

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

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

BRIEF FOR PETITIONER ON REHEARING

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QUESTION PRESENTED

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

The basis for jurisdiction, references to rulings and parties and to other pending cases, and Petitioner's Rule 8(c) certificate are given in Petitioner's opening brief.

STATUTORY AND REGULATORY PROVISIONS

Section 112 of the Clean Air Act, 42 U.S.C. §7412, defines a "hazardous air pollutant" as any substance

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

§112(a)(1). The Administrator must maintain a list of such pollutants. §112(b)(1)(A). Within 180 days of placing a pollutant on the list, he must propose national emission standards. He must promulgate the standards within a further 180 days, unless he finds that the substance "clearly is not" a hazardous air pollutant. §112(b)(1)(B). The last sentence of §112(b)(1)(B) states: "The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant."

¹ The panel unanimously ruled against EPA and the Intervenor on several procedural issues. See majority opinion, Part II, at 5-11, and dissenting opinion at 1. No party sought rehearing on these issues. The Court therefore should reinstate Part II when it rules on the issue presented for rehearing.

Under review in this case is a January 1985 notice in which EPA withdrew amendments originally proposed in 1977 to strengthen the national emission standard for the cancer-causing air pollutant vinyl chloride. 50 Fed. Reg. 1182 (1985) (JA 46), withdrawing proposed amendments to 40 C.F.R. Part 61, Subpart F (JA 28). Petitioner submits that the economic and technological feasibility tests used by EPA in the withdrawal are prohibited under §112.

The statutory and regulatory provisions are reproduced in full in Appendix A of Petitioner's opening brief.

STATEMENT OF THE CASE

The full statement of the case is found in Petitioner's opening brief at 3-13. The factual background may be summarized as follows. Vinyl chloride, or "VC", is a gaseous synthetic chemical used to manufacture polyvinyl chloride plastics. It is a potent human carcinogen, causing cancers of the liver, brain, and possibly other organs.² It is made or used at 57 chemical plants located in 18 states.³

EPA has consistently recognized that no safe level of exposure to vinyl chloride can be identified. As stated in the January 1985 notice: "[T]here is no known threshold level of effects for VC."⁴ Yet even under the 1976 standard, nearly 155

² See 40 Fed. Reg. at 59532-33 (JA 2-3); 41 Fed. Reg. at 46560 (JA 23); memorandum from R.E. McGaughy, EPA Carcinogen Assessment Group, to J. Padgett, Director, EPA Office of Air Quality Planning and Standards (Jan. 5, 1984) (Record, B-27) (JA 66).

³ EPA, Vinyl Chloride - A Review of National Emission Standards (EPA-450/3-82-003, Feb. 1982) at 2-9 (Record, A-25).

⁴ 50 Fed. Reg. at 1183 (1985) (col. 1) (JA 47). See also, 42 Fed. Reg. at 28154 (col. 2) (1977) (proposed amendments) (JA 40); 40 Fed. Reg. at 59532-33 (1975) (original proposal) (JA 2-3).

tons of VC gas escape each year from the typical polyvinyl chloride plant, causing widespread public exposure.⁸ In 1975 (when EPA last estimated), more than 4.6 million people lived within five miles of the VC-emitting plants.⁹

EPA proposed amendments to tighten the VC standard in 1977.⁷ In January 1985, however, the Agency withdrew the proposed amendments.⁸ The essence of the case is that in the January 1985 withdrawal EPA employed economic and technological tests which are barred under §112.

The January 1985 notice set forth cost-benefit and technological feasibility tests for standards under §112. The cost-benefit test was stated most explicitly in the notice's characterization of EPA's actions in 1976 when it first regulated vinyl chloride: "The current [1976] VC standard was established based on judgments concerning the costs and benefits of the standard to society."⁹ The technological feasibility test was stated as follows: That an emission limit may be established under §112 only if EPA shows that it has been "consistently achieved" in the past at operating facilities.¹⁰ The notice then concluded that the amendments proposed in 1977 do not pass these

⁸ An estimated 140.5 megagrams (154.5 tons) per year of VC still leak from a typical PVC plant. 50 Fed. Reg. 1184 (Table 1) (JA 48).

⁹ 40 Fed. Reg. at 59533 (col. 1) (JA 3).

⁷ 42 Fed. Reg. 28154 (1977) (JA 40).

⁸ 50 Fed. Reg. 1182 (1985) (JA 46).

⁹ Id. at 1183 (col. 3) (JA 47).

