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Comment

A Wrong Turn Crushes Protective Air Regulations: *American Trucking Ass'ns v. EPA*

Deborah Behles*

Not only did the panel depart from a half century of Supreme Court separation-of-powers jurisprudence, but in doing so, it stripped the Environmental Protection Agency of much of its ability to implement the Clean Air Act, this nation's primary means of protecting the safety of the air breathed by hundreds of millions of people.

—*American Trucking Ass'ns v. EPA* (Judge Tatel, dissenting)¹

In 1997, after extensive review, the Environmental Protection Agency (EPA) issued stringent standards to regulate particulate matter (PM) in the air.² The EPA expected that these PM standards, combined with the new 1997 ozone standard, would prevent “15,000 premature deaths, 350,000 cases of aggravated asthma, and one million cases of significantly decreased lung function in children each year.”³ The cost of implementing the stringent PM standards would

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1. *Am. Trucking Ass'ns v. EPA*, 195 F.3d 4, 17 (D.C. Cir. 1999) (per curiam) (Tatel, J., dissenting), *cert. granted sub nom. Am. Trucking Ass'ns v. EPA*, 120 S. Ct. 2193 (U.S. May 30, 2000) (No. 99-1426); *Browner v. Am. Trucking Ass'ns*, 120 S. Ct. 2003 (U.S. May 22, 2000) (No. 99-1257).

2. See National Ambient Air Quality Standards for Particulate Matter: Final Rule, 62 Fed. Reg. 38,652 (July 18, 1997) (codified at 40 C.F.R. pt. 50) [hereinafter 1997 Final Rule].

3. EPA, *EPA's Updated Clean Air Standards*, at <http://www.epa.gov/ttn/oarpg/naaqsfin/naaqsfac.html> (last visited Aug. 28, 2000); see also Health Effects Institute, *Reanalysis of the Harvard Six Cities Study and the American Cancer Society Study of Particulate Air Pollution and Mortality*, <http://www.healtheffects.org/news.htm> (July 2000). This report reaffirmed the connection between an increased risk of mortality and living in cities with higher long-term levels of particulate air pollution. *Id.*

fall predominantly on industry⁴ because the pollutant is generally associated with power generation, industrial boilers, and automotive emissions.⁵ Consequently, though public health and environmental groups widely supported the new standards, industrial groups strongly opposed their implementation.⁶ These industrial interests, which included the American Trucking Associations,⁷ challenged the PM standard in the United States Court of Appeals for the District

4. See *infra* note 6. Several industries, evidenced by the names of the *American Trucking* respondents, are affected by the rules. See Petition for a Writ of Certiorari for the Environmental Protection Agency at 2, *Am. Trucking Ass'ns v. EPA*, 195 F.3d 4 (D.C. Cir. 1999) (No. 99-1257), <http://www.usdoj.gov/osg/briefs/1999/2pet/7pet/99-1257.pet.aa.html> (last visited Aug. 28, 2000) [hereinafter Petition for a Writ of Certiorari for the EPA]; Thomas M. Strah, *Clinton Backs Clean Air Standards*, TRANSPORT TOPICS: TRUCKING'S ELECTRONIC NEWSPAPER, at <http://www.ttnews.com/members/printEdition/weekly.archive/06.30.97.tw3.html> (June 30, 1997) ("Utilities, automakers, oil companies, miners and manufacturers have already joined forces to wage a lobbying battle that participants on both sides say is unusually big and intense for a regulatory question.").

5. See EPA, 1997 *National Air Quality: Status and Trends, Particulate Matter*, <http://www.epa.gov/oar/aqtrnd97/brochure/pm10.html> (Dec. 1998).

6. Sandra Roberts, *A Furor Erupts over Ozone Standards*, CHEMICAL ENGINEERING, Aug. 1997, at 48. After the final rule was introduced, industry lobbied Congress in an effort to prevent enforcement of the standards. See generally National Resources Defense Council (NRDC), *Salvaging Air Quality Standards*, at <http://www.nrdc.org/air/pollution/naqstan.asp> (last visited Aug. 28, 2000) (noting the strong effort by industry to prevent implementation of the standards) [hereinafter *Salvaging Air Quality Standards*]. Industrial interests coordinated legislative, regulatory, and legal challenges to the revised PM standard. See, e.g., Daniel P. Bearth, *ATA Tells EPA: Back Off*, TRANSPORT TOPICS: TRUCKING'S ELECTRONIC NEWSPAPER, at <http://www.ttnews.com/members/printEdition/weekly.archive/03.17.97.tw3.html> (March 17, 1997). The American Trucking Associations and a number of other industrial interests informed the EPA early on that they thought the new standards were drastic and unscientific. See *id.*

7. There are several respondents. See Petition for a Writ of Certiorari for the EPA, *supra* note 4. The respondents include the American Farm Bureau Federation, American Forest and Paper Association, American Iron and Steel Institute, American Petroleum Association, Chemical Manufacturers Association, National Association of Manufacturers, National Association of Home Builders, National Automobile Dealers Association, National Coalition of Petroleum Retailers, National Mining Association, National Small Business United, and the United Mine Workers of America. *Id.* The respondents also represent other interests, including states such as Ohio. Persons appearing as amicus curiae include Representative Tom Bliley and Senator Orrin G. Hatch. *Id.* at 4. The EPA's position is supported by the American Lung Association, the Commonwealth of Massachusetts, and the states of New Jersey, New York, Connecticut, New Hampshire, and Vermont. *Id.* at 2.

of Columbia.⁸ As a result of this litigation, the EPA's ability⁹ to protect Americans from harmful PM was seriously diminished.¹⁰ The court concluded that the EPA had issued the new PM standards¹¹ without following an "intelligible principle," and challenged the agency to find a "determinate" standard as a basis for its decision.¹² The court found that the EPA's construction of the Clean Air Act (CAA) resulted in an unconstitutional delegation of legislative power.¹³ Notably, the per curiam opinion, authored by Circuit Judges Ginsburg and Williams,¹⁴ revived the nondelegation doctrine, widely viewed as dead for decades, by relying on selected details of the rulemaking process to support the decision.¹⁵ After this

8. *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999) (per curiam), *modified*, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *cert. granted sub nom. Am. Trucking Ass'ns v. EPA*, 120 S. Ct. 2193 (U.S. May 30, 2000) (No. 99-1426); *Browner v. Am. Trucking Ass'ns*, 120 S. Ct. 2003 (U.S. May 22, 2000) (No. 99-1257).

9. Fortunately, the Clean Air Act (CAA) includes several redundancies ensuring air pollution is addressed. *E.g.*, 42 U.S.C. § 7651 (1994) (requiring the reduction of PM because sulfate emissions from coal-fired electric generating units comprise a large portion of fine PM emissions); *see also* Clean Air Act, §§ 169A, 169B, 42 U.S.C. § 7491 (1994). Under this program, the EPA must protect the visibility in Class I areas that include wilderness and national park areas. Consequently, the EPA enacted a final national haze rule requiring various sources to reduce PM emissions. 64 Fed. Reg. 35,714 (July 1, 1999) (codified at 40 C.F.R. pt. 51).

10. The Department of Justice (DOJ), however, is still enforcing the CAA. Press Release, Dep't of Justice, U.S. Sues Electric Utilities in Unprecedented Action to Enforce the Clean Air Act (Nov. 3, 1999), 1999 WL 1005143, at *1. On November 3, 1999, the DOJ filed seven lawsuits against utility companies alleging CAA violations. *Id.* These actions seek to mandate that such facilities install air pollution-control technology. *Id.* Sadly, however, in late October 1999, John Chafee, the Senate Environmental and Public Works Committee chairman died. Neil Franz, *Chafee's Death Could Derail Key Legislation*, CHEMICAL WEEK, Nov. 3, 1999, at 16, 1999 WL 9312431. Senator Chafee was an environmental advocate and a key vote for environmental groups during his twenty-four years in the Senate. *Id.* His death could hurt the possibility of enforcing the new PM regulation. *Id.*

11. The court also found that the promulgation of the ozone standards violated the nondelegation doctrine. *Am. Trucking*, 175 F.3d at 1034. This Comment only addresses the court's treatment of the PM regulation, however.

12. *Id.*

13. *Id.* at 1034.

14. Judge Tatel, who dissented from Part I, authored Part IV.A-C of the opinion.

15. The panel's revival of the nondelegation doctrine and selective use of facts may be based on a law review article suggesting judicial reinvigoration of the nondelegation doctrine. *See generally* Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

controversial decision, the entire D.C. Circuit denied the EPA's petition for rehearing en banc.¹⁶ The EPA appealed the decision to the United States Supreme Court,¹⁷ to reverse the decision.¹⁸ The Court will hear the case this Fall.¹⁹

American Trucking evaluated the EPA's procedure for promulgating revisions to the National Ambient Air Quality Standards (NAAQS) under the CAA.²⁰ These standards set national goals for concentrations of outdoor air pollutants, which are emitted from a variety of sources and threaten public health.²¹ The NAAQS must be reviewed every five years to ensure that the standards reflect current scientific

16. *American Trucking*, 195 F.3d at 14. Nine of the eleven D.C. Circuit judges reviewed the petition and issued a response. *Id.* at 13. To grant rehearing, at least six judges must agree to rehear the case. *Id.* Only five judges agreed to rehear the case and the court denied the petition. *Id.*

17. See, e.g., Carol Cole, *Supreme Court Next Stop on EPA's NAAQS Appeal Track*, OCTANE WEEK, Nov. 8, 1999, LEXIS, News, By Individual Publication, Phillips Business Information, Inc. Newsletters. Cole's article accurately predicted that the EPA would appeal the D.C. Circuit's decision. *Id.*

18. See Carol Browner, *Prepared Oral Statement on Court Decision*, <http://www.epa.gov/ttn/oarpg/gen/cmbtest.html> (May 20, 1999) [hereinafter *Browner Prepared Statement on Decision*]. EPA Administrator Carol Browner stated: "We are pursuing all options available to us to overturn this decision. And in the interim we will take whatever steps, consistent with the court's decision, so that we can secure these protections for all Americans." *Id.* She later commented that the EPA is "encouraged that five of the nine judges who actually reviewed the case agreed with EPA's argument that the Clean Air Act is constitutional and recognized the importance of the protections provided by our stricter air pollution standards. . . ." This opinion puts [the] EPA in a very strong position for future legal action." Press Release, EPA, *Browner Statement on Appeals Court Decision* (Oct. 29, 1999), <http://www.epa.gov/region2/epd/99172.htm>.

19. The petitions for certiorari were granted by the Supreme Court on May 22 and May 30, 2000. A petition was granted for review of the delegation decision. *Browner v. Am. Trucking Ass'ns*, 120 S. Ct. 2003 (U.S. May 22, 2000) (No. 99-1257). In addition, the Supreme Court granted an industry-sponsored petition to review whether the NAAQS should be based partly on cost. *Am Trucking Ass'ns v. Browner*, 120 S. Ct. 2193 (U.S. May 30, 2000) (No. 99-1426). Oral argument is scheduled for November 7, 2000. *Supreme Court of the United States: October Term 2000*, http://www.supremecourtus.gov/calendar/argument_oct30.pdf (last visited Aug. 28, 2000).

20. *Am. Trucking*, 175 F.3d at 1033.

21. See 42 U.S.C. §§ 7409(d)(1), 7408(a)(2) (1994); see also EPA, *Regulating Smog and Particle Air Pollution: Air Quality*, <http://www.epa.gov/airprog/ oar/oaqps/regusmog/airqual.html> (Aug. 8, 1997).

knowledge.²² PM, commonly known as soot, is one of the pollutants regulated under the NAAQS.²³

Focusing on the NAAQS promulgation process, the D.C. Circuit initially found that the EPA followed the statutory procedure, mandated by Congress in the CAA, to revise the NAAQS.²⁴ Nevertheless, the court contested the EPA's procedure, finding that the EPA failed to identify a determinate standard for issuing and revising the NAAQS. In other words, the D.C. Circuit found that the procedure lacked an "intelligible principle."²⁵ Consequently, this decision could halt a significant portion of the EPA's efforts to protect the public under the CAA.²⁶ In addition, if the decision is upheld, the majority of rulemaking efforts by administrative agencies could be susceptible to invalidation because their congressional delegations of authority are less specific than those articulated in the CAA.²⁷ Moreover, important economic rules issued by

22. 42 U.S.C. §§ 7409(d)(1), 7408(a)(2).

23. *Id.* §§ 7409(d)(1), 7408(a)(2).

24. *Am. Trucking*, 175 F.3d at 1033-38.

25. *Id.* at 1038. See generally *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (stating that an "intelligible principle" needs to be furnished so a court can police the implementation of the statute).

