IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

85-1150

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioner,

v.

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

Respondents.

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

JOINT BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AND THE CHEMICAL MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

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NATURAL RESOURCES DEFENSE COUNCIL, INC., Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	No. 85-1150

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether Section 112 of the Clean Air Act, which commits to EPA's "judgment" the task of setting "emission standards" which provide an "ample margin of safety to protect the public health," represents a specific congressional mandate that EPA, in all cases, must completely prohibit emissions of any pollutant for which a health effects threshold cannot be identified, no matter how small the risks and regardless of the consequences. 1/

1/ Apart from the question set forth above, the briefs filed by respondent Environmental Protection Agency ("EPA") (at pp. 10-12) and intervenor Vinyl Institute (at pp. 15-25) demonstrate that the petition for review in this case may be dismissed on a variety of grounds, including untimeliness

(Footnote Continued)

RULE 8(b) STATEMENT

This case was not previously before this Court or any other court. Similar issues relating to EPA's regulation of hazardous air pollutants are presented in the following proceedings presently pending before this Court: Natural Resources Defense Council, Inc. v. Thomas, Nos. 84-1387, et al. (benzene); and Environmental Defense Fund, Inc. v. Thomas, Nos. 84-1524, et al., NRDC v. Thomas, Nos. 85-1123, et al., and American Mining Congress v. Environmental Protection Agency, Nos. 85-1285, et al. (radionuclides).

STATEMENT OF THE CASE

Section 112 of the Clean Air Act, 42 U.S.C. § 7412 (1982), directs the Administrator of EPA to establish "emission standards" for hazardous air pollutants "at the level which in his judgment provides an ample margin of safety to protect the public health . . . ." In this case, petitioner Natural Resources Defense Council, Inc. ("NRDC") asks the Court to rule that, in every case involving Section 112 regulation of a pollutant for which a clear health effects

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(Footnote Continued)

and failure to exhaust administrative remedies. In the interest of economy, this brief does not recapitulate those arguments but instead addresses the merits of petitioner's claim.

threshold cannot be defined (i.e., an "apparent non-threshold pollutant"), EPA is precluded from taking any account of feasibility and must automatically prescribe a zero-emissions standard designed to eliminate completely any public health risk no matter how small. This extreme and mechanical interpretation of Section 112 would abolish nearly fifteen years of practical administrative experience in the regulation of apparent non-threshold pollutants and would lead to results that Congress never intended.

Over the years, EPA has taken the position that it has authority to set zero-emissions standards under Section 112 in appropriate cases. 2/ But it has consistently rejected arguments that Section 112 rigidly prescribes such an extreme outcome for apparent non-threshold pollutants in all cases. 3/ Instead, the agency has adopted a more flexible approach which makes protection of the public health the "paramount" consideration in standard-setting, but also

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2/ See, e.g., Proposed Inorganic Arsenic Standards, 48 Fed. Reg. 33112, 33116 columns ("col.") 2-3 (July 20, 1983).

3/ See, e.g., Asbestos Standards, 38 Fed. Reg. 8820, col. 2 (April 6, 1973); Proposed Vinyl Chloride Standard, 40 Fed. Reg. 59532, 59534 cols. 2-3 (December 24, 1975); Proposed Radionuclides Standards, 48 Fed. Reg. 15076, 15078 col. 3 - 15079 col. 1 (April 6, 1983). See generally Proposed Airborne Carcinogen Policy, 44 Fed. Reg. 58642, 58660 cols. 1-2 (October 10, 1979).

leaves room for the Administrator to make the "judgment" in particular cases that non-zero standards "which permit small residual risks can . . . provide an ample margin of safety to protect the public health." 4/

At bottom, EPA's construction is a response to the regulatory dilemma that is nearly always presented in Section 112 proceedings: Because ambient air concentrations of carcinogens like vinyl chloride typically fall far below the exposure levels at which adverse health effects have been identified, 5/ there invariably are great uncertainties and "considerable scientific debate" about whether there is any risk at all from low ambient exposures. 6/ Due to this uncertainty, EPA has been unable to define an "atmospheric concentration that poses absolutely no public health risk"

4/ Proposed Airborne Carcinogen Policy, 44 Fed. Reg. at 58659 col. 2, 58660 col. 2; see also Withdrawal of Proposed Radionuclides Standards, 49 Fed. Reg. 43906, 43909 col. 1 (October 31, 1984).

5/ See, e.g., Asbestos Standards, 38 Fed. Reg. at 8820 col. 2; Proposed Inorganic Arsenic Standards, 48 Fed. Reg. at 33113-14; Proposed Radionuclides Standards, 48 Fed. Reg. at 15077 col. 2; Response to Comments on the Listing of Benzene, 49 Fed. Reg. 23478, 23479 cols. 1-2 (June 6, 1984). See generally Proposed Airborne Carcinogen Policy, 44 Fed. Reg. at 58644 col. 2.

6/ Proposed Airborne Carcinogen Policy, 44 Fed. Reg. at 58644 col. 3; see, e.g., Response to Comments on the Listing of Benzene, 49 Fed. Reg. at 23479 cols. 2-3, 23484-87.

for such substances, ven though a h alth effects threshold may in fact exist. 7/

In these circumstances, there are two basic options for regulating apparent non-threshold pollutants: (1) EPA can attempt to achieve absolute safety by banning emissions of all such pollutants entirely, even though this may result in major adverse social and economic consequences without producing any appreciable public health benefits; 8/ or (2) EPA, giving limited consideration to feasibility, can prohibit emissions in some cases and can establish non-zero emission limits designed to eliminate any significant health risk in other cases.

EPA has elected to follow the second option and has implemented it in a way that makes "public health considerations . . . paramount" and places "primary emphasis" on reducing the risk of adverse health effects. 9/ Thus, the

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7/ See Proposed Vinyl Chloride Standard, 40 Fed. Reg. at 59534 col. 1.

8/ EPA frequently has recognized that emission prohibitions would produce industry closure and related adverse social and economic consequences. See, e.g., Proposed Inorganic Arsenic Standards, 48 Fed. Reg. at 33117 col. 2 - 33118 col. 2; Proposed Radionuclides Standards, 48 Fed. Reg. at 15078 col. 3 - 15079 col. 1; see also infra notes 21, 22, 31 & 32 and accompanying text.

