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Defense Council

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December 15, 1986

Mr. George A. Fisher, Clerk
U.S. Court of Appeals for the
District of Columbia Circuit
Constitution Avenue and John
Marshall Place, NW, Room 5419
Washington, DC 20001

Re: NRDC v. EPA, No. 85-1150

Dear Mr. Fisher:

Enclosed for filing is the original and 19 copies of the petition for rehearing and suggestion for rehearing en banc.

Sincerely,

David D. Doniger
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CERTIFICATE OF SERVICE

I hereby certify that this 15th day of December, 1986, the enclosed Petition for rehearing and suggestion for rehearing en banc was served by first class mail on the counsel listed below:

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David D. Doniger

IN THE 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

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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December 15, 1986

CONCISE STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

The panel in this case decided, 2-1, that the Environmental Protection Agency (EPA) may apply economic and technological feasibility tests in setting emission standards under §112 of the Clean Air Act whenever there is "scientific uncertainty" about the health effects of a hazardous air pollutant. This conclusion is a drastic departure from settled judicial interpretation of the Clean Air Act and will have major adverse consequences for public health protection under this law and numerous others if allowed to stand.

Petitioner respectfully requests rehearing by the panel or the full Court for three reasons. First, the majority opinion conflicts with multiple precedents of this Circuit and the Supreme Court. Both Courts have repeatedly ruled that consideration of cost and feasibility is permitted in the Clean Air Act and similar statutes only when Congress expressly so provides. Union Electric Co. v. EPA, 427 U.S. 246, 257 n.5 (1976); American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 510 (1981); Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980), cert. denied, 449 U.S. 1042 (1980). No such authorization exists in §112. Contrary to the panel, this Court has twice ruled specifically that the Clean Air Act's "margin of safety" requirements are unambiguously oriented only to health protection. Lead Industries, supra; Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978).

The result of the majority opinion is a completely implausible contradiction between two parallel, contemporaneous provisions of the Clean Air Act; under §109 the "margin of safety" requirement bars cost and feasibility tests for health-endangering pollutants, while under §112 the same words are

construed to permit such tests.

Second, the majority opinion will severely hamper protection of the public from toxic pollutants under §112 and numerous other statutes. If allowed to stand, it will frustrate health-based regulation of at least 13 cancer-causing hazardous air pollutants in addition to vinyl chloride, including three which are the subject of other cases now before the Court.[1] By reversing the pre-existing rule that authority for cost and feasibility tests must be express, the opinion also clouds the meaning of other public health laws from which express authority for such tests was withheld.[2] The panel's "uncertainty" rationale will extend to virtually all cases of pollution and toxic chemical regulation, for there is almost always uncertainty in health effects evidence.

Third, the majority opinion has seriously erred in concluding that the "ample margin of safety" requirement is ambiguous. Even former EPA Administrator William Ruckelshaus has admitted that the Agency's cost and feasibility tests "torture that language."[3] This Court and nearly all commentators have previously found §112

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[1] EPA decisions are under judicial review for benzene (Nos. 84-1387 et al.), radionuclides (Nos. 84-1524 et al. and No. 86-1634), and arsenic (No. 86-1532). Also affected by this case will be standards for coke oven emissions (listed in 1984, 49 Fed. Reg. 36560) and nine other carcinogens which EPA officially stated in 1985 that it "intends" to list as hazardous air pollutants. See 50 Fed. Reg. 24317, 32621, 39626, 40286, 41466, 41994, 42000, 52422, 52880.

[2] See e.g., Clean Air Act §211 (regulation of dangerous fuel additives), §302(j) (regulation of health endangering fugitive emissions). See also 21 U.S.C. §348(c)(3) (food additive safety); 15 U.S.C. §1261(q)(1) (safety of toxic household products); 42 U.S.C. §§3001 & 3004(a) (listing and regulating of hazardous wastes).

[3] In an interview in 1984, Mr. Ruckelshaus advocated amending §112 to allow cost and feasibility tests. He stated: "We ought not have to torture that language" to reach that result. Inside EPA, Nov. 9, 1984, p. 8.

especially clear in excluding cost and feasibility tests. See Hercules, supra, and dis. op. at 3-4, 9-10. Nothing in the plain terms of the statute or legislative history suggests a concern for any factor other than health. To find an ambiguity in a statute this clear goes beyond anything required or permitted by Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984) and, as the dissent warns, effectively strips Congress of control over agency action. See dis. op. at 12-13.

