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NRDC v. EPA: Interpretation of Section 112 of the Clean Air Act

I. INTRODUCTION

The judiciary generally gives great deference to interpretations of a statute by the administrative agency charged with its implementation.¹ Consequently, the standard of review for an administrative agency's statutory interpretation is very narrow.² If Congress has specifically addressed the issue, then that specific statutory language governs. If the language and intent of Congress are ambiguous, however, an administrative agency has great latitude in interpreting the statutory language, and thus, the court must give considerable weight to the agency's interpretation.³ In fact, the presumptive validity of an agency's actions may only be overcome if they are found to be: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."⁴

In *NRDC v. EPA*,⁵ the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") evaluated the Environmental Protection Agency's ("EPA") interpretation of section 112(b)(1)(B)⁶ of the

1. The deference given, however, "does not permit the court to become a rubber stamp, automatically approving every agency interpretation of a statute. Rather, it requires 'a searching and careful' inquiry into the facts of each case to determine that the agency has acted within the scope of its statutory authority." *Ohio v. Ruckelshaus*, 776 F.2d 1333, 1339 (6th Cir. 1985). This means that an agency's action must be upheld unless it is unreasonable. *Id.*

An interpretation is unreasonable unless it is a permissible interpretation based on substantial evidence as stated in the Administrative Procedure Act standard, 5 U.S.C. § 706(2)(E). *Yaffe Iron & Metal Co. v. EPA*, 774 F.2d 1008, 1014 (10th Cir. 1985).

Substantial evidence is 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Moreover, the possibility of drawing two inconsistent conclusions from the evidence does not mean that they are not supported by substantial evidence. The agency's findings as to facts supported by substantial evidence must be accorded due deference and may not be set aside by the reviewing court.

Id. (citation omitted).

2. *Ohio v. Ruckelshaus*, 776 F.2d 1333, 1338 (6th Cir. 1985).

3. *Id.*

4. *Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1082-83 (6th Cir. 1984).

5. 824 F.2d 1146 (D.C. Cir. 1987) (en banc).

6. Section 112(b)(1)(B) provides in pertinent part: "The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant." 42 U.S.C. § 7412(b)(1)(B) (1982).

Clean Air Act ("CAA") as it applies to hazardous air pollutants. The suit by the Natural Resources Defense Council ("NRDC") challenged the EPA's interpretation of section 112(b)(1)(B) which allowed consideration of technological and economic feasibility in setting emission standards for hazardous pollutants. The Court of Appeals held that technological and economic feasibility could not be considered in the initial determination of what was "safe."⁷ The court concluded, however, that consideration of feasibility was acceptable in setting final emission standards.

This note examines *NRDC v. EPA* by focusing on the statutory language and intent of section 112 of the CAA, and shows that the EPA's interpretation of section 112(b)(1)(B) was in excess of statutory authority. As such, the D.C. Circuit, in *NRDC v. EPA*, gave undue deference to the EPA's interpretation of section 112.

II. THE *NRDC* CASE

The *NRDC* case concerned regulation of hazardous air pollutants under section 112 of the CAA, specifically the regulation of vinyl chlorides.⁸ Vinyl chlorides are known carcinogens, and as such, they fall within the ambit of section 112 since they "may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness."⁹ In 1975 the EPA sought to establish a standard for vinyl chloride emissions based on scientific data then available. Because of scientific uncertainty, it was impossible to ascertain a definite level below which no harm to humans would occur.¹⁰ However, the EPA had strong evidence that any atmospheric concentration would be unsafe to human health.¹¹

Based on its determination that any allowable concentration could be unsafe, the EPA was faced with two alternatives. First, the EPA

7. The court defined something as "unsafe" if it "threatens humans with a significant risk of harm." *NRDC*, 824 F.2d at 1153. See *infra* note 18 and accompanying text.

8. Section 112 defines hazardous air pollutants as "air pollutants to which no ambient air quality standard is applicable and which in the judgment of the Administrator cause . . . , or contribute . . . , to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C. § 7412(a)(1). Under section 112 the Administrator of the EPA ("Administrator") is required to establish an emission standard for such hazardous air pollutants. *Id.* at § 7412(b)(1)(B). This section provides: "The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant." *Id.*

9. 42 U.S.C. § 7412(a)(1).

10. *NRDC*, 824 F.2d at 1148.

