

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1150

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

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

SUPPLEMENTAL BRIEF ON REHEARING FOR
THE AMERICAN PETROLEUM INSTITUTE
AS AMICUS CURIAE

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PRELIMINARY STATEMENT

Congress, EPA and this Court have long understood that b cause there always is uncertainty in scientific data, public health standards necessarily reflect value judgments weighing the risks of underprotection against the consequences of overprotection. Dissatisfied with the policy judgment EPA made here, NRDC attempts "to erect" from previous court decisions "a policy of clear statement in environmental statutes" which would preclude any consideration of pragmatic values "unless the statute expressly so provides." 1/ Because Section 112 of the Clean Air Act does

1/ NRDC v. EPA, 804 F.2d 710, 726 (D.C. Cir. 1986), vacated, ___ F.2d ___ (D.C. Cir. 1987) ["Vinyl Chloride"]. This theme or variations of it appear throughout NRDC's Petition for Rehearing ["NRDC Pet."] and Brief on Rehearing ["NRDC Br."].

not specify what values may be weighed in evaluating the "margin of safety" to provide against uncertain dangers, NRDC reasons that Congress tacitly intended health to be "the only factor which EPA may consider." NRDC Br. at 4. The implication of this view, acknowledged only in footnotes, is that emissions bans are required in all cases where "known safe levels of exposure" cannot be identified. Id. at 27 n.50 (emphasis added); see also NRDC Pet. at 12 n.21.

NRDC's reading of Section 112 depends on a bright line rule of construction which supposedly emerges from previous decisions of this Court. 2/ According to NRDC, these cases preclude any consideration of practical concerns under other "margin of safety" statutes, including especially Section 109 of the Act.

API's supplemental brief focuses on this critical aspect of NRDC's challenge. 3/ As demonstrated below, none of

2/ NRDC cites *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980) ["Lead Industries"]; *American Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982) ["API"]; and *Hercules, Inc. v. EPA*, 598 F.2d 19 (D.C. Cir. 1978) ["Hercules"].

3/ To be sure, NRDC also argues from the text and history of Section 112 itself. But as demonstrated in our first brief ["API/CMA Br."] and as found by the panel majority here, these sources come nowhere near establishing an affirmative legislative preclusion of practical values. API/CMA Br. at 14-32. To the extent NRDC's textual and historical arguments about Section 112 have any force at all, it is only because of the judicial gloss NRDC draws from decisions construing other "margin of safety" statutes.

the Court's prior decisions supports NRDC's position. Moreover, under the principles announced in Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984), a "static judicial definition" of the phrase "margin of safety" cannot be drawn from those decisions to override EPA's construction of Section 112. 4/

First, far from imposing implied limits on the policy considerations the Administrator may consider in establishing "margins of safety" against uncertain harms, this Court's decisions in Lead Industries, API and Hercules all hold that Congress left those choices to EPA. Under both Sections 109 and 112, Congress authorized the Administrator to formulate an "essentially legislative policy judgment" about what degree of uncertainty (i.e., risk) is acceptable. In fact, the EPA "margin of safety" decisions reviewed in Lead Industries, API, and Hercules all reflect the kind of "pragmatic judgments" Congress expected the Agency to make in deciding how strictly to control pollutants which EPA found to lack "known safe" thresholds. For that and other reasons, those cases, which upheld EPA's decisions to set

4/ The question presented here is also involved, together with other aspects of EPA's construction of Section 112, in two other cases, Nos. 84-1387 et al., and Nos. 84-1524 et al. (challenges to EPA Section 112 decisions on benzene and radionuclides, respectively). Argument in these cases has been deferred pending a decision in this case. Because of its stake in the outcome here (among other things, API is a party in No. 84-1387), API sought and was granted leave to file a brief as amicus curiae with the panel, and the Court's Order dated February 27, 1987 invited amici curiae to file supplemental briefs on rehearing.

non-zero standards allowing some residual risks, cannot fairly be read to hold that non-health values are forbidden in establishing "margins of safety." See Part I, infra.

Second, whatever the correct reading of these cases, Chevron holds that EPA may adopt "different definitions in different contexts," "particularly [where] Congress has never indicated any disapproval of a flexible reading of the statute." Id. at 864. EPA's approach under Section 112 assigns "paramount" weight to public health values, and provides for infeasible standards, including even emissions bans, where residual health risks warrant, in the Administrator's judgment, an even greater margin of protection than the best controls can provide. Although different from EPA's approach to standard-setting under Section 109, this construction is entirely consistent with Congress' intent and, contrary to NRDC's assertion, is designed to provide a much more protective safety margin than the Agency's Section 109 standards have achieved. See Part II, infra.

