# *Adamo Wrecking Company v. United States:* When Is an Emission Standard Not an Emission Standard?

## I. INTRODUCTION

The number of pollutants that are potentially hazardous to human health and life, already alarmingly large, continues to expand rapidly.[1] Recent legislation has recognized the need to give special consideration to the regulation of such substances.[2] One example of this emphasis is section 112 of the Clean Air Act. Section 112(b)(1)(B) of the Act directs the Administrator of the Environmental Protection Agency (EPA) to prescribe emission standards for hazardous air pollutants "at the level which in his judgment provides an ample margin of safety to protect the public health."[3] Furthermore, section 112(c)(1)(B) prohibits emission of an air pollutant in violation of an applicable emission standard,[4] and the knowing violation of that section is a criminal offense under section 113(c)(1)(C).[5] Review of the Administrator's action in promulgating emission standards under section 112 is limited by section 307(b)(1)[6] to petitions to the United States Court of Appeals for the District of Columbia within 60 days of promulgation.[7] If review could have been had under section 307(b)(1), section 307(b)(2) denies review of the standard "in civil or criminal proceedings for enforcement."[8]

1. COUNCIL ON ENVIRONMENTAL QUALITY, TOXIC SUBSTANCES 5 (1971).
2. *See* Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601-2629 (1976); Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1609, *(codified at* 33 U.S.C.A. §§ 1251-1376 (West Supp. 1977)).
3. 42 U.S.C.A. § 7412(b)(1)(B) (West Supp. 1977).
4. 42 U.S.C.A. § 7412(c)(1)(B) (West Supp. 1977).
5. 42 U.S.C.A. § 7413(c)(1)(C) (West Supp. 1977).
6. 42 U.S.C.A. § 7607(b)(1) (West Supp. 1977).
7. The period for review is not limited if a "petition is based solely on grounds arising after such sixtieth day." 42 U.S.C.A. § 7607(b)(1) (West Supp. 1977). The 1970 version of this provision, applicable at the time the case discussed in this Comment was considered, limited the period for review to 30 days. 42 U.S.C. § 1857h-5(b)(1) (1970).
8. 42 U.S.C.A. § 7607(b)(2) (West Supp. 1977).

Although the environmental effects of many chemical substances are not well understood,[9] the danger posed by asbestos emissions has been well documented.[10] Indeed, asbestos is one of only four substances that have been classified as "hazardous air pollutants" under section 112.[11] Furthermore, at the time section 112 was drafted, Congress was particularly concerned about the health problems caused by asbestos.[12]

The first proposed emission standard for asbestos would have prohibited any visible emission of asbestos resulting from repair or demolition of commercial and apartment buildings.[13] It was not adopted because such a standard would, in many instances, make repair or demolition impracticable.[14] Instead, the Administrator

A few air pollution problems thought to require uniform nationwide regulation were left for solution to EPA, and one such area is that of hazardous air pollutants. "Although the implementation and enforcement responsibilities may be delegated to the states, the Administrator retains complete authority to establish emission standards for hazardous pollutants and concurrent authority to enforce them." Comment, *Direct Federal Controls: New Source Performance Standards and Hazardous Emissions*, 4 ECOLOGY L.Q. 645, 651 (1975).

The process for setting and enforcing standards for hazardous air pollutants is more centralized than that for general ambient air standards.

> The Clean Air Act places the initial burden of developing and enforcing plans for the abatement of air pollution on the states. The role assigned to EPA in this framework is largely supervisory; the Administrator is to ensure that the states fulfill their responsibilities under the Act and step in as a last resort if state regulation is ineffective.

*Id.*

9. COUNCIL ON ENVIRONMENTAL QUALITY, TOXIC SUBSTANCES at iv (1977).

10. For a discussion of the relationships between exposure to asbestos and certain diseases, see Horvitz, *Asbestos and its Environmental Impact*, 3 ENVT'L. AFFAIRS 145, 146 (1974).

In announcing the bases for the Administrator's determination that asbestos is a hazardous substance, the EPA cited various authorities that had found that even low-level or intermittent exposure to asbestos can cause cancer 20 or 30 years after the event. 38 Fed. Reg. 8,820 (1973).