26. See *City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1139 n.23 (C.D. Cal. 1999) ("The Court sets forth its reasoning on this issue [coarse PM regulations] in this section of the opinion in the event that *American Trucking* is modified on further review."); *Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F. Supp. 2d 582, 601 n.20 (E.D. Va. 1999) (finding that the plaintiff's argument about the Navy's failure to comply with the air quality standards was without merit considering the uncertainty introduced by the *American Trucking* opinion), *aff'd*, 217 F.3d 838 (4th Cir. 2000).

Uncertainty was already present in the EPA's enforcement efforts because of legislation delaying implementation of the PM standard. President Clinton directed the EPA to postpone implementing the PM_{2.5} standard until after the next five-year NAAQS review period because of the questionable science upon which the EPA based its decision. See *Implementation of Revised Air Quality Standards for Ozone and Particulate Matter*, 62 Fed. Reg. 38,421 (July 19, 1997). This statement was alluded to in Title VI of the Transportation Equity Act for the 21st Century. See Pub. L. No. 105-178, §§ 6101-02, 112 Stat. 463-65 (1998).

27. See Stephen L. Kass & Jean M. McCarroll, *Judicial Review of EPA Air Quality Standards*, N.Y. L.J., July 12, 1999, at 3 (predicting that the decision could paralyze administrative rulemaking). Specifically, *American Trucking* could transform legislative authority for agency decision-making and judicial oversight of agency rulemaking. See *id.*; see also Randolph J. May, *A Constitutional Time Bomb: D.C. Court of Appeals Chides Delegating of Legislative Authority to EPA*, FULTON COUNTY DAILY REP., June 25, 1999, WL, Fulton Daily Database ("[T]he court did more than throw a monkey wrench

agencies such as the Federal Communication Commission, the U.S. Department of Agriculture, and the Federal Power Commission,²⁸ which *are* supported by business and industry, could be invalidated under the decision's rationale. Finally, upholding the decision may require the EPA to consider cost and technological feasibility when determining ambient air quality standards, although the standards are currently based solely on health considerations.²⁹

This Comment analyzes whether *American Trucking* correctly concluded that the NAAQS informal rulemaking procedure, specifically the 1997 PM revision process, lacked an "intelligible principle" in violation of the nondelegation doctrine. Part I outlines the judicially imposed restraints on agency rulemaking and describes the history of the NAAQS revisions, particularly the revised PM standard. Part II describes *American Trucking* and discusses the reasoning behind the court's challenge to find an "intelligible principle" for the NAAQS revisions. Part III argues that *American Trucking* erred because the EPA did follow an "intelligible principle" when it promulgated the 1997 revised PM standards. This Comment concludes that *American Trucking* should be reversed and that the Supreme Court should reinstate the EPA's authority to protect the public from harmful air pollutants under the CAA.

I. THE ROADS TO AMERICAN TRUCKING

American Trucking represents the intersection of four different roads: (1) a court's evaluation of agency action where, (2) as a result of a congressional delegation, (3) the agency acts to regulate an air pollutant, and (4) later revises these regulations.

into EPA's enforcement of the Clean Air Act. It lobbed a constitutional time bomb that potentially could have government-wide impact.").

28. See *Am. Trucking*, 175 F.3d at 1057 (Tatel, J., dissenting) (listing agency delegations less specific than Section 109 of the CAA). As discussed later, these statutes are less specific than Section 109 of the CAA. See *infra* Part III.B.4.

29. See David M. Friedland & David M. Williamson, *D.C. Circuit Strikes Down Ozone and Particulate Matter Rules*, METROPOLITAN CORP. COUNS., July 1999, at 8, available at WL 07/99 METCC8 (stating that industry may now be able to overturn prior D.C. Circuit decisions prohibiting cost and technological feasibility considerations when setting air quality standards). See generally *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) (holding that the EPA may not consider cost when revising the NAAQS).

A. A COURT'S FUNCTION: JUDICIAL REVIEW OF AGENCY RULEMAKING

The judicial branch has the duty to ensure that an agency's actions are within constitutional and statutory limits. Courts review an agency's rulemaking decision by evaluating both the congressional delegation and the agency's decision. Both reviews limit an agency's power to promulgate rules.

Initially, before an agency can promulgate rules, Congress must delegate rulemaking authority to the agency.³⁰ Any statutory delegation must specifically limit agency discretion to avoid violating the "nondelegation doctrine."³¹ The functions of the nondelegation doctrine are threefold: (1) to ensure important policy choices are made by Congress, the elected branch of government; (2) to guarantee that Congress guides agency discretion with an "intelligible principle"; and (3) to guarantee meaningful judicial review.³²

To determine whether a statutory delegation violates the nondelegation doctrine, a court will look for an "intelligible principle."³³ Congress establishes an "intelligible principle" when it enacts a statute that limits an agency's rulemaking authority.³⁴ To find an "intelligible principle" courts consider: (1) the statutory language applicable to the rulemaking function; (2) other sections of the statute; (3) the purpose of the statute; and (4) the statute's legislative history.³⁵

The Supreme Court has not held that a statute violated the nondelegation doctrine since the 1930s.³⁶ In fact, the only real use of the doctrine occurred when a hostile Supreme Court

30. See U.S. CONST. art I, § 1. A delegation of legislative authority must originate in Congress to satisfy Article I of the Constitution which provides in part that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." *Id.*

31. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935).

32. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring); *Am. Trucking*, 175 F.3d at 1038 (citing Chief Justice Rehnquist's earlier articulation of the function of the nondelegation doctrine).

33. See *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971).

34. *Id.*

35. *Id.* at 748.

36. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Schechter Poultry Corp.*, 295 U.S. at 551 (declaring part of the National Industrial Recovery Act (NIRA) unconstitutional under the nondelegation doctrine); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935) (same).

disagreed with President Roosevelt's economic policy and used the nondelegation doctrine to strike down parts of New Deal legislation.³⁷ Absent such a politically charged environment, the Court has continually refused to apply the doctrine recognizing the compelling necessity for Congress to delegate rulemaking responsibilities to effectively administer the federal government.³⁸

After finding a permissible delegation to an agency, a court will evaluate the substance of the administrative decision.³⁹ Traditionally, courts have recognized the pragmatic importance of deferring to agency decision-making in areas of specialized expertise,⁴⁰ because when such expertise is required, agencies possess the necessary knowledge for effective development and timely promulgation of the rules.⁴¹ The judicial standard of review applied to EPA decisions depends on whether the challenged decision is procedural, legal, or factual.⁴² For legal

37. See ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 12-34 (1966) (discussing the hostility of the early New Deal Court to Roosevelt's economic programs).

38. Although Chief Justice Rehnquist has suggested reinvigoration of the nondelegation doctrine, the Court has not accepted his suggestion. See *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686-88 (1980) (Rehnquist, J., concurring) (suggesting that the Occupational Safety and Health Act represented an unconstitutional delegation of congressional power because Congress did not specify whether the Occupational Safety and Health Administration needed to employ a cost-benefit analysis in its rulemaking procedure).

39. See *infra* note 42 and accompanying text (describing the scope of judicial review for administrative agency actions).

40. In the past, the judiciary has deferred considerably to EPA decision-making. See *Train v. NRDC*, 421 U.S. 60, 75 (1975) (upholding the EPA's decision to approve a state plan because the decision was reasonable); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1147 (D.C. Cir. 1980) (deferring to the EPA's decision concerning the lead NAAQS); *Ethyl Corp. v. EPA*, 541 F.2d 1, 12 (D.C. Cir. 1976) (en banc) (allowing the EPA to regulate lead additives which demonstrate a "significant risk of harm," although the data was inconclusive). Therefore, unless an EPA decision is plainly unreasonable, a court should defer to the Agency's decision. See *Lead Indus. Ass'n*, 647 F.2d at 1147.

41. See May, *supra* note 27. According to May, administrative agencies play an essential role in today's world because legislatures cannot effectively enact legislation to address all of their legislative aspirations. *Id.* Additionally, May believes that Congress delegates rulemaking authority to administrative agencies because it does not want to be accountable for making tough decisions in fields such as environmental law. *Id.*

42. See 5 U.S.C. § 706 (1994). This section provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning

issues, courts defer to an administrative agency's interpretation of the law if the interpretation is reasonable.⁴³ For procedural questions, courts refer to the procedures articulated in the Administrative Procedure Act (APA).⁴⁴ Except in compelling circumstances, Courts may not require anything beyond the standard of review provided for in the APA.⁴⁵

For factual issues arising in informal rulemaking and non-adjudicatory proceedings, courts apply an "arbitrary and capricious" standard of review.⁴⁶ Under this review, a court must examine the facts with a "searching and careful" inquiry⁴⁷ to educate itself on the issues faced by the administrative

or applicability of the terms of an agency action. The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions 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; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Id.

43. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-44 (1984); *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 869 (D.C. Cir. 1996) (per curiam) (applying the *Chevron* analysis to the CAA). The first inquiry under *Chevron* is whether Congress has directly spoken on the contested legal issue. *Chevron*, 467 U.S. at 842-43. If Congress has spoken directly on the issue, a court should adopt its explicit intent and the judicial inquiry ends. *Id.* If Congress is silent on the issue, a court should defer to the agency's interpretation if it is reasonable and consistent with the statute. *Id.* at 843.

44. 5 U.S.C. § 706 (1994).

45. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 545-49 (1978) (holding that courts should not impose additional requirements beyond those specified in the APA).

46. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416-18 (1971) (applying the arbitrary and capricious standard of review to an agency decision), *abrogated by* *Califano v. Sanders*, 430 U.S. 99 (1977). The *Overton Park* Court stated that "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Id.* at 416; cf. *Pan Am. Grain Mfg. Co. v. EPA*, 95 F.3d 101, 103 (1st Cir. 1996) (noting that review under the arbitrary and capricious standard is narrow).

47. *Overton Park*, 401 U.S. at 416.

agency.⁴⁸ To determine if a decision is "arbitrary and capricious," a court must then ascertain whether the agency looked at all of the applicable factors while making the decision.⁴⁹ A court will interfere only if there is a clear, unequivocal error in judgment.⁵⁰ One example of an informal rulemaking procedure subject to this standard of review is the promulgation of the CAA's NAAQS.

B. THE DELEGATION: THE CAA AND THE NAAQS

Congress enacted the CAA to "protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population."⁵¹ The cornerstone goal of the CAA is to create and maintain NAAQS. To establish the NAAQS, the EPA must compile a list of criteria pollutants.⁵² Specifically, criteria pollutants are pollutants that "may reasonably be anticipated to endanger public health or welfare" and are produced by "numerous or diverse mobile or stationary sources."⁵³ After listing a criteria pollutant, the EPA has twelve months to publish an air quality criteria document, which reflects the "latest scientific knowledge" of the pollutant's effects on the general public.⁵⁴

48. *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1145 (D.C. Cir. 1980) (stating that the only purpose of the inquiry is the court's education); *see also Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc) (stating that a court "must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made").

49. 5 U.S.C. § 706 (1994).

50. *See supra* note 46 and accompanying text (describing the arbitrary and capricious standard of review as narrow).

51. 42 U.S.C. § 7401(b)(1) (1994).

52. *Id.* § 7408(a)(1).

53. *Id.* §§ 7408(a)(1)(A), 7408(a)(1)(B). Additionally, the statute requires the Administrator to name each pollutant "for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section." *Id.* § 7408(a)(1)(C); *see, e.g., NRDC v. Train*, 411 F. Supp. 864, 867-69 (S.D.N.Y. 1976) (mem.) (discussing the promulgation of air quality criteria for lead), *aff'd*, 545 F.2d 320 (2d Cir. 1976).

54. 42 U.S.C. § 7408(a)(2) ("The Administrator shall issue air quality criteria . . . [which] shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities.").

Next, the Administrator must establish "primary" and "secondary" NAAQS for the criteria pollutants.⁵⁵ Primary NAAQS are issued at a level "requisite to protect the public health" with an "adequate margin of safety."⁵⁶ Secondary NAAQS protect the public from any effects "associated with the presence of such an air pollutant in the ambient air."⁵⁷ In other words, primary standards protect people and secondary standards protect the environment (agriculture, livestock, buildings, etc). The EPA must issue and submit for public comment the proposed primary and secondary NAAQS.⁵⁸ Current criteria pollutants include PM, sulfur dioxide, carbon monoxide, nitrogen oxide, ozone, and lead.⁵⁹

When the CAA was enacted, Congress knew that the NAAQS would result in increased cost to industrial facilities.⁶⁰ Nevertheless, Congress decided public health was more important than cost or technological considerations.⁶¹ Therefore, under the CAA, the EPA must base its decision of where to set a standard solely on a pollutant's effect on human health; the EPA may not consider the cost or feasibility of complying with the standard.⁶²

55. 42 U.S.C. § 7409(a)(1)(A).