Given the conflict with Supreme Court and D.C. Circuit cases, the contradictions introduced into the Clean Air Act, the importance of the issues to public health, the existence of other cases already pending before the Court, the number of other hazardous air pollutants affected, the breadth of the precedent involved, and the sheer controversiality of the panel opinion, rehearing by the panel or by the full Court of Appeals is especially necessary.

I. The Panel Opinion Conflicts With Supreme Court Precedent

The Supreme Court has authoritatively held that consideration of cost and feasibility factors is permissible under the Clean Air Act and similar statutes only when Congress has expressly so authorized. Construing the Clean Air Act in Union Electric Co. v. EPA, the Supreme Court stated: "Where Congress intended the Administrator to be concerned about economic and technological feasibility, it expressly so provided." 427 U.S. 246, 257 n.5 (1976).* See also American Textile Mfrs. Inst. v. Donovan:

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* The deliberate exclusion of cost and technology tests is traced through the legislative history in Bonine, The Evolution of "Technology-Forcing" in the Clean Air Act, BNA Env. Reporter, Monograph 21 (1975).

"When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." 452 U.S. 490, 510 (1981). The Union Electric rule of construction was approved by Congress in the 1977 amendments to the Clean Air Act.[5] It is a rule which heretofore this Court has scrupulously observed. See Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1148 (D.C. Cir. 1980), cert. denied, 449 U.S. 1042 (1980).[6]

The panel majority admits that there is no express authorization for cost or feasibility tests in the language or legislative history of §112. Nonetheless, the panel affirmed EPA's use of such tests. This is a clear failure to follow Supreme Court precedent.

The panel majority asserts the Supreme Court's statements bear only on an argument that EPA is required to consider cost or feasibility and that they leave EPA to consider such factors if it chooses. Maj. op. at 34-35. This is not correct. In both cases the Supreme Court held that the agency was prohibited from applying the disputed tests.[7] The panel majority's holding

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[5] The 1977 House Report stated the committee's agreement with Union Electric and expressly continued the policy of providing specifically for cost and feasibility tests where they were desired. See H.R. Rep. No. 294, 95th Cong., 1st Sess. 2, 56, 68 n.18 (1977), reprinted in 4 A Legislative History of the Clean Air Act Amendments of 1977 2468, 2523, 2535 ["Leg. Hist."]. For instance, Congress added a requirement to prepare economic impact statements, but limited it only to specified sections of the law that expressly authorize cost considerations. Section 317(a), (e), 42 U.S.C. §7617(a), (e).

[6] See also American Petroleum Inst. v. Costle, 665 F.2d 1176, 1185 (D.C. Cir. 1981), cert denied, 455 U.S. 1034 (1982).

[7] "The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified . . . ." Union Electric, 427 U.S. at 257 (emphasis added). "In sum, we have concluded that claims of economic or technological infeasibility may not be considered . . . ." Id. at 265 (emphasis added). In American Textile, the

cannot be reconciled with the Supreme Court's statements.[4]

II. The Panel Opinion Conflicts With Prior Decisions of This Court

The panel opinion also conflicts with two decisions of this Court which found no ambiguity in the Clean Air Act's "margin of safety" requirement. In Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978), this Court interpreted §112 as follows:

> [T]he Clean Air Act Amendments of 1970 . . . distinguish between pollutants subject to technology-based regulation under section 111, and hazardous substances, subject to health-based regulation under section 112. Recognizing that "certain pollutants" required special treatment because of risk to health, Congress enacted section 112, dealing with hazardous pollutants, without provision for considerations of feasibility.

598 F.2d at 112. The majority asserts this case means only that EPA may not be forced to consider costs and feasibility and "says nothing about what [the ample margin safety] language may permit." Maj. op. at 33 (emphasis in original). That is not so. Following the Union Electric rule, Hercules concluded that Congress deliberately selected only health and environmental factors for EPA consideration.[5]

Court held that cost-benefit analysis was barred; beyond an expressly authorized feasibility test, "Congress did not contemplate any further balancing by the Agency. . . ." 452 U.S. at 513.