11. 40 C.F.R. § 61 (1977).

12. Adamo Wrecking Co. v. United States, 98 S. Ct. 566, 578 n.7 (1978), (Stevens, J., dissenting, citing the National Air Quality Standards Act of 1970, S. REP. NO. 91-1196, 91st Cong., 2d Sess. 20 (1970)).

13. *Id.* at 579 n.10, (Stevens, J., dissenting, citing 36 Fed. Reg. 23,242 (1971)). In 1973, the EPA pointed out that satisfactory means of measuring ambient asbestos concentrations had only recently been developed, and satisfactory means of measuring asbestos emissions were unavailable. 38 Fed. Reg. 8,820 (1973).

14. 98 S. Ct. 579 n.11 (Stevens, J., dissenting, citing 38 Fed. Reg. 8,821 (1973). There is, however, evidence in the legislative history of the Clean Air Amendments of 1970 that Congress' concern was so great that it was willing to accept plant closings as a consequence of the regulation of hazardous substances. *Id.* at 578-79 n.8 (Stevens, J., dissenting, citing the Summary of the Provisions of Conference Agree-

chose a more moderate approach and promulgated a regulation under section 112(b)(1)(B) that required asbestos insulation and fireproofing in large buildings to be watered down before the building could be demolished.[15]

On February 20, 1975, Adamo Wrecking Company was indicted in the United States District Court for the Eastern District of Michigan for knowingly violating section 112(c)(1)(B). The indictment alleged that Adamo, while engaged in the demolition of a building, had failed to comply with the asbestos standard promulgated by the Administrator. The district court granted Adamo's motion to dismiss the indictment on the ground that no violation of section 112(c)(1)(B) had been alleged so as to establish criminal liability under section 113(c)(1)(C). The court held that the cited regulation was not an "emission standard" within the meaning of section 112(c) because it prescribed a mandatory "work practice", or technique, for controlling emissions. The United States Court of Appeals for the Sixth Circuit reversed, holding that Congress had precluded such judicial review in section 307(b).[16]

The Supreme Court then reversed the Sixth Circuit Court's decision.[17] Writing for the Court, Justice Rehnquist agreed with Adamo that although section 307(b)(2) precludes judicial review of an emission standard in a criminal enforcement proceeding if review could have been obtained under section 307(b)(1), a defendant is entitled to claim that the regulation it is charged with having violated is not an emission standard. The Court then held that the asbestos regulation in question was not an emission standard but a work practice standard and, therefore, that no violation of section 112(c) had occurred.[18]

ment on the Clean Air Amendments of 1970, *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 133 (1974)).

15. 40 C.F.R. 61.22(d) (1973).

16. Adamo Wrecking Co. v. United States, 545 F.2d 1 (6th Cir. 1976).

17. 98 S. Ct. 566 (1978).

18. *Id.* at 575. In a concurring opinion, Justice Powell maintained that the issue of the constitutional validity of section 307(b)(1) restricting review to the Court of Appeals for the District of Columbia within a 30-day period would have merited serious consideration had it been raised. In his view, the fact that notice of regulations promulgated by the Administrator consists merely of publication of such action in the *Federal Register* is inadequate. He distinguished a similar provision upheld by the Supreme Court in *Yakus v. United States*, 321 U.S. 414 (1944), on the ground that the statute there came before the Court during World War II and was a valid exercise of the War Powers of Congress. *See* text accompanying notes 21-25 *infra*. Justice Powell was apparently also influenced by the fact that the case here involved a criminal prosecution. He stated, "I join the Court's opinion with the understanding

Justice Stewart, joined by Justices Brennan and Blackmun, dissented on the ground that subsections (b)(1) and (b)(2) of section 307 barred Adamo from raising the issue as to whether or not the asbestos regulation promulgated by the Administrator under section 112 was an emission standard.[19] In a separate dissent, Justice Stevens agreed with the Court that section 307(b) did not preclude the defense that a regulation promulgated under section 112 is not an emission standard. But, unlike the Court, he concluded that this particular regulation of asbestos was a valid emission standard and should be enforced under section 112(c).[20]

This Comment will first discuss the procedural issue arising under section 307(b) of the Act—whether a defendant may claim in a criminal enforcement proceeding that a regulation allegedly violated is not an emission standard, even if it has been promulgated as such and was not challenged according to the procedure set forth in section 307(b)(1). Second, the substantive issue in the case will be addressed—was the asbestos regulation which the Administrator promulgated *in fact* an emission standard? This will include consideration of the meaning of the term "emission standard" as intended by Congress. Finally, a concluding section will comment on the views expressed in the decision and on the implications of the ruling.