¹⁰ Id. at 1184 (col. 3) (JA 48).

tests.¹¹ Because the proposed amendments were no longer considered "appropriate," they were "withdrawn."¹²

SUMMARY OF THE ARGUMENT

The Supreme Court and this Court have ruled that an agency charged with setting standards to protect public health from dangerous pollutants cannot engage in cost-benefit analysis or take technological or economic considerations into account unless the statute expressly so provides. Union Electric Co. v. EPA, 427 U.S. 246 (1976); American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981); Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980), cert. denied 449 U.S. 1042 (1980).

No such proviso can be found in §112. That section and its legislative history demonstrate a specific and unqualified intention that the only factor which EPA may consider when setting standards for hazardous air pollutants is protection of public health. Section 112(b)(1)(B) states that standards must be set at the level which "provides an ample margin of safety to protect the public health." These words may not reasonably be read to make any factor other than health protection relevant to standard setting. They preclude EPA from compromising public health protection by employing cost-benefit and technological feasibility tests in setting standards.

EPA has asserted that Congress did not discuss how the Agency should regulate a pollutant which is hazardous to health at any level. This is flatly wrong. The legislative history demonstrates unequivocally that Congress understood some

¹¹ Id. at 1184-85 (JA 48-49).

¹² Id. at 1183 (col. 2) (JA 47).

pollutants may cause death or serious illness at any level of exposure. For such pollutants the legislative history shows that Congress intended EPA to set standards that protect persons from illness or death even if that requires standards which allow no measurable emissions. Congress expressly mandated such standards even if they cause facilities to close. The legislative history shows that Congress chose the "ample margin of safety" formulation to carry out this intent.

Interpreting the contemporaneous and closely parallel "adequate margin of safety" test in §109 of the Act, this Court has ruled that EPA may base standards on no factor other than protection of public health. Technological or economic feasibility may not be considered. Lead Industries Ass'n, supra. This Court reached the identical conclusion interpreting the "ample margin of safety" test as used in both §112 of the Clean Air Act and §307 of the Clean Water Act. Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978).

Despite these legislative materials and judicial precedent, the panel majority ruled that the "ample margin of safety" requirement is ambiguous and upheld EPA's use of economic and technological feasibility tests. The majority's reading conflicts with the plain meaning of the statute and with the Congressional intent clearly evident in the legislative history. The majority's reading also conflicts with the Supreme Court rulings that authority to consider costs or feasibility in a public health protection statute must be express, and with the D.C. Circuit cases holding that "margin of safety" provisions are exclusively health-based. Deference to an agency's interpretation is not permitted if, as here, the statute and

legislative history show that the intention of Congress is specific and clear. Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

EPA and the panel majority reached their conclusion that the Agency may employ cost and technological feasibility tests only by disavowing the "traditional tools of statutory construction" (Chevron, 467 U.S. 843, n.9), and reasoning backwards from their own views of appropriate public policy. In EPA's view, to preclude the Agency from employing these tests would be unwise. Substituting its view of appropriate policy for that of Congress, EPA saw fit to employ these tests anyway. The panel majority allowed its own view of appropriate policy to intrude when it described such tests as "natural, perhaps inevitable." Maj. op. at 26. But §112 reflects a contrary policy choice, and under our system of government, only Congress can change the law. TVA v. Hill, 437 U.S. 153 (1978); Lead Industries Ass'n, supra.

Because EPA violated §112's mandate to consider only protection of public health when setting hazardous air pollutant standards, this Court should vacate the January 1985 withdrawal of the proposed amendments to the VC standard. In view of the hazard to public health and EPA's eight-year delay in taking action on the proposal, this Court should remand the proceedings to EPA with instructions to complete further rulemaking in accordance with law on a judicially enforceable schedule. Section 112(b)(1)(B) mandates promulgation of proposals within 180 days of their issuance. In view of the statutory deadline, the appropriate period to allow EPA for completion of the rulemaking is no longer than 180 days after issuance of the Court's mandate.

ARGUMENT

- I. THE PANEL OPINION CONFLICTS WITH SUPREME COURT AND D.C. CIRCUIT PRECEDENT THAT AUTHORITY TO CONSIDER TECHNOLOGICAL OR ECONOMIC FEASIBILITY MUST BE EXPRESSLY GRANTED

The Supreme Court has authoritatively held that consideration of cost and feasibility factors is permissible under the Clean Air Act 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).¹³ See also American Textile Mfrs. Inst. v. Donovan: "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) (construing the Occupational Safety and Health Act).