56. *Id.* § 7409(b). The statute specifies that the standards should be set (a) in the Administrator's judgment, (b) based on health-related criteria, and (c) with an adequate margin of safety. *Id.* Additionally, section 7408(a)(1) provides:

For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall . . . publish, and shall from time to time thereafter revise, a list which includes each air pollutant—(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources. . . .

Id.

57. 42 U.S.C. § 7409(b)(2) (1994).

58. *Id.* § 7409(a)(2).

59. *Id.* § 7407. When the CAA was enacted in 1970, air quality criteria already existed for sulfur oxides, particulates, carbon monoxide, hydrocarbons, and photochemical oxidants. *See, e.g.*, 40 C.F.R. §§ 50.4 to 50.12 (2000). Nitrogen dioxide was added in 1971, and lead was added in 1976. *See id.*

60. *See Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1149 (D.C. Cir. 1980) (reasoning that "the absence of any provision requiring consideration of these factors was no accident; it was the result of a deliberate decision by Congress to subordinate such concerns to the achievement of health goals").

61. *See id.*

62. *Id.*; *see also* NRDC v. EPA, 902 F.2d 962, 972 (D.C. Cir. 1990) (per curiam), *vacated in part* by NRDC v. EPA, 921 F.2d 326 (D.C. Cir 1991) (per

After setting an initial standard, the EPA must "complete a thorough review" of the NAAQS every five years and make appropriate revisions.⁶³ An independent scientific review committee, the Clean Air Scientific Advisory Committee (CASAC), assists this review process.⁶⁴ This committee reviews the scientific data on the pollutant's effects on health and recommends revisions in the criteria and the NAAQS.⁶⁵ The EPA has been reluctant to revise the NAAQS because of scientific uncertainty⁶⁶ and the enormous administrative burden associated with the revision process. This five-year review, however, is statutorily mandated and, therefore, not discretionary.⁶⁷ Consequently, the PM standard is subject to continuing revision.⁶⁸

curiam); *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1186 (D.C. Cir. 1981). Notably, costs are considered later when the EPA implements the standards. 42 U.S.C. § 7410 (1994).

63. 42 U.S.C. § 7409(d)(1) (1994); *see also* *Env'tl. Def. Fund v. Thomas*, 870 F.2d 892, 896 (2d Cir. 1989) (concluding that "the Administrator must make some decision regarding the revision of the NAAQS" subject to judicial review when the EPA publishes a new criteria document).

64. 42 U.S.C. § 7409(d)(2)(A) (1994) ("The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.").

65. *Id.* § 7409(d)(2)(B-C).

66. *See* National Ambient Air Quality Standards for Carbon Monoxide—Final Decision, 59 Fed. Reg. 38,906 (Aug. 1, 1994) (codified at 40 C.F.R. pt. 50) (discussing the EPA's decision not to revise the carbon monoxide standards because of scientific uncertainty).

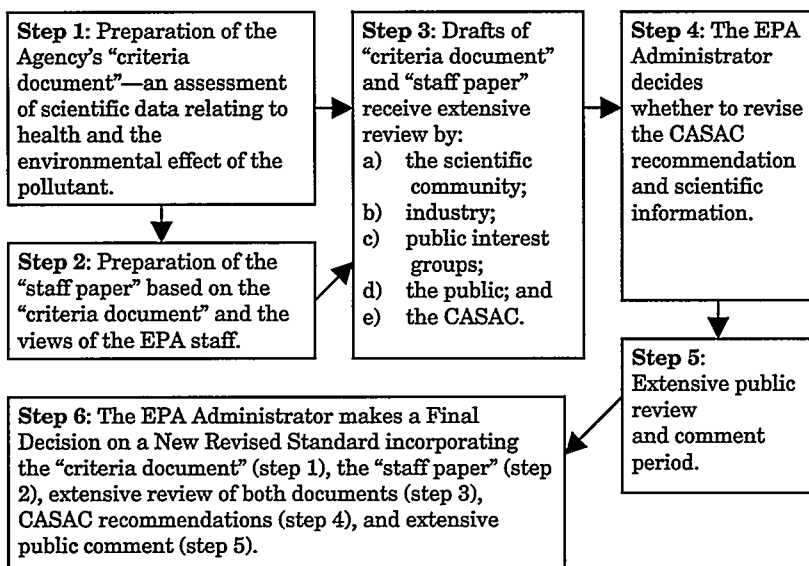
67. *Thomas*, 870 F.2d at 899-900 (holding that the EPA must take some formal action every five years, either by revising or declining to revise the standards).

68. *See, e.g.,* National Primary and Secondary Ambient Air Quality Standards, 36 Fed. Reg. 8186 (Apr. 28, 1971) (codified at 42 C.F.R. pt. 410) (describing the EPA's first PM regulation).

THE PROCESS OF NAAQS REVIEW⁶⁹

Before Review: Congress mandates that the standards must be:

- a) requisite to protect public health;
- b) with an adequate margin of safety; and
- c) based solely on health considerations.



C. THE POLLUTANT: THE NAAQS PM REGULATION

PM is another name for very small airborne particles, such as dust and sand, that are invisible to the naked eye. These particles consist of a complex mixture of organic and inorganic matter in the form of discrete solids and liquid droplets.⁷⁰ Both

69. 42 U.S.C § 7409 (1994); see also EPA, *Fact Sheet: EPA's National Ambient Air Quality Standards: The Standard Review/Reevaluation Process*, <http://www.epa.gov/ttn/oarpg/naaqsfin/naaqs.html> (July 17, 1997).

70. GERARD KIELY, ENVIRONMENTAL ENGINEERING 345 (1997); C. DAVID COOPER & F.C. ALLEY, AIR POLLUTION CONTROL: A DESIGN APPROACH 101 (2d ed. 1994). There are several different terms for PM: suspended particulate matter, total suspended particulates, black smoke, inhalable thoracic particles, and PM₁₀. KIELY, *supra*, at 345. In addition, foreign countries use different sizes to classify particles as PM. *Id.* at 346.

natural and anthropogenic (man-made) sources emit PM.⁷¹ Natural sources include volcanoes, forest fires, windstorms, pollen, and ocean spray.⁷² Anthropogenic sources are industry processes, mining, construction, motor vehicle exhaust, combustion, and refuse incineration.⁷³ Common components of PM are road, tire, and brake dust, volcanic ash, pollen, sea salt, wood smoke, diesel soot, ammonium nitrate, and ammonium sulfate.⁷⁴

When inhaled in high concentrations, PM can damage lung tissue and contribute to cancer and respiratory disease. In 1982, the EPA issued a three-volume air quality criteria document⁷⁵ that examined, among other things, studies of the health effects of acute exposure to ambient PM concentrations in London, England during the 1950s and 1960s.⁷⁶ The document suggested that there was no safe level of PM, essentially making it a "non-threshold" pollutant.⁷⁷ Subsequent studies⁷⁸ demonstrate that these particles, although generally non-toxic, irritate the respiratory system and cause respiratory disease, asthma, decreased lung function, and death.⁷⁹ PM's effect on human health depends partly on the size of the

71. COOPER & ALLEY, *supra* note 70, at 101.

72. *Id.*

73. *Id.*

74. Jeff Fedorchak, *Air War: EPA's extreme PM proposal*, *FOUNDRY MGMT. & TECH.*, Dec. 1, 1996, at 34, 1996 WL 8800467.

75. *See supra* note 54 and accompanying text.

76. *See generally* EPA, *Air Quality Criteria for Particulate Matter and Sulfur Oxides*, No. EPA-600/8-82-029a, at 1-94 (1982); *see also* KIELY, *supra* note 70, at 334 (describing the 1952 London "fog" as a catalyst for air pollution regulation around the world).

77. *See* EPA, *supra* note 76, at -029a to -029c.

78. EPA, *Fact Sheet: EPA's Revised Particulate Matter Standards*, <http://www.epa.gov/ttn/oarpg/naaqsfm/pmfact.html> (July 17, 1997) [hereinafter *Revised Particulate Matter Standards*]. The EPA identified a number of studies indicating that the health effects of PM exposure include premature death, increased hospital admissions and emergency room visits, increased respiratory and lung symptoms, and disease. *Id.*; *see also* Health Effects Institute, *supra* note 3 (citing a July, 2000 report by the Health Effects Institute confirming the results of these health studies).

79. *See* 1997 Final Rule, *supra* note 2, at 38,654; Joseph M. Feller, *Non-threshold Pollutants and Air Quality Standards*, 24 ENVTL. L. 821, 839 (1994).

particle.⁸⁰ As a result, the EPA bases its regulation on the size and ambient concentration of the particles.⁸¹

Before the EPA issued its controversial revised PM standard, the last PM NAAQS review occurred in 1987.⁸² In that review, the EPA included all particles with an aerodynamic diameter of less than ten micrometers (PM₁₀) in its measurements.⁸³ The aerodynamic diameter of a particle is the diameter of a hypothetical sphere (with a unit density of water) that will settle in still air at the same velocity as the particular particle.⁸⁴

In 1987, the EPA set two primary standard levels for PM—one measured daily, and the other measured every three years.⁸⁵ The EPA, while promulgating the 1997 PM revisions, assessed public health protection under the 1987 levels.

D. THE AGENCY'S DECISION: THE 1997 REVISED PM STANDARD

In April 1994, the EPA announced its intent to revise the PM Air Quality Criteria Document.⁸⁶ Initially, the EPA produced an air quality criteria document⁸⁷ and a staff paper summarizing the scientific basis for regulating PM.⁸⁸ On

80. *Revised Particulate Matter Standards*, *supra* note 78. Size matters because smaller particles can get farther into the lungs' sensitive airways causing more damage. *Id.*

81. 1997 Final Rule, *supra* note 2, at 38,654.

82. *See generally* Revisions to the National Ambient Air Quality Standards for Particulate Matter: Final Rule, 52 Fed. Reg. 24,634 (July 1, 1987) (codified at 40 C.F.R. pt. 50) [hereinafter 1987 Final Rule].

83. *Id.*

84. COOPER & ALLEY, *supra* note 70, at 101. For example, if a particle weighs one kilogram and has a three-inch diameter, its aerodynamic diameter would be the diameter of a one-kilogram sphere of water. The aerodynamic diameter is based only on the mass of the particle, not on its actual size. Therefore, a one-kilogram particle would have the same aerodynamic diameter if it were three inches or three feet wide.

85. 1987 Final Rule, *supra* note 82, at 24,634. Specifically, the EPA set the primary PM₁₀ standard at 50 µg/m³, the expected annual arithmetic mean, averaged over three years, and 150 µg/m³, the twenty-four hour average, with only one exceedance allowed per year. *Id.*

86. *See* Am. Lung Ass'n v. Browner, 884 F. Supp. 345, 349 (D. Ariz. 1994) (ordering publication of EPA's final PM rule by January 31, 1997); 1997 Final Rule, *supra* note 2, at 38,654.

87. *See supra* note 54 and accompanying text.

88. 1997 Final Rule, *supra* note 2, at 38,654. The CASAC reviewed the criteria document and commented that "although our understanding of the health effects of PM is far from complete, a revised Criteria Document which incorporates the Panel's latest comments will provide an adequate review of the available scientific data and relevant studies of PM." *Id.* (quoting Letter

November 27, 1996, the EPA officially announced its decision to revise the PM NAAQS after reviewing the 1987 standard.⁸⁹ The EPA's review of the old standard focused primarily on the adverse health effects⁹⁰ caused by fine particulates (PM_{2.5})⁹¹ and coarse particulates (PM_{10-2.5}).⁹² The epidemiological studies convincingly⁹³ demonstrated that the presence of PM causes increased health problems.⁹⁴ Moreover, the scientific evidence overwhelmingly demonstrated the need to regulate coarse and fine particulates separately.⁹⁵ In addition to examining scientific studies, the EPA solicited public comment and many

from George T. Wolff, Chair, Clean Air Scientific Advisory Committee, to Carol M. Browner, EPA Administrator (March 15, 1996)). Additionally, the CASAC commented that "the Staff Paper, when revised, will provide an adequate summary of our present understanding of the scientific basis for making regulatory decisions concerning PM standards." *Id.* (quoting Letter from George T. Wolff, Chair, Clean Air Scientific Advisory Committee, to Carol M. Browner, EPA Administrator (June 13, 1996)).

89. See National Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. 65,638 (Dec. 13, 1996) (codified at 40 C.F.R. pt. 50) [hereinafter 1996 Proposed Decision].

