No. 99-1257

IN THE SUPREME COURT OF THE UNITED STATES

CAROL M. BROWNER ADMINSTRATOR OF ENVIORONMENTAL PROTECTION AGENCY

v.

AMERICAN TRUCKING ASSOCTIATION INC

BRIEF FOR RESPONDENT
APPALACHIAN POWER COMPANY, ET AL

FILED SEPTEMBER 11, 2000

PETER S. GLASER
SHOOK, HARDY & BACON
600 14th Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 639-5627
Counsel for Western Fuels Association, Inc.

NEWMAN R. PORTER
LEWIS AND ROCA
40 N. Central Avenue
Phoenix, AZ 85004
(602) 262-5786
Counsel for Nevada Mining Association, Newmont Gold Company, and Meridian Gold Company

DAVID M. FLANNERY
JACKSON & KELLY
P.O. Box 553
1600 Laidley Tower
Charleston, WV 25322
(304) 340-1017
Counsel for Midwest Ozone Group and West Virginia Chamber of Commerce

KURT E. BLASE
O'CONNOR & HANNAN
Suite 500
1666 K Street, N.W.
Washington, D.C. 20006-2803
(202) 887-1400
Counsel for Kennecott Holdings Corporation, Kennecott Energy and Coal Company, Kennecott Services Company, and National Stone Association

DUANE J. DESIDERIO
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 861-2146
Counsel for National Association of Home Builders

MAURICE H. MCBRIDE
NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION
1899 L Street, N.W.
Washington, D.C. 20036
(202) 457-0480
Counsel for National Petrochemical & Refiners Association

TIMOTHY L. HARKER
THE HARKER LAW FIRM
9500 Accord Drive
Potomac, MD 20854
(301) 983-0964
and
THOMAS J. GRAVES
NATIONAL PAINT AND COATINGS ASSOCIATION, INC.
1500 Rhode Island Ave., N.W.
Washington, D.C. 20005
(202) 462-6272
Counsel for National Paint and Coatings Association

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 789-6000
Counsel for Phoenix Cement Company

QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency ("EPA" or "the Agency") revised National Ambient Air Quality Standards ("NAAQS") promulgated under Section 109 of the Clean Air Act, 42 U.S.C. § 7409, for the Agency to develop an intelligible principle for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the court had jurisdiction to review final action taken by the EPA Administrator under the Clean Air Act which resolved the question of whether the congressional "Subpart 2" ozone risk management program restricted EPA's authority to adopt and enforce a more stringent ozone NAAQS.

3. Whether the comprehensive and long-term risk management program Congress enacted to ensure reductions of ozone in the ambient air restricted EPA's authority to establish a more stringent ozone NAAQS.

AMENDED DISCLOSURE STATEMENT

1. Pursuant to Supreme Court Rule 29.6 and the Corporate Disclosure Statement filed by Appalachian Power Co., *et al.*, in its Response to the Petition for Writ of Certiorari filed in this case, the following list discloses additional parent companies, and publicly held companies that own 10% or more, of any party joining in this brief.

   Carolina Power & Light Co.
   (10% or greater owner: State Street Bank & Trust Co. Boston)
   Illinois Power
   (a subsidiary of Dynergy, Inc.)
   Kennecott Energy and Coal Co.
   (an indirect subsidiary of Rio Tinto PLC)
   Kennecott Holdings Corporation
   (an indirect subsidiary of Rio Tinto PLC)
   Kennecott Services Company
   (an indirect subsidiary of Rio Tinto PLC)
   Otter Tail Power Co.
   (10% or greater owner: Otter Tail Power Co. ESOP)

2. The following parties joining this brief have no parent corporations, and no publicly-held companies have a 10% or greater ownership interest in these parties.

   American Chemistry Council (formerly Chemical Manufacturers Association)

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GLOSSARY

The following is a glossary of acronyms and abbreviations used in this brief.

Act	Clean Air Act
Administrator	Administrator of the United States Environmental Protection Agency
Agency	United States Environmental Protection Agency
APC	Appalachian Power Co., *et al.*
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
OJA	Joint Appendix in D.C. Cir. Case No. 97-1441
OSP	Ozone Staff Paper

PM	Particulate Matter
PM_{10}	Particulate Matter with an aerodynamic diameter less than or equal to 10 microns
$PM_{2.5}$	Particulate Matter with an aerodynamic diameter less than or equal to 2.5 microns
PMJA	Joint Appendix in D.C. Cir. Case No. 97-1440
PPM	Parts Per Million
PMSP	Particulate Matter Staff Paper
Subpart 1	Subpart 1 of Part D of Title I of the Clean Air Act
Subpart 2	Subpart 2 of Part D of Title I of the Clean Air Act

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following additional statutory and regulatory provisions are involved in this case: CAA §§ 101(b), 182-185B, and 307(b); 40 C.F.R. § 50.9(b).[1]

STATEMENT OF THE CASE

A fundamental principle of our system of government is that executive branch agencies may exercise only that power that Congress has delegated to them. While Congress often delegates in broad terms in areas that are technically and scientifically complex, that delegation must specifically provide—or the executive branch agency must derive from the authorizing legislation—an intelligible principle that constrains the agency's discretion in a manner consistent with the congressional delegation. Just as no executive branch agency may exercise a policy judgment that Congress has not delegated to it, no executive branch agency may substitute its policy judgment for that of Congress.