The Union Electric rule of construction was approved by Congress in the 1977 amendments to the Clean Air Act.¹⁴ It is a rule which heretofore this Court has scrupulously observed. As the Court stated when it ruled that the closely parallel

¹³ The deliberate exclusion of cost and technology tests is traced through the legislative history of the Clean Air Act in Bonine, The Evolution of "Technology-Forcing" in the Clean Air Act, BNA Env. Reporter, Monograph 21 (1975).

¹⁴ 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 the requirement only to specified sections of the law that expressly authorize cost considerations. Clean Air Act §317(a), (e), 42 U.S.C. §7617(a), (e).

"adequate margin of safety" requirement in §109 of the Act precludes technological or economic feasibility considerations:

[W]hen Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of its statutory authority by taking other factors into account. . . . A policy choice such as this is one which only Congress, not the courts and not the EPA, can make.

Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1150 (D.C. Cir. 1980), cert. denied 449 U.S. 1042 (1980).¹⁵

Both EPA and the panel majority have admitted 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 was a clear failure to follow Supreme Court precedent.

The panel majority asserted that the Supreme Court's statements bear only on an argument that EPA is required to consider cost or feasibility and that they leave EPA free 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.¹⁶ The

¹⁵ See also American Petroleum Inst. v. Costle, 665 F.2d 1176, 1185 (D.C. Cir. 1981), cert denied, 455 U.S. 1034 (1982).

¹⁶ "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 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.

panel majority's holding thus cannot be reconciled with the Supreme Court precedents.¹⁷

II. THE PANEL OPINION CONFLICTS WITH THIS COURT'S PRIOR DECISIONS ON THE CLEAN AIR ACT'S "MARGIN OF SAFETY" TESTS

The panel opinion also conflicts with two decisions of this Court which found no ambiguity in the Clean Air Act's "margin of safety" requirements. 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 panel majority asserted that 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. Expressly following the Union Electric rule, Hercules concluded that Congress deliberately selected only health and environmental factors for EPA consideration:

[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 by toxic substances. The meaning of the statute being clear, it is not this court's prerogative to

¹⁷ The panel majority sought to distinguish American Textile a different way by asserting that its holding applies only to a specialized form of economic analysis: cost-benefit analysis. The majority contended 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).

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).

Necessarily, since the statute is clear, it is not the Agency's prerogative to impose such considerations either.^{1*}

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 EPA from considering cost and feasibility when setting ambient air quality standards. The panel majority opinion claimed 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:

^{1*} EPA argued before the panel that to effectively preclude feasibility considerations from §112(b)(1)(B) Congress would have had to spell out factors in addition to the terms "ample margin of safety," as it did in §307(a) of the Clean Water Act. EPA Br. at 18. EPA, however, has confused the holding in Hercules. The holding that feasibility may not be considered under §307(a) did not depend on the presence of the additional factors referred to by EPA; it depended on the absence of "any term commonly used to denote a feasibility consideration, e.g., feasibility, achievability, practicability, economic impact, or cost." 598 F.2d at 111.

"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."¹⁹ 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 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 32.²⁰ 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: "It makes no sense to allow the Administrator greater latitude in the

¹⁹ S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970), 1 A Legislative History of the Clean Air Act Amendments of 1970 410 ["Leg. Hist."].

²⁰ The panel majority asserted that the bar against feasibility tests under §109 is due to "structural aspects of the ambient air pollution provisions not germane here." The panel also asserted that §109's legislative history is clearer than §112's in stating that facilities may have to close if necessary to protect health. Maj. op. at 30. To the contrary, §112's standard-setting and implementation structure is closely parallel to §109's and §112's legislative history is equally clear in barring feasibility considerations. See Dis. op. at 5-8 and infra at pp. 24-25.

establishment of standards for pollutants Congress explicitly recognized as highly dangerous than he is allowed in the regulation of less dangerous pollutants." Dis. op. at 8.

III. SECTION 112 AND ITS LEGISLATIVE HISTORY UNAMBIGUOUSLY MANDATE CONSIDERATION OF HEALTH FACTORS ONLY

No provision for applying cost-benefit or technological feasibility tests can be found on the face of §112 or in its legislative history. To the contrary, the words, structure, and legislative history of §112 show that no factor other than protection of public health is to affect the Administrator's decisionmaking when setting hazardous air pollutant standards and that cost and feasibility considerations were intentionally excluded.²¹ Thus there is no support for EPA's or the panel majority's assertion that §112 is ambiguous.