90. See 1997 Final Rule, *supra* note 2, at 38,655. The Agency's ultimate conclusion to revise the standards focused on an evaluation of health effects, a quantitative health risk assessment, and a calculation of an adequate margin of safety. *Id.*

91. *Id.* at 38,654. The criteria found that fine and coarse particulates differ by source, formation process, chemical properties, and physical properties. *Id.* Fine particulates are those particles with an aerodynamic diameter of less than 2.5 micrometers. *Id.*

92. *Id.* Coarse particulates are those particles with an aerodynamic diameter of between 2.5 and 10 micrometers (PM_{10-2.5}). *Id.*

93. See *id.* at 38,657. The EPA stated that "[g]iven the nature of the health effects in question, this finding, which is based on a large number of studies that used PM₁₀ measurements, as well as studies using other indicators of PM, clearly indicates that revision of the current PM NAAQS is appropriate." *Id.* Additionally, the majority of comments received from the public reiterated the view that the PM NAAQS needed to be revised to protect public health. *Id.* Moreover, several state and local governments commented that new air quality standards for fine PM were necessary to protect the public. *Id.*

94. *Id.* at 38,656-57. The CASAC felt the evidence of PM effects was "fairly strong" because a majority of studies demonstrated increased respiratory problems. *Id.* at 38,656 n.7. Although the Committee noted that the results of the studies should be reviewed cautiously, the extensive evidence indicated a health effect correlation to PM presence. *Id.* at 38,657.

95. *Id.* at 38,666. The majority of refinements to the PM NAAQS revolved around defining the regulatory classes. See *id.* The PM regulations have moved from regulating total suspended particles (TSP) to PM₁₀, in 1987, and then, in 1997, to PM₁₀ and PM_{2.5}. *Id.*

of the comments came from an industry-led campaign to prevent the revisions.⁹⁶

While making its final decision to revise the PM standards, the EPA considered the air quality criteria document, the staff paper, and public comment.⁹⁷ After acknowledging that scientific uncertainty is undoubtedly present in health-effects related research, the EPA felt its "intensive evaluation" and "high degree of scrutiny" provided an adequate basis for the decision to revise the 1987 PM standard.⁹⁸

After determining that revisions were necessary, the EPA next addressed how to revise the PM NAAQS to protect the public. Initially, the Agency determined whether and where to draw a line between fine and coarse particulates.⁹⁹ The EPA elected to retain the coarse PM (PM₁₀) standard because at that level "particles [are] capable of penetrating to the thoracic region, including both the tracheobronchial and alveolar regions"¹⁰⁰ thereby harming the human respiratory system.

96. See 1996 Proposed Decision, *supra* note 89, at 65,638. The EPA took "extensive and unprecedented steps" to solicit public comment. 1997 Final Rule, *supra* note 2, at 38,654. These steps included a toll-free telephone hotline, comments submitted via e-mail, public hearings and meetings, and satellite telecasts. *Id.*

97. 1997 Final Rule, *supra* note 2, at 38,655 ("After taking this information and comments into account, and for the reasons discussed below in this unit, the Administrator concludes that revisions to the current primary standards to provide increased public health protection against a variety of health risks are appropriate."). Studies used in the revision analysis were completely reviewed in the criteria document and evaluated in the CASAC process. *Id.* at 38,663.

98. *Id.* at 38,655 ("[I]n the judgment of the Administrator, this intensive evaluation of the scientific evidence has provided an adequate basis for regulatory decision making at this time, as well as for the comprehensive research needs document recently developed by EPA, and reviewed by CASAC and others, for improving our future understanding of the relationships between ambient PM exposures and health effects.").

99. *Id.* at 38,658. Several environmental groups disagreed with the EPA about where to draw the line because they disagreed with the Agency's interpretation of the scientific findings. *Id.* Additionally, some environmental groups favored certain foreign standards, such as the proposed British daily PM₁₀ standard of 50 µg/m³, which is only one-third of the 1987 U.S. standard. *Id.* at 38,657-58. Alternatively, several groups representing business, industry, and local government felt the proposed standards were inappropriate because of the uncertainty of the scientific information. *Id.* at 38,658.

100. *Id.* at 38,666. The EPA relied on conclusions reached in the staff paper and those made during the 1987 revision to reinstate the PM₁₀ level. *Id.* Additionally, the EPA found that recent information found in the criteria document also supported this conclusion. *Id.* at 38,667.

The EPA concluded, however, that the PM_{10} standard does not adequately protect the public from the harmful effects of fine particles.¹⁰¹ Accordingly, the EPA recommended a separate regulation for fine particles.¹⁰² Scientific evidence demonstrated that the size differentiation between fine and coarse particles lies somewhere between one and three micrometers.¹⁰³ Thereafter, based on the CASAC's recommendation, the air quality criteria document, the staff paper, and public comment, the EPA chose the 2.5 micrometer size for fine PM.¹⁰⁴ In sum, under the 1997 regulations, coarse PM includes particles whose aerodynamic diameter¹⁰⁵ is between 2.5 and 10 micrometers; fine PM includes particles under 2.5 micrometers.¹⁰⁶

The EPA next considered the level of PM exposure it would allow under the new standards.¹⁰⁷ Focusing on fine PM ($PM_{2.5}$), the EPA decided that long and short-term levels were necessary because health studies demonstrated the harmful

101. *Id.* Both the criteria document and the staff paper concluded that the NAAQS should regulate fine and coarse PM separately. *Id.* The CASAC stated that there was "a consensus that a new $PM_{2.5}$ NAAQS be established." *Id.* (quoting Letter from George T. Wolff, Chair, Clean Air Scientific Advisory Committee, to Carol M. Browner, EPA Administrator (June 13, 1996)). The main reason for separating coarse and fine particulates is because they are physically and chemically different. *Id.*

102. *Id.* As the EPA noted, the epidemiological evidence demonstrated that the most effective way to protect the public was to regulate fine particles separately. *Id.* In particular, the staff paper suggested that fine particles are more directly linked to mortality and that a regulatory focus would control other gaseous precursors. *Id.*

103. *Id.* The EPA recognized the scientific data supported a cut-off point somewhere in this range. *Id.*

104. *Id.* at 38,668. The staff paper and the criteria document both recommended using the 2.5 mark. *Id.* The National Mining Association, however, suggested a smaller cutoff point at one micrometer (PM_1). *Id.* at 38,668 n.27. The EPA rejected this suggestion because, although it would reduce the intrusion of coarse particles, it would also omit some PM components from regulation including acid sulfates, nitrates, and various organic compounds. *Id.*

105. *E.g., supra* note 84 and accompanying text (discussing aerodynamic diameter).

106. 1997 Final Rule, *supra* note 2, at 38,668. The EPA followed the staff and CASAC recommendations to use $PM_{2.5}$ as the appropriate indicator for fine PM. *Id.* Several CASAC members felt that coarse particulates should be measured by $PM_{10-2.5}$. *Id.* A majority of the committee, however, found it reasonable to measure PM_{10} by itself as an indicator for coarse PM. *Id.*

107. *Id.* Although the EPA considered the acceptable levels for both standards, this Comment only details the EPA's decision concerning $PM_{2.5}$, even though PM_{10} encountered similar analysis.

effects of both long and short-term exposure to fine PM.¹⁰⁸ Based upon the CASAC's recommendations and public health concerns,¹⁰⁹ the EPA decided that a short-term regulation would measure fine PM concentrations over twenty-four hour periods.¹¹⁰ The EPA found that the long-term regulation and regulatory focus should be on annual concentrations.¹¹¹ Next, the Administrator determined the levels for the twenty-four hour and the annual PM_{2.5} standards. The EPA primarily considered the health effects discussed in the staff paper and the criteria document to determine a level of PM exposure sufficient to protect public health and provide an adequate margin of safety for the public.¹¹² These considerations led to a

108. *Id.* at 38,668-69.

109. *Id.* at 38,669. A clear majority of CASAC members supported the standards. *Id.* Seventeen out of nineteen recommended the twenty-four hour standard and thirteen out of nineteen recommended the annual standard. *Id.* at 38,669 n.28. Additionally, the EPA noted that a single standard would result in "either inadequate protection for some effects, or unnecessarily stringent control for others." *Id.* at 38,669. Both standards would work together effectively and efficiently to achieve cleaner air. *See id.* Although the annual standard may be difficult to implement, the EPA believed it would greatly reduce exposure to harmful PM. *Id.* at 38,670. Furthermore, the EPA felt that an annual standard reflecting area-wide exposure combined with a twenty-four hour standard for peak and seasonal protection, would adequately protect public health. *Id.* at 38,672.

110. *Id.* at 38,668. The Administrator found a twenty-four hour standard would protect against episodes lasting several days. *Id.* Additionally, although some effects occur at smaller time increments, the EPA found that none of the studies provided an adequate basis for a different regulation. *Id.* Furthermore, the EPA recognized that twenty-four hour regulations will likely lead to reductions in shorter-term concentrations. *Id.*

111. *Id.* at 38,668-69. The EPA reasoned that more risk is associated with long-term exposure. *Id.* at 38,669. Additionally, long-term exposure is the primary source of knowledge of the health effects of PM. *See id.* at 38,670. Therefore, using the annual standard as the controlling standard will lead to more consistent risk reductions. *See id.*

The EPA considered seasonal measuring as an alternative. *Id.* at 38,669. However, the EPA found there was insufficient evidence to create a standard measured by seasonal averaging times. *Id.* Instead, the EPA decided to use the annual arithmetic mean, an average over three years, as the annual PM_{2.5} standard because the mean more accurately reflects area-wide PM exposure. *Id.* at 38,671. An annual arithmetic mean is more accurate because a single monitor with the highest measured values does not illustrate the overall quality of the air. *Id.*

112. *Id.* at 38,674. Seeking to set a standard that would reduce U.S. PM pollution to an adequate level, the EPA considered the need to provide for variations in seasonal levels, *supra* note 111, and looked at the combined protection from the annual and twenty-four hour standards. 1997 Final Rule, *supra* note 2, at 38,669. In particular, the EPA balanced several factors when making its decision: (1) the protection provided by the twenty-four hour

final decision for the annual standard¹¹³ and the twenty-four hour standard.¹¹⁴ The new levels will provide greater protection to the public than the less stringent and less comprehensive 1987 PM standards.

Although the EPA based its decision to revise the PM standards on over sixty peer-reviewed and debated scientific studies,¹¹⁵ the industry-sponsored Air Quality Coalition (AQC),¹¹⁶ claimed that the standards were not supported by science.¹¹⁷ The AQC represented seven hundred companies, trade associations, and business groups that spent millions of dollars to prevent the EPA from revising the NAAQS, while supporting legislation to roll back these standards.¹¹⁸ Because the predominant concern of the AQC is the cost associated with increased regulation, one commentator characterized the debate over the new standards as a battle between human lives

standard; (2) the combined protection from the twenty-four hour and annual standard; (3) the scientific study information; (4) the uncertainties of the risks in the scientific data; (5) the PM levels recommended by the CASAC; and (6) public comment. *Id.* at 38,677. The strengths and weaknesses of the study were also interpreted by the CASAC members. *Id.* The Agency also considered public comment urging more or less stringent standards but ultimately rejected these suggestions. *Id.* at 38,675. Realizing the scientific uncertainties present in the data, the EPA proposed pursuing an expanded research program to improve implementation. *Id.*

113. *Id.* at 38,679. Specifically, the annual standard requires a $15 \mu\text{g}/\text{m}^3$ or lower concentration for a three-year average. *Id.* The EPA chiefly relied on U.S. and Canadian studies listed in the staff paper to make this decision. *Id.* at 38,675. The staff paper found the presence of significant negative health effects associated with a mean PM concentrations between 16 and $21 \mu\text{g}/\text{m}^3$. *Id.* at 38,676. Based on these studies and conclusions, the EPA found that all the values for finding a correlation of PM to negative health effects were greater than $15 \mu\text{g}/\text{m}^3$. *Id.* The Agency concluded that this level provided an adequate margin of safety. *Id.* at 38,677.

114. *Id.* at 38,679. The twenty-four hour standard requires that "the 3-year average of the 98th percentile of 24-hour $\text{PM}_{2.5}$ concentrations at each population-oriented monitor within an area is less than or equal to $65 \mu\text{g}/\text{m}^3$. . ." *Id.*

115. See Browner Prepared Statement on Decision, *supra* note 18.

116. See Nat'l Ass'n of Mfrs., *Air Quality Coalition*, at <http://www.nam.org/rer/Air/index.html> (last visited Aug. 28, 2000) (recruitment page for the Air Quality Coalition); Annenberg Pub. Policy Ctr., *Issue Ads 97-98: Air Quality Standards Coalition*, at http://appcpenn.org/issueads/profiles/air_quality.htm (last modified Oct. 12, 1998).

117. Akiko Allison Gotoh, *Conflict over Air Quality Standards*, at http://mamba.bio.uci.edu/~pjbryant/global/sen_sem/gotoh97.htm (Feb. 5, 1997).