- I. SECTIONS 109 AND 112 BOTH NECESSARILY PERMIT THE ADMINISTRATOR TO TAKE ACCOUNT OF NON-HEALTH "POLICY" CONSIDERATIONS IN MAKING AN "ESSENTIALLY LEGISLATIVE" JUDGMENT ABOUT HOW TO PROTECT THE PUBLIC HEALTH AGAINST UNCERTAIN DANGERS.

NRDC's position in this case is simple, though extreme. NRDC claims that Section 112 imposes a two-step process in which EPA must (i) identify a risk-free "threshold" level of exposure, and then (ii) set the standard far enough below that level to provide a "margin of safety." According to

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NRDC, EPA's job is confined to a purely scientific analysis of the available health data, so that if a perfectly safe "threshold" cannot be found for a particular pollutant, EPA must ban it. NRDC Br. at 14-15, 27 n.50; NRDC Pet. at 10-11.

The crucial flaw in this view is that scientific evidence rarely, if ever, provides definitive answers about the health risks posed by environmental pollutants. The National Academy of Sciences ["NAS"] has observed that all risk assessment is characterized by "pervasive uncertainty." Accordingly, "policy considerations" -- including "value judgments" about "the appropriate degree of conservatism" to apply in evaluating gaps and conflicts in the data -- "inevitably affect, and perhaps determine" the choices federal agencies must make in formulating standards to protect the public health. 5/

This Court, too, has often recognized the inherent limitations of science and the corresponding need for "value" or "policy" judgments in standard-setting. 6/ Given "the

5/ NAS, Risk Assessment in the Federal Government: Managing the Process 11, 19, 33, 37 (1983).

6/ See, e.g., Environmental Defense Fund v. EPA, 598 F.2d 62, 79-81, 83-85 (D.C. Cir. 1978) ["PCBs"]; Ethyl Corp. v. EPA, 541 F.2d 1, 24-25 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474-75 (D.C. Cir. 1974). Both the majority and dissenting opinions in the panel decision here recognized the inherent limitations of scientific research. Vinyl Chloride, 804 F.2d at 716, 722-23; id. at 735 n.4, 736 (Wright, J., dissenting).

absence of any clear thresholds," the Administrator's decisions "necessarily . . . rest largely on policy judgments." Lead Industries, 647 F.2d 1147, 1152. To make this "essentially legislative" determination "concerning the relative risks of underprotection as compared to overprotection," Ethyl, 541 F.2d at 20 (quoting Hodgson, 499 F.2d at 475). EPA must "decide what inferences may be drawn" from the available data and "formulate policy with respect to what risks are acceptable." PCBs, 598 F.2d at 84 (emphasis added).

As developed below, Congress knew that EPA's "public health" and "margin of safety" decisions necessarily would involve "pragmatic judgments" about the acceptable degree of risk in each case, given the extent of uncertainty that harm may occur and the inevitable economic and social consequences of lower standards. 7/ Indeed, this truth about public health policymaking can readily be discerned in the EPA decisions that were upheld by the cases NRDC relies on so heavily. Against this legislative and administrative background, none of those decisions can fairly be read to

7/ Whether or not informed by a formal accounting of costs and benefits, such a judgment essentially involves the formulation of public policy by assigning values to the potential for harm and the effects of tighter controls. Contrary to NRDC's suggestion (NRDC Pet. at 4-5), neither EPA nor any party supporting the Agency's position contends that a formal cost-benefit analysis is required under Section 112. Therefore, American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981), has no bearing on this case. See API/CMA Br. at 35-36.

foreclos practical considerations in establishing "margins of safety."

- A. Congress Has Long Recognized That True Health Effects Thresholds Are Rare and Prescribed "Margins of Safety" To Authorize "Pragmatic Judgments."