A. The Standard-Setting Language in §112(b)(1)(B) Directs EPA to Consider No Factor Other Than Protection of Public Health

Section 112(b)(1)(B) requires the Administrator to set each hazardous air pollutant standard "at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant." The exclusive focus of these words on protection of health should be clear on their face. Nothing in these words can reasonably be read to authorize EPA's compromising public health protection by considering economic or technological factors.

²¹ This reading is supported by virtually all commentators. See the publications cited in dis. op. at 3-4, 9-10, as well as Bonine, supra note 13, and Kramer, Economics, Technology, and the Clean Air Act of 1970: The First Six Years, 6 Ecology L. Q. 161, 194-196 (1976). See also the brief of amici curiae law professors in support of rehearing (filed Dec. 16, 1986).

The panel majority agreed that the latter half of this mandate ("to protect the public health") is "unambiguously" health-based.²² The majority asserted, however, that this mandate is diminished by the "ample margin of safety" requirement. Those words, the panel concluded, are ambiguous and permit EPA to consider cost and technological feasibility whenever there is some uncertainty in the health effects evidence. Maj. op. at 11-12, 26.

The majority's reading of the "ample margin of safety" requirement 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 health protection indicated by the remainder of the phrase "to protect the public health." The "ample margin of safety" plainly indicates a policy of erring on the side of caution to protect public health not only from known dangers, but also from potential dangers indicated by probative but incomplete evidence. The precautionary function of these words is clearly 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 be provided against hazards which research has not yet identified."²³

²² Accord, Motor & Equipment Mfrs. Ass'n v. EPA, 627 F.2d 1095, 1117-18 (D.C. Cir. 1979).

²³ S.Rep. No. 1196, 91st Cong., 2d Sess. 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 panel majority misappropriated the "paradox" referred
(continued...)

The majority correctly observed that the "ample margin of safety" requirement gives EPA means for coping with scientific uncertainty. Maj. op. at 12. From this, however, the majority reasoned -- 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.²⁴ When Congress adopted this case law in 1977, it likewise excluded such non-scientific factors.²⁵

²³ (...continued)
to in this case. That 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.

²⁴ 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.

²⁵ 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. 294, 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 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."

The majority asserted 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 showed, 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 13. 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.²⁶ "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 regulated under §112.²⁷ This is how Congress intended EPA to exercise "judgment" to resolve scientific issues.

²⁶ 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.

²⁷ EPA has long been aware that empirically verifying carcinogenicity at all low levels of exposure is not possible due to limits of scientific techniques and resources. At the same time, EPA has long recognized scientifically sound reasons why no thresholds may actually 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 EPA (and all other federal health protection agencies) to resolve the uncertainty by presuming the absence of safe levels for such compounds.

3. The Remainder of §112 Underscores the Exclusive Health Focus of Standard-Setting

The exclusive health focus intended for standards set under §112(b)(1)(B) is further emphasized by the remainder of §112. First, the term "hazardous air pollutant" itself is defined in words admitting of no other concern: A substance causing or contributing to air pollution "which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." §112(a)(1).

Second, the statute provides only one basis on which EPA may decline to set national emission standards: If it determines that the pollutant, after all, "clearly is not a hazardous air pollutant." §112(b)(1)(B). That inquiry is obviously limited to the public health protection factors relevant under the definition of a hazardous air pollutant quoted above.

Third, the statute specifically provides for limited consideration of economic and technological factors in the application of the standards to particular sources. Under §112(c)(1)(A)(ii), the Administrator may grant an existing source a waiver permitting up to two years of operation out of compliance with the hazardous air pollutant standard if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

Since Congress explicitly limited consideration of technological or economic factors to existing sources only, and explicitly limited the period of such waivers to a maximum of two years,

there is no room for contending that EPA may give broader consideration to these factors in standard-setting itself.^{3*}

Fourth, 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 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 dissenting opinion, none of these restrictions on the Presidential exemption would make sense if feasibility considerations were broadly permissible in standard-setting. Any situation in which the Presidential exemption might come into play undoubtedly would already have been accommodated during EPA's broader consideration of feasibility when the standard was set. Such a construction would turn the national security condition and the requirement of Presidential involvement into surplusage. Dis. op. at 6, 14-15.

Fifth, additional evidence for the prohibition on considering technological and economic factors when setting standards is found in the extreme care with which the terms "not feasible" are defined under §112(e), the 1977 amendment authorizing EPA to set design or work practice standards, rather than emission standards, in narrowly specified circumstances.