The actions of the Environmental Protection Agency ("EPA" or "the Agency") at issue here violate this principle. In 1997, citing the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7401 *et seq.*, and the policy judgment of its Administrator, EPA replaced existing National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter ("PM") with revised standards. In each instance, while EPA characterized ranges of health risks associated with alternative standards, the Agency did not articulate any principle based on the Act to guide its exercise of risk

[1] These provisions are reproduced in the attached Appendix ("App.___"), or the Appendix to Conditional Cross-Pet. in Case No. 99-1431.

management judgment in selecting standards from that range of risks. By revising the ozone NAAQS, EPA also replaced the statutory program for reducing ozone enacted by Congress in 1990 with a more stringent program of EPA's own creation.

Because EPA's actions are incompatible with the scope of authority delegated to that Agency by Congress, they must be vacated. The Court should instruct EPA that Congress has not authorized it to establish a more stringent ozone NAAQS and that, in promulgating a NAAQS, it must articulate the principle, based on the Act, that it applies in exercising its risk management judgment.[2]

I. THE STATUTORY SCHEME.

A. The NAAQS Program.

The NAAQS program is the centerpiece of the Clean Air Act. It requires a joint effort by EPA and the States, with EPA responsible for establishing NAAQS and the States responsible for implementing them.

NAAQS apply to air pollutants that EPA finds "may reasonably be anticipated to endanger public health or welfare" and that result from "numerous or diverse" mobile and stationary sources. CAA § 108(a). Prior to setting standards, EPA must prepare a "criteria document" that "accurately reflects the latest scientific knowledge useful in

[2] While the reviewing court correctly objected to EPA's construction of the statute as providing no intelligible principle for risk management decisions, as Appalachian Power Co., *et al.*, ("APC") and American Trucking Associations, Inc., *et al.*, ("ATA") explain in Case No. 99-1426, the Act provides the basis for such a principle. Acceptance of the arguments in Case No. 99-1426 regarding the proper construction of the Act would require that the revised standards at issue here be vacated.

indicating the kind and extent of all identifiable effects on public health or welfare" of varying quantities of the pollutant in the ambient air. CAA § 108(a)(2); *see also* Br. for Resp'ts Appalachian Power Co., *et al.*, in Support of Pet'rs (99-1426) 6, 37-39 [hereinafter "APC Br."].

Based on the criteria document, the Agency sets "primary" NAAQS at a level "requisite to protect the public health" with an "adequate margin of safety," and "secondary" NAAQS at a level "requisite to protect the public welfare from any known or anticipated adverse effects." CAA § 109(b). NAAQS may be revised "as may be appropriate" in accordance with §§ 108 and 109(b). CAA § 109(d); *see* APC Br. 39-42.

In promulgating or revising NAAQS, EPA must consult an independent scientific review committee—the Clean Air Scientific Advisory Committee ("CASAC")—that advises the Agency on (1) the "adequacy" and "basis" for existing and revised NAAQS, (2) "the relative contribution to air pollution concentrations of natural as well as anthropogenic activity," and (3) "any adverse public health, welfare, social, economic, or energy effects" from different approaches to NAAQS implementation. CAA § 109(d).

B. Application and Enforcement of NAAQS.

In order to implement a NAAQS, States are responsible for identifying and submitting to EPA a list of areas to be designated "attainment" (meeting the standard), "nonattainment" (not meeting the standard), or "unclassifiable." CAA § 107(d)(1)(A). EPA then promulgates these designations, making "such modifications as the Administrator deems necessary." CAA § 107(d)(1)(B). At that time, EPA "may classify" nonattainment areas to provide an attainment date or "for other purposes" *unless* "classifications are specifically

provided under other provisions" of the Act. CAA § 172(a)(1)(C).

Once areas are designated and, if appropriate, classified pursuant to the Act, States are responsible for adopting State Implementation Plans ("SIPs") that provide for "implementation, maintenance, and enforcement" of the NAAQS. CAA § 110(a). For areas that are designated nonattainment, the SIP must "meet the applicable requirements of Part D." CAA § 110(a)(2)(I). General requirements for nonattainment area plans are found in Subpart 1 of Part D of Title I of the Act. CAA §§ 171-179B.