9/ Proposed Airborne Carcinogen Policy, 44 Fed. Reg. at 58657 col. 3, 58659 col. 2, 58661 col. 2.

agency presumes, for regulatory purposes, that carcinogens "pose some finite risk . . . at any exposure lev l above zero." 10/ And it couples this "no-threshold" presumption with conservative procedures for assessing the magnitude of the risks that may theoretically exist at low ambient concentrations, thereby producing estimates which EPA customarily calls "plausible upper limit[s]" "in the sense that the risk is probably not higher than the calculated level and could be much lower." 11/

Thus, public health conservatism dominates EPA's regulatory approach under Section 112. But the agency has not read the statute to require the imposition of zero-emissions standards designed to achieve absolute safety in the case of all apparent non-threshold pollutants regardless of consequences. Instead, EPA allows considerations of feasibility to play a "limited" and "secondary" role in developing standards for non-threshold pollutants. 12/ This does not mean

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10/ Id. at 58646 col. 2; see also Response to Comments on the Listing of Benzene, 49 Fed. Reg. at 23479 col. 2.

11/ Proposed Inorganic Arsenic Standards, 48 Fed. Reg. at 33114 col. 2; see also Proposed Benzene Emissions Standards for Coke By-Product Recovery Plants, 49 Fed. Reg. 23521, 23526 col. 3 (June 6, 1984); Withdrawal of Proposed Radionuclides Standards, 49 Fed. Reg. at 43910 col. 3.

12/ Vinyl Chloride Standard, 41 Fed. Reg. 46560, 46562 col. 1 (October 21, 1976); Withdrawal of Proposed Radionuclides Standards, 49 Fed. Reg. at 43909 col. 1.

that emissions of a substanc can never b prohibited under EPA's reading of Section 112. To the contrary, the agency has banned products or emissions in several instances, 13/ and has made clear that Section 112 standards "could entail closure of a source or even an industry." 14/ Nevertheless, under EPA's approach, the fact that an industry might be forced to close can be a relevant consideration in the standard-setting proceeding.

This is not to say that EPA has treated feasibility as a floor below which an emission standard will not be set. EPA's judgment as to whether a standard satisfies the mandate of Section 112 has typically turned, instead, on factors such as: (i) whether a "significant" public health risk would remain after implementation of the standard; 15/

13/ For example, the Asbestos Standards ban the use of many asbestos-containing materials. 40 C.F.R. §§ 61.143, 61.150 (1984). See also infra note 19.

14/ Proposed Airborne Carcinogen Policy, 44 Fed. Reg. at 58661 col. 2. See also Proposed Inorganic Arsenic Standards, 48 Fed. Reg. at 33157 cols. 1-2 (some "glass producers may discontinue production . . . or change this production to other furnaces"; "the closure of one or more furnaces is not impossible"); Asbestos Standards, 38 Fed. Reg. at 8822 col. 2 ("the standard may adversely affect some individual plants or companies which are marginal operations").

15/ See, e.g., Radionuclides Standards, 50 Fed. Reg. 5190, 5191 cols. 2-3 (February 6, 1985) (declining to prescribe more stringent standards because residual risks are "too small to warrant regulation"); Proposed Withdrawal of

(Footnote Continued)

(ii) wheth r a more stringent standard might creat new hazards (e.g., to workers or from the use of substitutes); 16/ and (iii) whether more stringent standards, including a complete emissions ban, would achieve a significant additional measure of risk reduction and would do so without unreasonably great practical impacts. 17/

EPA's standard-setting decisions for vinyl chloride reflect these considerations. Specifically, although unable to point to evidence of adverse health effects at "the concentrations of vinyl chloride found in the ambient air," EPA based the standard on the "assum[ption] . . . that there is no atmospheric concentration that poses absolutely no public

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(Footnote Continued)

Proposed Benzene Standards, 49 Fed. Reg. 8683, 8388 col. 3 (March 6, 1984) ("standards under Section 112 should protect against significant health risks") (emphasis in original); Withdrawal of Proposed Benzene Standards, 49 Fed. Reg. 23558, 23559 (June 6, 1984).

16/ See, e.g., Radionuclides Standard for Underground Uranium Mines, 50 Fed. Reg. 15386, 15387 col. 1 (April 17, 1985) ("EPA had to weigh protection of the public health with protection of the mine personnel"); Proposed Airborne Carcinogen Policy, 44 Fed. Reg. at 58658 col. 1 (zero emission standards might lead to the use of substitutes that "pose risks which could approach or exceed those of the banned substances").

17/ See, e.g., Proposed Inorganic Arsenic Standards, 48 Fed. Reg. at 33117 col. 2; Benzene Fugitive Emissions Standards, 49 Fed. Reg. 23498, 23502 cols. 2-3 (June 6, 1984).

health risk." 18/ Accordingly, th standard prohibits some emissions and, more generally, reduces ambient concentrations to levels far below those at which adverse health effects have been demonstrated. 19/

At the same time, EPA concluded that a complete emissions ban was "neither desirable nor necessary" to provide an ample margin of safety in the case of vinyl chloride. 20/ That judgment rested on a number of considerations, including the facts that (i) the standard EPA adopted eliminated 95 percent of vinyl chloride emissions, thus substantially reducing any health risks that might otherwise exist; (ii) the "extremely high" social and economic impacts of a prohibition (including "closure of an entire industry") 21/

18/ Proposed Vinyl Chloride Standard, 40 Fed. Reg. at 59534 col. 1.

19/ 40 C.F.R. § 61.65(a) (1984) (prohibiting relief valve emissions except in emergencies); Proposed Vinyl Chloride Standard, 40 Fed. Reg. at 59533 col. 1 (no proof of adverse health effects even at pre-standard ambient concentrations).

20/ Proposed Vinyl Chloride Standard, 40 Fed. Reg. at 59534 cols. 2-3; Vinyl Chloride Standard, 41 Fed. Reg. at 46561 col. 3; Withdrawal of Proposed Revisions to Vinyl Chloride Standard, 50 Fed. Reg. 1182, 1183 col. 3 (January 9, 1985).

21/ The Environmental Defense Fund, the principal environmental interest group participating in the EPA proceedings, concurred in this assessment, stating: "It is generally agreed [that requiring a zero-emissions level] would force the industry to shut down." Statement of Robert Rauch and David Medine [of EDF] at the Environmental Protection Agency's Public Meeting on the Proposed

(Footnote Continued)

would be "grossly disproportionate" to the health benefits of liminating the small risks that might theoretically remain under the standard; and (iii) an emissions ban could lead to the use of less desirable, untested substitutes with "potentially adverse health and environmental impacts" of their own. 22/

SUMMARY OF ARGUMENT

Section 112(b)(1)(B) of the Clean Air Act directs the Administrator of EPA to promulgate "emission standard[s]" for hazardous air pollutants "at the level which in his judgment provides an ample margin of safety to protect the public health." In this case, NRDC asks the Court to interpret Section 112 as an inflexible, zero-risk provision akin to the Delaney Clause of the Federal Food, Drug and Cosmetic Act. Under NRDC's interpretation, EPA would be precluded from taking any account of feasibility in standard-setting, even as a secondary consideration, and would have to prohibit emissions entirely, regardless of the consequences, in

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(Footnote Continued)

Amendments to the Final Emission Standard for Vinyl Chloride, at 4 (July 19, 1977).