## II. THE PROCEDURAL ISSUE UNDER SECTION 307(b)

In *Yakus v. United States*,[21] the Supreme Court considered a statutory provision giving the Emergency Court of Appeals exclusive jurisdiction of all nonconstitutional challenges to Administrative regulations under the Emergency Price Control Act. The Court held that the provision precluded the defense of invalidity of

that it implies no view as to the constitutional validity of the preclusion provisions of § 307(b) in the context of a criminal prosecution." 98 S. Ct. at 575-76. *See also* text accompanying note 70 *infra*.

19. *Id.* at 577.

20. *Id.*

21. 321 U.S. 414 (1944). *Yakus* involved the willful sale of wholesale cuts of beef at prices above the maximums prescribed by a regulation promulgated under the Emergency Price Control Act of 1942, the purpose of which was to prevent wartime inflation. The procedure prescribed by the Act for determining the validity of a price regulation issued by the Administrator was to protest and obtain a hearing before the Administrator within 60 days after the regulation was issued. The determination of the hearing board could then be reviewed on complaint to the Emergency Court of Appeals and by the Supreme Court on certiorari. The constitutionality of the Act and of the review procedure were challenged and both were upheld.

a regulation in a criminal prosecution for its violation, at least when its invalidity had not been adjudicated according to the protest procedure prescribed by statute.[22]

Justice Rehnquist maintained that *Yakus* was not dispositive of the issue in *Adamo*, which he phrased as whether "the Administrator's mere designation of a regulation as an 'emission standard' is sufficient to foreclose any further inquiry in a criminal prosecution under section 113(c)(1)(C) of the Act."[23] Emphasizing that (1) section 307(b) applies only to "emission standards,"[24] and that (2) the Clean Air Act's "complex inter-relationship between the imposition of criminal sanctions and judicial review of the Administrator's actions" cannot be equated to the simpler scheme considered in *Yakus*,[25] he concluded that Congress intended emission standards to be of a certain type and that the Administrator was not empow-

22. *Id.* at 431.
23. 98 S. Ct. at 569.
24. *Id.*
25. Justice Rehnquist noted that,

> The stringency of the penalty imposed by Congress lends substance to petitioner's contention that Congress envisioned a particular type of regulation when it spoke of an "emission standard." The fact that Congress dealt more leniently, either in terms of liability, of notice, or of available defenses, with other infractions of the Administrator's orders suggests that it attached a peculiar importance to compliance with "emission standards."

*Id.* at 572. Justice Rehnquist contrasted this with the *Yakus* provision where "*any* actions taken by the Administrator under the purported authority of the designated sections of the Act [could] be challenged only in the Emergency Court of Appeals." *Id.* at 570 (emphasis in original).

Justice Rehnquist may also have been influenced in his decision by the issue of fair notice. He critically noted that "persons subject to the Act, including innumerable small businesses, may protect themselves against arbitrary administrative action only by daily perusal of proposed emission standards in the Federal Register and by immediate initiation of litigation in the District of Columbia to protect their interests." *Id.* at 572 n.2. *See also* note 18 *supra*. The respondent argued that the procedures here afforded much greater notice and opportunity to seek review than was the case in *Yakus*. First, proposed regulations are published and become widely known through public hearings before they are finally issued. Second, the delay between publication and promulgation gives interested parties sufficient time to study the proposals and prepare petitions for judicial review, should they decide that such a step is necessary. Third, parties are given 30 days after promulgation within which to file petitions for review. Fourth, the petition need not be complex but may be a single paragraph setting out general reasons for challenging a regulation. Finally, even if no petition is filed within 30 days, review can be obtained after the 30th day if new grounds arise. This was in contrast to the *Yakus* situation where once a regulation had been promulgated, review was required to be sought immediately and no statutory challenge to the regulation could be made thereafter for any reason. Brief for Respondent at 20, Adamo Wrecking Co. v. United States, 98 S. Ct. 566 (1978).