In 1990, Congress recognized that, for a variety of reasons, the general classification and planning provisions of Part D of the Act were not appropriate to address ozone nonattainment and ozone "maintenance" based upon the established 1-hour ozone NAAQS.[3] Reflecting the failure of many areas to attain the ozone NAAQS,[4] as well as Congress' determination that massive economic dislocation and impossible deadlines driven by the general planning provisions were neither necessary nor appropriate responses to ozone health risks,[5] Congress in 1990 designated the 1977

[3] H.R. Rep. No. 101-952, at 335 (1990), *reprinted in* 1 Sen. Comm. on Env't and Pub. Works, 103d Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1990*, at 1785 (Comm. Print 1993) [hereinafter *1990 Legis. Hist.*], OJA 3546; *see also* H.R. Rep. No. 101-490, pt. 1, at 146-49 (1990), *reprinted in* 2 *1990 Legis. Hist., supra*, 3170-72, OJA 3557-59; 136 Cong. Rec. 130-33 (Jan. 23, 1990), *reprinted in* 4 *1990 Legis. Hist., supra*, 4832-39 (Sen. Chafee); APC Br. 15-17.

[4] H.R. Rep. No. 101-490, pt. 1, at 229-31, *reprinted in* 2 *1990 Legis. Hist., supra* note 3, at 3253-55, OJA 3598-3600.

[5] *See supra* note 3.

Amendments' General Provisions "Subpart 1" of Part D of Title I of the Act, and added a new Subpart 2 to Part D of Title I. Subpart 2 "specifically provide[s]" for ozone classifications and, based on those classifications, for detailed regulatory requirements that Congress had concluded would represent a pragmatic solution to reducing ozone concentrations throughout the country. *See* CAA §§ 181-185B.

Subpart 2 comprehensively addresses classification of areas and control programs for ozone. It explains how areas designated nonattainment for ozone are to be regulated, and includes specific regulatory programs for volatile organic compounds and nitrogen oxides, substances that contribute to ozone formation. *See, e.g.*, CAA § 182.

Subpart 2 also imposes requirements on areas that attain the ozone NAAQS. As an example of the specificity of the balances struck by Congress even for "attainment areas," each metropolitan area with a population of 100,000 or greater in the Northeastern States "ozone transport region" established by Congress in Subpart 2 must adopt an enhanced vehicle inspection and maintenance program. CAA § 184(a), (b)(1)(A). And nonattainment areas that achieve attainment are subject to "maintenance plans" that "include a requirement that [if the NAAQS is again violated,] the State will implement all measures [including Subpart 2 requirements]. . . that were contained in the State implementation plan for the area before redesignation" to attainment. CAA § 175A(d).

In short, Congress "stood up to the plate" in Subpart 2 and defined a risk management program to resolve the health risks from ozone, rather than continuing the politically "feel good" deadlines and control strategies that failed under Subpart 1. Subpart 2 is Congress' comprehensive and long-

term program to reduce health risks associated with ozone concentrations in the ambient air.

II. THE 1997 OZONE AND PM NAAQS REVISIONS.

Both ozone and PM have been the subject of NAAQS since the beginning of the ambient standards program. Ozone has been subject to a 1-hour NAAQS of 0.12 ppm that EPA established in 1979 and reaffirmed in 1993 as protective of public health with an adequate margin of safety. 58 Fed. Reg. 13008, OJA 3449. PM has been subject to annual and 24-hour NAAQS that use PM_{10} as a size indicator, and that were adopted in 1987 in place of earlier, less stringent standards measuring PM as Total Suspended Particulate (TSP). 52 Fed. Reg. 24634, PMJA 208.

In its brief, EPA asserts that scientific evidence that has emerged since these NAAQS were last reviewed shows that the existing standards fail to protect "millions of Americans from adverse health effects." EPA Br. 2. According to EPA, "a wide range of adverse health effects *were occurring* at concentrations below the pre-existing PM and ozone NAAQS." *Id.* 31 (emphasis added). But these assertions are not the stated basis for the revised NAAQS and, indeed, do not reflect the rulemaking records.[6]

Far from reflecting a response to demonstrated adverse public health effects, EPA's rulemaking determinations represent a "policy choice" to provide more "margin of safety" in light of "uncertainties associated with inconclusive scientific and technical information" and "hazards that

[6] 62 Fed. Reg. 38656, PMJA 6 (PM risk estimates "should not be viewed as demonstrated health impacts"); *see also* EPA, *Review of National Ambient Air Quality Standards for Ozone* 104 (1996) [hereinafter *OSP*], OJA 1914 (ozone risk estimates are not "demonstrated health impacts").