22/ Proposed Vinyl Chloride Standard, 40 Fed. Reg. at 59534 cols. 2-3; Vinyl Chloride Standard, 41 Fed. Reg. at 46561 col. 3 - 46562 col. 1; Withdrawal of Proposed Revisions to Vinyl Chloride Standard, 50 Fed. Reg. at 1183 col. 3 - 1184 col. 1.

every case where a health effects threshold cannot be id n-tified. EPA has rep atedly rejected such a mechanical and extreme construction of Section 112, and the Agency's more reasonable and flexible interpretation is amply supported by the statutory text and legislative history.

Section 112 on its face does not call for a prohibition of emissions. Instead, it directs EPA to promulgate an "emission standard," a term specifically defined in Section 302(k) of the Act to mean a requirement which "limits" emissions. 42 U.S.C. § 7602(k) (1982). Nor does the statutory text contain a specific legislative directive to eliminate all risk. Instead, Section 112 articulates a broadly-worded, goal-oriented objective -- to "protect the public health" with "an ample margin of safety" -- and expressly commits to EPA's "judgment" the task of "pour[ing] content into these relatively broad concepts." 23/ See infra Part I.

The legislative history strongly supports EPA's more flexible reading of the statutory text. It shows that whil Congress intended public health considerations to be the overriding concern in developing Section 112 standards, it

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23/ United States v. Ethyl Corp., 761 F.2d 1153, 1155 (5th Cir. 1985).

did not embrace the automatic prohibition approach or the "no-risk philosophy" that NRDC somehow finds in the statute.

For one thing, the broad and flexible language of Section 112 was adopted in Conference Committee as a substitute for a provision in the Senate bill that spoke in terms of prohibiting emissions of pollutants found to be hazardous to health. 24/ The "thrust" of the provision that became Section 112 was thereby changed, and EPA was given more latitude "to do what is feasible and to do what is reasonable." See infra Part II.A.

Moreover, in its deliberations on the 1977 Clean Air Act Amendments, Congress gave every indication that it endorsed the approach EPA had been taking to the regulation of apparent non-threshold pollutants under Section 112. This included approving references to EPA's asbestos standard and its proposed vinyl chloride standard (both of which reflected limited consideration of feasibility rather than establishing zero-emissions requirements), and authorization for EPA to consider a variety of approaches in regulating four other potentially carcinogenic pollutants. In these and

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24/ In fact, even the prohibition provision that was abandoned in the Conference Committee was more flexible and less extreme than NRDC's interpretation of Section 112, for the Senate bill was intended to provide for "departures" from the emissions ban where "complete control . . . may not be necessary or practicable." See infra Pp. 23-24.

other respects, Congress made clear its understanding that a "no-risk philosophy" is "impractical" and, if adopted, would turn the "margin of safety" concept into an "illusion." At the same time, Congress took steps to reaffirm its expectation that EPA would exercise "a substantial element of judgment" in setting standards under Section 112 and that non-zero standards, leaving small levels of residual risk, could be established under the "margin of safety" provisions of the Act. See infra Part II.B.

In these circumstances, a zero-risk/zero-emissions reading of Section 112 is not supportable, and the cases on which NRDC relies 25/ do not compel a contrary result. See infra Part III. Indeed, in light of the statutory language and legislative history, a decision by EPA to adopt NRDC's extreme construction of Section 112 probably would be unlawful, particularly in view of the enormous practical implications of such an interpretation and the absence of any indication whatsoever that Congress intended such a result. 26/

25/ American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981); Lead Industries Association, Inc. v. EPA, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980); Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978).

26/ See Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 645 (1980).

But the key point here is that EPA has emphatically rejected a zero-risk/zero- missions construction of Section 112. EPA's interpretation, which places primary emphasis on public health and allows a limited, secondary role for consideration of feasibility, is perfectly consistent with the statutory language and legislative intent. Because it is a "rational" and "permissible" construction of the Act, it should be respected by the Court 27/ particularly in light of the "inherent imprecision" of the relevant statutory terms 28/ and the fact that the critical statutory determination has been committed to the judgment of the Administrator. 29/

ARGUMENT

Under Section 112(b)(1)(B) of the Clean Air Act, the Administrator of EPA is to promulgate emission standards for hazardous air pollutants "at the level which in his judgment

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27/ Chemical Manufacturers Association v. Natural Resources Defense Council, Inc., ___ U.S. ___, 105 S. Ct. 1102, 1108 (1985); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., ____ U.S. ____, 104 S. Ct. 2778, 2782 (1984).

28/ Cf. Association of Data Processing Service Organizations, Inc. v. Board of Governors, 745 F.2d 677, 697 (D.C. Cir. 1984).

29/ Cf. Lead Industries Association, Inc. v. EPA, 647 F.2d 1130, 1147 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980).

provides an ample margin of safety to prot ct the public health." NRDC reads this provision to be both rigid in operation and absolute in terms of the degree of public health protection required. According to NRDC, in every case where EPA is unable to define a health effects threshold, Section 112 completely divests the agency of all discretion and flatly requires a total ban on all emissions, no matter how small the risks (if any) might be and regardless of the practical consequences. 30/

EPA recognized over six years ago that because dozens, and perhaps hundreds, of substances may ultimately be treated as apparent non-threshold pollutants, 31/ the practical implications of such a zero-risk/zero-emissions interpretation of Section 112 would be farreaching:

> A requirement that the risk from atmospheric carcinogen emissions be reduced to zero would produce massive social dislocations, given the pervasiveness of at least minimal levels of carcinogenic emissions in key American industries. Since few such industries could soon operate in compliance with

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30/ See Brief for Petitioner ("Pet. Br.") at 14-15.

31/ See, e.g., Proposed Airborne Carcinogen Policy, 44 Fed. Reg. at 58643 col. 3 ("over fifty known or potential carcinogens"). The National Toxicology Program has identified more than 100 substances or groups of substances that are either known or may reasonably be anticipated to be carcinogenic. See U.S. Department of Health and Human Services, National Toxicology Program, Third Annual Report on Carcinogens (Summary, September 1983).