ered unilaterally to characterize a regulation as an "emission standard."[26] He acknowledged that "[a]t the very least, it may be said that the issue is subject to some doubt" and that, under the Court's holding, there is danger that "district courts will be importuned, under the guise of making a determination as to whether a regulation is an 'emission standard,' to engage in judicial review in a manner that is precluded by § 307(b)(2) of the Act."[27] However, Justice Rehnquist asserted that the congressional purposes of insuring (1) uniform interpretation and application of the substantive standard and (2) immediate review by a single court of its adoption would not be undermined.[28]

In his dissent, Justice Stewart, joined by Justices Brennan and Blackmun concluded that the trial court should have rejected Adamo's claim that the asbestos regulation was not an emission standard. He pointed out that allowing the trial court to inquire whether or not a regulation promulgated as an emission standard under section 112 is *in fact* an emission standard as contemplated by Congress is equivalent to asking whether the Administrator has acted beyond his statutory authority. He noted that such an inquiry is a normal part of a trial court's judicial review of administrative action. However, in this particular context, such review is expressly forbidden by section 307(b)(2).[29] Additionally, the Stewart dissent asked what limits, outside of the procedures established by Congress under section 307(b), are to be placed on judicial review of regulations promulgated as emission standards for hazardous pollutants. The Court's understanding that an emission standard must be numerical led to its conclusion that a work practice regulation could not be an emission standard.[30] Section 112 of the Clean Air Act expressly requires that an emission standard relate to a "hazardous air pollutant" and that it provide "an ample margin of

26. 98 S. Ct. at 572.

27. *Id.* at 572-73. Justice Rehnquist stressed that,

> The narrow inquiry to be addressed by the court in a criminal prosecution is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding.

*Id.* at 573.

28. *Id.* at 572.

29. 98 S. Ct. at 576.

30. *See* text accompanying notes 34-37 *infra*.

safety to protect the public health."[31] The dissenters were concerned that defendants on trial for violating other regulations promulgated as emission standards would assert that these and other supposed requirements of an emission standard had not been met and that therefore no violation had occurred.[32] Consequently, under the Court's holding, the opportunities to have hazardous pollutant regulations reviewed during enforcement proceedings would become excessively numerous. This would frustrate Congress' intent to promote uniform and expeditious judicial review of such regulations.[33]

## III. The Substantive Issue: What is an Emission Standard?

The substantive issue in *Adamo* was debated along three lines: the importance of the language of the statute; the significance of the Clean Air Act Amendments of 1977; and the deference that should be given to the Administrator.

In discussing the language of the statute, Justice Rehnquist maintained that section 112 distinguishes on its face between emission standards and the techniques to be used in achieving those standards. He pointed to such language in the statute as "the installation of controls,"[34] "the technology to implement such standards,"[35] "pollution control techniques,"[36] and "establish any such standard *at the level . . .*,"[37] to buttress his contention that a standard must be quantitative in order to be an "emission standard."

In his dissent, Justice Stevens argued that the 1970 statute does not compel an interpretation which would hamper the Administrator's effective regulation of hazardous pollutants. He acknowledged Congress' preference for numerical standards.[38] Stressing, however, Congress' concern when section 112 was drafted regard-

31. 42 U.S.C. § 1857c-7(c)(1)(B) (1970).

32. 98 S. Ct. at 577. *See also* note 60 *infra*.

33. *Id.* at 576.

34. *Id.* at 573 (referring to Section 112(c)(1)(B)(ii) of the Clean Air Act, 42 U.S.C. § 1857c-7(c)(1)(B)(ii) (1970)).

35. *Id.* (referring to Section 112(c)(2) of the Clean Air Act, 42 U.S.C. § 1857c-7(c)(2) (1970)).

36. *Id.* (referring to Section 112(b)(2) of the Clean Air Act, 42 U.S.C. § 1857c-7(b)(2) (1970)).

37. *Id.* (emphasis in original, referring to Section 112(b)(1)(B) of the Clean Air Act, 42 U.S.C. § 1857c-7(b)(1)(B) (1970)).