research has not yet identified." 62 Fed. Reg. 38857, OJA 2; *id.* 38653, PMJA 3.[7] This is because, contrary to EPA's assertions, the rulemaking records contain estimates of health *risk,* not demonstrated adverse public health effects that are occurring as a result of exposure to these pollutants.[8] The existence of such risks was recognized in previous NAAQS proceedings and, as EPA's risk assessments show, are also addressed by the existing NAAQS.[9]

As a result, as the record of these proceedings and the Agency's decisions show, this case is *not* about whether or not EPA can regulate based on predictions of health risk. Rather, it is about EPA's failure to exercise reasoned public health risk management judgment as to the level of protection that is "appropriate" among a range of "risk" options.

A. The Administrative Record on Ozone.

Reflecting that the rulemaking to revise the ozone NAAQS was based on small, predicted health risks, the

[7] *See also* EPA Br. (D.C. Cir. 97-1441) 35 (EPA "appropriately applied margin of safety considerations in choosing among options."); *id.* 48.

[8] *See, e.g.,* 62 Fed. Reg. 38665, PMJA 15 ("[T]he Administrator believes that it is more appropriate to provide additional protection against the risk posed by PM by adding new standards for the fine fraction of PM_{10}"); *id.* 38863, OJA 8 (explaining that the Administrator sought to reduce risk).

[9] *See* 58 Fed. Reg. 13015, OJA 3456 (lung function changes even on days when the NAAQS was not exceeded); 52 Fed. Reg. 24642, PMJA 216 (noting the data suggest a "continuum of response" with the risk "decreasing with concentration"); *see also OSP, supra* note 6, at 24, OJA 1834 ("Prior to completion of the previous review . . . there was a substantial data base defining health effects of [ozone]."); 43 Fed. Reg. 26964, OJA 3518 (discussing range of health risks considered in establishing 1979 NAAQS). Nor do the revised standards eliminate the risk. EPA has not identified any level that is without risk for either pollutant.

Administrator's science advisers (CASAC) questioned the need for the revised ozone NAAQS. As CASAC concluded:

> [T]here is no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedences) as being significantly more protective of public health. For example, the differences in the percent of outdoor children . . . responding between the present standard and the most stringent proposal . . . *are small and their ranges overlap for all health endpoints*.[10]

The administrative record on ozone sheds light on CASAC's concerns regarding appropriate standard revisions. The record shows that, while attaining the existing 1-hour ozone NAAQS would not eliminate all health risk associated with exposure to ozone, a new NAAQS would not necessarily reduce the remaining risk, and might even increase it. The question EPA confronted therefore was what level of health "risk" is "requisite" to protect the "public health" given this record.

EPA's own risk assessment found that the range of estimated risk (expressed as the number or percent of individuals in the sensitive population (outdoor children)[11]

[10] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner 3 (Nov. 30, 1995) [hereinafter CASAC Ozone Letter], OJA 238 (emphasis added). EPA is simply wrong when it states that CASAC "did not mean" that "the public health effects were the same at any level" within the range. *See* EPA Br 33 n.23.

[11] Because the risk assessment focuses on the sensitive subpopulation and because it took into account the full range of dose/response information contained in the health studies, it reflects responses by sensitive, as well as typical, individuals.

predicted to respond to ozone at least once a year) overlapped with the range of estimated risk if EPA retained the existing standard.[12] The overlap occurred for all the various types of health effects that were analyzed. In fact, for approximately one-third of the population evaluated, the new standard could place the population at greater risk than if the standard remained unchanged.[13]

Thus, EPA staff acknowledged that ranges of estimated risk were little different for the 1-hour and 8-hour ozone NAAQS.[14] In fact, the staff concluded that an 8-hour NAAQS of 0.09 ppm (which they indicated would be roughly equivalent to the 1-hour NAAQS) "would reduce estimated exposures of the at-risk population sufficiently to provide some margin of safety."[15]

CASAC agreed. The Committee endorsed the full range of options suggested by the staff, including no increase in the

[12] *See* CASAC Ozone Letter, *supra* note 10, at 3, OJA 238. Moreover, this risk assessment did not even comprehensively address the uncertainties in the data. APC Br. 11 & nn.16-20; *see also* CASAC Ozone Letter, *supra* note 10, at 2, OJA 237 (large uncertainties exist in the risk estimates); *OSP*, *supra* note 6, at 55, OJA 1865 (noting that children do not appear to experience the symptoms from ozone exposure that are modeled in the risk assessment).