11. Based on the best available scientific evidence, it had been determined that vinyl chlorides caused cancer at all levels of exposure. *NRDC*, 824 F.2d at 1148.

could prohibit all emissions of vinyl chlorides. Second, the EPA could adopt a standard that would allow emissions at the lowest possible level achievable by use of the best available control technology. Since the first alternative would have required closure of the entire plastics industry,¹² in 1976 the EPA opted for the second alternative and consequently promulgated final emission standards for vinyl chloride based solely on the level attainable by the best available control technology.¹³ As a result, the Environmental Defense Fund ("EDF") filed suit against the EPA, alleging that the EPA had exceeded its regulatory authority by considering technological and economic feasibility. That suit was later settled before trial.

As part of the settlement of the EDF suit, the EPA in 1977 proposed new regulations which would have reduced emission levels to five parts per million ("ppm"), with a stated ultimate goal of zero emissions.¹⁴ The EPA, however, never acted on the new proposals. In 1985 the EPA withdrew the proposed regulations in violation of the settlement agreement with the EDF and reinstated the 1976 standards based on the best available control technology.¹⁵ The suit by the NRDC challenged the EPA's use of technological and economic feasibility in setting a standard under section 112(b)(1)(B).¹⁶

On first hearing, the panel decision of the D.C. Circuit Court of Appeals held in favor of the EPA,¹⁷ and allowed consideration of technological and economic feasibility at all stages of the regulations promulgation. On rehearing, the en banc court held that the EPA must place primary emphasis on health in setting standards for hazardous pollutants under section 112(b)(1)(B). However, while holding that the EPA could consider only health in determining what was safe, the court did allow consideration of technological and economic feasibility in setting the emission levels.¹⁸

12. *Id.* at 1147.

13. *NRDC*, 824 F.2d at 1149; 41 Fed. Reg. 46,560 (1976).

14. 42 Fed. Reg. 28,154 (1977).

15. 40 C.F.R. § 61.63 (1987).

16. The NRDC argued that the EPA must set a zero level of emissions when it cannot be determined that there is a level above zero which is safe. *NRDC*, 824 F.2d at 1151-52.

17. *NRDC v. EPA*, 804 F.2d 710 (D.C.Cir. 1986).

18. While the court refused to accept the NRDC's interpretation of section 112 as precluding the consideration of technological and economic feasibility in promulgating standards, the court also refused to accept the EPA's argument that the Administrator could place significant emphasis on feasibility. *NRDC*, 824 F.2d at 1163-66. The court rejected the argument that since the 1977 amendments to the Clean Air Act were made with Congress' awareness of vinyl chloride regulations already promulgated by consideration of feasibility factors, the passage of those amendments was a ratification of the use of technological and economic feasibility in setting standards. *Id.* at 1160-63. On the contrary, the court stated that since the Administrator had substituted technological feasibility for health as the primary consideration, he had not exercised reasonable discretion in

The court's analysis was flawed for the following reasons. First, the court failed to adequately consider the legislative history of the CAA generally. Second, the court failed to recognize that the legislative history of section 112 specifically indicates that consideration of feasibility was precluded.¹⁹ Third, the court misinterpreted comparison of section 112(b)(1)(B) to other sections of the CAA,²⁰ overlooking section

promulgating the standards. *Id.*

Consistent with this interpretation, the court found that the primary consideration of Congress in enacting section 112 was the public health. As such, the court said, the Administrator is required to first determine what the standard should be for providing an ample margin of safety based on an initial determination of what is safe. *Id.* at 1164-66. The court stated:

This determination must be based exclusively upon the Administrator's determination of the risk to health at a particular emission level. . . . [T]he Administrator's decision does not require a finding that 'safe' means 'risk-free,' or a finding that the determination is free from uncertainty. Instead, we find only that the Administrator's decision must be based upon an expert judgment with regard to the level of emission that will result in an 'acceptable' risk to health. In this regard, the Administrator must determine what inferences should be drawn from available scientific data and decide what risks are acceptable in the world in which we live. This determination must be based solely upon the risk to health. The Administrator cannot under any circumstances consider cost and technological feasibility at this stage of the analysis. The latter factors have no relevance to the preliminary determination of what is safe. Of course, if the Administrator cannot find that there is an acceptable risk at any level, then the Administrator must set the level at zero.

Id. at 1164-65 (citations omitted).

The court further stated that because of the technological uncertainty often involved in determining what is safe, "the Administrator should be free to diminish as much of the statistically determined risk as possible by setting the standard at the lowest feasible level." *Id.* at 1165. This, the court said, should be done only after a safe level of emissions has been determined by consideration of health alone. *Id.* at 1165-66. Thus, the Administrator has substantial discretion to consider feasibility during the later stages of emission standards promulgation. However, "[i]f the purpose of the statute is to protect health, discretion to overprotect does not logically imply discretion to underprotect." Comment, *The Trial of Hazardous Air Pollution Regulation*, 16 ENVTL. L. REP. 10,066, 10,071 (1986).

