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# Emission Standards - Quantification and Liability

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# EMISSION STANDARDS—
# QUANTIFICATION AND LIABILITY

ENVIRONMENTAL LAW–CLEAN AIR ACT OF 1970: Regulation promulgated by the Administrator of the Environmental Protection Agency designating asbestos as a toxic substance, in response to the "hazardous air pollutants" section of the Clean Air Act of 1970, held to be a "work practice standard," and therefore not subject to criminal sanctions upon violation. *Adamo Wrecking Co. v. United States*, 98 S.Ct. 566 (1978).

In a close decision,[1] the Supreme Court reversed the Sixth Circuit Court of Appeals[2] reading of Section 307(b) of the Clean Air Act (CAA) and affirmed the U.S. District Court for the Eastern District of Michigan's dismissal[3] of a criminal indictment under section 112(c)(1)(b) of the CAA.[4]

Adamo Wrecking Co. had been indicted for allegedly having failed to comply with a CAA regulation, entitled "National Emission Standard for Asbestos,"[5] which established a procedure to be followed in the demolition of buildings containing asbestos. The regulation, however, did not specifically quantify the allowable emissions. The U.S. District Court dismissed the criminal indictment on the ground that the regulation was not an "emission standard" as contemplated by Congress when it authorized the Administrator of the Environmental Protection Agency to promulgate such standards. Rather, the court held, regulation was a "work practice standard" and under the terms of the statute did not carry with it criminal liability.[6]

The Court of Appeals reversed that dismissal stating that the district court's action constituted judicial review contrary to the provisions of section 307(b) of the Clean Air Act. This section allows review of an "emission standard" promulgated by the Administrator only in the United States Court of Appeals for the District of Columbia within sixty days of its adoption and provides that actions of the

1. This was a 5-4 decision with one concurring opinion and two separate dissents.
2. United States v. Adamo Wrecking Co., 545 F.2d 1 (6th Cir. 1976).
3. United States v. Adamo Wrecking Co. (unreported case in U.S. District Court for Eastern Div. of Mich., Southern Div.).
4. 42 U.S.C. §1857c-7(c)(1)(B) (1970).
5. 40 C.F.R. §61.22(d)(2)(i) (1977).
6. Clean Air Act §113(c)(1)(C), 42 U.S.C. §1857c-8(c)(1)(C) (1970).

Administrator "shall not be subject to judicial review in civil or criminal proceedings for enforcement."[7]

The Supreme Court granted certiorari[8] to decide two issues: 1) whether the district court's determination did constitute "judicial review" and was, therefore, in error; and 2) if the decision did not constitute review, whether the finding was correct so as to necessitate a dismissal of the indictment.

In discussing the judicial review provision of the Clean Air Act,[9] the Supreme Court reviewed in detail their holding in *Yakus v. United States.*[10] In that case the Court held that Congress, in the context of criminal proceedings, could require the validity of regulatory actions to be challenged in a particular court, within a particular time, or not at all. The case dealt with the Emergency Price Control Act during World War II and the Court found that the compelling nature of the national mobilization effort, combined with the broad language of the Emergency Price Control Act, gave "clear evidence of Congressional intent that any actions taken by the Administrator should be challenged only in the Emergency Court of Appeals."[11] The *Adamo* Court did not find a similar compelling interest in the Clean Air Act. Nor did an exhaustive analysis of the statutory scheme of the CAA which imposes civil or criminal sanctions for violation of its provisions reveal to the Court a Congressional intent that judicial review be limited only to a specific court. The Court concluded, in fact, that Congress in the Clean Air Act had: 1) chosen not to prescribe either civil or criminal liability in every instance of a violation; 2) imposed civil liability for a much wider range of violations than criminal; and 3) not precluded judicial challenge to an order as a defense in criminal proceedings. . . .[12]

Finding the most stringent of criminal penalties were imposed by the CAA for violations of an emission standard,[13] the Court questioned whether the Administrator's designation of a regulation as an "emission standard"[14] was conclusive as to its actual character. Noting that the CAA afforded leniency for most violations and