[13] 62 Fed. Reg. 38867, OJA 12; *OSP*, *supra* note 6, at 80, OJA 1891. Similarly, asthmatic hospital admissions in New York City were predicted either to decrease slightly (0.2%) or increase slightly (0.03%) depending on the form of the 0.08 ppm 8-hour standard. (EPA selected a form for the standard that was between the two options evaluated.) *See* Non-State CAA Pet'rs and Intervenors' Br. (D.C. Cir. 97-1441) 52.

[14] *OSP*, *supra* note, 6, at 125, 130, OJA 1935, 1940; Memorandum from Harvey M. Richmond to Karen Martin 5 (Feb. 11, 1997), OJA 2318.

[15] *OSP*, *supra* note 6, at 167, OJA 1977; *see also* APC Br. 10-13, for further discussion of the ozone record.

stringency of the standard.[16] In fact, of the ten CASAC panel members who expressed their opinions, four specifically recommended an 8-hour NAAQS no more stringent than the existing NAAQS and three others included 0.09 ppm within their recommended range.[17] Because of overlapping risk estimates, CASAC indicated that EPA's selection of a specific standard would have to reflect "policy judgment."[18]

But what decisional standard would govern that "policy judgment"? CASAC provided no answer and was even told by EPA not to provide information called for by the Act (e.g., "implementation impacts") that could inform that policy judgment.[19]

B. The Administrative Record on PM.

Although recommending the adoption of a NAAQS for fine PM, CASAC noted "the many unanswered questions and uncertainties regarding the issue of causality" of health effects by the pollutant, which created uncertainty about the level of health protection under a revised standard. These

[16] CASAC Ozone Letter, *supra* note 10, at 3, OJA 238.

[17] *Id.*, OJA 238. Thus, whatever concerns CASAC may once have had with the adequacy of the protection provided by the existing standard, *see* EPA Br. 13 (citing a letter written by CASAC in 1989), after reviewing the latest scientific information as presented in the *OSP* and Criteria Document the majority of CASAC was comfortable with recommending a standard at the stringency of the existing one.

[18] CASAC Ozone Letter, *supra* note 10, at 3, OJA 238.

[19] *Compare* CASAC Tr. (3/21/95), 36-39, OJA 253-54 (EPA's Gleason states that CASAC's responsibilities concerning implementation strategies are "irrelevant to how we set standards"), *with* CASAC Tr. (3/19/95), 37-38, OJA 285-86 (CASAC member Price notes a "bit of a conflict" with EPA in that there "is not that review" of the "the interface of science and control strategy issues" called for by the Act).

uncertainties affecting EPA's risk characterization included: "exposure misclassification, measurement error, the influence of confounders, the shape of the dose-response function, . . . the lack of an understanding of toxicological mechanisms, and *the existence of possible alternative explanations*."[20] As a result, CASAC was unable to form a consensus on appropriate NAAQS for fine PM.[21]

Confirming CASAC's concerns, EPA staff "emphasize[d] the *unusually large uncertainties*" associated with establishing standards for $PM_{2.5}$.[22] These uncertainties included the "lack of demonstrated mechanisms" that "limits judgments about causality of effects and appropriate concentration-response models to apply in quantitatively estimating risks" associated with $PM_{2.5}$.[23]

EPA staff also acknowledged "the question as to whether or to what extent the observed effects attributed to PM exposures are confounded by other pollutants commonly occurring in community air."[24] The EPA staff noted that

[20] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner 3 (June 13, 1996) [hereinafter CASAC PM Letter], PMJA 3163 (emphasis added).

[21] *Id.* 2, PMJA 3162.

[22] EPA, *Review of the National Ambient Air Quality Standards for Particulate Matter* VII-41 (1996) [hereinafter *PMSP*], PMJA 2153 (emphasis added).

[23] *Id.* VII-42, PMJA 2154.

[24] *Id.*, PMJA 2154. A "confounder" in an epidemiological study is an "independent risk factor [e.g., another pollutant] for the outcome" (e.g., mortality) that is "associated with the exposure variable" (e.g., ambient PM). EPA, *Air Quality Criteria for Particulate Matter* 12-24 (1996) [hereinafter *PMCD*], PMJA 1398. Failure to consider a "confounder" in

several authors "have demonstrated that it may not be possible to separate individual effects of multiple pollutants."[25] The staff recognized that, even when statistically significant, reported associations between particulate matter and health effects were "weak" and the "'relative risks'" were "consistently 'small'"[26]—indeed, so small that epidemiologists are generally reluctant to believe such risk findings.[27]

Furthermore, while EPA emphasizes that a number of epidemiological studies addressed PM effects, EPA Br. 9, most of those studies involved PM size fractions other than the $PM_{2.5}$ fraction that EPA chose to regulate.[28] And most of

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an epidemiological study may produce inaccurate or exaggerated associations with the variable of concern (i.e., PM).