^{3*} See Pet. Br. at 23-24, showing that the two-year waiver for individual existing sources and the Presidential national security exemption (discussed immediately below) were the only significant concessions to non-health factors agreed to by the House and Senate conferees in 1970.

Such a standard may be set only when an emission standard is "not feasible," terms which are 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, when doing so would violate another health or safety law, 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 As the dissenting opinion pointed out, Congress's

¹⁹ Congress specifically had in mind the problem of dispersed asbestos emissions from building demolition, in which emissions cannot be practically 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. For more on the specific limitations imposed by Congress on the term "not feasible," see Pet. Br. at 4 n.3 and 20 n.34. The Conference Report further emphasized these limitations. It described the Senate provision as dealing with situations "where it is not possible or feasible to measure hazardous emissions or to capture them through appropriate devices for control." H.R. Rep. No. 564, 95th Cong., 1st Sess. 150 (1977), 3 Leg. Hist. 511. It underlined once more that the terms "not feasible" relate solely to EPA's ability to measure emissions and that do not authorize EPA to consider the feasibility for industry of controls: "The language in this section with respect to technological or economic limitations defines what is not feasible only for purposes of prescription or enforcement by EPA." Id. at 151 (emphasis added).

The panel majority plainly misunderstood §112(e). The opinion stated: "Where measurement is impracticable because of technological or economic factors, uncertainty as to health effects necessarily exists." Maj. op. at 26. Presumably the majority had in mind 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. With a pollutant such as asbestos, scientists know it is hazardous and are able to measure it in the ambient air, yet EPA is still 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

(continued...)

restrictively defining "feasible" in §112(e) would make no sense if EPA were already authorized to consider a more general notion of feasibility when setting standards. Dis. op. at 6-7.³⁰

C. The Legislative History Reinforces §112's Exclusive Focus on Protecting Public Health

The legislative history demonstrates Congress's intent that EPA should consider only what is required to protect public health when developing hazardous air pollutant standards. The panel majority's contrary conclusion rested on a clear misinterpretation of the Conference Committee agreement. We first summarize the Senate and House provisions, and then the Conference agreement.

³⁰ (...continued)

a threshold pollutant and a standard allowing some level of emissions, or with a nonthreshold pollutant and a standard allowing no emissions.

³¹ EPA offered several extraordinarily weak textual arguments which the panel did not even discuss. First, EPA made the amazing claim that Congress, by using the words "in his judgment," delegated to EPA the authority to define the legal meaning of the "ample margin of safety" test any way it sees fit. (EPA Br. at 18, 33.) This is plainly wrong. The clear function of "in his judgment" is to give EPA some discretion in assessing the facts presented by particular pollutants. See Reply Br. at 15, n.36. The words do not give EPA carte blanche to decide what the legal criteria are; Congress decided that question already. EPA's contention goes beyond even the majority's overbroad notion of deference. A statute which really gave EPA a blank check to make any factors relevant probably would be an unconstitutional delegation even by today's standards.

Second, EPA argued that the statement of purpose in §101(b)(1) authorizes cost and technological feasibility tests. EPA Br. at 18-19. The Agency cited this provision, however, to support precisely the opposite conclusion in Lead Industries. See 647 F.2d at 1152-53 and Reply Br. at 16, n.38. EPA cannot have it both ways. Moreover, if the present assertion were correct, then the same purpose would control all other sections of the law. This proposition would require overruling Union Electric Co. v. EPA, 427 U.S. 246 (1976), Lead Industries, and this Court's construction of §112 in Hercules.

Section 112 originated in 1970 in the Senate bill.³² That bill required EPA³³ to prohibit emissions of hazardous air pollution agents³⁴ within one year after listing them unless the Agency found either (a) that the pollutant in fact was "not hazardous to the health of persons," or (b) "that a departure from such prohibition . . . will not be hazardous to the health of persons" (i.e., that the pollutant had been shown to have a threshold below which it could be safely breathed). The prohibition (or emission standard in the case these findings were made) became effective for both new and existing sources immediately on promulgation.³⁵

Describing this provision, the Senate Report stated that EPA "would be required to publish a proposed prohibition of emissions of such agents or combination of such agents from any stationary source." The Administrator

would be required to promulgate such prohibition, unless he found on the basis of a preponderance of the evidence that the air pollution agent was not, in fact, hazardous to the health of persons -- or that a greater than zero emission could be permitted without presenting a hazard to health.³⁶

³² S. 4358, §115, 91st Cong., 2d Sess. (1970) (as reported by the Senate Committee on Public Works), 1 Leg. Hist. 565-69.

