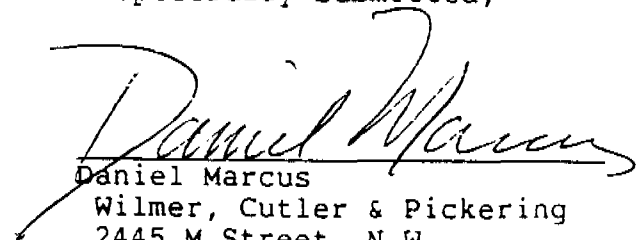
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