[25] *PMSP*, *supra* note 22, at VII-42 to VII-43, PMJA 2154-55.

[26] *PMCD*, *supra* note 24, at 12-346 to 12-347, PMJA 1720-21.

[27] *See* Gary Taubes, *Epidemiology Faces Its Limits*, 269 Science 164, 168 (1995), PMJA 3134. While EPA argues that the concept of statistical significance can be used to separate associations that "may reflect cause-and-effect relationships" from those that may be the product of "chance," EPA Br. 9 n.10, statistical significance "only takes into consideration random variation in the data. It ignores the systematic errors, the biases and confounders, that will almost invariably overwhelm the statistical variation." Taubes, *supra*, at 168, PMJA 3134 (*citing* Norman Breslow, University of Washington). In short, the existence of a statistically significant association does not establish either causality or the significance of health risk.

[28] *See* 62 Fed. Reg. 38676, PMJA 26 (*citing PMSP*, *supra* note 22, at V-60b to V-60c, V-61a, PMJA 2023-24, 2026). While several studies are listed in the tables relied on by EPA, only Schwartz, *et al.* (1996), Thurston, *et al.* (1994), Schwartz, *et al.* (1994), Dockery, *et al.* (1993), and Pope, *et al.* (1995) reported a statistically significant relationship with $PM_{2.5}$. Two studies in those tables reported no statistically significant association between $PM_{2.5}$ and the studied effects, Ostro, *et al.*

those studies ignored the important effect of confounders (e.g., the presence of other pollutants or other variables that could have produced the effect). *See supra* note 27.

The record showed that in six of seven studies in which confounders were fully analyzed, the initial association reported between PM and health effects lost statistical significance.[29] As the staff acknowledged, therefore, studies that failed to consider a full array of confounders "probably overestimate[d] the PM effect."[30] Yet, during the rulemaking, EPA consistently denied to the public data needed to analyze the role of confounders in the critical $PM_{2.5}$ studies.[31]

Although EPA put forward quantitative projections of the health impacts of low levels of $PM_{2.5}$, the uncertainties in the science were so great that Agency staff warned that its "risk estimates . . . should *not* be interpreted as precise measures of risk."[32] Similarly, CASAC noted that the risk assessment did

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(1993) and Neas, *et al.* (1995). The daily $PM_{2.5}$ levels were as high in the studies that did not report statistical significance as in the ones that did.

[29] *See* Non-State Fine PM Pet. Br. (D.C. Cir. 97-1440) 17.

[30] *PMCD*, *supra* note 24, at 12-333, PMJA 1707.

[31] EPA did not make the data available even though EPA itself had funded the most critical studies and despite a requirement that "the factual data on which the proposed rule is based" be placed in the public docket. *See* CAA § 307(d)(3). EPA's failure to place these data in the docket, and its implications for the validity of the $PM_{2.5}$ standards, was one of the issues that the lower court said it would resolve only after EPA responded to the court's remand. Non-State Fine PM Pet. Br. (D.C. Cir. 97-1440) 33-44; 175 F.3d 1034, Pet. App. 5a.

[32] *PMSP*, *supra* note 22, at VI-1, PMJA 2051 (emphasis added). Among the uncertainties acknowledged by EPA staff were "uncertainties in the concentration-response" relationship, use of ambient concentrations "as a

not include all of the uncertainties and that the combined effect of those uncertainties was not examined.[33] Thus, EPA's risk assessment was simply "premised *on the assumption* that PM (measured as PM_{10} and $PM_{2.5}$) is causally related to the health effects observed in the epidemiological studies and/or that PM is a useful index for the mixture of pollutants that is related to these effects."[34]

For these reasons, CASAC observed that EPA's risk assessments were of "limited value" for identifying an appropriate standard[35] and noted "the existence of possible alternative explanations" for the effects examined in the risk assessment.[36] While most of the science advisers endorsed the concept of a $PM_{2.5}$ standard, only 2 of 21 specifically recommended an annual NAAQS as stringent as the one EPA

surrogate for population exposures," the lack of site-specific risk estimates for $PM_{2.5}$, and uncertain estimates of baseline incidence of hospital admissions and respiratory symptoms. *Id.* at VI-1, VI-7, VI-14, VI-21, PMJA 2051, 2058, 2066, 2073. EPA assumed there was no threshold for the effects. *PMSP, supra* note 22, at VI-16; PMJA 2068.

[33] CASAC PM Letter, *supra* note 20, at 3, PMJA 3163; *see also* Leland Deck, *et al., A Particulate Matter Risk Assessment for Philadelphia and Los Angeles* 105 (1996), PMJA 3362 (co-pollutants were not addressed).