38. *Id.* at 579 n. 13 (citing the National Air Quality Standards Act of 1970, S. Rep. No. 91-1196, 91st Cong., 2d Sess. 20 (1970)).

ing the hazards associated with asbestos emissions[39] and the impracticability of regulating those emissions numerically, he concluded that "[i]t is unlikely that Congress intended, by expressing a modest preference for numerical standards . . . to mandate plant closings under a numerical standard when a work practice rule would achieve the same level of protection with less economic disruption."[40] Furthermore, he noted that the Administrator of the EPA has powers "to prescribe such regulations as are necessary to carry out his functions under this chapter."[41]

Congress has recently amended the Clean Air Act to (1) authorize the Administrator to "promulgate a design, equipment, work practice, or operational standard, or combination thereof" when "it is not feasible to prescribe or enforce an emission standard,"[42] and (2) extend the coverage of section 307(b) to emission requirements as well as emission standards.[43] According to the Court, these changes indicated that Congress now endorses a distinction between "work practice standards" and "emission standards."[44] In addition, the Court claimed that the Administrator himself has drawn such a distinction in having chosen to regulate through a work practice standard only when it became clear that a quantitative regulation would be impracticable.[45]

The Stevens dissent not only questioned the relevance of an enactment by the 95th Congress to a determination of the intention

39. *Id.* at 578 n. 7 (citing the National Air Quality Standards Act of 1970, S. REP. NO. 91-1196, 91st Cong., 2d Sess. 20 (1970)).

40. *Id.* at 580 n. 14. In 1973 the EPA Administrator announced a determination that while it was necessary to control emissions from major man-made sources of asbestos in order to fully protect the public health, it was not necessary at that time to prohibit all emissions. 38 Fed. Reg. 8,820 (1973).

41. *Id.* at 580 n. 16 (referring to Section 301 of the Clean Air Act, 42 U.S.C. § 1857g(a) (1970)).

42. Clean Air Amendments of 1977, 42 U.S.C.A. § 7412(e)(1) (West Supp. 1977).

43. 42 U.S.C.A. § 7607(b)(1) (West Supp. 1977).

44. 98 S. Ct. at 573.

45. *Id.* at 574. There is evidence that Congress preferred numerical standards, fearing that too frequent resort to work practice rules would hinder industry's ability to apply the most efficient pollution control technology. *See Id.* at 579 n.13 (Stevens, J., dissenting; citing National Air Quality Standards Act of 1970, S. REP. NO. 91-1196, 91st Cong., 2d Sess. 17 (1970)). Indeed, the 1977 Amendments express such a preference. 42 U.S.C.A. § 7412(e)(4) (West Supp. 1977). However, it does not follow that Congress intended that work practice regulations *never* be promulgated as emission standards. Furthermore, the Administrator's preference for numerical standards would not necessarily imply that he thought emission standards must be quantitative.

of the 93rd Congress, but also disputed the conclusions that the Court drew from the 1977 Amendments. Justice Stevens thought that the changes in the law were meant to confirm the Administrator's power to regulate under section 112 by work practice standards and were not meant to distinguish between regulations which are numerical and those which are not. He found it persuasive that challenges to the Administrator's power to promulgate work practice rules under this section have been met consistently with Congressional affirmance of such power.[46] Justice Stevens was convinced that several successful challenges in 1974 to indictments for violations of the asbestos regulation led Congress to authorize the Administrator to promulgate a work practice standard when it would not be feasible to prescribe an emission standard.[47] In support of his conclusion that Congress did not intend to restrict the meaning of "emission standard," he recalled in a footnote events that occurred during and subsequent to oral argument of *Adamo*. On October 11, 1977, during oral argument, some members of the Court suggested that the words "emission standard" in section 307(b) should be given a narrow reading. Less than five weeks later a bill was enacted to prevent future misreadings of the provision: Congress amended it to read "*any* emission standard or requirement".[48] Finally, Justice Stevens suggested that the Court's holding as to the meaning of "emission standard" may even render the 1977 Amendments ineffectual.[49] Noting that the recent amend-

46. *Id.* at 582-3. The Stevens dissent traces the history of the 1977 Amendment concerning this issue.