The court's decision has caused the EPA to reevaluate the standards previously promulgated and could cause some of these previous standards to be rewritten. Current Developments, ENVTL. L. REP. 1099 (Aug. 21, 1987). Since these previous standards were promulgated under the former policy of the EPA using consideration of feasibility as primary importance, they may be invalid in light of the current decision. *Id.*

19. The final version of section 112 was a compromise provision of a joint Senate and House conference committee, and more closely resembled the Senate version. See *infra* notes 31-32 and accompanying text. The D.C. Circuit rejected the similarity between the final version of section 112 and the Senate bill, dismissing it as inconsequential. *NRDC*, 824 F.2d at 1153-54. In so doing, the court stated:

The final version of section 112 . . . omits any reference to a prohibition of emissions and directs the Administrator to set an emissions standard 'at the level which in his judgment provides an ample margin of safety to protect the public health.' Thus, Congress rejected a provision which would have required the Administrator to prohibit certain emissions and adopted a provision which places that decision within the Administrator's discretion.

Id.

20. The court rejected the statutory interpretations of other sections of the CAA posed in

111 which specifically provides for consideration of technological and economic feasibility.²¹ Fourth, the court overlooked specific subsections in section 112 which provide for consideration of technological and economic feasibility under limited circumstances.²² Fifth, the court misinterpreted the language of section 112(b)(1)(B),²³ especially with regard to the "margin of safety" language.²⁴ In sum, the court failed to cor-

Union Elect. Co v. EPA, 427 U.S. 246 (1976) (stating that the Administrator cannot consider technological or economic feasibility under section 110(a)(2)), and Lead Indus. Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980) (stating that section 109(b)(1) prohibits the consideration of technological and economic feasibility), *cert. denied*, 449 U.S. 1042 (1980), as controlling this case. *NRDC*, 824 F.2d at 1157. In doing so the court stated that each of those cases considered whether the EPA *must* consider factors other than health factors, as contrasted in this case with the issue of whether the EPA *may* consider such factors. *Id.* at 1157. The court also said that in each of the two cited cases "there was some indication in the language, structure, or legislative history of the specific provision at issue that Congress intended to preclude consideration of cost and technological feasibility. . . . [W]e find no such indication with respect to section 112." *Id.* at 1157.

21. *See infra* notes 41-54 and accompanying text.

22. *See infra* notes 55-61 and accompanying text.

23. The court stated that since the statutory language did not specifically limit the factors to be considered in section 112, the Administrator could "conceivably include all of the specific factors listed in other parts of the Act if necessary 'to protect the public health.'" *NRDC*, 824 F.2d at 1158. The court also stated that even though Congress used the modifier "ample," intending that the agency set a standard great enough to assure that the public would not be exposed to "anything resembling the maximum risk," Congress intended to allow the EPA a great deal of discretion in setting standards. *Id.* at 1153. The court, in summarizing its position that the language of section 112 could not mean that zero emissions standards were mandated if health risks were speculative, emphasized that with carcinogens it is "unlikely that science will ever yield *absolute* certainty of safety in an area so complicated and rife with problems of measurement, modeling, long latency, and the like. [Accordingly], the Administrator would have no discretion but would be required to prohibit all emissions." *Id.* (emphasis in original). If such a result was intended by Congress, said the court, then it would have clearly indicated the same by use of explicit language. *Id.*

24. In evaluating the "margin of safety" language, the court compared section 112 to section 109. *NRDC*, 824 F.2d at 1152-53. The court pointed to a Senate Report, S. REP. NO. 1196, 91st Cong., 2d Sess. 10 (1970), dealing with section 109 which "explained the purpose of the 'margin of safety' standard as one of affording 'a *reasonable* degree of protection . . . against hazards which research has not yet identified.'" *NRDC*, 824 F.2d at 1152 (emphasis in original). The court incorrectly interpreted the language in that report. (Also, the language cited by the court actually appeared under a discussion of section 110 rather than section 109 as the court had indicated.) *See infra* note 69 and accompanying text. The court stated that the statutory "margin of safety standard" was in accord with the historical use of that term in an engineering context where that term is used to allow for compensation in determinations based on uncertainties and variabilities. *NRDC*, 824 F.2d at 1152 (quoting Hall, *The Control of Toxic Pollutants Under the Federal Water Pollution Control Act Amendments of 1972*, 63 IOWA L. REV. 609, 629 (1978)). Based upon such reasoning, the court stated that the Administrator had a great deal of discretion in promulgating emission standards. The court also pointed to Environmental Defense Fund v. EPA, 598 F.2d 62 (D.C. Cir. 1978), a decision concerning interpretation of identical language in the Federal Water Pollution Control Act. *NRDC*, 824 F.2d at 1152-53. The court said that in that case the language "margin of safety" was a directive to the Administrator to find a way to reconcile the seemingly paradoxical task of assuring the safety of the public's health when knowledge of the facts necessary to make such a decision are unknown. *Id.*

Additionally, the court said that the use of the word safety "is significant evidence that [Con-

rectly evaluate congressional intent of section 112, thereby giving undue deference to the EPA's interpretation of that section.