> zero-emission standards, closure would be the only legal alternativ . Among the important activities affected would be the generation of electricity from either coal-burning or nuclear energy; the manufacturing of steel; the mining, smelting, or refining of virtually any mineral (e.g., copper, iron, lead, zinc, and limestone); the manufacture of synthetic organic chemicals; and the refining, storage, or dispensing of any petroleum product. 32/

A congressional intention to require regulatory action having consequences of this magnitude should not be presumed lightly. In striking down a standard of the Occupational Safety and Health Administration reflecting the same kind of zero-risk approach to regulation that NRDC claims is required here, the Supreme Court stated: "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the [agency] the unprecedented power over American industry that would result from the Government's view . . . ." 33/ The same reasoning applies in the present case.

32/ Proposed Airborne Carcinogen Policy, 44 Fed. Reg. at 58660 cols. 2-3. Nor would the impact be limited to the industrial sector of our economy. Since products of incomplete combustion also are thought to be carcinogenic, non-industrial activities as widespread as the burning of wood in home fireplaces also could be subject to prohibition under NRDC's interpretation of Section 112. See id. at 58660 n.20.

33/ Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 645 (1980).

As shown b low, there is no "clear mandate" in the Clean Air Act for the xtrem and rigid r ading of Section 112 that NRDC urges upon the Court. To the contrary, both the statutory text and the legislative history indicate that Section 112 should be interpreted in a far more reasonable and flexible manner which, while placing primary emphasis on protection of the public health, rejects a zero-risk approach to regulation and allows a limited, secondary role for consideration of feasibility.

I. RATHER THAN INFLEXIBLY PROHIBITING ALL EMISSIONS OF APPARENT NON-THRESHOLD POLLUTANTS, THE TEXT OF SECTION 112 BROADLY COMMITS TO EPA'S "JUDGMENT" THE TASK OF SELECTING AN "EMISSION STANDARD" THAT PROVIDES "AN AMPLE MARGIN OF SAFETY TO PROTECT THE PUBLIC HEALTH" IN INDIVIDUAL CASES.

NRDC's position in the present case is simple, if extreme. According to NRDC, a Section 112 standard for a carcinogen such as vinyl chloride (or for any other apparent non-threshold pollutant) must prohibit emissions of the pollutant entirely, regardless of the consequences. See Pet. Br. at 14, 30. The language of Section 112, however, is not so mechanical and extreme. Rather, as discussed below, Section 112 on its face plainly commits to the judgment of the Administrator the responsibility of determining, on a case-by-case basis, how best to achieve Congress' broad public

health objectives, and it incorporates mor than enough flexibility to allow the Agency to stop short of totally banning emissions in appropriate cases.

Contrary to what NRDC would have this Court believe, Section 112 does not speak in terms of inflexible emission prohibitions designed to achieve absolute safety. Instead, it directs the Administrator of EPA to "prescribe an emission standard" which, in his judgment, will meet certain broadly-worded public health goals. 42 U.S.C. § 7412(b)(1)(B). There is no suggestion of an automatic ban on emissions; to the contrary, "emission standard" is specifically defined in Section 302(k) of the Act to mean "a requirement . . . which limits the quantity, rate, or concentration of emissions." Id. § 7602(k) (emphasis supplied). While the adoption of a zero-emissions standard in some cases may well fall within the ambit of these statutory expressions, they unquestionably empower EPA to set non-zero standards as well.

Moreover, the overriding goal of Section 112 -- to "provide an ample margin of safety to protect the public health" -- represents neither a precise legislative formula for standard-setting nor an absolute command that all risks

be completely eliminated. 34/ While this language clearly makes public health considerations the primary concern in standard-setting, it does not amount to an unyielding directive for EPA to adopt zero-risk/zero-emissions standards in all cases where health effect thresholds have not been definitively established.

Rather, as the Supreme Court observed in construing the phrase "safe or healthful" under the Occupational Safety and Health Act of 1970:

> "[s]afe" is not the equivalent of "risk-free." There are many activities that we engage in every day -- such as driving a car or even breathing city air -- that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities "unsafe."

Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 642 (1980). 35/ Hence, while the "margin of

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34/ Moreover, the fact that Section 112 is phased in terms of broadly-stated public health objectives, and does not prescribe specific feasibility criteria such as those set forth in Section 111 (42 U.S.C. § 7411 (1982)), does not mean that feasibility cannot be considered in any way under Section 112. Rather, the language of Section 112 indicates that feasibility need not be the floor on the standard in cases where more stringent requirements are necessary to provide "an ample margin of safety."

35/ EPA has embraced this interpretation of the term "safety," stating: "Common understanding is that most activities are not, and cannot be made, risk-free. Common usage is not to characterize them therefore as 'unsafe.'" Withdrawal of Proposed Benzene Standards, 49 Fed. Reg. at 23559 col. 1 (emphasis in original).

safety" concept clearly is focused on health prot ction, it surely does not mean "that the safety factor must guarantee a failure risk of zero." 36/ Indeed, Congress has used the "margin of safety" concept in other settings where perfect safety could never be attained 37/ and, as detailed below, has rejected the notion that zero-emissions standards are required for apparent non-threshold pollutants subject to "margin of safety" standards under the Clean Air Act. See infra Part II.B. 38/

Finally, and perhaps most important, Section 112 by its terms commits to the "judgment" of the Administrator the policy question of how best to implement Congress' broadly stated public health objectives. NRDC's interpretation reads this provision out of the statute entirely, for no

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36/ See Proposed Airborne Carcinogen Policy, 44 Fed. Reg. at 58660 col. 3.

37/ See, e.g., 30 U.S.C. § 874(a) (1982) (employing the "margin of safety" concept with regard to safety risks to miners, such as the failure of a hoist cable).

38/ Similarly, no absolute command to eliminate all risk is necessarily implied by the ultimate objective of Section 112, "to protect public health," as illustrated by a line of decisions by this Court and the Seventh Circuit approving EPA's consideration of benefits and costs under a statute that called for the cancellation of pesticides found to be "injurious to living man." See Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 594 (D.C. Cir. 1971); Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528, 536 (D.C. Cir. 1972); Stearns Elec. Paste Co. v. EPA, 461 F.2d 293, 307 (7th Cir. 1972).

"judgment" would be needed if Congress intended zero-emissions standards to be prescribed automatically for all apparent non-threshold pollutants.