118. See *supra* note 116.

and economic expenditures.¹¹⁹ Not surprisingly, the revised PM standards caused considerable debate in Congress.¹²⁰ When the AQC's lobbying effort proved unsuccessful, the debate moved to the courts. The United States Court of Appeals for the District of Columbia¹²¹ received numerous petitions requesting judicial review of the primary and secondary PM NAAQS¹²² and the petitions were filed predominately by associations whose membership would be adversely affected by the new standards.¹²³

II. AMERICAN TRUCKING'S ROADBLOCK IMPAIRS THE PUBLIC'S PROTECTION AGAINST HARMFUL PARTICULATE MATTER.

The D.C. Circuit consolidated the petitions for review of the revised PM standard into one case and a three-judge panel heard the matter on December 17, 1998. The panel vacated the standards and the EPA petitioned the court for rehearing en banc. Although the D.C. Circuit Court denied the petition for rehearing, the Supreme Court granted the EPA's petition for a writ of certiorari and will hear the case this Fall.¹²⁴

119. Gotoh, *supra* note 117.

120. See *Salvaging Air Quality Standards*, *supra* note 6. For example, Representatives Klink, Upton, and Boucher introduced a bill to delay the implementation of the revisions for four years. H.R. 1984, 105th Cong. (1997). This bill was never enacted although it had up to 197 co-sponsors.

121. See 42 U.S.C. §§ 7607(b)(1), (d)(8) (1994). If a standard issued by the EPA has national applicability or if a party alleges a procedural rulemaking error, the United States Court of Appeals for the District of Columbia Circuit hears any petition for judicial review. *Id.*

122. *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999) (per curiam), *modified*, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *cert. granted sub nom.* *Am. Trucking Ass'ns v. EPA*, 120 S. Ct. 2193 (U.S. May 30, 2000) (No. 99-1426); *Browner v. Am. Trucking Ass'ns*, 120 S. Ct. 2003 (U.S. May 22, 2000) (No. 99-1257). The court's authority arises under statute. *Supra* note 121. Specifically, the court addressed challenges to the 1997 PM NAAQS and the 1997 Ozone NAAQS. See, e.g., *Am. Trucking*, 175 F.3d at 1033; 1997 Final Rule, *supra* note 2, at 38,652, 38,856.

123. The majority of the associations petitioning for review of the revisions are also members of the AQC. See *supra* note 116. These organizations include the National Association of Manufacturers, the National Mining Association, the American Petroleum Institute, the American Trucking Associations, and the Chemical Manufacturers Associations. *Id.*

124. 120 S. Ct. 2193 (U.S. May 30, 2000) (No. 99-1426); 120 S. Ct. 2003 (U.S. May 22, 2000) (No. 99-1257). Oral argument is scheduled for November 7, 2000.

A. THE D.C. CIRCUIT'S CHALLENGE TO THE EPA: FIND AN "INTELLIGIBLE PRINCIPLE" FOR PM RULE PROMULGATION.

In *American Trucking*, the D.C. Circuit scrutinized the revised PM standard. The majority opinion, authored jointly by Judges Williams and Ginsburg,¹²⁵ began by examining the EPA's authority to promulgate PM regulations¹²⁶ and recognized that the EPA must choose a PM level "requisite" to protect the public health' with an 'adequate margin of safety.'¹²⁷ Applying this congressional mandate to PM, the court assumed that PM was a non-threshold pollutant, which means the only safe concentration exists at zero.¹²⁸ Based on this assumption, the court concluded the EPA must explain any regulation level above zero for PM because any non-zero level could potentially risk public health.¹²⁹ Next, the court examined the criteria used during the rulemaking procedure.¹³⁰ The court found that the factors used to determine the regulations' impact on public health were reasonable.¹³¹ Nevertheless, the court decided that the EPA had failed to state an "intelligible principle" under which to apply the factors.¹³²

125. Both Judge Williams and Judge Ginsburg were appointed by President Reagan.

126. *Am. Trucking*, 175 F.3d at 1034. The small business petitioners urged this issue to the court arguing that the EPA's loose construction of the CAA amounted to an unconstitutional delegation of power by Congress. *Id.*

127. *Id.* (citing 42 U.S.C. § 7409(b)(1) (1994)); see also 42 U.S.C. § 7409(d)(1) (stating that the EPA must "promulgate such new standards [NAAQS] as may be appropriate in accordance with . . . [§ 7409(b)]"). Some critics consider this part of the opinion to be dicta. See, e.g., Kass & McCarroll, *supra* note 27, at 3, 6 (asserting that the delegation issue was not the main holding of the *American Trucking* decision).

128. *Am. Trucking*, 175 F.3d at 1034. The court assumed PM was a non-threshold pollutant although this status was not officially confirmed by the EPA. See *id.*

129. *Id.* The court noted that it is not feasible to have the PM regulations set at zero because this would lead to the end of industrialization. *Id.* at 1038 n.4.

130. *Id.* at 1034-35. The EPA's criteria for rulemaking decisions, according to the opinion, include the seriousness of the effect, likelihood of the effect, and the number of people affected. *Id.* at 1035.

131. *Id.* at 1034.

132. *Id.* at 1034. The court noted the EPA did state what it would base its evaluation on but it "revealed no cut-off point." *Id.* Although the court hinted at a delegation problem, it found the EPA's criteria did not result in an "inherent nondelegation problem." *Id.* at 1034. Nevertheless, the court found that the EPA failed to show any definite criteria for determining a threshold level for the regulations. *Id.*

The court concluded that the EPA's explanation for the revised PM standard amounted only to a hollow assertion that negative health effects are less likely at lower levels of exposure.¹³³ While it recognized that the EPA has discretion to make "policy judgment[s]" when faced with scientific uncertainty,¹³⁴ the court found that the basis for the EPA's regulation would allow it to choose and regulate any PM level,¹³⁵ thereby giving the EPA too much discretion.¹³⁶ As a result, the court challenged the EPA to create a determinate standard for the NAAQS and remanded the case to the EPA directing the Agency to identify a constitutional construction of the CAA.¹³⁷ The court reasoned that a determinate standard will ensure that the EPA's decisions are not arbitrary and that judicial review is meaningful.¹³⁸

As a starting point, the court suggested that the EPA examine a generic unit of harm as a possible solution to the regulations' indeterminacy.¹³⁹ The court cited a method used in Oregon to calculate welfare distribution for healthcare

133. *Id.* at 1035. The court quoted language from the final ozone rule as a basis for this assertion. *Id.* Additionally, the court noted that the EPA based its regulations on the CASAC's recommendation of specific standards, but the CASAC did not offer reasons for its recommendation. *Id.* at 1035-36. Furthermore, the majority disregarded the dissent's argument for deference to this highly intellectual scientific body because "the question whether EPA acted pursuant to lawfully delegated authority is not a scientific one." *Id.* at 1036. Moreover, the court suggested that the EPA could defend its decision to set a standard at a certain level by identifying a tolerable level of uncertainty. *Id.* at 1036.

134. *Id.* at 1037.

135. *Id.* at 1036. The court used London's 1952 "Killer Fog" as an example of the different standards the EPA could set under its criteria. *Id.* Specifically, the court noted that the "EPA's formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog." *Id.* at 1037. Additionally, the court noted that the EPA did cite evidence to support the PM standard but found that its evidence did not demonstrate the health effects at the revised standard. *Id.* at 1037 n.2.

136. *Id.* at 1037.

137. *Id.* at 1038. The court stated that it did not want to hold the statute unconstitutional if the Agency could salvage it. *Id.*

138. *Id.*; see also Friedland & Williamson, *supra* note 29 (noting that the opportunity for the EPA to select new standards is a new and interesting approach).

139. *Am. Trucking*, 175 F.3d at 1039-40. This suggestion was modeled after Oregon's health care approach. *Id.* at 1039. The court reasoned that "an agency wielding the power over American life possessed by EPA should be capable of developing the rough equivalent of a generic unit of harm that takes into account population affected, severity, and probability." *Id.*

recipients using "Quality-Adjusted Life Years." In this method, welfare payments are calculated by dividing a treatment's "Quality-Adjusted Life Years" benefit by the treatment's cost.¹⁴⁰ The court admitted, however, that it might be difficult for the EPA to conceive a similar standard because it may not consider economic cost in its decision-making.¹⁴¹

In addition, the court scrutinized the EPA's decision to use PM₁₀ as a coarse particulate indicator.¹⁴² The court found that the EPA adequately supported its decision to regulate coarse PM.¹⁴³ It rejected, however, the EPA's decision to use PM₁₀ as the coarse particulate indicator.¹⁴⁴ The court reasoned that the indicator would regulate more than coarse particles in the air, essentially leading to undesirable "double regulation" of fine PM and under-regulation of coarse PM.¹⁴⁵ Furthermore, the court rejected the argument that using PM₁₀ as an indicator would be practical because feasibility can not be considered when promulgating the NAAQS.¹⁴⁶ As a result of these

140. *Id.* Oregon's health care approach for low-income individuals measures the probability and duration of an illness with or without a specified treatment. *Id.* at 1039 n.5. Next, the state polls its citizens to ascertain how highly they value various levels of health. *Id.* These factors are used to calculate a unit of harm and allocate resources among those who need it. *Id.*

141. *Id.* at 1039. In the second part of the opinion, the court reaffirmed that the EPA could not consider costs when revising standards. *Id.* at 1040. The court also rejected several claims by the petitioners and amici asserting that the EPA should have considered additional criteria while revising the PM and ozone NAAQS. *Id.*

142. *Id.* at 1053. This part of the opinion was authored by Judge Tatel. The court began its analysis by defining coarse and fine particles. *Id.* Coarse particles result from crushing or grinding solids and generally have diameters between 2.5 and ten micrometers. *Id.* Fine particles result from combustion or gas processes and have diameters of 2.5 micrometers or less. *Id.*

143. *Id.* The court pointed to two studies and nine multivariable analyses supporting the EPA's decision to regulate coarse PM at the 1997 levels. *Id.* at 1053-54. The court commented on the limitations of judicial review stating that review only acts in "ascertaining that the choices made by the Administrator were reasonable and supported by the record." *Id.* (quoting *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1160 (D.C. Cir. 1980)).

144. *Id.* at 1054. The EPA argued that (1) all the studies use the PM₁₀ indicator in the models; (2) both the PM₁₀ standard and PM_{2.5} standard will work in conjunction; and (3) a nationwide monitoring program for PM₁₀ is already in existence. *Id.*

145. *Id.* at 1054-55.

146. *Id.* at 1054-55 (quoting *NRDC v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1980)). In contrast, the EPA argued that using PM₁₀ is pragmatic because monitoring systems for this level already exist. *Id.* at 1054.

findings, the court held that the decision to use PM₁₀ as an indicator was "arbitrary and capricious."¹⁴⁷

In his dissent, Judge Tatel disagreed with the majority's assertion that the EPA did not use a determinate standard for developing the regulations.¹⁴⁸ The judge found that the CAA's "air quality criteria" provided a sufficient basis to make a regulation "requisite" to protect public health.¹⁴⁹ Additionally, he determined that the record reflected an adherence to a "disciplined decision-making process."¹⁵⁰ Judge Tatel concluded that the EPA did not pick arbitrary points for the regulations.¹⁵¹ The judge noted that if people disagree with the EPA's decision-making procedure, they should voice their opinion through the legislative process.¹⁵²

B. THE DENIAL OF REHEARING

The EPA petitioned the whole court for rehearing en banc challenging the panel's conclusion that the EPA failed to articulate an "intelligible principle" while promulgating the 1997 revised PM standard.¹⁵³ The EPA argued that an

147. *Id.* at 1054-55

148. *Id.* at 1057-62 (Tatel, J., dissenting); *see also* Friedland & Williamson, *supra* note 29 (characterizing the dissent as "a vociferous dissent to the non-delegation portion of the otherwise unanimous opinion, attacking the two-judge majority for misapplying non-delegation principles and for giving short shrift to the evidence supporting EPA's choice of NAAQS levels").

149. *Id.* at 1058. Judge Tatel alluded to 42 U.S.C. § 7408(a)(2) (1994), which requires criteria "to the extent practicable" to

include information on—(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant; (B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and (C) any known or anticipated adverse effects on welfare.

Id.

150. *Id.* at 1059. Judge Tatel recognized that the EPA based its decision on the "latest scientific knowledge," the regulation was "requisite to protect the public health," and the decisions were made within the scope set by the CASAC (the independent advisory committee required by 42 U.S.C. § 7409(d)(2)). *Id.*

151. *Id.* at 1061.

152. *Id.* In reaction to this case, two bills have been introduced in Congress to address the power of agency decisionmaking. *See* Congressional Responsibility Act of 1999, H.R. 2301, 106th Cong. (1999); S. 1348, 106th Cong. (1999).