Although NRDC attempts to read the phrase "margin of safety" as a mandate to eliminate all risk, Congress rejected such an unrealistic approach. Congress understood that all health evidence involves uncertainty, but it did not command EPA to set standards eliminating all risks regardless of the consequences. On the contrary, the "margin of safety" provisions enacted in 1970 were specifically intended to give the Administrator the latitude to define "a reasonable degree of protection . . . against hazards which research has not yet identified." B/

By 1977, seven years of standard-setting experience under both Sections 109 and 112 had confirmed the wisdom of this built-in flexibility. Adverting specifically to ambient pollutants regulated under Section 109, Congress acknowledged that "the 'safe threshold' concept is, at best, a

B/ S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970) ["1970 Senate Report"], reprinted in 1 Senate Comm. on Environment and Public Works, Legislative History of the Clean Air Act, at 410 ["Legis. Hist."] (emphasis added). Moreover, Congress expected Section 109 standards to establish a "national health minimum" subject to the States' authority to set stricter standards. Id. (emphasis added); see 42 U.S.C. § 7416 (1982).

necessary myth" because the "limitations of present knowledge" make it "impossible" to find a concentration "for any pollutant -- other than zero -- below which it is certain that no human beings will be adversely affected." 9/ As Senator Muskie succinctly put it, because "there is no such thing as a threshold for health effects," the Administrator "has had to make a pragmatic judgment" about the level of the standards. 10/

In fact, by 1977 widespread recognition of the safe threshold concept as a "myth" had touched off a heated legislative debate over the adequacy of the existing ambient standards. 11/ In the end, however, Congress refused to

9/ H.R. Rep. No. 294, 95th Cong., 1st Sess. 111, 112 ["1977 House Report"] (4 Legis. Hist. at 2578, 2579) (quoting NAS, Summary of Proceedings: Conference on Health Effects of Air Pollution at 7 (Nov. 1973)) (emphasis added). These limitations had long been apparent to those most familiar with the health evidence. Even in 1970, Senator Muskie understood that the existing "state of research" would not permit EPA to pinpoint "a certain threshold without any harmful effect." See API/CMA Br. at 26 n.46.

10/ 123 Cong. Rec. 18460, 18463 (June 10, 1977) (3 Legis. Hist. at 1030, 1038) (emphasis added). Echoing the 1970 Senate Report (see note 8, supra), Senator Muskie acknowledged that the ambient standards had been set "as the minimum necessary and the minimum reasonably attainable in the dirty air areas," and that more stringent standards "would impose unacceptable kinds of restrictions." Id. (3 Legis. Hist. at 1031, 1038).

11/ The 1977 House Report documents the emergence of data suggesting, at least to some observers, that the ambient standards promulgated in the early 1970's incorporated "small or virtually non-existent" safety margins. 1977 House Report at 105-28 (4 Legis. Hist. at 2572-95). For example, a "comprehensive review" of the health evidence led

(Footnote Continued)

mandat stricter standards. Instead, it r affirmed "the nec ssarily judgmental element in th task of predicting future health risks," and endorsed the "pragmatic judgments" underlying EPA's "margin of safety" determinations:

Some have suggested that since the standards are to protect against all known or anticipated effects and since no safe thresholds can be established, the ambient standards should be set at zero or background levels. Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical. 12/

Indeed, instead of directing that the national standards be reduced to perfectly "safe" levels, Congress added a new Part C to Title I of the Act to "prevent significant deterioration" of air quality in attainment areas.

42 U.S.C. §§ 7470-79 (1982). This "PSD" program was founded on the legislative determination that "adverse" health effects may "reasonably be anticipated to occur . . . notwithstanding attainment and maintenance of all national ambient air quality standards." Id. § 7470(1) (emphasis added).

Moreover, the PSD program was not designed to eliminate all residual health effects uncertainties but to ensure that "economic growth will occur . . . consistent with the preservation of existing clean air resources" and that "any decision to permit increased air pollution" in attainment

(Footnote Continued)

a group of Johns Hopkins researchers to recommend a reduction in the Ambient Ozone Standard from 0.08 to 0.06 ppm. Id. at 108-09 (4 Legis. Hist. at 2575-76).

12/ 1977 House Report at 51, 127 (mphasis added) (4 L gis. Hist. at 2518, 2594).

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areas would be made "only after a careful evaluation of all the consequences." Id. § 7470(3), (4).

- B. By Weighing "the Relative Acceptability of Various Degrees of Uncertainty," EPA's "Margin of Safety" Decisions Under Section 109 and Elsewhere Represent Exactly the Sort of "Pragmatic Judgments" Congress Authorized and Expected.