Congress, of course, knows full well how to demand absolute safety when it wants to do so. Thus, when Congress wanted to make clear that a cancer-causing agent could not be deemed to be "safe" for purposes of food additive regulation, it said so in unmistakable terms. 39/ By contrast, no such special usage of the term "safety" is found in Section 112, thus indicating that a more flexible approach to the regulation of apparent non-threshold pollutants was intended.

In sum, the statutory language of Section 112 implies a far more reasonable and flexible approach to regulation than NRDC would like to believe. Rather than requiring that EPA prohibit emissions entirely and adopt zero-risk standards,

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39/ The Delaney Clause of the Federal Food, Drug and Cosmetic Act provides, simply and unequivocally, that "no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal." 21 U.S.C. § 348(c)(3)(A) (1982).

Similarly, the Endangered Species Act before its amendment in 1978 imposed on "Federal agencies" the unqualified obligation to "insure" that their actions "[do] not . . . result in the destruction or adverse modification of habitat" of endangered species listed by the Secretary of Interior. 16 U.S.C. § 1536(a)(2) (1976 ed.). See Tennessee Valley Authority v. Hill, 437 U.S. 153, 173 (1978) ("This language admits of no exception").

Congress employed broad, goal-oriented language and expressly committed the critical policy determinations to EPA's "judgment." In so doing, Congress "left it to the Administrator to pour content into [the] broad concepts" embodied in the text of Section 112. United States v. Ethyl Corp., 761 F.2d 1153, 1155 (5th Cir. 1985).

II. THE LEGISLATIVE HISTORY REVEALS THAT CONGRESS REJECTED A "NO-RISK PHILOSOPHY" AND CHOSE NOT TO REQUIRE AN AUTOMATIC PROHIBITION OF ALL EMISSIONS IN THE CASE OF NON-THRESHOLD POLLUTANTS.

The legislative history of the Clean Air Act confirms that NRDC's extreme and wooden reading of Section 112 distorts congressional intent. Over the years, Congress has had several opportunities to embrace a zero-risk/zero-emissions approach to regulating hazardous air pollutants. It repeatedly has declined to do so. Instead, in a variety of different ways, Congress has underscored its intent to vest in EPA a broad measure of discretion to achieve the policy goals of Section 112 while rejecting the "no-risk philosophy" advocated by NRDC.

A. During the Legislativ Process, the Broad and Flexible Provisions of Section 112 Were Substituted for a Requirement To Prohibit Emissions of Hazardous Air Pollutants.

Section 112, as enacted in 1970, had its legislative origins in a much different provision contained in Section 115 of the Senate bill, S. 4358. In contrast to the legislation Congress ultimately enacted, Section 115 of the Senate bill contemplated a more inflexible regulatory scheme, which would have required EPA to prohibit emissions of air pollutants found to be hazardous to the health of persons. 40/ Even that provision, however, was not intended to require absolute safety. Rather, as explained by the Senate Committee on Public Works in reporting the bill, the combination of emission prohibitions under Section 115 of the Senate bill and emission standards under Section 114 of the bill was intended to provide effective control of "stationary source emissions that pose any significant danger to public health or welfare." 41/ Emission prohibitions were

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40/ See S. 4358, 91st Cong., 2d Sess. § 115 (1970), reprinted in A Legislative History of the Clean Air Act Amendments of 1970, Senate Comm. on Public Works, 93d Cong., 2d Sess. 565-69 (Comm. Print. 1974) (hereinafter "1970 Leg. Hist.").

41/ S. Rep. No. 91-1196, 91st Cong., 2d Sess. 20 (1970) (1970 Leg. Hist. at 420) (emphasis supplied).

not to be required for source categories "wher complete control . . . may not be necessary or practicable." 42/

Even if Section 115 of the Senate bill were read to be more consistent with NRDC's position in the present case, the fact is that the legislation that later emerged from conference and was enacted into law bears little resemblance to the Senate approach. In place of a required prohibition of emissions, the Conference Committee substituted the present scheme calling for "emission standards" reflecting EPA's "judgment" about the appropriate "level" of emissions below which an "ample margin of safety" could be deemed to exist.

In a brief footnote (Pet. Br. at 23, n.41), NRDC attempts to dismiss the change from Section 115 of the Senate bill to Section 112 of the final legislation as having no significance. Representatives of the Senate and House conferees, by contrast, viewed the actions taken in Conference Committee to be of considerable significance. Thus, Senator Spong, one of the Senate conferees, explained that by providing for the promulgation of emission standards rather than requiring a prohibition of emissions, the Conference Committee had "changed" "the thrust of . . . the Senate

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42/ Id. (emphasis supplied).

bill . . . ." 43/ And in presenting the conference bill to the House, Congressman Staggers stated:

> The conferees have been guided by two principles: to do what is feasible and to do what is reasonable.
>
> The bill passed by the other body incorporated many provisions which had not been included in the bill as passed by the House. The House Conferees scrutinized carefully each of these provisions and applied to them the test of reasonableness and feasibleness. On the basis of these two tests, many of these Senate provisions have been revised. 44/

NRDC relies heavily on three brief passages from the 1970 legislative history with little regard to the statutory provision being addressed. Two of the passages cited by NRDC relate to Section 115 of the Senate bill; consequently they shed little light on what Congress intended when it adopted the very different approach embodied in Section 112. 45/ NRDC's third reference, a floor statement by

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43/ 1970 Leg. Hist. at 146.

44/ 1970 Leg. Hist. at 111.

45/ In any event, the first excerpt NRDC quotes merely paraphrases the Senate bill, and should be read in light of the Senate Committee's intent to control only those stationary sources that pose "significant danger." See supra notes 41-42 and accompanying text. The second quote, a floor remark by Senator Muskie to the effect that "any level of emissions of certain pollutants may produce adverse effects that cannot be tolerated," is ambiguous at best. It does not necessarily mean, as NRDC suggests, that Senator Muskie would require EPA to adopt zero-risk standards

(Footnote Continued)

Senator Muskie concerning Conference Committee action, stands for nothing more than the unsurprising proposition that Section 112 standards may in some cases require the closing of "a plant" or even set limits allowing "no measurable emissions." Pet. Br. at 24 (quoting 1970 Leg. Hist. at 133). As noted above, EPA's interpretation of Section 112 is entirely consistent with that statement. See supra pp. 2-10.

In any event, there is a big difference between the possible closure of a plant and the closure of entire industries, a result that would logically flow from strict application of NRDC's interpretation. 46/ Indeed, perhaps the

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(Footnote Continued)

banning emissions of all apparent non-threshold pollutants. In fact, as shown below, Congress (including Senator Muskie) was well aware that small risks of adverse health effects would necessarily have to be tolerated, and the presence of such risks was viewed as being consistent with the existence of a margin of safety. See infra pp. 32-33 & notes 45, 56.