[4] The majority seeks to distinguish American Textile a different way by asserting that it applies only to a specialized form of economic analysis: cost-benefit analysis. The majority contends that "EPA has not engaged in that form of analysis here." Maj. op. at 35. The EPA notice under review, however, plainly stated otherwise: That the standard was "based on judgments concerning the costs and benefits of the standard to society." 50 Fed. Reg. at 1183 (col. 3) (JA 47).

[5] > [T]he congressional selection of factors is a legislative determination that the need of the public and the environment for protection from toxic chemicals is more important than the problems of stringent regulation. This congressional determination is a rational response to the dangers presented

The panel opinion is also in conflict with Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980), cert. denied, 449 U.S. 1042 (1980). There the Court held that the "adequate margin of safety" requirement in §109 bars cost and feasibility considerations from the setting of ambient air quality standards. The majority claims this case "did not assert that the statutory language precluded consideration of feasibility." Maj. op. at 29 (emphasis in original). But Lead Industries held precisely that. In a single paragraph the Court specifically cited the Union Electric rule that authority for cost or technology factors must be express in the statutory language and concluded: "Nothing in [§109's] language suggests that the Administrator is to consider economic or technological feasibility in setting ambient air quality standards." 647 F.2d at 1148-49.

Lead Industries drew the same conclusion from the 1970 Senate Report's explanation for requiring margins of safety: "Margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified."[10] Lead Industries stated: "We are unable to discern here any congressional intent to require, or even permit, the Administrator to consider economic or technological factors . . . ." 647 F.2d

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> by toxic substances. The meaning of the statute being clear, it is not this court's prerogative to impose considerations of feasibility. See Tennessee Valley Authority v. Hill, 437 U.S. 153 . . . (1978); Union Electric Co. v. EPA, 427 U.S. 246 . . . (1976).

598 F.2d at 112 (parallel citations and footnote omitted).

[10] S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970) ["1970 Senate Report"], reprinted in 1 A Legislative History of the Clean Air Act Amendments of 1970 410 ["Leg. Hist."].

at 1150 (emphasis added). The panel's explanation for refusing to follow this interpretation of the critical report language is totally unconvincing. According to the panel, it was not the quoted report language but other aspects of the legislative history which led the Lead Industries Court to conclude that feasibility tests were barred from the setting of ambient standards. Maj. op. at 32.[11] This simply is not what Lead Industries says. It says no authority or permission for cost or feasibility tests can be found "here", i.e., in this report language.

The majority's position defies logic, for it means that the provision which requires an "adequate" margin of safety (§109) is more protective of health than the provision which requires an "ample" margin (§112). As stated by the dissent (at 8): "It makes no sense to allow the Administrator greater latitude in the establishment of standards for pollutants Congress explicitly recognized as highly dangerous than he is allowed in the regulation of less dangerous pollutants."

III. Neither §112 Nor Its Legislative History Is Ambiguous

Even if treated as a case of first impression, there is no support for the majority's conclusion that §112 is ambiguous. The words, structure, and legislative history of §112 all show that

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[11] The panel asserts that the bar against feasibility tests under Section 109 is due to "structural aspects of the ambient air pollution provisions not germane here." The panel also asserts that Section 109's legislative history is clearer than Section 112's in stating that facilities may have to close if necessary to protect health. Maj. op. at 30. The dissent shows, however, that Section 112's standard-setting and implementation structure is closely parallel to Section 109's and that Section 112's legislative history is equally clear in barring cost and feasibility considerations. Dis. op. at 5-8. See infra at pp. 11-15.

the cost and feasibility considerations were intentionally excluded.[12]

A. The Panel Ignores the Plain Meaning and Express Function of the "Ample Margin of Safety" Requirement

Section 112(b)(1)(B) requires EPA to set the standard for a hazardous air pollutant at the level which "provides an ample margin of safety to protect the public health." The panel majority agrees that the latter half of this mandate ("to protect the public health") is "unambiguously" health-based.[13] The majority asserts, however, that this unambiguous mandate is diminished by the "ample margin of safety" requirement. Maj. op. at 11-12.