Recognizing, as Congress did, that a "no risk philosophy" is "impractical," EPA has repeatedly declined to set health standards at zero despite the absence of "known safe" thresholds. Indeed, pragmatic values demonstrably played a role in the EPA "margin of safety" decisions upheld in the same cases which form the cornerstone of NRDC's challenge here. While that role was not inflexibly defined to mean precisely the same thing in every case, each of the decisions undeniably reflects a practical policy judgment to accept some health risks in the face of scientific uncertainty.

In the preamble accompanying the Ambient Lead Standard affirmed in Lead Industries, for example, the Agency said that "protection of the public health" was EPA's "principal concern," but freely acknowledged that the standard realistically could not completely "protect everyone" against any possibility of harm. 43 Fed. Reg. 46246, 46251 cols. 2, 3 (Oct. 5, 1978). In fact, the Agency prepared estimates indicating, subject to various uncertainties, that some 20,000 young children (the "sensitive population" the standard sought to protect) might experience blood lead levels

above the "thr shold" EPA posited for decisionmaking purposes. ^{13/} To be sure, EPA insisted that "the standard is based on health considerations" and that economic and technical factors played no role. Id. at 46247 cols. 1, 3. ^{14/} Nevertheless, EPA rejected lower standards because they would require "exceptionally stringent" controls and concluded that the standard selected would provide an "adequate margin of safety" because it would prevent "an unacceptable risk to health." Id. at 46252 col. 1 (emphasis added), 46254 col. 2.

Likewise, in setting the Ambient Ozone Standard upheld in API, the Agency found that "a clear threshold of adverse health effects cannot be identified with certainty for ozone." 44 Fed. Reg. 8202, 8213 cols. 1-2 (Feb. 8, 1979). While steadfastly maintaining that public health "must be

^{13/} 43 Fed. Reg. at 46255 cols. 2-3. EPA did not find that adverse effects would necessarily occur in children with blood lead levels of 30 µg Pb/dl. Rather, the Agency treated this as "the maximum safe blood lead level for children" but recognized that whether certain blood-lead levels are "adverse to health" is "a question of the degree to which the effect has progressed." Id. at 46253 col. 1, 46254 col. 3. While this meant that children with blood lead levels of 30 µg might suffer no adverse effects at all, the Agency could not definitively rule out the existence of any risk at that or even lower levels. Thus, EPA also estimated that over 700,000 children could experience blood-lead levels above 15 to 20 µg Pb/dl, the lowest levels at which physiological changes had been observed in humans, but concluded that these levels did not pose a "significant risk." Id. at 46253 col. 1 (emphasis added), 46255 col. 3.

^{14/} The Agency did prepare an impact analysis, however, which disclosed "no reason to expect imminent closure of any facility." Id. at 46251 col. 3.

the compelling factor" and that the standard could not be based on "cost or attainability," the Administrator nevertheless declined to adopt "a zero-level standard" because "controlling ozone to very low levels is a task that will have significant impact on economic and social activities." Id. (emphasis added). In fact, EPA decided to relax the previous standard Congress had reviewed extensively in 1977 (see note 11, supra), even though the Agency itself credited studies showing some physiological responses, albeit of uncertain health significance, below the new standard. ^{15/} As EPA put it, the revised standard was based on a judgment about "the relative acceptability" of "the uncertainty that any given level is low enough to prevent health effects." Id. (emphasis added).

The pragmatic judgments inherent in EPA's "margin of safety" determinations are spelled out even more clearly in the decision approved in Hercules. There, EPA construed the Clean Water Act's "ample margin of safety" language to "all w[] a balancing test" under which feasibility is given

^{15/} According to EPA, physiological responses had been demonstrated in both humans and experimental animals exposed below the 0.12 ppm standard EPA chose. See 44 Fed. Reg. at 8214. API contended in the Ozone proceedings that such evidence is not sufficient to justify the conclusion that adverse human health effects will occur at the 0.12 ppm level EPA selected for the standard (or even at higher levels). Nor did the Agency make such a finding. Rather, it made a "judgment[] as to the point in the continuum of physiological responses to ozone that must be exceeded for an adverse health effect to occur." Id. at 8207 c 1. 2.