46/ If Senator Muskie really intended zero-emission standards for all non-threshold pollutants, his description of the scope and impact of the bill would have been far more sweeping, for Senator Muskie quite clearly understood that true health effect thresholds do not exist. See, e.g., Air Pollution, Part 2: Hearings on S. 3229, S. 3466, S. 3546, Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess. 850-51 (1970) (recognizing that "[t]here is just not that kind of evidence available from the present state of research in order to establish" "a certain threshold without any harmful effect"); see also infra note 56.

most striking thing about the legislative history of the 1970 Amendments is the absence of any discussion of broad-scale, industry-wide closure. Surely Congress would not have enacted a requirement that it expected would have such drastic consequences without extensive and explicit discussion of the matter. The absence of such a discussion belies NRDC's claim in the present case.

B. Subsequent Legislative Action Confirms Congress' Rejection of a "No-Risk Philosophy" that Allows No Role Whatsoever for Practical Considerations.

By the time Congress revisited the Clean Air Act in 1976 and 1977, EPA's construction of Section 112 as applied to apparent non-threshold pollutants had already been reflected in standard-setting actions for asbestos and vinyl chloride. Yet, congressional criticism of EPA's decisions on the grounds that they took feasibility into account and permitted small residual risks is nowhere to be found. Rather, Congress referred approvingly to those actions and authorized EPA to set non-zero standards for a series of other cancer-causing pollutants as well, thus providing further support for the agency's approach to implementing Section 112 in the case of non-threshold pollutants.

For example, the House Committee on Interstate and Foreign Commerce paid particular attention to EPA's 1975 vinyl

chloride proposal during its 1976 deliberations on amending th Clean Air Act. The Committee's R port expressly r cognized that vinyl chloride is carcinogenic and that no safe level of exposure could be defined, but it did not suggest that a zero-emissions standard was needed. Instead, it urged EPA to promulgate without delay the proposed standard 47/ in which EPA had expressly rejected a zero-risk/zero-emissions requirement in favor of limited consideration of feasibility. See supra pp. 8-10.

Similarly, in 1977, Congress had occasion to consider the agency's Asbestos Standards when it amended Section 112 to authorize, in certain circumstances, non-numerical design, equipment, work practice and operational standards of the type EPA adopted for asbestos. 48/ Although asbestos, a known carcinogen, is an apparent non-threshold pollutant, EPA elected not to ban its production, processing and use; instead, it considered what would be feasible in setting the

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47/ See H.R. Rep. No. 1175, 94th Cong., 2d Sess. 23-24 (1976), reprinted in A Legislative History of the Clean Air Act Amendments of 1977, Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess. 6572-73 (Comm. Print 1978) (hereinafter "1977 Leg. Hist.").

48/ See Section 112(e) of the Act, 42 U.S.C. § 7412(e) (1982).

standards. 49/ Yet, when it referred to th Asbestos Standards in 1977, Congress made no suggestion that a standard prohibiting all asbestos emissions was needed. To the contrary, the Senate Environment and Public Works Committee observed that Section 112(e) "would fully authorize the present EPA regulations governing asbestos." 50/ At the same time, it stressed that "[d]esign standards [under Section 112(e)] are not to be used where no margin of safety exists for a pollutant." 51/ Since the Committee viewed Section 112(e) as "fully authoriz[ing]" the asbestos standards (which did not ban emissions), it obviously did not understand the term "ample margin of safety" to require a prohibition on emissions of non-threshold pollutants or to preclude all consideration of feasibility.

This same theme was repeated in the development of Section 122 of the Act, which directed EPA to consider the need for controls on radioactive pollutants, cadmium, arsenic and polycyclic organic matter. Congress recognized that, like asbestos and vinyl chloride, each of those four pollutants

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49/ See Asbestos Standards, 38 Fed. Reg. at 8820 cols. 2-3.

50/ S. Rep. No. 127, 95th Cong., 1st Sess. 44 (1977 Leg. Hist. at 1418).

51/ Id.

had "been found to be cancer causing or cancer promoting." 52/ Yet it did not r quire that they be subjected to zero-risk/zero-emissions requirements. Instead, EPA was given discretion to determine how to control these pollutants, if at all. See 42 U.S.C. § 7422 (1982).

As indicated in the Report of the House Interstate and Foreign Commerce Committee, which drafted Section 122, the intent was to authorize EPA to "apply the appropriate means and extent of regulation" rather than "to specify the degree of emission reduction which should be required." 53/ Moreover, Congress evidently contemplated that EPA would consider feasibility and practicability in exercising its authority under Section 122. The House Committee stressed, for example, that some sources of radioactive pollutants "may be controllable only partially or not at all," making it "all the more essential to control . . . those sources which are controllable." 54/ Similarly, the Committee referred approvingly to a National Air Quality Advisory Committee

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52/ H.R. Rep. No. 294, 95th Cong., 1st Sess. 36 (hereinafter "1977 House Report") (1977 Leg. Hist. at 2503).

53/ Id. at 41 (1977 Leg. Hist. at 2508).

54/ Id. at 38 (1977 Leg. Hist. at 2505).

recommendation that arsenic emissions be controlled "to the maximum extent practicable." 55/

The examples outlined above are specific reflections of a broad congressional recognition that true health effect thresholds are unlikely to exist for any pollutant 56/ and that, accordingly, a "no-risk philosophy ignores all economic and social consequences and is impractical." 57/ Congress rejected that "no-risk philosophy" and declined to turn the "margin of safety concept" into an "illusion" by equating it with a risk-free environment. 58/ At the same time, Congress amended Section 112 and a variety of other provisions of the Act in order to emphasize the degree to which the Administrator was expected to exercise judgment in

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55/ Id. at 39 (1977 Leg. Hist. at 2506).

56/ See, e.g., id. at 105-27 (1977 Leg. Hist. at 2572-94). Senator Muskie was a most emphatic supporter of this view (see 1977 Leg. Hist. at 781-82, 1030-31, 1038), yet nowhere did he urge a wholesale overhaul of EPA's various non-zero "margin of safety" standards under Title I of the Act "to get down to zero pollution" levels which, as he stressed, is the only way to "eliminate all health effects." Id. at 1030-31.

57/ 1977 House Report at 127 (1977 Leg. Hist. at 2594).