³³ The 1970 Senate and House bills and committee reports actually referred to the Secretary of Health, Education, and Welfare, who, until the creation of EPA by executive reorganization later in 1970, was responsible for implementing federal air pollution laws. For convenience, we refer to EPA as the implementing agency in discussing these bills and reports.

³⁴ A hazardous air pollution agent was defined in §115(b) in essentially identical terms as used in the final law.

³⁵ See Pet. Br. at 21-22.

³⁶ S. Rep. No. 1196, 91st Cong., 2d Sess. 20 (1970), 1 Leg. Hist. 420.

Explaining these requirements to the full Senate, Senator Muskie, the Act's chief sponsor and floor manager, stated: "The committee was presented with strong evidence that any level of emissions of certain pollutants may produce adverse effects that cannot be tolerated."¹⁷ It is hard to imagine a clearer intention that EPA consider health factors only.

The House bill would have limited regulation of "extremely hazardous" air pollutants to new sources only and would have allowed EPA to make specific exemptions from prohibitions, presumably on the basis of non-health considerations.¹⁸ But this bill was not enacted.

The final legislation fashioned by the Conference Committee followed the structure and content of the Senate bill with only two significant modifications. First, the Conferees adopted the requirement that standards provide an "ample margin of safety to protect the public health." This choice of words can have no explanation other than a conscious decision to emulate and amplify the "adequate margin of safety" test being used in §109 of the Act, which originated in the Senate bill and which was

¹⁷ Cong. Rec. S16091 (daily ed. Sept. 21, 1970), 1 Leg. Hist. 227.

¹⁸ Under the House bill, EPA was to set performance standards for new sources for pollutants which "substantially endanger" public health. In setting these standards EPA was instructed to consider technological and economic factors. The bill stated, however, that "[i]f such emissions are extremely hazardous to health, no new source of such emissions shall be constructed or operated, except where (and subject to such conditions as he deems necessary and appropriate) the [Administrator] makes a specific exemption with respect to such construction or operation." H.R. 17255, §5 (proposing new §112(b)(1)), 91st Cong., 2d Sess. (1970) (as reported by the House Committee on Interstate and Foreign Commerce), 2 Leg. Hist. 921.

clearly intended to be exclusively health based and to preclude technological and economic feasibility considerations.''

Second, the Conferees made three specific changes to the Senate bill's provision that compliance was required immediately upon promulgation: (a) they delayed the effective date of a hazardous air pollutant standard for all existing sources by 90 days; (b) they made available the two-year compliance waiver for specific existing sources; and (c) they provided for the Presidential national security waivers. §112(c)(1)(B)(i), (c)(1)(B)(ii), and (c)(2). These were the only concessions to feasibility considerations the conferees made, and they related exclusively to compliance, not to standard-setting.''

This legislative choice to exclude non-health factors from standard-setting under §112 was made most explicit by Senator Muskie, the chairman of the Senate conferees, in post-conference floor debate:

The standards must be set to provide an ample margin of safety to protect the public health. This could mean, effectively, that a plant would be required to close because of the absence of control techniques. It could include emission standards which allow for no measurable emissions.''

' See the legislative history of the "adequate margin of safety" test, traced in Lead Industries Ass'n, 647 F.2d at 1149-50.

' Mention of permission to consider cost or feasibility under §112 is conspicuously absent from the list of concessions to "reasonableness and feasibility" 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.

' Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970, Exhibit 1 to Statement of Sen. Muskie, Cong. Rec. S20601 (daily ed., Dec. 18, 1970), 1 Leg. Hist. 133.

This statement drew no dissent or objection from any quarter.

D. There Is No Ambiguity In The Legislative History

The panel majority incorrectly derived an ambiguity on the role of cost and feasibility tests from the 1970 Conference agreement. The key point for the majority was the change in 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 panel majority's contention was 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 concluded that the final language was ambiguous.

As the dissent showed, however, permission to consider costs and feasibility cannot reasonably be drawn out of the Conference Committee's changes. First, the Conferees chose for hazardous pollutants the same standard-setting criteria used by the Senate bill for ambient air quality standards.⁴² The only difference was the substitution of "ample margin" in place of "adequate margin," which if anything was a strengthening change. See dis. op. at 8. Even the panel majority conceded that Congress barred feasibility tests from ambient standards. It is therefore not credible that when the Conferees deliberately copied the margin

⁴² Compare §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 §112(b)(1)(B) (hazardous pollutant standards must "provide[] an ample margin of safety to protect the public health").

altered operating procedures or a change of fuels. Some facilities may be closed."