III. ANALYSIS

A. *Legislative History Of The Clean Air Act Generally*

Section 112 is a result of the 1970 Amendments to the Air Quality Control Act of 1967. These amendments as a whole are known as the CAA.²⁵ The first step in analyzing the intent of Congress in enacting section 112 is to consider the overall intent of Congress in enacting these amendments. The D.C. Circuit, however, failed to adequately consider this.

Congress did not enact the legislation in order to reach a reasonable accommodation between air free of hazardous pollutants and economic considerations; rather, the CAA was enacted in response to growing public concern with poor air quality and as a result of the failure of the Air Quality Act of 1967.²⁶

[T]he 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution . . . and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.²⁷

The Senate Report²⁸ stated that the purpose of the bill was to restructure the methods available to attack a critical and growing national problem of air pollution.

The legislation . . . is the result of deep concern for protection of the health of the American people. Air pollution is not only an aesthetic nuisance. The Committee's concern with direct adverse effects upon public health has increased since the publication of air quality criteria documents for five major pollutants These documents indicate that the air pollution problem is more severe, more pervasive, and growing at a more rapid rate than was generally believed. . . . [N]ew information . . . intensified the committee's concern to author-

gress] did not intend to require the Administrator to prohibit all emissions of non-threshold pollutants." *NRDC*, 824 F.2d at 1153. In support of its position, the court pointed to a Supreme Court decision, *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980), which held that "'safe' does not mean 'risk-free,'" but rather that "something is 'unsafe' only when it threatens humans with 'a significant risk of harm.'" *NRDC*, 824 F.2d at 1153.

25. See Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 *UCLA L. REV.* 740 (1983).

26. *Id.* at 744.

27. *Union Elec. Co. v. EPA*, 427 U.S. 246, 256-57 (1976).

28. *S. REP. NO. 1196*, 91st Cong., 2d Sess. (1970).

ize a massive attack on air pollution. This bill is designed to provide the basis for such an attack.²⁹

Thus, the general legislative history of the CAA shows that congressional intent was to assert a "massive attack on air pollution" by forcing development of technology. This intent would best be met by a strict reading of the statutory language and legislative history of section 112(b)(1)(B).

B. Legislative History Of Section 112

The court failed to recognize that the legislative history of section 112 indicates that consideration of technological and economic feasibility

29. *Id.* at 1. The report further stated:

Although the nature of the attack will differ from region to region, one objective will be the same: Air quality standards protective of the health of persons must be achieved within the 3-year period of the approval of plans to implement ambient air quality standards. The right of States to set more stringent standards of air quality has been preserved. Maintenance of existing high quality air is assured through provision for maximum control of new major pollution sources.

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

The requirements for State action will be broadened. And the obligation on polluters will be greatly increased. What has been a program focused on uniquely critical areas, underfunded and inadequately manned, will become truly national in scope and will require an immediate increase in personnel and funding.

.....

In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.

Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down, and in addition that new sources should be controlled to the maximum extent possible to prevent atmospheric emissions.

.....

The bill would provide other important tools to protect public health and to assure effective implementation of the purposes of the Act. By providing authority to prohibit the emission of pollutants which present a clear hazard to health, the bill shifts the burden of proof to the polluter to identify safe emission levels.

.....

The extent of Federal involvement in the development and maintenance of air pollution control programs would be broadened. The pace and degree of enforcement will be quickened.

Id. at 2-3.

ity was precluded.³⁰ The Senate version of section 112 contained stringent provisions which explicitly allowed only consideration of health in determining emissions levels of *all* pollution sources.³¹ The House bill, on the other hand, contained provisions which explicitly allowed consideration of technological and economic feasibility in setting emissions standards and governed only *new* pollution sources.³²

Contrary to the court's reasoning,³³ the joint committee bill more closely resembles the Senate version than the House version. It does so in two distinct respects. First, section 112 governs regulation of *all* pollution sources as opposed to only *new* pollution sources. Second, like the Senate version, section 112(b)(1)(B) contains no explicit language permitting consideration of technological and economic feasibility. This fact is emphasized by provision in sections 112(c) and 112(e) for specific exemptions in limited circumstances based on technological and economic feasibility.³⁴ If section 112(b)(1)(B) allowed consideration of technological and economic feasibility, sections 112(c) and 112(e) would be unnecessary.³⁵

In sum, the similarity of the final version of section 112(b)(1)(B) to the Senate bill, which allowed only health considerations, shows that consideration of technological and economic feasibility was precluded except for the explicit exemptions provided in sections 112(c) and 112(e). This is clearly indicated in the committee reports on the final version.