The majority's reading finds no support on the face of the statutory words or in the legislative history, and it does not even follow logically. The plain reading of "ample margin of safety" is that these words amplify, not diminish, the exclusive concern for protection of public health indicated by the remainder of the phrase "to protect the public health." The statutory words plainly indicate a policy of erring on the side of caution to protect public health not only from known danger but also from potential danger indicated by probative but incomplete evidence. The precautionary function of the margin of safety requirement is also plainly evident in the Senate Report language discussed above: "Margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to

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[12] This reading is supported by virtually all commentators. See dis. op. at 3-4, 9-10. See also Bonine, supra note 4; Kramer, Economics, Technology, and the Clean Air Act of 1970: The First Six Years, 6 Ecology L. Q. 161, 194-196 (1976).

[13] Accord, Motor & Equipment Mfrs. Ass'n v. EPA, 627 F.2d 1095, 1117-18 (D.C. Cir. 1979).

be provided against hazards which research has not yet identified."[14]

The majority correctly observes that the "ample margin of safety" requirement gives EPA means for coping with scientific uncertainty. Maj. op. at 12. From this, however, the majority reasons -- admittedly without any positive support in the statute or legislative history -- that considering costs and feasibility is "natural, perhaps inevitable" whenever there is uncertainty. Id. at 26. The majority's reasoning does not follow. Economic or technological considerations are of no logical use in resolving scientific uncertainties. See dis. op. at 22. None of the prior cases mix such factors into the resolution of scientific uncertainties under precautionary, health-based statutes.[15] When Congress adopted this case law in 1977, it likewise excluded such non-scientific factors.[16]

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[14] 1970 Senate Report at 10, 1 Leg. Hist at 410. See Lead Industries, 647 F.2d at 1154-55; Hercules, 598 F.2d at 104; Ethyl Corp. v. EPA, 541 F.2d 1, 15 (D.C. Cir. 1976) (en banc), cert. denied, 426 U.S. 941 (1976). See also Environmental Defense Fund v. EPA, 598 F.2d 62, 81 (D.C. Cir. 1978). The majority misappropriates the "paradox" referred to in this case. This paradox related exclusively to the Administrator's difficulty fulfilling his duty to assure public health protection when the full extent of the health danger is unknown. The paradox has nothing to do with cost factors, and the case does not permit EPA to consider such factors.

[15] See, e.g., Ethyl, 541 F.2d at 24-29, which nowhere mentions a single non-scientific factor as relevant to resolving health effect uncertainties. See also the other cases cited in note 12.

[16] Congress expressly adopted Ethyl in the 1977 amendments. Like Ethyl, the House Report emphasized "the preventive or precautionary nature of the act," the importance of erring on the side of caution, and "the predominant value of protection of public health," and never once suggested the relevance of non-scientific factors. H.R. Rep. No. 295, 95th Cong., 1st Sess. 49, 4 Leg. Hist. 2516. See generally id. at 43-51.

The majority's reasoning may be applicable to statutes that expressly authorize cost considerations, e.g., the Federal

The majority asserts that limiting the Administrator's "judgment" about safety margins exclusively to health factors would render his discretion a nullity. Maj. op. at 13. The dissent shows, however, that there are plenty of opportunities within §112 for the use of "judgment." The Administrator's exercise of judgment about safety margins "lies in classifying pollutants as threshold or non-threshold, and in establishing specific threshold levels." Dis. op. at 18. Two of the first three hazardous pollutants, mercury and beryllium, fell into the threshold category. For them, EPA carefully assessed the health effects data and, applying its judgment as to a safety margin, chose emission limits calculated to keep ambient pollution levels well below the level which Agency believed to be the threshold.[17] "Judgment" is also involved in determining whether a pollutant does not have a threshold. EPA exercised judgment on this issue with vinyl chloride and each other cancer-causing substance

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Insecticide, Fungicide, and Rodenticide Act ("unreasonable risk", expressly defined to include cost considerations) or the Occupational Safety and Health Act ("feasibility"). See Environmental Defense Fund v. EPA, 510 F.2d 1292, (D.C. Cir. 1975); Environmental Defense Fund v. EPA, 548 F.2d 998 (D.C. Cir. 1976); Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 474-75 (D.C. Cir. 1974). But consideration of such factors is permissible under such statutes only because it is expressly authorized, not because it is "natural" or "inevitable."