153. *Am. Trucking Ass'ns v. EPA*, 195 F.3d 4, 4 (D.C. Cir. 1999) (per curiam), *cert. granted sub nom.* *Am. Trucking Ass'ns v. EPA*, 120 S. Ct. 2193

intelligible principle was apparent in the statute.¹⁵⁴ Accordingly, the EPA's discretion was limited by the statute, which requires that the regulations be set at a level "requisite" to protect public health.¹⁵⁵ The agency also claimed this limitation was used as a basis for creating a determinate level.¹⁵⁶ Moreover, the EPA quoted other statutory language and legislative history to show the presence of a determinate principle.¹⁵⁷ The EPA further challenged the limitations the panel's decision placed on their considerations when promulgating the NAAQS.¹⁵⁸

The court, in a per curiam opinion supported by four judges,¹⁵⁹ recognized that the EPA employs a balancing process to choose among ambiguous principles.¹⁶⁰ The court stated it would look at these balanced choices to determine whether an intelligible principle exists.¹⁶¹ However, the court found it

(U.S. May 30, 2000) (No. 99-1426); *Browner v. Am. Trucking Ass'ns*, 120 S. Ct. 2003 (U.S. May 22, 2000) (No. 99-1257).

154. *Id.* at 6.

155. *Id.* The court disregarded the EPA's assertions stating, "[i]n its briefs defending the NAAQS, the EPA merely asserted that the Clean Air Act provides an intelligible principle; it failed both to state that principle and to argue that its revised NAAQS were promulgated in accordance with that principle." *Id.* at 7.

156. *Id.* at 6.

157. *Id.*

158. *Id.* The EPA challenged the panel's decision which found that the "EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under § 108 and NAAQS under § 109." *Id.* (citing *Am. Trucking*, 175 F.3d at 1052).

159. Judge Williams (Reagan appointee), Judge Ginsburg (Reagan appointee), Judge Sentelle (Reagan appointee), and Judge Randolph (Bush appointee) did not support rehearing. Although only four judges supported the denial, rehearing was denied because two judges did not participate in the opinion. Six judges must support rehearing the case for it to be reheard.

160. See *Am. Trucking*, 195 F.3d at 8.

161. *Id.* The court interpreted *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980) [The Benzene Case], as unaffected by *Chevron*. *Id.* The court noted that Justice Stevens' plurality opinion found the Occupational Health and Safety Act required "a threshold finding . . . that significant risks are present." *Indus. Union Dep't*, 448 U.S. at 642. The court noted that this was evidence that previous courts examined statutes for intelligible principles even though this method was implicitly rejected by the *Chevron* Court. See *Am. Trucking*, 195 F.3d at 8. Judge Silberman disagreed with the court's interpretation of *Industrial Union Department*. *Id.* at 14 (Silberman, J., dissenting). He believed that the Supreme Court just inserted the delegation principle at the last minute merely paying "lip service" to the doctrine. *Id.*

could not determine the sufficiency¹⁶² of the asserted intelligible principle until it is applied in practice.¹⁶³ Consequently, it denied the EPA's petition for rehearing.

Five judges dissented and supported rehearing.¹⁶⁴ Judge Silberman believed that the CAA's statutory language did not create a determinacy problem. Specifically, the judge found the court's reliance on the nondelegation doctrine to be "fundamentally unsound."¹⁶⁵ Judge Silberman reasoned that by directing the EPA to narrow Congress's delegation, the court undermined the primary function of the nondelegation doctrine.¹⁶⁶ The main purpose of the doctrine, according to Judge Silberman, is to ensure Congress makes important policy decisions.¹⁶⁷ Therefore, the court should not require an agency to narrow a broad congressional delegation because it takes away congressional power to make these essential choices.¹⁶⁸ Moreover, Judge Silberman argued the court should have applied the arbitrary and capricious standard of review rather than engaging in a searching review of the decision.¹⁶⁹ In

162. To interpret the sufficiency of the intelligible principle, the court stated it would look at the history, context, and purpose of the CAA. *Am. Trucking*, 195 F.3d at 7 (citing *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946); *Fed. Radio Comm'n v. Nelson Bros. Bond & Mort. Co.*, 289 U.S. 266, 285 (1933)).

163. *Id.* The court defended its earlier per curiam opinion issued by the three-judge panel. *Id.* It found that the EPA "merely asserted" that the CAA established an intelligible principle without saying what the principle was or if it had been followed. *Id.*

164. Judge Edwards (Carter appointee), Judge Silberman (Reagan appointee), Judge Rogers (Clinton appointee), Judge Tatel (Clinton appointee), and Judge Garland (Clinton appointee) supported rehearing.

165. *Am. Trucking*, 195 F.3d at 14 (Silberman, J., dissenting).

166. *Id.* at 15.

167. *Id.* at 15. Judge Silberman admitted that the panel recognized its decision thwarted this purpose. *Id.* at 15 n.2. However, the panel believed its decision was supported by the two other purposes of the doctrine: nonarbitrary decision-making and meaningful judicial review. *Am. Trucking*, 175 F.3d at 1038. Judge Silberman, however, felt these rationales were collateral to the primary function of the doctrine, that is, forcing Congress to make crucial policy decisions. *Am. Trucking*, 195 F.3d at 15 n.2.

168. *Id.* at 15. Judge Silberman believed that it does not make sense to give the EPA such authority because Congress is elected to make these crucial policy choices. *Id.* By giving ultimate responsibility to the Agency, the court would give Congress unlimited power to delegate without any specificity because the Agency will have to determine the "intelligible principle." *See id.*

169. *Id.* at 15-16. *See generally* *Am. Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998). In *American Lung Ass'n*, the court examined a procedural issue arising out of Section 109 of the CAA and did not find the section unconstitutional. *Am. Trucking*, 195 F.3d at 16-17. Instead, the court applied

summary, he asserted that the court overstepped its bounds by reinvigorating the nondelegation doctrine and requiring subsequent agency action.¹⁷⁰

Despite the dissent's arguments, the D.C. Circuit denied rehearing by a vote of 5 to 4.¹⁷¹ Consequently, the EPA needs to identify and follow an intelligible principle to create the new NAAQS PM standards. Unless reversed, this decision could have a widespread effect on separation of powers jurisprudence and on the EPA's ability to protect Americans from harmful air pollutants.

II. AMERICAN TRUCKING TOOK A WRONG TURN AND RISKS THE PUBLIC'S PROTECTION AGAINST HARMFUL PARTICULATE MATTER.

American Trucking erred by preventing implementation of the revised PM standards unless the EPA articulates an "intelligible principle" to promulgate the NAAQS.¹⁷² The court mistakenly looked for an "intelligible principle" in the EPA's actions and ignored precedent that focused on statutory language. Consequently, this decision severely undermines the nondelegation doctrine by stripping Congress of its power to delegate authority to regulating agencies. Moreover, *American Trucking* should have analyzed the EPA's regulatory decisions under the arbitrary and capricious standard rather than employing a searching constitutional inquiry.¹⁷³ If the court

the arbitrary and capricious standard of review finding that the EPA failed to adequately explain where Section 109 applied to its analysis. *Id.*

170. *Id.* at 15-16. ("By treating this case as a statutory interpretation question laden with constitutional implications the panel implicitly asserts a greater role for a reviewing court than is justified.")

171. *Id.* at 4.

172. Surprisingly, the issue of judicial inquiry into the presence of an "intelligible principle" was not raised by the petitioners and was not essential to the decision. See Kass & McCarroll, *supra* note 27, at 3 (contending that the court placed the nondelegation part of the opinion in Part I of the opinion "before it was evident that much, if not all of the delegation analysis was not essential to the decision").

173. See *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1061 (D.C. Cir. 1999) (per curiam) (Tatel, J., dissenting) ("Whether EPA failed to live up to the principles it established for itself has nothing to do with our inquiry under the non-delegation doctrine. Those issues relate to whether the NAAQS are arbitrary and capricious. . . . The constitution requires that Congress articulate intelligible principles; Congress has done so here."), *modified*, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *cert. granted sub nom.* *Am. Trucking Ass'ns v. EPA*, 120 S. Ct. 2193 (U.S. May 30, 2000) (No. 99-1426); *Browner v. Am. Trucking Ass'ns*, 120 S. Ct. 2003 (U.S. May 22, 2000) (No. 99-1257).

had correctly focused on the CAA's statutory language, it would have found a determinate principle.

A. THE COURT ERRED BY SEARCHING FOR AN "INTELLIGIBLE PRINCIPLE" IN THE EPA'S ACTIONS RATHER THAN THE STATUTE.

To determine whether the 1997 PM NAAQS revision procedure presented a delegation problem, *American Trucking* examined the Agency's actions. The court scrutinized the EPA's reasoning in determining its final rule for an intelligible principle, which would provide a determinate criterion for making its decisions.¹⁷⁴ The court concluded that the EPA did not follow an intelligible principle and held that the EPA, not Congress, needed to adopt one and make the "fundamental policy choices."¹⁷⁵

The D.C. Circuit's requirement that the Agency create an "intelligible principle" reflects the court's fundamental misunderstanding of the nondelegation doctrine and the proper scope of judicial review of agency decisions. By requiring the EPA to narrow its statutory discretion, the court undercut the purposes of the nondelegation doctrine, ignored precedent, and failed to apply the correct standard of review to the Agency's decision.

1. The Court's Focus on the EPA's Action Undermines the Functions of the Nondelegation Doctrine.

The court's decision to force the EPA to articulate its own "intelligible principle" contradicts all three functions of the nondelegation doctrine. Specifically, the decision *fails* to (1) ensure that important policy choices are made by Congress; (2) guarantee that Congress guides agency action with an "intelligible principle"; and (3) guarantee meaningful judicial review.¹⁷⁶

First, making the EPA determine the scope of its own authority strips Congress of an important policy choice¹⁷⁷ because, according to the court's ruling, the EPA, not Congress, will decide how much administrative discretion it has in

174. See *supra* notes 137-41 and accompanying text.

175. *Am. Trucking*, 175 F.3d at 1038.

176. See *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring).

177. See *Am. Trucking*, 175 F.3d at 1038 (admitting this deficiency in its decision).

making future PM decisions. Consequently, the decision directly contradicts the constitutional principle that Congress should make important policy choices.¹⁷⁸ If any change in the CAA needs to be made, Congress must do it, not the Agency.¹⁷⁹ *American Trucking* also placed considerable power in the unelected judiciary by giving courts the power, without a discernible standard for judicial intervention, to strike down an agency decision, when it finds an agency has not "adequately" narrowed its statutory delegation.¹⁸⁰ *American Trucking* removes power from the people by shifting legislative duties meant for the elected Congress to the unelected EPA and the courts.

Second, the court's decision fails to guarantee that Congress will furnish agencies with an "intelligible principle" for decision-making. The court misinterpreted this function of the nondelegation doctrine by characterizing it as avoiding non-arbitrary decision-making. The Supreme Court, however, has specifically stated that the second function of the doctrine is to force Congress, not an agency, to articulate a guide for agency decision-making.¹⁸¹ *American Trucking* directly contradicted this function because the court issued the EPA a "blank check" to articulate its guiding principles. In other words, according to *American Trucking*, Congress has no constitutional burden to meet because an agency has the duty to ensure that the delegation is constitutional. Hypothetically, under this rationale, Congress could tell the EPA to "regulate air" because Congress does not have to provide an "intelligible principle"; rather this would be the Agency's responsibility. Therefore,

178. Cf. U.S. CONST. art. I, § 1.

179. See *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1150 (D.C. Cir. 1980) (stating that neither the court nor the EPA can change the NAAQS rule promulgation policy that does not consider cost or technological feasibility); cf. *TVA v. Hill*, 437 U.S. 153, 194 (1978). In *TVA*, the court followed the text of the Endangered Species Act hinting that only Congress may institute change if it is needed. See *id.*

180. The result in *American Trucking* is ironic considering the circumstances under which the nondelegation doctrine was revived. The *American Trucking* majority and other "strict constructionalists" opine that judges should not make public policy. See *supra* note 125 (describing the *American Trucking* panel majority); *supra* note 38 (describing Chief Justice Rehnquist's suggestion to reinvigorate the nondelegation doctrine). The implicit transfer of power to the judiciary clearly contradicts *Chevron* and other cases that emphasize a deferential role for the courts in reviewing agency decisionmaking.

181. Compare *Indus. Union Dept.*, 448 U.S. at 607, with *Am. Trucking*, 195 F.3d at 15.

under this hypothetical, the EPA would have to determine how to make Congress's "regulate air" instruction constitutional under the nondelegation doctrine. This would plainly violate the second function of the nondelegation doctrine by not requiring Congress to articulate a guide for agency action.