For example, Senator Muskie stated during a Senate *post-conference* consideration of the final version of section 112:

The standards must be set to provide an ample margin of safety to protect the public health. This could mean, effectively, that a plant could be required to close because of the absence of control techniques. It could include emission standards which allow for no measurable emissions.³⁶

Additionally, a more telling exposition is found in the House Report of the final version of section 112³⁷ where Representative Staggers

30. See *supra* note 19 and accompanying text.

31. See S. 4358, 91st Cong., 2d Sess. §6(b), 116 CONG. REC. 32,375 (1970).

32. See H.R. 17,255, 91st Cong., 2d Sess. §5(a), 116 CONG. REC. 19,225-26 (1970).

33. See *supra* note 19 and accompanying text.

34. See *infra* notes 55-61 and accompanying text.

35. NRDC v. EPA, 804 F.2d 710, 734 (D.C. Cir. 1986) (Wright, J., dissenting).

36. SENATE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, EXHIBIT 1 TO STATEMENT OF SEN. MUSKIE, CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, 93D CONG., 2D SESS., 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 133 (Comm. Print 1974).

37. [Mr. Staggers speaking]. Mr. Speaker, I am gratified to bring to the House the

stated that the Administrator should "vigorously enforce [section 112] to the point of setting zero emission levels for these highly hazardous substances" ³⁸ He further stated:

We have allowed the excuse of expanding technology and production to over-ride the paramount interest of the average citizen in protecting the environment and the air we breathe. Now I hope the pendulum

conference report on the Clean Air Act Amendments of 1970. I am proud to say to the House that the conference report embodies clean air legislation which is stronger than the bills passed by either House.

I say this because the conferees after numerous and arduous working sessions have worked out a bill which promises to give to the American people clean air to breathe within the shortest feasible time.

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 feasibility. On the basis of these two tests, many of these Senate provisions have been revised. The revisions, however, do not weaken those provisions. On the contrary, the revisions strengthen them because they make more likely that we shall achieve the desirable goals which these provisions were designed to achieve.

The Administrator has been given wide discretion in dealing with the emissions of highly hazardous substances. [Sec. 112] I would hope that in this area the Administrator will *vigorously enforce* the act *to the point of setting zero emission levels* for these highly hazardous substances, which should be listed and defined. . . .

Mr. Speaker, our Nation has had a sad and frustrating history of weak-kneed inaction by those who have been charged with protecting the divine right of every citizen to breathe clean air. Not only have the laws been weak and shot through with loopholes, but the underfunded administration of legislation to combat air pollution has been ineffective. *We have allowed the excuse of expanding technology and production to over-ride the paramount interest of the average citizen in protecting the environment and the air we breathe.*

Now I hope the pendulum will swing dramatically and drastically in the opposite direction. The very survival of human life on earth depends on the ability to breathe. We are getting choked with air pollution. Now that this excellent piece of legislation has been passed, *the challenge is clearly how well the act will be administered.* At the highest level of Government, leadership is demanded in order to protect clean air. *The President of the United States must insist that this act be administered forcefully, fearlessly, and where any benefit of the doubt exists it should be resolved in favor of clean air and against those who pollute the air.* We can no longer afford the pussy-footing, artful dogging, delays, end runs, and outright flouting of the intent of the legislation which has characterized the history of air pollution control. I trust that the President and the Environmental Protection Agency will seize this challenge and thus protect the right of every citizen to breathe clean air.

HOUSE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, 93D CONG., 2D SESS., 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 111, 116 (Comm. Print 1974) (emphasis added; brackets in original). Thus there seems to be no disagreement between the Senate and House objectives and methods.

38. *Id.* at 116.

will swing dramatically and drastically in the opposite direction. . . . [T]he challenge is clearly how well the act will be administered. . . . The President of the United States must insist that this act be administered forcefully, fearlessly, *and where any benefit of the doubt exists it should be resolved in favor of clean air and against those who pollute the air.*"³⁹

The House Report demonstrates that even the House of Representatives, which initially wanted to include feasibility considerations in section 112 generally, stated that the EPA should set "zero emission levels for . . . highly hazardous substances . . ." ⁴⁰ The combined reports demonstrate that allowance for consideration of technological and economic feasibility is precluded under section 112(b)(1)(B). A comparison of section 112 to other sections of the CAA strengthens this conclusion.