"some consideration" but decidedly "less weight" than "environmental and public health factors." Toxaphene/Endrin Standard, 42 Fed. Reg. 2588 cols. 2-3 (Jan. 12, 1977). EPA specifically rejected NRDC's contention, repeated here, that Union Electric v. EPA, 427 U.S. 246 (1976), precludes consideration of economic and technological factors in standard-setting. ^{16/} As in the Section 109 cases, EPA read "the statutory 'ample margin' concept [a]s an elastic one which . . . allows for considerable exercise of judgment by the Administrator in setting the standards." Id. at 2597 col. 1. Typically, the Agency held, it would be appropriate to require as a minimum "the very best that control technology can do" as a "logical break point" on the "spectrum ranging from certain safety (a prohibition) to the uncertain point where harmful effects are caused and safety ends." Id. ^{17/} "Setting a standard at this point," EPA concluded,

^{16/} EPA stressed that unlike the "ministerial" review of state implementation plans ["SIPs"] involved in Union Electric, the Administrator's task in setting standards under Section 307 "require[s] considerable exercise of discretion." EPA observed, moreover, that costs and feasibility could be considered at "a number of points" before the final SIP review stage at issue in Union Electric, whereas Section 307 afforded no such earlier opportunity. 42 Fed. Reg. at 2596-97.

^{17/} The standards set under Section 307 of the Water Act illustrate the flexibility provided by the Administrator's interpretation of the "ample margin of safety" criterion. EPA banned PCB discharges because "the argument for a prohibition based on considerations of toxicity is compelling." 42 Fed. Reg. 6532, 6550 col. 2 (Feb. 2, 1977). Nevertheless, EPA made clear in the Toxaphene/Endrin decision that

(Footnote Continued)

"achi v s the purpose of the Act without inflicting unrea-
sonable and unjustifiabl conomic and social costs." Id.
(emphasis added).

C. In Light of the Foregoing Legislative
and Administrative Background, Lead
Industries, API and Hercules Cannot
Fairly Be Read as Completely
Prohibiting Practical Considerations.

Although the pragmatic judgments described above were
affirmed by this Court in Lead Industries, API and Hercules,
these are the same cases that NRDC reads as foreclosing any
c nsideration of costs or feasibility under Section 112.
NRDC's argument turns the holdings of these cases upside
down. The industry petitioners in these cases asserted that
EPA had a statutory duty to consider costs and feasibility
in setting "margin of safety" standards and that the Agency
had given too little weight to such considerations. 18/ In

(Footnote Continued)

Section 307 "does not require the zero discharge of every
substance for which a cancer risk is found." Id. at 2588,
2592 col. 3. There, EPA set non-zero effluent standards for
toxaphene and endrin because they were "considered suf-
ficiently stringent to provide an ample margin of safety."
Id. at 2610 col. 2.

18/ See Lead Industries, 647 F.2d at 1148 ("St. Joe argues
that the Administrator abused his discretion by refusing to
consider" "the economic impact . . . and the technological
feasibility of compliance," "and maintains that the . . .
standards will have a disastrous economic impact");
Hercules, 598 F.2d at 110 ("Velsicol's principal argu-
ment . . . is that EPA was required to" consider feasibility
"but failed to do so adequately"); API, 665 F.2d at 1184
("API . . . argues that EPA must consider whether the . . .
standard is attainable and whether the anticipated costs of

(Footnote Continued)

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rejecting these challenges, this Court thrice refused to impose limits on the Administrator's discretion when Congress did not do so, holding that the values to be considered, and the weight to be assigned to each, were matters Congress left to the Administrator so long as the statute's overriding health goal is honored. See, e.g., Lead Industries, 647 F.2d at 1146-47.

Carefully scrutinized, the opinions in these cases support only the narrow conclusion required to sustain EPA's decisions -- i.e., that technological feasibility need not be a lower bound on "margin of safety" standards. The opinions note the absence of any express mention of costs or feasibility in the statutory text (Lead Industries, 647 F.2d at 1148; Hercules, 598 F.2d at 111), but that observation suggests at most that Congress did not mandate consideration of such factors. ^{19/} To find an affirmative preclusion based on silence alone would violate the key principle, expressed in Lead Industries itself, that the Court will not "impose limits on the Administrator's authority which, so far as we can tell, Congress did not." 647 F.2d at 1153.

(Footnote Continued)

meeting that standard are justified when compared with the results to be achieved").

^{19/} The panel majority here agreed that the absence of such factors may well mean that Congress declined "to require" consideration of cost or feasibility but certainly "does not mean that Congress intended to preclude" consideration of them. Vinyl Chloride, 804 F.2d at 727 (emphasis added).

