

consideration of “economic impacts and other costs.”¹⁹ And EPA guidance recognizes that unreasonably expensive controls are *not* “best available control technology.”

Accordingly, consistent with the EPA’s own recognition of the commonsense principle that radically cost ineffective controls are not “available,” the President would be justified in using his discretion to find that the controls here are not available.

B. A two-year compliance extension is in the national security interests of the United States because of the importance of domestically sourced copper

The President must also “determine[]” that a compliance exemption “is in the national security interests of the United States.”²⁰ There is ample evidence that it is in the United States’ national security interests to exempt FMMI’s Miami Smelter from compliance with the Copper Rule. In short, the Miami Smelter is one of only two primary copper smelters currently operating in the United States, and the facility generates a significant portion of the nation’s domestically produced copper. If, as a result of the unavailability of technology to meet the Copper Rule, FMMI cannot maintain economically viable smelter operations at the facility, the curtailment of that domestic production risks making the United States strategically vulnerable to, and increasingly dependent upon, foreign suppliers of copper (particularly China). That outcome would be problematic because global copper demand is forecasted to significantly increase—and likely outstrip global supply—in the coming decades.

1. The scope of “national security interests of the United States” under Section 112(i)(4) of the Act is broad

The Clean Air Act does not define the scope of “national security interests of the United States” for purposes of Section 112(i)(4), and to FMMI’s knowledge, no court has meaningfully interpreted its scope. Broadly speaking, “national security” is a capacious term without a single controlling definition.²¹ However, the principle, especially following the close of the Cold War, has been understood to go beyond military defense and protection from interstate conflict, and instead to encompass a wider range of threats to the safety, welfare, and values of the nation, such as resource or energy scarcity, disruption of economic activities, and trade restrictions or barriers.²²

¹⁹ 42 U.S.C. § 7479(3) (“The term ‘best available control technology’ means an emission limitation . . . which the permitting authority . . . taking into account . . . economic impacts and other costs, determines is achievable . . .”).

²⁰ *Id.* § 7412(i)(4).

²¹ See James E. Baker, *In the Common Defense: National Security Law for Perilous Times* 18 (2007) (“[N]o single definition of national security is recognized in law or as policy predicate.”).

²² See David A. Baldwin, *The Concept of Security*, 23 Rev. Int’l Stud. 5, 23 (1997), <https://perma.cc/QPM8-BD65>; see also Baker, *supra* n.21, at 19 (taking a narrower view of “national security” but nevertheless acknowledging that the concept centers on “preservation of a value system,” especially from more “immediate” and “human threats”); Inv. Div., Directorate for Fin. and Enter. Affairs, Org. for Econ. Coop. and Dev., *Security-Related Terms in International Investment Law and in National Security Strategies* 11 (2009), <https://perma.cc/DN99-J5T7> (study of states’ national security policies finding that