C. Comparison Of Section 112 To Other Sections Of The CAA

Comparison of section 112 to other sections of the CAA shows that section 112(b)(1)(B) does not allow consideration of technological and economic feasibility when promulgating emission standards. Section 109(b)(1),⁴¹ for example, requires the establishment of ambient air quality standards⁴² and allows the Administrator to use judgment in assuring an "adequate margin of safety."⁴³ It does not, however, mention consideration of technological or economic feasibility.⁴⁴ In *Lead Industries Association, Inc. v. EPA*,⁴⁵ the D.C. Circuit stated that sec-

39. *Id.* (emphasis added).

40. *Id.*

41. 42 U.S.C. § 7409(b)(1).

42. Ambient is defined as "surrounding or encompassing." Ambient air quality standards are those designed to control the atmospheric concentrations of a pollutant. Emission standards, on the other hand, are intended to control the actual amount emitted from a specific source.

43. Section 109(b)(1) provides in pertinent part:

National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.

42 U.S.C. § 7409(b)(1).

44. *Id.*

45. 647 F.2d 1130 (D.C. Cir. 1979). After examining the language and legislative history of section 109(b)(1), the court stated that technological and economic feasibility factors were not permitted to be considered. *Id.* at 1148-50. The court stated that

when Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of its statutory authority by taking other factors into account. A policy choice such as this is one which only Congress, not the courts and not EPA, can make. Indeed, the debates on the Act indicate that Congress was quite conscious of this fact.

Id. at 1150.

tion 109(b)(1) not only fails to require the consideration of technological and economic feasibility, but it actually prohibits such a consideration.⁴⁶ Additionally, section 110(a)(2),⁴⁷ which also concerns state ambient air quality standards, does not mention technological or economic feasibility.⁴⁸ In *Union Electric Co. v. EPA*,⁴⁹ the Supreme Court interpreted section 110(a)(2) as prohibiting the consideration of feasibility by the Administrator in his decision-making process.⁵⁰

The foregoing interpretations can be applied by analogy to section 112(b)(1)(B). Like sections 109 and 110, section 112(b)(1)(B) does not explicitly bar the consideration of technological and economic feasibility in the establishment of air standards. Nevertheless, since the language is nearly identical in all three sections, section 112(b)(1)(B) should be read to prohibit the consideration of technological and economic feasibility in the same manner as sections 109 and 110. The intended result of all three sections was to protect the public health. There were never any counterbalancing considerations for technological or economic feasibility.⁵¹

Furthermore, section 112(b)(1)(B) is inherently more deserving of feasibility preclusion. Sections 109 and 110 deal with ambient air quality standards, whereas section 112 is concerned with "hazardous air pollutant emission controls." Thus,

[i] makes no sense to allow the Administrator greater latitude in the establishment of standards for pollutants Congress explicitly recognized as highly dangerous than he is allowed in the regulation of less dangerous pollutants. In fact, § 112's language directing the Adminis-

46. *Id.* at 1148-50.

47. 42 U.S.C. § 7410(a)(2).

48. Section 110(a)(2) provides in pertinent part:

(2) The Administrator shall . . . approve or disapprove [a] plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) . . . (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan . . . and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained.

Id.

49. 427 U.S. 246 (1976). The Court interpreted the legislative history of section 110(a)(2) to preclude consideration of technological and economic feasibility factors. The Court also stated that the "technology-forcing character" of the CAA was "designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." *Id.* at 258. In analyzing the language of section 110(a)(2), the Court then stated that the "technology-forcing" "approach is apparent on the face of § 110(a)(2)." *Id.*

50. *Id.* at 257-58.

51. See *infra* notes 55-61 and accompanying text.

trator to establish regulations which "in his judgment provide an ample margin of safety to protect the public health" appears on its face to be *more* strict than § 109's language "*adequate* margin of safety."⁵²

Indeed, "[a]mple' is defined as 'abundant; plentiful; more than adequate.' Clearly Congress intended that in dealing with toxic pollutants that pose a threat to human health, margins of safety should be generous to ensure protection of human health."⁵³

Further comparison shows that other sections of the CAA contain express provisions for consideration of technological and economic feasibility. For example, section 111 explicitly states:

a standard of performance shall reflect the degree of emission limitation and the *percentage reduction achievable through application of the best technological system* of continuous emission reduction that (*taking into consideration the cost of achieving such emission reduction, any non-air quality health and environmental impact and energy requirements*) the Administrator determines has been adequately demonstrated.⁵⁴

The Administrator, in implementing section 111, is therefore directed to base standards on technological and economic feasibility. Contrasted with this explicit directive of section 111, section 112(b)(1)(B) does not direct the Administrator to consider feasibility in setting standards for hazardous air pollutants and thus would seem to prohibit him from so doing.