In subsequent floor debate on the bill Senator Muskie 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." Most important is Muskie's explanation of the final legislation's requirement for an ample margin of safety to protect 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."

None of these statements drew the slightest qualification or objection. Their clear message is that the closing of facilities is 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.

" Id. at 2, 1 Leg. Hist. 402 (emphasis added).

" 1 Leg. Hist. 227. Muskie also quoted legislative history from 1967 which stated: "Considerations 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." Id. at 226-227.

" 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.

E. Congress Did Not Ratify EPA's Interpretation

The panel unanimously rejected EPA's contention that the 1977 amendments ratified EPA's cost and feasibility tests. See maj. op. at 19-24. Petitioner submits that the case against ratification is even stronger than as put by the panel. A complete discussion is found in NRDC's Reply Br. at 26-33."

IV. DEFERENCE TO AN AGENCY INTERPRETATION WHEN THE STATUTE IS SO CLEAR GOES BEYOND ANYTHING REQUIRED OR PERMITTED BY CHEVRON

Asserting that §112 is ambiguous and opining that consideration of cost and feasibility is "natural, perhaps inevitable," the panel majority deferred to EPA's interpretation, citing Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984). But to find an ambiguity in a statute this clear goes beyond anything

" A short response is due to two other EPA arguments that the panel did not even mention. First, EPA incompletely quoted a passage from the 1970 Senate Report which states, in relevant part, that "complete control of beryllium from steel plants, for example, may not be necessary or practicable. . . ." S.Rep. No. 1196, 91st Cong., 2d Sess. 20 (1970), 1 Leg. Hist. 420. From this EPA drew the incorrect conclusion that "the Senate bill assumed that feasibility would be considered" even for pollutants hazardous at any level of exposure. EPA Br. at 19. The passage, however, refers specifically to a pollutant that at the time was believed to have a safe threshold. See 38 Fed. Reg. 8820, 8823 (1973). Thus, complete control of emissions would not be necessary because beryllium was believed to have a safe level of exposure. A complete discussion of this passage is found in NRDC's Reply Br. at 17-19.

Second, referring to Senator Muskie's post-conference statement that §112 "could include emission standards which allowed for no measurable emissions" even if plants are forced to close, EPA suggested that use of the word "could" gave the Agency discretion to consider feasibility factors even when dealing with pollutants that are hazardous to health at any level of exposure. EPA Br. at 21. Here again, however, EPA ignored the fact that not all hazardous air pollutants are hazardous at any level. Where a pollutant has a safe threshold, the ample margin of safety test can be satisfied while still allowing emissions. But for the "certain pollutants" which Muskie earlier described as intolerably dangerous at "any level of emissions" (Cong. Rec. S16091 (daily ed., Sept. 21, 1970), 1 Leg. Hist. 227), public health must be protected even if it means a "no measurable emissions" standard and the closing of plants.

required or permitted by Chevron and, as the dissent warned, effectively strips Congress of control over agency action.** What the panel really did was substitute its own views of appropriate policy in place of Congress's. Chevron states: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843 n.9.** In this case traditional tools of statutory construction permit only one conclusion: That Congress barred cost and feasibility tests from standard-setting under §112.**

The only argument left to EPA and the panel majority is their own view that precluding administrative consideration of cost and technological feasibility is not an appropriate public policy. EPA speculated, without any attempt having been made, that the vinyl chloride industry could never meet a no measurable

** "In our caution not to rob the Executive Branch of its proper role in the constitutional system, we must be extremely careful not to deprive Congress of effective legislative control over agency action." Dis. op. at 13.

** Cf. Security Industry Ass'n v. Board of Governors of the Federal Reserve System, 104 S.Ct. 2979, 2983 (1984): "[D]eference is not to be a device that emasculates the significance of judicial review." See also Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968).

** EPA has claimed "Congress never discussed the particular problem associated with apparent non-threshold pollutants" -- pollutants with no known safe levels of exposure. 40 Fed. Reg. at 59534 (col. 3) (1975) (original vinyl chloride proposal) (JA 4). But this assertion is flatly wrong. The legislative history reviewed above shows that Congress clearly understood some pollutants are intolerably hazardous at any level of exposure and determined that protection of the public health with an ample margin of safety required standards permitting no measurable emissions, even if that meant pollution sources would close.

emissions standard and might have to close.¹¹ Even though Congress contemplated this result when the public is exposed to a pollutant that is hazardous at any level of exposure, EPA overrode the law and substituted a policy of cost-benefit analysis. The panel majority was equally guilty of substituting its view for Congress's when it characterized EPA's policy as "natural, perhaps inevitable." Maj. op. at 26.