7. Clean Air Act §307(b)(2), 42 U.S.C. §1857h-5(b)(2) (1970).
8. 430 U.S. 953 (1977).
9. Clean Air Act §307(b), 42 U.S.C. §1857h-5(b) (1970).
10. 321 U.S. 414 (1944).
11. Adamo Wrecking Co. v. United States, 98 S.Ct. 556, 570 (1978).
12. *Id.* at 571.
13. Clean Air Act §113(c)(1)(C) provides:
"violates . . . section 112(c) . . . of this title shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or both." 42 U.S.C. §1857c-8(c)(1)(C) (1970).
14. *See* 40 C.F.R. §61.22(d)(2)(i) (1970), entitled "National Emission Standard for Asbestos."

stressed the importance of compliance with emission standards, the Court concluded that Congress has intended a specific type of regulation when it used the term "emission standard." Based on this evidence, the Court held that it was proper for a Federal District Court to determine whether a regulation which a defendant allegedly violated is an "emission standard" within the meaning of the CAA.[15] Delineating a narrow inquiry to be addressed during judicial review in such an instance, the Court specified that a district court is not "to pursue any of the familiar inquiries which arise in the course of an administrative review proceeding"[16] and may only determine if the regulation in question is in fact an "emission standard" under the Act.

Finally, the Court addressed the issue raised by the district court's determination that Regulation 61.22(d)(2)(i) was not an "emission standard" as contemplated by Congress. After a discussion of the provisions of section 112(b)(1)(B), which call for the Administrator to establish standards "at the level which in his judgment provides an ample margin of safety . . . ," the Supreme Court decided that a quantitative measure was mandated by Congress to create an "emission standard." The Court found support for this conclusion in the Administrator's own account of the development of the regulation. In adopting a "work practice standard," the Administrator had abandoned a "no visible emissions" standard because he had concluded that the stringent regulation would prohibit repair or demolition work in many situations. Generally, it is impossible to demolish a building without creating visible emissions.[17] The Court also found support for its strict interpretation of the regulation in the 1977 amendments to the Clean Air Act. One amendment authorizes the Administrator to promulgate a "design, equipment, work practice, or operational standard" when "it is not feasible to prescribe or enforce an emission standard."[18] This amendment did not subject these more relaxed standards to the enforcement provisions of section 112(c).

These same factors were used by Justice Stevens in his detailed dissent as evidence supporting a determination that the regulation in question was an "emission standard" within the meaning of the

15. Adamo Wrecking Co. v. United States, 98 S.Ct. 556, 572 (1978).

16. *Id.* at 573.

17. 38 Fed. Reg. 8821 (1973) *quoted in* Adamo Wrecking Co. v. United States, 98 S.Ct. 556, 574 (1978).

18. Clean Air Act Amendments of 1977, Pub. L. 95-95, §110, 91 Stat. 703; adding to §112 of the Clean Air Act, paragraph (e); *discussed in* Adamo Wrecking Co. v. United States, 98 S.Ct. 556, 573 n. 4 (1978).

Clean Air Act and as intended by Congress.[19] He reasoned that Congress attached the most stringent penalties to violations of emission standards for "hazardous air pollutants" and that the Court should not construe the regulation "so as to deny the Administrator the authority to regulate poisonous substances effectively."[20] Justice Stevens found the regulation not to have been promulgated "instead" of an emission standard as the majority reasoned, but rather as a logical procedural alternative to the quantified emission standard which was not appropriate or possible in this instance.[21]

Broad statutory construction did not carry the day, however, and criminal sanctions for violation of the Clean Air Act are now limited to specifically quantified standards as promulgated by the Administrator. Unless Congress moves to broaden the penalties of section 113(c), criminal sanctions for the violation of nonquantified standards for hazardous air pollutants are not available.

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19. Adamo Wrecking Co. v. United States, 98 S.Ct. 556, 577-84 (1978).
20. *Id.* at 577.
21. *Id.* at 581.