In Lead Industries, the Court's refusal to interfere with the Administrator's judgment was bolstered by the indicia of Congress' intent. The panel there relied on: (i) a contrast with a separate provision of the Act, Section 111, which makes feasibility a floor on the standards; 20/ (ii) Congress' intent that Section 109 standards be "technology-forcing" and its rejection "of the concept of technical feasibility as the basis of ambient air standards;" and (iii) the "preventive or precautionary nature" of the Act, exhorting "the Administrator . . . to err on the side of caution." 647 F.2d at 1148-49, 1152-53 (emphasis added). These notions lent support to the Court's conclusion that EPA's policy judgment should not be overturned merely because the Agency did not give attainability and cost considerations as much weight as the industry petitioners would have preferred. But they fall far short of demonstrating an affirmative legislative intent to foreclose the consideration of such values in deciding how great a "margin of safety" to provide against pollutants lacking "known safe" thresholds. 21/

20/ See also Hercules, 598 F.2d at 111-112 & n.39.

21/ Indeed, the panel in Hercules recognized that EPA "did consider feasibility in the proceedings leading to the regulations in issue" and, notwithstanding the absence of any challenge to the standards as too lax, went on to consider "the possibility that we must remand . . . on the grounds that EPA took an erroneous step in its deliberations." 598 F.2d at 113. The Court ultimately found a remand unneces-

(Footnote Continued)

In sum, to read Lead Industries, Hercules and API as imposing a complete prohibition on non-health considerations, as NRDC does, would misapprehend the pragmatic character of the EPA decisions reviewed and the specific questions the Court was called upon to resolve. Such a reading simply cannot be reconciled with the Court's ultimate decision to defer to the Administrator's policy judgments in each of these cases, and to affirm non-zero standards that deemed residual health risks "acceptable" in light of the practical consequences of stricter regulation.

II. THE "MARGIN OF SAFETY" CONCEPT IS FLEXIBLE AND PROVIDES PLENTY OF ROOM FOR DIFFERENT APPROACHES TO IMPLEMENTING THE ACT'S OVERARCHING PUBLIC HEALTH GOAL.

NRDC asserts that EPA's limited consideration of feasibility under Section 112 "defies logic" because "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)." NRDC Br. at 11. As shown above, the premise of this argument is invalid because EPA is not forbidden to consider costs and feasibility in setting standards under Section 109 and has in fact exercised its discretion to consider pragmatic values in

(Footnote Continued)

sary because EPA did not relax the standards to ensure that they were feasible but merely observed that they "were, in fact, feasible." Id. at 114. The Court found, in other words, that EPA did not compromise the overriding health goal for the sake of feasible standards.

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setting the standards upheld in Lead Industries and API. But even if NRDC's reading of those cases were correct, its conclusion remains wrong because EPA is under no obligation to interpret the phrase "margin of safety" inflexibly, and its construction of Section 112 in practice achieves a more protective safety margin than the Section 109 standards sustained in those cases. Accordingly, EPA's construction of the statute is perfectly "logical" and fully consistent with Congress' intent.

A. As in Chevron, There Is No Basis for Imposing a "Static Judicial Definition" of the Phrase "Margin of Safety" Under the Clean Air Act.

Even if this Court's prior decisions affirmatively precluded practical considerations under Section 109, those decisions would not control EPA's interpretation of Section 112. Lead Industries itself holds that "[t]he choice" among various "possible approaches" to providing a margin of safety "is a policy choice of the type that Congress specifically left to the Administrator's judgment." 647 F.2d at 1162. Indeed, Chevron establishes that the courts lack authority to "adopt a static judicial definition" of a statutory term when "Congress itself ha[s] not commanded that definition." 467 U.S. at 842.

NRDC's argument here is strikingly similar to the one rejected in Chevron. There, a panel of this Court ruled that EPA was required to adopt, under a Clean Air Act program designed to improv air quality, a stricter definition

of the statutory term "source" than was permissible in a program designed only to maintain existing air quality. NRDC v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982). Although conceding that EPA's definition was not foreclosed by the language of the statute, the panel felt compelled to follow this "bright line" distinction because previous decisions had inferred it from the structure and purposes of the Act. 22/

The Supreme Court reversed, noting that the distinction drawn in the earlier cases "may well be a sensible one," but was "not a distinction that Congress ever articulated." 467 U.S. at 864. The Court upheld EPA's interpretation because: (i) both the statute and the legislative history were "silent on the precise issue" presented; and (ii) "Congress ha[d] never indicated any disapproval of a flexible reading of the statute." Id. at 862, 864.