> In late 1974, several wrecking companies successfully challenged indictments brought against them . . . for violating the wetting requirements. Six weeks after the first court ruling, the Administrator proposed an amendment that would expressly confirm his authority to establish design, equipment, or work practice standards when numerical emission limitations were not feasible. A major bill to amend the Clean Air Act was proposed in the 94th Congress, but House and Senate were unable to agree. In 1977, the Senate again proposed a major revision. It included the Administrator's requested authorization . . . .
>
> When the bill emerged from conference, it no longer expressly stated that a work practice rule was an emission standard . . . . But it is most unlikely that the conference committee intended to express indirect disapproval of the Administrator's reading of the 1970 Act. The conference report explained that the change in language was merely intended to "clarify" an aspect of the Senate version which was unrelated to the question whether a work practice rule is, or had been a species of emission standard.

*Id.* at 582.

47. *Id.* at 583.

48. 98 S. Ct. at 583 n. 24 (emphasis added).

49. *Id.* at 584.

ments allow promulgation of work practice standards, but make no direct reference to their enforcement, Justice Stevens raised the possibility that a work practice rule could be promulgated but could not be enforced. He did not believe that Congress could have intended such a consequence.

Justice Rehnquist argued that although deference to the Administrator is appropriate in most circumstances, such deference is unnecessary here because in his view the 1977 Amendments do not support the Administrator's construction.[50] Conceding that the Administrator thought the originally proposed regulations of asbestos which prescribed work practices were "emission standards," he stated that "neither the regulations themselves nor the comments accompanying them give any indication of the Administrator's reasons for concluding that Congress, in authorizing him to promulgate 'emission standards,' intended to include 'work practice standards' within the meaning of that term."[51] Justice Rehnquist contended that because the Administrator's interpretation did not indicate the "validity" of his reasoning, it lacked "power to persuade."[52]

Justice Stevens maintained that the Administrator's construction of the statute was "sufficiently reasonable" and should be accepted,[53] especially in view of the importance Congress ascribed to regulating hazardous substances and its clear mandate for prompt, uniform and final review of hazardous emission standards.[54] Referring to the Court's criticism of the Administrator's failure to persuasively support his construction of the words "emission standard" to include "work practice standard," Justice Stevens replied that such explanations have not previously been required.[55]

50. *Id.* at 575.

51. *Id.* at 574 n. 5.

52. *Id.* Justice Rehnquist stated that according to Skidmore v. Swift & Co., 323 U.S. 134, 140 (1947), "one factor to be considered in giving weight to an administrative ruling is 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " *Id.*

53. *Id.* at 581.

54. *Id.* at 581 n. 19.

55. *Id.* at 581 n. 18. He noted that such a standard was employed in a recent case dealing with the construction of the Clear Air Act: Train v. Natural Resources Defense Council, 421 U.S. 60 (1975). *Id.* at 581 n. 18. It is interesting to note that Justice Rehnquist, who wrote the Court's opinion in that case, has adopted a different standard in this one.

## IV. CONCLUSION

The Court's conclusion, that a defendant who is on trial for violating an emission standard can challenge that regulation in district court on the ground that it is not an emission standard, is untenable. Congress asserted unequivocally that it intended regulations promulgated to control hazardous pollutants to be reviewed promptly and uniformly, and to this end it enacted provisions that restricted review of such regulations to the Court of Appeals for the District of Columbia within thirty days.[56] Allowing a defendant to challenge in district court the validity of a standard he allegedly violated severely weakens these provisions.[57]

As the Stewart dissent points out, the distinction between review of the Administrator's action in promulgating an emission standard on the one hand, and review of whether or not a regulation is in fact an emission standard on the other, is illusory. The inquiry ultimately rests upon whether or not the Administrator has abused his discretion. As long as the characteristics of an emission standard remain partially undefined, the validity of a regulation as an emission standard will be open for review in actions against violators in district court.[58] Congress intended that a decision as to whether an emission standard is proper would be reached in the Court of Appeals for the District of Columbia within 60 days after promulga-