Aside from the fundamental response that only Congress has the authority to change the law (TVA v. Hill, 437 U.S. at 194-95; Lead Industries, 647 F.2d at 1150), there are other persuasive reasons why Congress rationally chose to limit EPA's authority. These are discussed in full in NRDC's Pet. Br. at 29-36, and need only brief mention here. The main point is that the limitation on relevant factors is essential to Congress's expressly chosen policy of "technology-forcing."¹² As the Supreme Court noted in Union Electric:

[T]he 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution. . . . These requirements are of a "technology-forcing character" . . . and are expressly designed to forced regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.

Allowing such claims [of infeasibility] to be raised . . . would frustrate congressional intent. It would permit a proposed plan to be struck down as infeasible before it is given a chance to work, even though Congress clearly contemplated that some plans would be infeasible when proposed Technology forcing is a concept somewhat new to our national experience and necessarily entails some risks. But Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking.

¹¹ In fact, great strides towards leak-free operation have already been demonstrated at particular plants. See Petitioner's opening brief at 31-33 & n.51.

¹² See Bonine, supra note 13.

427 U.S. at 256-57, 268-69. By substituting technological feasibility and cost tests, EPA has negated this statutory policy.

If a particular exercise of technology-forcing comes up short, Congress is capable of making necessary adjustments in standards. As stated by a noted commentator, William Rodgers:

[EPA's] tendency to resist enforcement of the law as written on grounds of social catastrophe is not unknown in environmental legal circles. The position presupposes that a "better" policy choice or decision analysis requires a consideration of factors other than those specified legislatively. This may very well be true, but there is no reason why Congress cannot selectively allocate responsibilities for any "ideal" decision, charging EPA with making a health-based judgment but reserving for another agency or itself choices of utilitarian override. It is important to keep in mind that a dynamic, as opposed to a static theory of legislation would view an EPA "final" order anticipating shutdown of a source under Section 112 as simply one stage of an ongoing process that gives different answers to different questions at different times.''

If an industry makes the effort to eliminate its hazardous emissions, and if that effort does not succeed completely, the final decision what to do properly rests with elected representatives. Such a situation requires sensitive determinations with both pragmatic and moral consequences: Whether an industry should be closed in order to protect public health, or whether protection of public health should be delayed or compromised to keep the industry going. Placing such determinations in the hands of Congress, rather than EPA, promotes greater protection of public health because Congress will likely grant fewer exceptions from protection with an "ample margin of safety," and on stiffer terms, than will EPA. Greater political legitimacy also results because the decisions are made

'' W. Rodgers, Environmental Law (West Pub. Co., 1984 Supplement) at 161 (footnote omitted).

by elected representatives, not by an agency bureaucracy. It is precisely these decisions which Congress best reserves, as it did in §112, to itself.

REQUEST FOR RELIEF

The January 1985 withdrawal should be vacated and the matter remanded to EPA for further rulemaking proceedings in compliance with the law. Because of the continuing hazard to public health from vinyl chloride emissions, and because of EPA's nearly eight year delay in taking action on the 1977 proposal, this Court should establish a specific deadline for completion of the proceedings on remand. In view of §112(b)(1)(B)'s requirement for moving from proposal to promulgation of a hazardous air pollutant standard within 180 days, Petitioner submits that the Court should order EPA to complete the rulemaking on remand no later than 180 days after the issuance of the Court's mandate.

In previous instances where EPA has coupled illegal action with long delay, this Court has issued judicial deadlines to govern action on remand. For example, in Sierra Club v. EPA, 719 F.2d 436 (D.C. Cir. 1983), cert. denied 468 U.S. 1204 (1984), this Court wrote:

Congress thought EPA could solve all problems [involved in writing tall stack regulations] in six months and the agency has had six years. We think it appropriate to direct EPA to promulgate new final regulations that remedy the defects this court has found within six months from the issuance of our mandate, the period originally specified by Congress.

Id. at 469-70.

CONCLUSION

For the foregoing reasons, the January 1985 withdrawal should be vacated and the proceeding should be remanded to EPA with instructions in accordance with the requested relief.

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Respectfully submitted,

A handwritten signature in cursive script, reading "David Doniger".

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