NRDC's effort to draw from Lead Industries, API and Hercules a "static judicial definition" of the phrase "margin of safety" should be rejected for the same reasons. The

22/ Id. at 720, 726 (citing ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978), and Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1980)). The Gorsuch panel "express[ed] no view on the decision [it] would reach if the line drawn in Alabama Power and ASARCO did not control [its] judgment." Id. at 720 n.7.

Act does not even define the term "margin of safety," much less affirmatively exclude practical considerations. 23/

Even the dissent was unwilling to accept NRDC's absolutist interpretation of Congressional silence. 24/ Indeed, the dissent apparently was prepared to conclude that the Conference Committee's substitution of "margin of safety" standards for the prohibition in the Senate bill supports an authority "to consider feasibility" under Section 112. 804 F.2d at 734. The dissent rejected this conclusion only because of the simultaneous insertion of the presidential waiver provision in Section 112(c)(2), which the dissent thought "unnecessary unless the 'ample margin of safety' language otherwise bars consideration of available technology." Id. Section 112(c)(2) would be "unnecessary,"

23/ See Vinyl Chloride, 804 F.2d at 716; API/CMA Br. at 17-22. Apparently NRDC's new "policy of clear statement in environmental statutes" operates selectively, because NRDC is willing to infer the existence of some powers but not others. For example, although reading the statute to exclude consideration of practical factors by negative implication, NRDC eagerly supports an authority to prohibit emissions which is not expressly granted in Section 112, even though Section 307 of the Water Act reveals that Congress knew full well how to do so. See Hercules, 598 F.2d at 97 n.1. Nor is there any express mention of the authority, upheld by this Court in National Ass'n of Demolition Contractors, Inc. v. Costle, 565 F.2d 748 (D.C. Cir. 1977), to consider the safety trade-offs of stricter Section 112 standards.

24/ Rejecting NRDC's position that an emissions ban is required whenever a "known safe" threshold is not found, the dissent reiterated the "well established" proposition that the Administrator could decline to regulate "insignificant" risks despite the absence of any express authority. Vinyl Chloride, 804 F.2d at 736-37.

how v r, only if Section 112 standards must always be feasible. 25/ B cause EPA claims th latitude t adopt infeasible standards where necessary to protect public health, non f the structural considerations or historical remarks identified by NRDC and the dissent is inconsistent with EPA's interpretation of the statute. 26/

Nor has there been any Congressional "disapproval" of EPA's flexible reading of the "margin of safety" requirement under Sections 112 and 109. Whether or not Congress can be said to have ratified EPA's approach during the 1977 Amendments to the Act (see API/CMA Br. at 27-32; pp. 8-10, supra), the legislative history is not even directionally consistent with the kind of "clear mandate" that would be needed to accept the far-reaching consequences of NRDC's extrem construction. See Industrial Union Dep't, AFL-CIO v.

25/ Similarly, NRDC claims that the "restrictive" definition of "feasible" in Section 112(e) "would make no sense if EPA were already authorized to consider a more general notion of feasibility when setting standards." NRDC Br. at 19. Yet, a provision nearly identical to Section 112(e) appears in Section 111, where EPA is required to set feasible standards. See 42 U.S.C. § 7411(h) (1982).

26/ Moreover, practical concerns must be involved at some level in any decision to disregard a risk as "insignificant." For "how can [the Administrator] assess risks if he cannot make policy judgments?" Ethyl, 541 F.2d at 20. In the dissent's own words, the Administrator can decide which " xpenditures of effort" are "pointless" and when the "gain[s]" of further control are "trivial or of no value." Vinyl Chloride, 804 F.2d at 736 (quoting Alabama Power, 636 F.2d at 360-61).

American Petroleum Inst., 448 U.S. 607, 645 (1980); API/CMA
Br. at 14-17.

- B. Because it Makes Public Health the
"Paramount" Concern, EPA's Construction
of Section 112 Is Fully Consistent With
Congress' Intent and, in Fact, Provides
a More Protective Safety Margin than
the Section 109 Standards Previously
Sustained by this Court.

Contrary to NRDC's approach of finding preclusions
based solely on Congressional silence, this Court has re-
cently held that an agency may consider factors not "specif-
ically designated" by Congress so long as "the weight given"
to such factors does not fall "outside the range" of the
agency's policymaking discretion and the "overarching" goals
of the statute are honored. 27/ Indeed, as Center for Auto
Safety makes plain, an agency may even rely upon a factor
that Congress rejected as the sole basis for setting stan-
dards, at least where the statutory criteria "are broad
enough to encompass" it. 793 F.2d at 1338, 1339.