[17] See 38 Fed. Reg. 8820 (1973). As stated by the dissent: "The existence of uncertainty in the determination of threshold levels not only fails to undercut [the limitation of relevant factors to health considerations], but actually supports it. Congress was aware that safe emission levels might always be scientifically uncertain to some extent, and therefore gave the Administrator discretion to make the final determination of the threshold levels of various pollutants by evaluating existing scientific evidence." Dis. op. at 19.

regulated under §112.[10] This is how Congress intended EPA to exercise "judgment" to resolve scientific issues.

B. The Majority's Interpretation Removes the Sense In Other Provisions of §112

The majority's reading of the "ample margin of safety" test destroys the sense in two other provisions of §112. Under §112(c)(2) the President may make a two-year, renewable exemption for a specific source if he finds "technology . . . is not available" and the source's operation is needed for reasons of national security. The national security condition clearly shows that Congress did not want exemptions due to the unavailability of technology alone. The need for Presidential action shows that Congress did not want even these exemptions to be lightly or frequently made, and never by EPA. As noted by the dissent, provision for a technological exemption on such stringent terms makes sense only if feasibility considerations are not permissible in standard-setting. Dis. op. at 6, 14-15. The creation of the exemption thus shows that any conferees who favored feasibility tests lost their battle to have such factors considered in the setting of the standards themselves.

The other provision is §112(e), added in 1977, which allows EPA to set design or work practice standards, rather than emission standards, in narrowly specified circumstances. Such a standard

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[10] EPA has long recognized that empirically verifying carcinogenicity at all low levels of exposure is not possible due to limits of scientific techniques and resources. Nonetheless, EPA has long held (as have all other federal health protection agencies) that there are scientifically sound reasons to conclude no thresholds exist for carcinogens. This scientific understanding, coupled with the duty to err on the side of caution created by the "ample margin of safety" requirement, has led the Agency to resolve the uncertainty by presuming the absence of safe levels for such compounds.

may be set only when an emission standard is not "feasible," a term which is very restrictively defined. Under §112(e)(2), an emission standard is not "feasible" only when it is technically impossible to vent the pollution through a centralized smokestack, or when it is technically or economically impractical to measure (as opposed to control) the emissions.[19] Such a standard still must protect health with an ample margin of safety.[20] The dissent points out that the restrictive definition of "feasible" makes no sense if EPA is already authorized to consider a more general notion of feasibility. Dis. op. at 6-7.[21]

C. The Panel Majority Finds An Ambiguity in Legislative History Where None Exists

The panel majority incorrectly derives an ambiguity on the role of cost and feasibility tests from the 1970 conference agreement. The key issue is the significance of the change in

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[19] Congress specifically had in mind problems such as dispersed asbestos emissions from building demolition, in which emissions can be neither collected nor measured. See S. Rep. No. 127, 95th Cong., 1st Sess. 44 (1977), 3 Leg. Hist. 1418.

[20] "Design standards are not to be used where no margin of safety exists." Id.

[21] The majority misunderstands Section 112(e). The opinion states: "Where measurement is impracticable because of technological or economic factors, uncertainty as to health effects necessarily exists." Maj. op. at 26. Presumably the majority imagines a case where scientists cannot measure people's pollutant exposure and therefore cannot relate it to disease. Section 112(e)'s feasibility test, however, is addressed to a different, enforcement-related problem: an inability to monitor emissions from particular sources. Scientists may well know that a pollutant is hazardous and may well be able to measure it in the ambient air, yet EPA may still be unable practicably to measure how much is emitted by a particular source. In that case, rather than set an unenforceable quantitative limit on emissions, EPA is allowed to set design or work practice requirements so long as they effectively protect health. These considerations apply equally whether dealing with a threshold pollutant and a standard allowing some level of emissions, or with a nonthreshold pollutant and a standard allowing no emissions.

conference from the Senate bill, which prohibited emissions of hazardous pollutants unless they were demonstrated to have safe thresholds, to the final mandate to provide "an ample margin of safety to protect the public health." Boiled down, the majority's contention is that the final language is more general than the Senate's, and that "we have no way of knowing the meaning of the change from specific regulatory commands to a different and more general pattern." Maj. op. at 18. From this the majority concludes that the final language is ambiguous.