In sum, comparison of section 112(b)(1)(B) to other sections of the CAA shows that similar sections prohibit consideration of technological and economic feasibility, and also points out that Congress explicitly provides for such considerations when it intended that result. In addition, specific provisions for consideration of technological and economic feasibility are found in three subsections of section 112.

D. Specific Subsections Of Section 112 Provide For Consideration Of Technological And Economic Feasibility

The intention that feasibility not be considered in section 112(b)(1)(B) may be inferred from three subsections of section 112: 112(c)(2),⁵⁵ 112(c)(1)(B)(ii)⁵⁶ and 112(e)(1).⁵⁷ These subsections pro-

52. *NRDC*, 804 F.2d at 731 (Wright, J., dissenting) (quoting *Environmental Defense Fund v. EPA*, 598 F.2d 62, 81 (D.C. Cir. 1978) (emphasis in original)).

53. Hall, *The Control of Toxic Pollutants Under the Federal Water Pollution Control Act Amendments of 1972*, 63 *IOWA L. REV.* 609, 630 (1978) (emphasis added).

54. 42 U.S.C. § 7411(a)(1) (emphasis added).

55. Section 112(c)(2) provides:

vide for consideration of technological and economic feasibility only under specified circumstances. Subsection 112(c)(2) allows a two-year waiver of a hazardous pollutant standard by the President "if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security."⁵⁸ Subsection 112(c)(1)(B)(ii) allows a two-year waiver by the Administrator in the case of an existing source "if he finds that such period is necessary for the installation of controls . . ."⁵⁹ Finally, subsection 112(e)(1) allows the Administrator "to set work practice standards, which are stated in terms of how the polluting activity is conducted, not how much pollution enters the ambient air, if EPA [finds] emission standards impractical."⁶⁰

There would be little sense in setting forth exceptions in the sub-

(2) The President may exempt any stationary source from compliance with paragraph (1) for a period of not more than two years if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security. An exemption under this paragraph may be extended for one or more additional periods, each period not to exceed two years. The President shall make a report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

Id. at § 7412(c)(2).

56. Section 112(c)(1)(B)(ii) provides in pertinent part:

(B) no air pollutant . . . may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

Id. at § 7412(c)(1)(B)(ii).

57. Section 112(e) provides:

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in his judgment is adequate to protect the public health from such pollutant or pollutants with an ample margin of safety. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce an emission standard" means any situation in which the Administrator determines that (A) a hazardous pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

Id. at § 7412(e).

58. *Id.* at § 7412(c)(2).

59. *Id.* at § 7412(c)(1)(B)(ii).

60. Comment, *supra* note 18, at 10,067.

sections previously discussed, allowing consideration of technological and economic feasibility, if section 112(b)(1)(B) allowed such consideration. Additionally, subsection 112(e)(1) was enacted in 1977 as an amendment to section 112. If section 112(b)(1)(B) had been intended to allow consideration of feasibility in determining standards, the subsequent amendment (which limited consideration of feasibility to very specialized circumstances) would have been unnecessary.⁶¹ Furthermore, a close look at the language of section 112(b)(1)(B) shows that only health can be considered.

E. *The Language Of Section 112*

Contrary to the court's opinion,⁶² the language of section 112(b)(1)(B) explicitly provides only for consideration of health. Section 112 (b)(1)(B) directs the Administrator to establish an emissions "standard at the level which in his judgment provides an ample margin of safety to protect the public health from [a] hazardous air pollutant."⁶³ As stated in the dissenting opinion of the panel decision, "[t]he provision contains no language authorizing the Administrator to consider technological and economic feasibility. On the contrary, the language on its face clearly makes the Administrator's decision dependent only on health considerations."⁶⁴ Although ignored by the court, many scholars support this interpretation.⁶⁵ In fact, the D.C. Circuit itself stated in an earlier decision: "Recognizing that 'certain pollutants' required special treatment because of risk to health, Congress enacted section 112, dealing with hazardous pollutants, without provision for considerations of feasibility."⁶⁶ Not only does the overall language of

61. *NRDC*, 804 F.2d at 730-31 (Wright, J., dissenting).

62. See *supra* note 23 and accompanying text.

63. 42 U.S.C. § 7412(b)(1)(B).

64. *NRDC*, 804 F.2d at 728 (Wright, J., dissenting).