As demonstrated above, the very nature of setting
health standards in the face of scientific uncertainty re-
quires some consideration of non-health concerns, and

27/ Center for Auto Safety v. NHTSA, 793 F.2d 1322, 1340-41
(D.C. Cir. 1986); accord Hercules, 598 F.2d at 107, 109
("zone of reasonableness" test); cf. 123 Cong. Rec. 18461 (3
Legis. Hist. at 1031) ("The constraints . . . which resulted
in the present primary standards still exist. The necessity
for balancing health requirements against the need for
growth still exists.") (remarks of Sen. Muskie).

Congress enacted the "margin of safety" requirement for the express purpose of directing the Administrator to make the necessary value judgments. What is more, EPA's construction of Section 112 does, in fact, honor Congress' "overarching" public health goal.

Specifically, EPA consistently makes public health the "paramount" consideration in setting standards and considers cost, feasibility and other non-health factors solely to assist in judging where along the continuum of uncertainty to set a standard. See API/CMA Br. at 2-10. But in contrast to Section 109, where the Agency has generally assumed the existence of a health effects threshold as a "necessary myth" even in the face of contrary evidence, under Section 112 EPA makes the extremely conservative assumption that any level of exposure presents some risk, at least for carcinogens. Id. at 4-6. Moreover, EPA's approach contemplates standards requiring more than what is feasible, including emissions bans, where necessary to protect the public health from unacceptable risk, which EPA assesses using a "plausible upper limit" methodology that may overstate the true risk by a factor of 100, 1,000, or even more. Id. at 6-10.

The end result is a more protective margin of safety, directed, of course, at a more serious potential harm. Although the Section 109 standards have been set near (if not within) the range of exposures within which there was some evidence that adverse effects might occur, (see pp. 11-13,

supra), public exposures remaining after compliance with Section 112 standards are far below any levels shown to cause harm. 28/ The estimated risk under the Vinyl Chloride Standard, for example, is less than 1-in-a-million, over 10,000 times smaller than the risk remaining under the Ambient Lead Standard. 29/ Thus, unlike NRDC's impractical vision of setting standards at zero under both Sections 109 and 112 whenever "known safe" thresholds cannot be found, EPA's construction gives real meaning to the statutory distinction between "adequate" and "ample" safety margins.

CONCLUSION

NRDC's petition attempts to portray the panel ruling here as a "drastic departure from settled judicial interpretation of the Clean Air Act," which "will have major adverse consequences for public health protection," "cloud[] the meaning of other public health laws," and "effectively strip[] Congress of control over agency action." NRDC Pet.

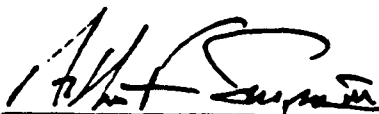
28/ In the case of vinyl chloride, for example, EPA found no evidence of adverse health effects at the ambient concentrations that prevailed even before the 95 percent emission reduction mandated by the standard. See API/CMA Br. at 8-9; 41 Fed. Reg. 46560 col. 2 (Oct. 21, 1976).

29/ Id. at 46560 col. 2 (calculations indicating an upper limit risk of about 0.2 per million under the standard). The Ambient Lead Standard, in contrast, was designed to protect 99.5 percent of the "most sensitive" population, and therefore left a risk of 0.05 percent, or 1-in-200. 43 Fed. Reg. at 46252 col. 2. The Ambient Ozone Standard was similarly designed to protect the 99th percentile of the most sensitive population group. 44 Fed. Reg. at 8215 col. 3.

at 1, 2, 3. Yet EPA's approach to standard-setting under Section 112 has remained essentially the same during nearly seventeen years of implementation by four different Administrations, without so much as a hint of Congressional disapproval. See API/CMA Br. at 27-32; compare Chevron, 467 U.S. at 857-60, 863-64. Moreover, the Agency's pragmatic approach to establishing "margins of safety" against uncertain harms has consistently been upheld by this Court.

For the reasons set forth above and in our first brief, we submit that the panel majority here was correct when it concluded that EPA may give "incidental consideration [to] non-health factors" so long as public health remains "the overriding consideration under [its] construction of section 112." 804 F.2d at 726.

Respectfully submitted,



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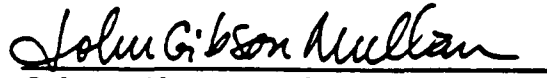
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