58/ Id. at 111 (1977 Leg. Hist. at 2578).

discharging his statutory responsibilities. 59/ In so doing, Congress specifically reaffirmed that "a substantial element of judgment" is "necessary and permissible" in "establishing margins of safety." 60/ And it made clear that the existence of some residual risk is fully compatible with the "margin of safety" concept, at least so long as the residual risk is not "significant." 61/

59/ The amendment added identical language to various sections of the Act, including Section 112(a)(1), to authorize the Administrator to exercise "judgment" in assessing whether pollutants "may reasonably be anticipated" to cause the health risks addressed by each of the affected sections. See Pub. L. No. 95-95 § 401, 91 Stat. 685, 790-91 (1977).

60/ 1977 House Report at 50-51 (1977 Leg. Hist. at 2517-18).

61/ The House Interstate and Foreign Commerce Committee, which drafted these amendments, intended to "uphold[] the majority opinion in" Ethyl Corp. v. EPA, 541 F.2d 1, 13, 30, 31 & n.62 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976) (accepting a "significant risk" test under the Clean Air Act), and the dissenting opinion of the three-judge panel in Ethyl (equating the phrase "endanger the public health" with "significant risk of harm"). See 1977 House Report at 44-45, 49 (1977 Leg. Hist. at 2511-12, 2516).

The fact that Congress amended the Clean Air Act (including Section 112) in a variety of respects in 1977 without making any pertinent change in the standard-setting provision of Section 112(b)(1)(B) "is persuasive evidence that the interpretation [that EPA had placed on that provision] is the one intended by Congress." NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974). This is particularly true since, as discussed above, the Agency's application of Section 112 to apparent non-threshold pollutants had been "fully brought to the attention of . . . Congress" in the form of the asbestos and vinyl

(Footnote Continued)

III. EPA'S INTERPRETATION OF SECTION 112 IN THIS CASE IS REASONABLE AND PERMISSIBLE AND ACCORDINGLY SHOULD BE RESPECTED BY THE COURT.

As detailed above, neither the statutory text nor the legislative history supports NRDC's inflexible, zero-risk interpretation of Section 112. To the contrary, while public health concerns are unquestionably the overriding objective, Congress affirmatively rejected NRDC's "no-risk philosophy" as being both "illusory" and "impractical". Instead of prohibiting emissions of apparent non-threshold pollutants outright, it committed to the Administrator's judgment the determination of what level of emissions would be consistent with "an ample margin of safety" in individual cases. And it expected that practical considerations would play at least a limited role in making the difficult and uncertain science and policy judgments the statute requires. 62/

(Footnote Continued)

chloride standards. See United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979), quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 487-489 (1940).

62/ Consequently, so long as EPA's ultimate public health judgments about the degree of protection required fall within a "zone of reasonableness" (Hercules, Inc. v. EPA, 598 F.2d at 106-07), the agency is free to consider other factors such as feasibility in determining precisely where in that zone the emission standard should be set. Cf. Standards for Aldrin/Dieldrin, DDT (DDD, DDE), Endrin and

(Footnote Continued)

In light of the foregoing points, an EPA d cision to adopt NRDC's zero-emissions construction of Section 112 would probably be unlawful. See supra pp. 15-16. But the critical fact here is that EPA has emphatically rejected NRDC's extreme view. And its alternative interpretation -- which provides a limited, secondary role for consideration of feasibility -- finds ample support in the statutory text and legislative history. 63/ In these circumstances, as the Supreme Court and this Court have recently and repeatedly made clear, EPA's "reasonable" and "permissible" interpretation of the Act should be respected by the courts. 64/ The reasons for deferring to EPA's construction are particularly

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(Footnote Continued)

Toxaphene, 42 Fed. Reg. 2588, 2596 col. 3 - 2597 col. 1 (January 12, 1977) (limited consideration of economic and technological factors affords the Administrator "some guidance in deciding where on the spectrum of 'ample margin of safety' it would be reasonable and prudent to set the standard").

63/ Taken most favorably to NRDC, the legislative history could only be viewed as ambiguous on the question at issue. But, as the Supreme Court recently found in another context, "ambiguous legislative history falls far short of showing that the [agency's] interpretation of the Act is unreasonable." Pattern Makers, League of North America v. NLRB, ___ U.S. ___, 105 S. Ct. 3064, 3074 (1985).

64/ See Chemical Manufacturers Association v. Natural Resources Defense Council, Inc., ___ U.S. ___, 105 S. Ct. 1102, 1108 (1985); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., ___ U.S. ___, 104 S. Ct. 2778, 2782 (1984); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 75, 87 (1975); General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1566-67 (D.C. Cir.

(Footnote Continued)

compelling in this case, because the regulatory scheme of the Clean Air Act is "technical and complex," 65/ because the term "ample margin of safety is "inherent[ly] imprecis[e]," 66/ and because the policy question of what constitutes an "ample margin of safety" is committed to the judgment of the Administrator. 67/

NRDC tries to avoid this conclusion by suggesting that a decision in its favor is somehow compelled by the Supreme Court's decision in American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981), and by two decisions of this Court, Lead Industries Association, Inc. v. EPA, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042

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1984), cert. denied, ___ U.S. ___, 105 S. Ct. 2153 (1985).

Although EPA's overall construction of Section 112 should be respected since it is reasonable as applied in the present case, the agency's application of Section 112 in other factual settings may present different questions that are not addressed here.

65/ See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. at 2792; Train v. Natural Resources Defense Council, Inc., 421 U.S. at 87.

66/ Cf. Association of Data Processing Service Organizations, Inc. v. Board of Governors, 745 F.2d 677, 696 (D.C. Cir. 1984).

67/ Cf. Lead Industries Association, Inc. v. EPA, 647 F.2d 1130, 1147 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980) ("Deference to the Administrator's interpretation is particularly appropriate in construing a statute that invests him with a considerable amount of discretion."); Kennecott Copper Corp. v. Costle, 572 F.2d 1349, 1353 (9th Cir. 1978).

(1980), and Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978). Its reliance on these cases is misplac d.

According to NRDC, the American Textile Manufacturers Institute case establishes that agencies "cannot . . . take technological or economic considerations into account unless the statute expressly so provides." Pet. Br. at 14. But that case involved the question of whether OSHA was required to use cost-benefit analysis when the statute specifically provided for feasibility analysis. 452 U.S. at 509. The question was not whether technological and economic considerations had to be taken into account (everyone agreed that they did), but how they should be taken into account. Consequently, the American Textile Manufacturers Institute decision has no application here, where NRDC asserts that EPA may not take feasibility into account in any way whatsoever under the broad delegation of authority contained in Section 112 of the Clean Air Act.