[34] *PMSP, supra* note 22, at VI-1, PMJA 2051 (emphasis added). However, CASAC noted "the many unanswered questions and uncertainties regarding the issue of causality." CASAC PM Letter, *supra* note 20, at 3, PMJA 3163.

[35] CASAC PM Letter, *supra* note 20, at 3, PMJA 3163. EPA's reliance on this risk assessment to quantify health effects from PM concentrations below the previous standards, EPA Br. 2, is therefore unwarranted.

[36] CASAC PM Letter, *supra* note 20, at 3, PMJA 3163.

chose to make its controlling standard.[37] In an observation that reflected the nature of the record, CASAC also noted that any decision on NAAQS revision would require "policy judgments."[38]

C. The Impacts of Standard Revision.

In contrast to the uncertain health risk and inconclusive science on which the Administrator's decisions were based, the ozone and PM NAAQS revisions would impose real and substantial burdens on society. For example, EPA observed in its regulatory impact assessment that the revised standards would create implementation difficulties and may be unachievable in many areas.[39] Nevertheless, the Agency estimated that the revised ozone and PM NAAQS could together cost as much as $47 billion annually.[40] Others (including the Council for Economic Advisors) estimated that the revised NAAQS would be even more expensive. *See* APC Br. 17-19. By comparison, only $18 billion were spent on medical research in the U.S. the year the NAAQS were promulgated. *See* U.S. Dep't of Commerce, *Statistical Abstract of the United States* 118, Table 163 (119th ed. 1999). Of this, $16.5 billion were government sponsored,

[37] *Id.* at 5, PMJA 3165; *see also* 62 Fed. Reg. 38670, PMJA 20 (explaining the annual NAAQS will be "the generally controlling standard").

[38] CASAC PM Letter, *supra* note 20, at 4, PMJA 3164. As with ozone, however, *see supra* note 19, EPA's science advisers did not address factors such as implementation impacts that could have informed EPA's policy judgment.

[39] EPA, *Regulatory Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* ES-12, 7-2, 7-5 (1997), OJA 2919, 2930-31.

[40] *Id.* ES-12 to ES-13, OJA 2919-20.

and $1.5 billion were privately sponsored. *Id.* These figures illuminate the disparity between the investments that would be compelled in this case to address uncertain health risks and the government's total investment in medical research directed at demonstrated adverse public health effects.

D. The Administrator's Decisions.

The Ozone and PM NAAQS–The Administrator explained that her decisions to revise the NAAQS reflected her judgment as to how much protection is "sufficient[]" in light of "uncertainties associated with inconclusive scientific and technical information" and "hazards that research has not yet identified." 62 Fed. Reg. 38857, OJA 2; *id.* 38653 PMJA 3. But rather than explain what principles guided her exercise of "policy judgment" in selecting among regulatory options based upon uncertain predictions of risk, the Administrator addressed at length the factors that did *not* guide her judgment. These factors, which could have provided a principled approach to making risk management decisions, included the cost and technological feasibility of controls, the disruptive impact of replacing the congressional ozone reduction program with a new program to be devised by EPA, and the public health "disbenefits" of more restrictive standards.[41]

The Administrator did explain the factors that she used to characterize the health risk associated with PM and ozone. These included "the nature and severity of the health effects

[41] 62 Fed. Reg. 38878-85, OJA 23-30; *id.* 38683-95, PMJA 33-45; EPA, *Responses to Significant Comments on the National Ambient Air Quality Standards for Ozone* 128-33 (July 1997), OJA 210-15; EPA, *Responses to Significant Comments on the 1996 Proposed Rule on the National Ambient Air Quality Standards for Particulate Matter* 112 (July 1997), PMJA 312.

involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed."[42]

Based on these factors and the scientific record described above, the Agency presented ranges of risks for alternative standard levels.[43] For ozone, EPA selected a revised standard from this range at a level that, in the Agency's judgment, reflected the level at which "public health impacts . . . [are] important and sufficiently large as to warrant a standard."[44] For PM, EPA selected the 15 $\mu g/m^3$ annual $PM_{2.5}$ NAAQS on the grounds that the evidence for health risk below that level was too uncertain.[45]

[42] *See* 62 Fed. Reg. 38883, OJA 28; *id.* 38688, PMJA 38.