65. For example, one scholar states that the language "an ample margin of safety to protect to public health" means "that health must be protected without regard to cost. Section 112(b) . . . appears to make cost irrelevant." Currie, *AIR POLLUTION: FEDERAL LAW AND ANALYSIS* § 3.28 (1984). Another scholar stated that "§ 112 appears to direct EPA to set a highly protective standard that eliminates possible serious risks without regard to cost." F. ANDERSON, D. MANDELKER & A. TARLOCK, *ENVIRONMENTAL PROTECTION: LAW & POLICY* 511 (1984). Additionally,

[s]ection 112 can be read to require EPA to impose draconian controls to completely eliminate the risks whenever EPA concludes that an air pollutant may be hazardous at any level of emission. For example, it is generally accepted that there is no threshold level of safe exposure to airborne carcinogens. Therefore, protection of the public with a margin of safety would seem to require cutting out all exposure by eliminating all emissions.

Comment, *supra* note 18, at 10,068 & n.18.

66. *Hercules, Inc. v. EPA*, 598 F.2d 91, 112 (D.C. Cir. 1978).

section 112(b)(1)(B) support this conclusion, but also the “margin of safety” language specifically points to such reasoning.

The D.C. Circuit failed to recognize that “the term ‘margin of safety’ [as used in section 112(b)(1)(B)] was intended to provide protection ‘*against* hazards which research has not yet identified.’”⁶⁷ As used in the engineering context, “[t]he safety factor is meant to compensate for uncertainties and variabilities in design, materials, workmanship, and so forth; *the greater the variability, the larger the factor of safety.*”⁶⁸ Thus, the “margin of safety” standard was intended to protect *against* unknown dangers, not allow for them by consideration of technological and economic feasibility.⁶⁹ Allowing the Administrator discretion to consider technological and economic feasibility is contrary to the need for an “ample margin of safety.”

The court also failed to recognize that section 112 only addresses “unsafe” conditions,⁷⁰ i.e. conditions which pose a “significant risk of harm” to humans.⁷¹ As defined in section 112, a hazardous air pollutant is a pollutant which “causes, or contributes to air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.”⁷² Because all levels of exposure to vinyl chlorides are thought to cause cancer, vinyl chlorides indeed threaten humans with a “significant risk of harm” and are therefore “unsafe.” Therefore, if an emission level above zero is set because it is technologically or economically

67. *Environmental Defense Fund v. EPA*, 598 F.2d 62, 81 (D.C.Cir. 1978) (emphasis added). See *supra* note 24 and accompanying text.

68. Hall, *supra* note 53, at 629 (emphasis added).

69. The court also failed to correctly interpret a Senate report discussing the “margin of safety” language. S. REP. NO. 1196, 91st Cong., 2d Sess. (1970). The language cited by the court in support of its proposition that the “margin of safety” language allowed the Administrator to set a more lax standard actually appeared under a discussion of section 110 rather than section 109 (as the court had indicated in its discussion). The language therein indicated:

This section would provide for publication and promulgation of national ambient air quality standards at a level which will protect *the health of persons*. In setting such air quality standards the Secretary should consider and incorporate *not only* the results of research summarized in air quality criteria documents, *but also* the need for *margins of safety*. Margins of safety are essential to any *health-related* environmental standards if a reasonable degree of protection is to be provided *against* hazards which research has not yet identified.

Id. at 9-10 (emphasis added). In other words, after the best scientific research is considered, a margin of safety should be factored in to provide *additional* protection.

70. See *supra* note 24 and accompanying text.

71. The court defined something as “unsafe” if it “threatens humans with a significant risk of harm.” *NRDC*, 824 F.2d at 1153 (quoting *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 642 (1980)).

72. 42 U.S.C. § 7412(a)(1).

infeasible to set a level at zero, the standard is *ipso facto* "unsafe" and in contradiction to the statutory language of section 112(b)(1)(B).

IV. CONCLUSION

The D.C. Circuit Court of Appeals' opinion limited the EPA's consideration of technological and economic feasibility in the initial stages of promulgating emission standards under section 112(b)(1)(B) of the Clean Air Act. The court, however, allowed consideration of feasibility in setting the standard after an initial determination is made of what is "safe." This seems to create a paradoxical situation in that a determination of what is "safe" must first be made by relying solely on health considerations; however, once this is done, a standard which is "unsafe" may be promulgated because it is technologically and economically infeasible to institute the appropriate standard.

Although the court recognized that congressional intent was oriented toward public health, the court then abandoned that health directive in favor of feasibility. This is not only a departure from congressional intent of section 112(b)(1)(B), but also overlooks the specific exemptions provided within the section which are designed to accommodate intolerable economic consequences. Thus, the court made a step in the right direction by limiting the EPA's authority to override congressional intent but failed to go far enough. Under such an interpretation implementation of congressional intent becomes infeasible.

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