The Lead Industries decision, which construed another provision of the Clean Air Act, and the Hercules decision, which interpreted a provision of a separate statute, do not control the present case either.

In Lead Industries, the court deferred to EPA's view that it was not required to consider economic or technological feasibility in setting the primary ambient air quality standard for lead under Section 109 of the Clean Air Act,

42 U.S.C. § 7409 (1982). 68/ By contrast, in the present case, NRDC is asking this Court to reject EPA's longstanding position that it is permitted to consider feasibility in establishing standards under Section 112. Moreover, in Lead Industries, unlike the present case, neither EPA nor the court faced the question of how the "margin of safety" language should be applied to apparent non-threshold pollutants. EPA has consistently distinguished between threshold and non-threshold pollutants in this respect and has applied the statutory term flexibly to respond to differing circumstances. 69/

A further critical distinction between Lead Industries and the present case is that Section 109 air quality standards do not actually impose pollution control requirements on any emitting sources. 70/ Rather, they serve as the basis for the development by individual states of implementation plans which, in turn, may impose emission limitations on specific sources. Since states are free to consider

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68/ See Lead Industries Association, Inc. v. EPA, 647 F.2d at 1148. The Court observed: "Unless it can be shown that the Administrator's construction of the statute is plainly unreasonable, we must uphold his interpretation." Id. at 1147.

69/ See, e.g., Proposed Airborne Carcinogen Policy, 44 Fed. Reg. at 58660 col. 1.

70/ See Lead Industries Association, Inc. v. EPA, 647 F.2d at 1149 n.37.

feasibility in developing impl mentation plans, "industries with particular economic or technological problems may s k special treatment in the plan itself." 71/ By contrast, Section 112 standards apply directly to specific emission sources. Thus, the effects of a Section 112 standard prohibiting emissions of vinyl chloride (or any other non-threshold pollutant) could not be mitigated by the development of a state implementation plan that considers feasibility.

In short, there would be no conflict between Lead Industries (which deferred to EPA's conclusion that it is not required to take feasibility into account in developing standards for threshold pollutants under Section 109) and a decision here that defers to EPA's conclusion that it is permitted to consider feasibility in developing standards for apparent non-threshold pollutants under Section 112. The "margin of safety" language of the two provisions is broad enough to accommodate both results, and as much deference is due to the agency's application of the term "ample margin of safety" under Section 112 as to its application of the term "adequate margin of safety" under Section 109. As

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71/ See id.; Union Electric Co. v. EPA, 427 U.S. 246, 266 (1976). Technological and economic factors can be taken into account in the enforcement of the state implementation plan as well. See id. at 266-69.

the Supreme Court observed in upholding EPA's interpretation of another term used in the Clean Air Act, "the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute." 72/

In Hercules, as in Lead Industries, the court accepted the agency's interpretative position -- stating that it "agree[d] with EPA's contention that section 307(a) [of the Clean Water Act] does not require it to consider economic and technological factors" in setting "ample margin of safety" standards for toxic water pollutants. 73/ Also, as in Lead Industries, neither EPA nor the court was presented with the question of how a "margin of safety" should be applied to a pollutant for which no health effects threshold can be defined. In these respects, Hercules, like Lead Industries, differs from the present case.

The cases also differ in that Section 307(a)(2) of the Clean Water Act sets forth a number of specific factors, none of which relates to feasibility, that the Administrator

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72/ See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. at 2792.

73/ Hercules, Inc. v. EPA, 598 F.2d at 111 (emphasis added).

must take into account in developing effluent standards for toxic water pollutants. 74/ The Court in Hercules relied heavily on the statutory specification of these factors in reaching its decision. 75/ Section 112 of the Clean Air Act, by contrast, specifies no such factors, leaving the term "ample margin of safety" undefined and thus more fully committed to the discretion of the Administrator.

Moreover, in the rulemaking that was upheld by the court in Hercules, EPA took a position that closely parallels the position it has taken in setting standards for vinyl chloride. 76/ Thus, on the facts, the judgment in

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74/ See Hercules, Inc. v. EPA, 598 F.2d at 111. The factors specified in Section 307(a)(2) at the time the standards were adopted in Hercules were "the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms." See id. at 111 n.38. A seventh factor has since been added to Section 307(a)(2).

75/ Id. at 111, 114.

76/ In the preamble to the standards being reviewed in Hercules, EPA stated: "It is the position of the Agency that § 307(a) does not require the zero discharge of every substance for which a cancer risk is found." 42 Fed. Reg. at 2592 col. 3. EPA also stated that, in setting standards under Section 307(a), "the Administrator has the authority 'to give at least some consideration to the economic impact, including the availability of control technology . . . .'" Id. at 2596, col. 1. And it noted that consideration had in fact been given to those factors in establishing the Section 307(a) effluent standards that were before the court in Hercules. See id.

Hercules is perfectly consistent with a decision upholding EPA's action in the present case.

In short, the cases on which NRDC relies to support its extreme reading of Section 112 do not control the present case. The fact is that only one decision of this Court comes close to interpreting the "ample margin of safety" provision of Section 112 itself. In that case, National Association of Demolition Contractors, Inc. v. Costle, 565 F.2d 748 (D.C. Cir. 1977), the court accepted the position that Section 112 does not require EPA to prohibit the demolition of asbestos-containing buildings during sub-freezing temperatures, even though such a prohibition would be necessary if the term "ample margin of safety" were interpreted to require a risk-free environment without regard to feasibility. In approving EPA's decision to allow demolition to continue, the court found "no basis for concluding that the Administrator . . . acted in anything other than a reasonable fashion, consistent with law." Id. at 753. The same finding should be made in the present case.

CONCLUSION

Neither the statutory text nor the legislative history of Section 112 support NRDC's view that EPA has no option

other than to prescribe a total ban on missions of all apparent non-threshold pollutants. Rather than mbracing the extreme "no-risk philosophy" that NRDC advocates, Congress chose a far more flexible approach that commits to EPA's judgment the policy determination of what emission limitation provides, in each case, an ample margin of safety to protect the public health.

Pursuant to this delegation of authority, EPA has consistently rejected NRDC's zero-risk reading of Section 112. Instead, the agency has adopted a construction that makes protection of public health the "paramount" consideration while assigning a limited, secondary role to feasibility in establishing standards for apparent non-threshold pollutants. In view of the "inherent imprecision" of the statutory terms and the authority the agency has been given to make the policy judgments required to implement the Act's broadly-stated public health objectives, EPA's approach

unquestionably is reasonable and permissible and, hence, should be respected by the Court.

Respectfully submitted,

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