Third, meaningful judicial review is less feasible when a court focuses on the EPA's actions rather than statutory language. Due to the EPA's scientific knowledge, the Agency *could* create an intelligible principle using scientific theory and terminology.¹⁸² Although any theoretical scientific procedure should be evaluated using scientific principles, a court would evaluate it under legal principles.¹⁸³ Consequently, judicial review will probably be less meaningful because courts interpreting technical procedures generally give more deference to an agency's scientific expertise.¹⁸⁴ Hence, courts will not be able to adequately review an agency's actions when the guide (the delegation) is written in terms that are difficult to interpret. Therefore, *American Trucking's* focus on the EPA's actions directly contradicts the purposes of the nondelegation doctrine by removing power from Congress and making meaningful judicial review less feasible.

2. The Court Ignored Precedent by Analyzing the EPA's Actions For an Intelligible Principle.

Other courts searching for determinate principles have focused on statutory language. Congress, not an agency, must provide an "intelligible principle" to direct an agency's power.¹⁸⁵ This "intelligible principle" must be a defined and binding rule of conduct.¹⁸⁶ To find an "intelligible principle," courts look to

182. See *Pan Am. Grain Mfg. v. EPA*, 95 F.3d 101, 103-05 (1st Cir. 1996) (discussing the EPA's scientific expertise).

183. See *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) ("We must look at the decision not as the chemist, biologist, or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.").

184. See *supra* note 40 and accompanying text (describing the courts' deference to an agency's technical expertise).

185. See *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1473 (D.C. Cir. 1998) (stating that Congress provides the "intelligible principle," not the agency) (citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

186. See *Yakus v. United States*, 321 U.S. 414, 424 (1944) ("The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. . .").

Congress's statutory "command."¹⁸⁷ An "intelligible principle" can be derived from a statute's explicit words, purpose, legislative history, and analogous regulatory schemes.¹⁸⁸

For example, in *Touby v. United States* the Supreme Court looked at a statute and its textual constraints to determine whether the Attorney General had the authority to control substances posing an "imminent hazard to the public safety;" in other words, whether the statute presented an "intelligible principle."¹⁸⁹ The Court found an "intelligible principle" in the words of the statute and in the context in which the words were used.¹⁹⁰ In addition, the Court referred to several other statutes found to be constitutional.¹⁹¹ The specific words of those statutes provided the baseline for the determinate principle, and the statutory context restricted this baseline.¹⁹² Moreover, this type of inquiry has been followed in other cases.¹⁹³ Therefore, courts should look for the delegation in the statute because this is Congress's statement defining an agency's discretion.¹⁹⁴ *American Trucking* erred by ignoring this precedent and focusing on the EPA's actions rather than the statute.

3. The Court Applied the Wrong Standard of Review.

Under earlier caselaw and the Administrative Procedures Act (APA), the court should not have analyzed the EPA's actions under a searching and careful constitutional review.¹⁹⁵

187. See *id.* at 424-25.

188. See *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 746-48 (D.D.C. 1971).

189. *Touby v. United States*, 500 U.S. 160, 165 (1991).

190. *Id.*

191. *Id.* (citing cases in which the Court upheld terms such as "excessive profits," "fair and equitable," and "public interest" as sufficiently determinate).

192. See *id.* at 165-66.

193. See, e.g., *NBC v. United States*, 319 U.S. 190 (1943); *Milk Indus. Found. v. Glickman*, 132 F.3d 1467 (D.C. Cir. 1998); *Amalgamated Meat Cutters*, 337 F. Supp. at 737; cf. *Lichter v. United States*, 334 U.S. 742, 783-84 (1948) (finding that an agency's interpretation of a statute can be one factor in deriving an intelligible principle).

194. See *Loving v. United States*, 517 U.S. 748, 758-59 (1996).

The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Id. (citations omitted).

195. See *supra* Part I.A (describing the standards of judicial review for

American Trucking erred because Congress, not the EPA, needs to develop constitutionally determinate standards for agencies.¹⁹⁶ Under the APA, an agency's factual decisions are subject to an arbitrary and capricious standard of review.¹⁹⁷

Under the arbitrary and capricious standard of review, the EPA must demonstrate that it looked at all the applicable factors in its decision and did not commit a clear error in judgment.¹⁹⁸ The EPA's determination of the revised PM standard should follow Section 109 of the CAA and be evaluated under this type of review.¹⁹⁹ To demonstrate compliance with the statute, the EPA must rely upon substantial evidence²⁰⁰ in support of its decisions.²⁰¹ Essentially, the EPA must show that its decisions have a reasonable basis²⁰² and are not arbitrary and capricious.²⁰³ Courts apply this standard to limit agency discretion in the same way the nondelegation doctrine restricts congressional delegation.²⁰⁴

agency decisions).

196. See *supra* Part III.A.1; see also *Indus. Union Dep't v. Hodgson*, 499 F.2d 467, 476 (D.C. Cir. 1974).

197. *Supra* note 46 and accompanying text.

198. See *supra* notes 46-50 and accompanying text.

199. See *Hodgson*, 499 F.2d at 475 (stating that these judgments "are not susceptible to the same type of verification or refutation by reference to the record as are [other] factual questions").

200. See *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1147 (D.C. Cir. 1980) (recognizing the necessity of the Administrator's reliance on policy judgments when the scientific evidence is not established); *Hodgson*, 499 F.2d at 475-76 (recognizing the need to make policy judgments). In *Hodgson*, the court found that "the [Administrator] is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer." *Id.*

201. See *Lead Indus. Ass'n*, 647 F.2d at 1146; *Hodgson*, 499 F.2d at 474.

202. See *Lead Indus. Ass'n*, 647 F.2d at 1146; see also *Pan Am. Grain Mfg. v. EPA*, 95 F.3d 101, 103 (1st Cir. 1996). In *Pan American Grain*, the court stated that in areas where the EPA's expertise is implicated, a court may not substitute its judgment for that of the EPA. *Id.* at 105 (citing *Mision Indus., Inc. v. EPA*, 547 F.2d 123, 129 (1st Cir. 1976)); cf. *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 869 (D.C. Cir. 1996) (holding that the EPA has discretion to implement its regulations). The *Texas Municipal Power* court found that although the EPA did not describe its proposed methodology for allocating an emission rate for an electric utility facility, the EPA's conduct was not irrational. *Id.* The court also found that "[i]n the absence of a rule or stated policy on point, the EPA must possess a reasonable amount of discretion to implement its own regulations." *Id.* (citing *NRDC v. EPA*, 22 F.3d 1125, 1148 (D.C. Cir. 1994)).

203. See *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976).

204. See generally *Am. Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998) (remanding an EPA decision for a failure to explain the correlation of the

American Trucking should have analyzed the EPA's decision under an arbitrary and capricious standard of review. The court's primary concerns were that the Agency could set PM standards at any level—even at a hazardous level—and that the Agency had adopted a "loose interpretation of the statute."²⁰⁵ The court failed to recognize, however, that if the standards were set at a hazardous level, they clearly would not satisfy the arbitrary and capricious standard of review. Additionally, if the Agency truly did adopt a "loose interpretation" of the statute,²⁰⁶ this would represent an abuse of discretion and the decision would be invalidated under this standard of review.

Consequently, *American Trucking* should have used the arbitrary and capricious standard to resolve its concerns. Furthermore, the court's searching constitutional review directly violated the APA and precedent, which requires judicial review of agency decisions under the "arbitrary and capricious" standard of review.

B. THE CAA CONVEYS AN "INTELLIGIBLE PRINCIPLE," WHICH THE EPA FOLLOWED.

If the court had correctly focused on the statute, it would have found the "intelligible principle" for which it was searching. The determinate standard articulated in Section 109 of the CAA is a disciplined decision-making procedure—an "intelligible principle." This procedure has been upheld by earlier courts and is more definite than other sufficiently determinate "intelligible principles." Furthermore, the EPA correctly followed this intelligible principle when it promulgated the 1997 PM standards.

regulation to a public health problem).

205. *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999) (per curiam), *modified*, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *cert. granted sub nom. Am. Trucking Ass'ns v. EPA*, 120 S. Ct. 2193 (U.S. May 30, 2000) (No. 99-1426); *Browner v. Am. Trucking Ass'ns*, 120 S. Ct. 2003 (U.S. May 22, 2000) (No. 99-1257).

206. In reality, the Agency did not adopt a "loose interpretation" of the statute. See *infra* Part III.B.

1. When Science Is Uncertain, a Determinate Standard for Promulgating Health-Based Regulations Must Be a Disciplined Decision-Making Procedure.

The D.C. Circuit's suggestion that the EPA create a substantive standard for promulgating the NAAQS ignores reality. The only effective way to make an agency decision determinate and accountable, while at the same time reflecting changing science and values, is to follow a disciplined decision-making procedure.

Under the CAA, the EPA must decide where the "requisite" PM level (with an adequate margin of safety) exists. The level "requisite" to protect public health is unclear for non-threshold pollutants because the only level that could completely protect public health is zero. This, however, is not a realistic option according to the EPA, Congress, and the courts.²⁰⁷ When the level is not zero, the EPA must make a policy judgment in the absence of a determinate scientific level.²⁰⁸ The EPA must base this policy judgment on changing science and the values articulated by Congress in the CAA. Forcing the Agency to create a substantive formula to promulgate these standards will either cause the formula to be too inflexible or the true decision will be hidden under layers of artificial explanation.

For example, if the EPA develops a formula that only looks at cancer risk to determine the public health risk, and later the Agency determines that a pollutant also affects human hearing, the EPA would be forced to either neglect the protection of public health, violate its formula, or find a creative solution to the dilemma. The statute's decision-making process is the only way for the EPA to confront scientific uncertainty while avoiding excessive agency discretion.²⁰⁹

207. See *Am. Trucking*, 175 F.3d at 1038 (recognizing that the EPA does not advocate a zero-risk policy); *NRDC v. EPA*, 824 F.2d 1146, 1162-63 (D.C. Cir. 1987) (en banc) (finding that ample margin of safety for hazardous air pollutants does not require a zero-risk policy). Attaining a PM level of zero is theoretically impossible because the spreading of PM results partially from natural sources such as wind.

208. See *Am. Trucking*, 175 F.3d at 1034. The EPA must, however, take several factors into account when making its decisions. See *supra* Part I.D.

209. See, e.g., *NRDC v. EPA*, 824 F.2d 1146, 1153 (D.C. Cir. 1987) (en banc).

[W]e think it 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. . . . Congress chose instead to deal with the pervasive nature of scientific

The pre-established factors that guide Agency decisions reflect congressional values and ensure that final standards are not arbitrary. For example, the CAA's decision-making process sets forth decision-making guidelines. The CAA's "intelligible principle" mandates that the EPA must base its decisions on the criteria document, the CASAC's opinion, and public comment.²¹⁰ When regulating a non-threshold pollutant, these outside sources help the Agency make a well-reasoned decision.²¹¹ Scientific, environmental, public health, and industry perspectives are all represented in the decision-making process. Although some public comment may not focus on the protection of public health,²¹² consideration of these alternative perspectives forces the EPA to support the scientific basis for its decision.

It is impossible for Congress to anticipate every piece of scientific evidence, changing health data, technology, and science, and set a substantive standard for the EPA without bringing itself to a standstill. In addition, the EPA cannot pretend that a decision such as the revised PM standard is based on a determinate scientific principle when the science is uncertain. A disciplined decision-making process is the only way to give a scientifically uncertain decision determinacy and accountability.

2. The CAA Provides the EPA with an "Intelligible Principle."

Section 109 of the CAA provides the EPA with an "intelligible principle" because it conveys the *how*, *where*, *when*, and *why* of NAAQS rule promulgation.²¹³ Consequently, this

uncertainty and the inherent limitations of scientific knowledge by vesting in the Administrator the discretion to deal with uncertainty in each case.

Id.; see also Feller, *supra* note 79, at 836 (suggesting that the EPA may avoid facing the statistical risk dilemma by focusing on the uncertainty aspect in their decision-making).

210. See *supra* Part I.D and accompanying text.

211. See 1997 Final Rule, *supra* note 2, at 38,667.

212. Inevitably, industry produces scientific evidence for public comment reflecting its view that the regulations should be less strict. See *id.* For example, the EPA relied on public comment in favor of increased industrial feasibility when it decided to retain the PM₁₀ indicator and add the PM_{2.5} indicator, instead of utilizing a PM_{2.5-10} indicator. See *supra* note 104 and accompanying text. This reliance was found to be "arbitrary and capricious" by the court. See *supra* notes 142-47.