56. *See* note 7 and accompanying text *supra*. The government's brief noted that the Supreme Court has regularly and vigorously construed statutes limiting the time and court in which judicial review may be had. Such was the case in Connor v. Waller, 421 U.S. 565 (1975), with respect to a provision in the Voting Rights Act of 1965. Furthermore, in Whitney National Bank v. Bank of New Orleans, 379 U.S. 411, 420-22 (1965), it was held that when Congress has provided for review of administrative orders in the court of appeals, that is the exclusive judicial remedy even in the absence of an express exclusivity provision. Brief for Opposition at 6. The legislative history clearly indicates that review of emission standards was placed in the D.C. Circuit to assure "even and consistent national application" of the standards. S. REP. No. 91-116, 91st Cong., 2d Sess. 41 (1970).

57. The government, in its brief, identified one aspect of this debilitating effect. By requiring parties to challenge emission standards promptly or not at all, section 307(b) gives the regulations a desirable finality which in turn minimizes the need for government enforcement. This is because businesses that endeavor to comply with those standards will tend to report violations by competitors. The Court's decision may eliminate the likelihood of competitive enforcement by undermining the authoritativeness of regulations promulgated as emission standards. Brief for the United States at 25-26.

58. New regulations promulgated as emission standards under section 112 could be subject to challenge on the theory that they are not addressed to a "hazardous air pollutant" or that the level is set too high for merely an "ample margin of safety." *See* text accompanying note 31 *supra*.

tion.[59] Instead, such a decision will often be reached in any number of district or appellate courts only after an indictment is obtained.[60] In some cases, potential defendants may decide deliberately not to challenge emission standards during the 60-day allotted period, knowing that if they are subsequently indicted, they can challenge the standard at that time.[61]

As to the substantive issue, the Court's restrictive interpretation of the term "emission standard" is a step backward from the goal of achieving cleaner air and a healthier environment. It unnecessarily restricts the EPA's flexibility in devising methods to control hazardous pollutants. The term has never been conclusively defined and its dimensions have not always been confined to quantitative standards.[62] Unfortunately, the recent amendments to the Clean Air Act that allow work practice standards where quantitative

59. S. REP. NO. 91-116, 91st Cong., 2d. Sess. 41 (1970).

60. Judge Edwards, in the decision reached by the Court of Appeals for the Sixth Circuit, inquired: "Would Congress have intended to leave review of the validity of a national emission standard to District Court enforcement proceedings in fifty states with the high probability of many conflicting interpretations?" United States v. Adamo Wrecking Co., 545 F.2d 1, 4-5 (6th Cir. 1976), *rev'd*, Adamo Wrecking Co. v. United States, 98 S. Ct. 566 (1978).

61. There was no practical reason why the asbestos regulation could not have been challenged at the proper time. The issue—whether a work practice regulation can be an emission standard under section 112—was not difficult to anticipate, but was apparent on the face of the regulation at the time it was promulgated. *See* Brief for the United States at 24.

62. The opinions in *Adamo* cite few cases in general and none which have considered this point in particular.

In the context of other areas in the Clean Air Act, two methods have been employed generally to limit emissions even though they are not quantitative limits on the amount of pollutants that may come out of a source. These methods are the use of tall stacks and fuel standards. Section 110 of the Act requires state plans to include emission limitations. Some states attempted to establish tall stack dispersion as a legitimate emission limitation. The approach was rejected by at least one court in Natural Resources Defense Council v. EPA, 489 F.2d 390 (5th Cir. 1974), *rev'd on other grounds sub nom.* Train v. Natural Resources Defense Council, 421 U.S. 60 (1975). That case held that tall stack dispersion violated the policy against nondegradation and could not be used until all possible emission limitations had been tried. The court did, however, treat fuel regulations relating to permissible sulphur content as a species of emission limitations. When the Supreme Court reversed, the issue of tall stack intermittent controls was not before it, but it did indicate that a state is at liberty to adopt whatever mix of emission limitations it deems best suited to its own situation. The Clean Air Act now permits the use of tall stacks that meet certain qualifications to achieve emission limitations under an applicable implementation plan. 42 U.S.C.A. § 7423 (West Supp. 1977). The content of fuel may be regulated by the Administrator under 42 U.S.C.A. § 7542 (West Supp. 1977). *See* Comment, *State Implementation Plans and Air Quality Enforcement*, 4 ECOLOGY L. Q. 595, 607 (1975); GRAD, ENVIRONMENTAL LAW; SOURCES AND PROBLEMS 3-172 (1978).