The dissent, however, clearly shows that permission to consider costs and feasibility cannot reasonably be drawn out of the conference committee's changes. First, the conference committee chose for hazardous pollutants the same standard-setting criteria used by the Senate bill for ambient air quality standards.[22] The only difference is the substitution of "ample margin" in place of "adequate margin," which if anything is a strengthening change. Dis. op. at 8. Even the majority concedes that Congress barred feasibility tests from ambient standards. It is therefore not credible that when the conferees deliberately copied the margin of safety language in §112, they intended a different result on such factors.

Second, as demonstrated above, the majority's reading of the "ample margin of safety" test destroys the sense in the conferees' decision to write the Presidential national security exemption. As the dissent states (at 14-15), that provision:

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[22] Compare Section 109(b)(1) (air quality standards must be set at levels which "allowing an adequate margin of safety, are requisite to protect the public health") with Section 112(b)(1)(B) (hazardous pollutant standards must "provide[] an ample margin of safety to protect the public health").

> is unnecessary unless the "ample margin of safety" language otherwise bars consideration of available technology. The conference committee added both pieces of language at the same time, a fact that makes it difficult to believe the committee was unaware of the interaction between them.[23]

The majority also contends the legislative history of §109 is clearer on the exclusion of cost and feasibility considerations than the history of §112. The majority cites a passage from the Senate Report which states, regarding ambient standards, that "existing sources of pollutants either should meet the standard of the law or be closed down,"[24] and asserts this statement is unique. Maj. op. at 30. But equally clear statements apply to hazardous pollutant standards as well, both before and after the conference.[25] Most importantly, in post-conference floor debate

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[23] Mention of permission to consider cost or feasibility under Section 112 is conspicuously absent from the list of concessions to "reasonableness and feasibleness" claimed by the House conferees in the statement of Rep. Staggers, the committee chairman and floor manager, in the House post-conference floor debate. 1 Leg. Hist. 111-112. If the House members had gained any ground from the Senate on this point, it is reasonable to expect that it would have been mentioned here.

[24] 1970 Senate Report at 3, 1 Leg. Hist. 403.

[25] Just one page before the statement quoted by majority, the Senate Report said:

> The protection of public health -- as required by the national ambient air quality standards and as mandated by provision for elimination of extremely hazardous pollution agents -- will require major action throughout the Nation. Many facilities will require major investments in new technology and new processes. Some facilities will need altered operating procedures or a change of fuels. Some facilities may be closed.

1970 Senate Report at 2, 1 Leg. Hist. 402 (emphasis added). In Senate floor debate the Act's chief sponsor, Senator Muskie, quoted legislative history from 1967 that "[c]onsiderations of technology and economic feasibility . . . should not be used to mitigate against protection of the public health and welfare." He continued: "Contrary to this intent, these considerations have been used as arguments to compromise the public health. Therefore, the committee has made explicit in this bill what is implicit to standards designed to protect our health." He then

Senator Muskie (the Act's chief sponsor) summarized the final provision as follows:

> The standard 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.[26]

None of these statements drew the slightest qualification or objection. Their clear message is that the closing of facilities will be required if necessary to protect public health from hazardous pollutants, no less than if necessary to meet ambient standards. The majority cannot credibly maintain that Congress had any less resolve to protect public health or any more sympathy for cost and feasibility considerations in the context of hazardous pollutants than in the context of ambient standards.

To find an ambiguity in a statute this clear goes beyond anything required or permitted by Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984), and, as the dissent warns, effectively strips Congress of control over agency action. Dis. op. at 13. The "traditional tools of statutory construction" (Chevron, 467 U.S. at 843 n.9) permit only one conclusion: That Congress barred cost and feasibility tests from standard-setting under §112.

Conclusion

For these reasons, Petitioner urges the panel or the full Court to grant rehearing of this case.

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stated specifically about hazardous air pollutants: "The committee was provided with strong evidence that any level of emissions of certain pollutants may produce adverse effects that cannot be tolerated." 1 Leg. Hist. 226-227.

[26] Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970, Exhibit 1 to Statement of Sen. Muskie, 1 Leg. Hist. 133.

Respectfully submitted,

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December 15, 1986