213. See *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1146 (D.C. Cir. 1980) (stating that the CAA establishes a "procedural framework"). But see Feller,

allows the EPA to make well-reasoned decisions despite scientific uncertainty.²¹⁴

The statutory language describes the *what* and *when* of the NAAQS promulgation process. The statute mandates that the EPA must promulgate NAAQS primary standards.²¹⁵ To guide promulgation, the statute requires that the EPA identify as "criteria pollutants" air pollutants that endanger public health and that come from diverse sources.²¹⁶ The EPA must then establish primary NAAQS for each of the criteria pollutants.²¹⁷ These standards must be promulgated after naming the criteria pollutant, and revised every five years.²¹⁸ Therefore, the statute's "intelligible principle" determines *what* air pollutants the EPA regulates and *when* it produces regulations for those contaminants.

The statute's purpose and legislative history define *why* the regulations should be promulgated. The CAA's purpose is to protect public health and welfare against harmful air pollutants.²¹⁹ As *Lead Industries Ass'n v. EPA* acknowledged, this interpretation is strengthened by the legislative history of Section 109 of the CAA, which suggests that protecting public health is of such importance that the EPA should only look at health considerations.²²⁰ The statute's determinate principle provides the EPA with the only purpose for the standards—the protection of public health.

Section 109 of the CAA also describes *how* the NAAQS decisions should be made. It mandates that regulations be set at a level "requisite" to protect public health with an adequate margin of safety.²²¹ The statute tells the EPA where to set the regulations and how much leeway it should provide for in the standards. Furthermore, Section 109 dictates the factors upon

supra note 79, at 832 (stating the CAA gives "little guidance as to how air quality standards are to be selected"). Regrettably, courts have not given much guidance to the Agency except for ruling out cost and technological considerations. *See id.*

214. *See Lead Indus. Ass'n*, 647 F.2d at 1155 ("Congress provided that the Administrator is to use his judgment in setting air quality standards precisely to permit him to act in the face of uncertainty.") (footnote omitted).

215. 42 U.S.C. § 7409(a) (1994).

216. *Supra* note 53 and accompanying text.

217. *Supra* note 56 and accompanying text.

218. *Supra* note 63 and accompanying text.

219. *Supra* note 51 and accompanying text.

220. 647 F.2d at 1148.

221. *See generally* 42 U.S.C. § 7409 (1994).

which the EPA must base its decisions. These factors include public comment,²²² a criteria document,²²³ and the recommendations of the CASAC, an independent scientific committee.²²⁴ The statute also describes several details of these factors including, for example, who each member of the CASAC must be and how many members should be on the committee.²²⁵ The EPA must consider the interests of industry, the scientific community, environmentalists, the general public, and the government in its decision. The EPA then must use health-based criteria to balance these interests. The criteria focus on the nature and severity of health effects, the types of health evidence, the kind and degree of uncertainty, and the size and nature of the population at risk.²²⁶ To summarize, Section 109 provides the EPA with an "intelligible principle" because it articulates the *how*, *where*, *when*, and *why* of the NAAQS rule promulgation.

3. Courts Have Already Found Section 109 of the CAA Determinate.

Although no court has examined Section 109 for an "intelligible principle," in *Lead Industries Ass'n*, the D.C. Circuit found the statutory language provided "adequate support" for the Administrator to make a NAAQS regulation decision.²²⁷ According to *Lead Industries Ass'n*, the statutory language defined a basis for the NAAQS's decisions because it forced the Agency to look at the criteria document, expert testimony, and public comment to support its factual findings and policy judgments.²²⁸ In other words, the statute's

222. *Id.* § 7409(a)(1)(B).

223. *See supra* note 54 and accompanying text.

224. *See supra* note 64 and accompanying text.

225. *See id.*

226. *See Lead Indus. Ass'n*, 647 F.2d at 1161.

227. *Id.* at 1146. The lead industries argued that the EPA did not adequately explain how it determined the maximum safe blood level for lead. *Id.* at 1157. The court found, however, sufficient support for the EPA's decision in the criteria document. *Id.* at 1158. Furthermore, the court stated that the "Administrator's decision is, of course, precisely the sort of issue that Congress specifically left to his judgment, and where there is evidence in the record which supports these judgments, this court is not at liberty to substitute its judgment for the Administrator's." *Id.*

228. *See id.* at 1158. Even if the experts' views differ, the court noted that "[i]t is not our function to resolve disagreement among the experts or to judge the merits of competing expert views." *Id.* at 1160 (citing *AFL-CIO v. Marshall*, 617 F.2d 636, 651 n.66 (D.C. Cir. 1979), *vacated sub nom. Cotton*

delineation of *how* the NAAQS should be promulgated has been found to be sufficient to support an Agency decision.

Other cases have also upheld challenges to Section 109.²²⁹ For example, in *NRDC v. EPA*, industrial interests argued that the EPA's procedure for determining the 1987 PM NAAQS was unrestrained and could "justify virtually any number on the same basis. . . ." ²³⁰ The D.C. Circuit rejected this argument and found that the EPA's decision was reasonable because the data provided no clear thresholds, so the "Administrator needed to select a level along a continuum of responses."²³¹ By raising the nondelegation issue in light of this precedent, *American Trucking* erroneously implied that these decisions were incorrectly decided. These decisions should not be questioned because they all correctly found that Section 109 provides an "intelligible principle."

4. Section 109 Is More Determinate than Other Statutory Language.

Compared with the language of other statutes, the language of Section 109 sets forth a determinate principle. The language requiring the protection of public health, at a "requisite" level, and with "an adequate margin of safety" is far more definite than the language found in other statutes.

In *Yakus v. United States*, for example, the Supreme Court upheld the Emergency Price Control Act, which allowed the Administrator to set prices that were "generally fair and equitable."²³² Focusing on the text of this delegation, the word "generally" means "usually,"²³³ which illustrates that prices need not always be fair and equitable. On the other hand, "adequate," as found in Section 109, means the regulation must be "sufficient to satisfy a requirement."²³⁴ This modifier, unlike the word "generally," does not afford the EPA any discretion.²³⁵

Warehouse Ass'n v. Marshall, 449 U.S. 809 (1980)).

229. See, e.g., *NRDC v. EPA*, 902 F.2d 962 (D.C. Cir. 1990) (upholding the 1987 PM revisions); *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981) (upholding the 1979 ozone revisions).

230. *NRDC*, 902 F.2d at 969.

231. *Id.*

232. 321 U.S. 414, 420 (1944).

233. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1996), available at <http://www.dictionary.com/cgi-bin/dict.pl?term=generally> (last visited Aug. 28, 2000).

234. *Id.*, <http://www.dictionary.com/cgi-bin/dict.pl?term=adequate>.

235. But see *Lead Indus. Ass'n*, 647 F.2d at 1152.

The Supreme Court has also upheld the FCC's authority under the Federal Communications Act to regulate "as public convenience, interest, or necessity requires."²³⁶ Similarly, the Court has approved the FCC's authority under the Communications Act to regulate to "protect the public interest."²³⁷ Section 109's language is more definite than these delegations because the statute states the regulation must be at a level requisite to protect public health. The regulation of health is more definite than the regulation of public interest because "public interest" may include any number of factors relating to social, economic, political, or health concerns.

Agency authority to determine "just and reasonable" rates has also been upheld as sufficiently determinate.²³⁸ Words such as "reasonable" and "fair" are indefinite because perceptions of what constitutes fairness and reasonableness differ greatly across viewpoints. Use of the term "requisite," on the other hand, requires the Agency to find the level *necessary* to protect public health. Because this affords less room for discretion, Section 109's "requisite" language is more definite. In sum, the Supreme Court should uphold the statutory language of Section 109 because it is more definite than statutory language upheld by previous courts.

5. The EPA Followed Section 109's "Intelligible Principle."

In 1997, PM was already a criteria pollutant, so the EPA only had to follow the procedure for revising the NAAQS.²³⁹ Accordingly, the EPA gathered information from public comment, the criteria document, the staff paper, and the CASAC to make its decision.²⁴⁰

The EPA used this information to produce PM standards "requisite" for the protection of public health with "an adequate margin of safety."²⁴¹ The PM₁₀ level is a necessary standard for coarse PM because it is the level at which particles penetrate

236. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (citation omitted).

237. *NBC v. United States*, 319 U.S. 190, 222 (1943) (upholding FCC authority under the 1934 Communications Act to regulate broadcast licensing in the public interest).

238. *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (upholding the Federal Power Commission's authority to determine "just and reasonable" rates).

239. *Supra* notes 75-85 and accompanying text.

240. *Supra* Part I.D.

241. *See* 1997 Final Rule, *supra* note 2.

the thoracic region.²⁴² Although there was no scientific evidence available to produce a determinate level for fine PM, the EPA used all of the information above and made a policy judgment.²⁴³ Ultimately, the EPA's 1997 PM NAAQS promulgation involved a lengthy and costly process, which considered presentations by EPA staff, various states, environmental organizations, and industry.²⁴⁴ The final rule demonstrates that the EPA followed the statute's "intelligible principle" because it followed all of the procedures outlined in the statute. Therefore, the *American Trucking* court erred by failing to find that the EPA followed an "intelligible principle" during the 1997 PM NAAQS revisions.

C. FORCING THE EPA TO ARTICULATE A DETERMINATE STANDARD WILL WASTE SCARCE RESOURCES MEANT TO PROTECT THE PUBLIC.

Forcing the EPA to search for a more determinate principle will result in higher administrative cost while failing to reduce uncertainty. The rule-making procedure already employs several costly and time-consuming steps, which fail to produce concrete answers.²⁴⁵ Even with additional or different steps, the EPA will still have to make a balancing decision because non-threshold pollutants have no definite "requisite" level above zero.²⁴⁶ The CAA's purpose is to promulgate standards that protect public health.²⁴⁷ Public health is not adequately served through the production of more paperwork only to arrive at a final decision that may not be any more certain than before.

The court's suggestion to use unit of harm analysis will also involve more administrative cost, while resulting in the same uncertainty.²⁴⁸ This approach is not feasible in the realm of environmental law for several reasons. First, the Oregon model attempts to allocate scarce resources in an economically efficient manner; essentially it balances two variables:

242. See *supra* note 100 and accompanying text.

243. See *supra* note 98 and accompanying text.

244. See Kass & McCarroll, *supra* note 27, at 3 (describing the rulemaking process as "complex and lengthy").

245. See, e.g., *supra* Part I.D.

246. See *supra* note 128 and accompanying text.

247. See *supra* note 51 and accompanying text.

248. See *supra* notes 139-41 and accompanying text (discussing the generic unit of harm criteria).

economic cost and health. In contrast, the EPA's NAAQS rulemaking decisions may not be influenced by economic cost. Moreover, the EPA's resources protect the entire population, not a select percentage of the population, so there is no need to allocate funding in the same way. Furthermore, even if the EPA obtained all the information contained in the Oregon plan, it would inevitably have to make the same line-drawing conclusions.²⁴⁹ Therefore, the court's suggestion to find a hypothetical formula in order to weigh environmental and public health is presumptuous and infeasible.

The *American Trucking* decision is particularly galling given that the controversy over these standards centers on a battle between competing interests: economic cost and the protection of human life.²⁵⁰ This is a battle the industrial coalition should fight (and *has* fought and lost) in Congress, and not in the courts. If not reversed, *American Trucking*, ironically, will only waste money and time, inevitably hurting both sides of the debate. The public, including industry, will have to pay for the additional procedures suggested by the court. In addition, this decision endangers the entire structure of agency rulemaking, including economic rules favored by industry.

CONCLUSION

Under the CAA, Congress articulated a procedure for the EPA to follow during the NAAQS revisions. EPA followed this procedure when it promulgated the 1997 revisions to the PM standard. In *American Trucking*, however, the court invalidated this procedure and introduced more uncertainty in this already scientifically uncertain area of law.

The *American Trucking* court committed several errors. First, the court erred by looking for an "intelligible principle" in the EPA's actions. Second, the court did not examine the EPA's decisions under an arbitrary and capricious standard of review; rather, it engaged in a searching constitutional review. Finally, the decision results in severe delegation problems

249. See Kass & McCarroll, *supra* note 27. This approach would inevitably leave the EPA in its original position "of having a great deal of information concerning the perceived and relative public health impacts of various pollutants but still having to select a NAAQS using its best judgment." *Id.* at 35.

250. See *supra* notes 115-18 and accompanying text (describing the industrial coalition and the coalition's goals).

because it takes away congressional power and gives it to agencies. The court's focus on agency action ignores precedent, by not looking to the CAA for a determinate standard.

Ultimately, the *American Trucking* decision is flawed because the EPA *did* follow an "intelligible principle" and this principle is articulated in the CAA. Section 109 of the CAA sets out a disciplined decision-making process that constitutes an intelligible principle. The language has been upheld by previous courts and is more definite than other statutory language found constitutional by other courts. If this decision is not reversed, it could severely limit the public's protection against dangerous air pollutants such as PM. *American Trucking's* wrong turn needs to be turned back around.