standards are infeasible[63] may not shield other sections of the Act and other enactments that use the phrase "emission standard" or "emission limitation" from the implications of *Adamo*.[64] Nor will the amendments ameliorate possible setbacks the Court has dealt to restrictive review provisions and to the amount of deference the Administrator's ruling should be given. Hopefully, such effects will be kept to a minimum, since the Court's decision in *Adamo* was based on considerations that apply specifically to section 112.

In his dissent, Justice Stevens pointed out that the enforcement clause of section 112 was not amended and still applies technically to emission standards only,[65] and, under the narrow interpretation of that term in *Adamo*, such standards must be quantitative. Theoretically then, the 1977 Amendments allow a standard that regulates work practices to be promulgated but do not provide for its enforcement. Nevertheless, it is probable that "emission standards" in that section will be read to include work practice standards. Not only is it unlikely that Congress meant to allow promulgation of work practice standards under section 112 only to leave them unenforceable, but the language of the amended statute could be read to require enforcement of such standards: "For purposes of this section, if in the judgment of the Administrator, it is not feasible *to prescribe or enforce* an emission standard . . . he may instead *promulgate* a design, equipment, work practice, or operational standard, or combination thereof . . . ."[66] The fact that the infeasability of enforcing an emission standard is considered relevant to the Administrator's decision to promulgate a work practice standard indicates that enforcement is considered necessary and important. Other language in that section provides: "Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it becomes feasible to promulgate and *enforce* such standard in such terms."[67] Here again, enforcement of a standard appears to be a corollary of promulgation.

There is still another aspect to the 1977 Amendments that tends to support the proposition that work practice standards can be both promulgated and enforced. Section 302(k) reads,

63. 42 U.S.C.A. §§ 7411(h) & 7412(e) (West Supp. 1977).

64. *See, e.g.*, 42 U.S.C.A. § 7410(a)(2)(B) (West Supp. 1977); N.Y. ENVIR. CONSERV. LAW (McKinney) § 19-0301(1)(b)(3); OHIO REV. CODE Ch. 3713.04 art. IV (A). However, "emission standard or limitation" is now defined very broadly in § 7604(f), the citizen suit provision. Another provision, § 7602(k), is discussed in text accompanying note 68 *infra*.

65. 98 S. Ct at 584.

66. 42 U.S.C.A. § 7412(e)(1) (West Supp. 1977) (emphasis added).

> The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to issue continuous emission reduction.[68]

This section arguably equates emission standards to certain work practices, insofar as the latter may be deemed "requirements." However it is interpreted, the section definitely strengthens the contention that the Administrator has the flexibility to promulgate and enforce the type of standards that are most effective in dealing with any particular problem.

The Court in *Adamo* has given section 112 of the Clean Air Act a literal and narrow construction. If such a mechanistic reading has been given to a provision designed to protect the public from *hazardous* pollutants,[69] legislation directed at less urgent environmental concerns is likely to be subjected to even greater scrutiny. The Court seems to be requiring Congress to foresee every possible contingency that may arise and provide for each one in language that is totally unambiguous: an impossible task. It is possible that the Court will read the amended legislation with the same rigidity and formality that it used in interpreting the language of the 1970 Clean Air Act in the present case. If it does, Congress will again be forced to amend the Act in order to effectuate its obvious purposes. More positively, the Court was influenced in *Adamo* by the fact that the prosecution was for a criminal offense. It acknowledged that it followed "the familiar rule that 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.' "[70] Perhaps prosecutions in civil cases will not be disposed of so leniently.

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67. 42 U.S.C.A. § 7412(e)(4) (West Supp. 1977) (emphasis added).

68. 42 U.S.C.A. § 7602(k) (West Supp. 1977).

69. The statutory definition of a "hazardous pollutant" is "an air pollutant . . . which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C.A. § 7412(a)(1) (West Supp. 1977).

70. 98 S. Ct. at 572-73.