[43] For ozone, it identified a range of standards from 0.09 ppm (which it equated to the existing 1-hour NAAQS) to 0.07 ppm. 62 Fed. Reg. 38858, OJA 3. For the annual $PM_{2.5}$ standards (the controlling $PM_{2.5}$ standard), *id.* 38670, PMJA 20, EPA identified a range of 12 $\mu g/m^3$ to 20 $\mu g/m^3$. 61 Fed. Reg. 65659, PMJA 140. The range proposed for the 24-hour $PM_{2.5}$ standard was 20 $\mu g/m^3$ to 65 $\mu g/m^3$. *Id.*, PMJA 140. The Agency set secondary NAAQS for both ozone and $PM_{2.5}$ at the level of the primary NAAQS. 62 Fed. Reg. 38877, OJA 22; *id.* 38683, PMJA 33.

[44] 62 Fed. Reg. 38868, OJA 13; *see also* EPA Br. (D.C. Cir. 97-1441) 41 (A 0.09 ppm standard "would not adequately address the uncertainties concerning...chronic effects," while "uncertainties concerning chronic effects were too great to warrant selection of the second- or third-highest forms" of a 0.08 ppm standard.); *id.* 42-43 (EPA is not required "to make any specific 'findings,'" not even a finding that regulatory action is needed to protect against a "significant risk of harm.").

[45] *See* 62 Fed. Reg. 38675, PMJA 25; EPA Br. 11. Reflecting the uncertainty and sizable impacts, the President ultimately instructed EPA to complete a further review of the science prior to implementing these standards. 62 Fed. Reg. 38421, PMJA 195.

What the Agency did *not* do was to articulate a principle based on the statute for *managing* those risks—i.e, a principle that explains why certain risks were "sufficiently large" to require regulation or how much uncertainty is too much.[46] The Agency did not articulate a principle that a court could use for assessing whether the resulting standard is reasonable.[47]

Subpart 2—In its "[f]inal decision on the primary standard" for ozone, EPA explained how "the Act should be interpreted" regarding the interplay of Subpart 2 and EPA's ozone NAAQS revision authority. As EPA explained, "the 1-hour standard will remain applicable to an area until EPA determines that it has attained the 1-hour standard." At that time, the 1-hour standard and Subpart 2 "will no longer apply to that area." 62 Fed. Reg. 38873, OJA 18 (final decision); *see id.* 38884-85, OJA 29-30 (response to comments). EPA therefore concluded that it had statutory authority to adopt a more stringent ozone NAAQS that would override the comprehensive Subpart 2 ozone risk management program adopted by Congress for ozone attainment, nonattainment, and maintenance areas. Based on that interpretation, EPA promulgated regulatory provisions (40 C.F.R. §§ 50.9(b), 50.10) that "replac[ed] the existing 1-hour [standard]. . . with a new [more stringent] 8-hour [standard]." 62 Fed. Reg. 38873, 38894-95, OJA 18, 39-40.

[46] *See* 175 F.3d 1036, Pet. App. 10a.

[47] *See, e.g.*, 62 Fed. Reg. 38883, OJA 28; *id.* 38688, PMJA 38; *see also* EPA Br. 28-29 (requiring consistent decisional criteria is "inconsistent with EPA's own expert assessment of the flexibility necessary to apply Section 109's mandate to all the pollutants for which EPA must develop standards").

III. THE D.C. CIRCUIT DECISIONS.

Faced with EPA's failure to articulate an intelligible principle to guide its exercise of public health risk management judgment, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit held (with Judge Tatel dissenting) that EPA's interpretation of the Clean Air Act would render the Act's applicable provisions an unconstitutional delegation of legislative power. 175 F.3d 1034, Pet. App. 5a. Because the court believed that these provisions might be subject to an interpretation that would not violate the nondelegation doctrine, however, the court remanded both revised NAAQS to EPA. The court directed EPA to develop a construction of the Act that would provide an intelligible principle for EPA's exercise of risk management judgment.[48]

In remanding the NAAQS, however, the court tied EPA's hands in developing this "intelligible principle." The lower court did this by reaffirming the D.C. Circuit's previous interpretations of the Act to preclude EPA from relying on many factors that the Agency otherwise should have considered to guide its risk management judgment when promulgating NAAQS.[49]

The panel also unanimously held that there was no ambiguity that Congress intended implementation of an

[48] Because it concluded that EPA's interpretation of the Act was flawed, the lower court left unanswered critical questions concerning EPA's interpretation of the science. *See supra* note 31. Thus, it is misleading for the American Lung Association to state that the court "did not . . . question the validity of the science relied upon by EPA . . . ." ALA Br. 11.

[49] Those interpretations of the Act are fully briefed in Case No. 99-1426.

ozone NAAQS to proceed under Subpart 2, and agreed with petitioners that Subpart 2 "must preclude the EPA from requiring areas to comply *either more quickly or with a more stringent ozone NAAQS*." 175 F.3d 1049, Pet. App. 40a (emphasis added).[50] The panel, however, refused to set aside the primary and secondary 8-hour standards, 175 F.3d 1057, Pet. App. 57a-58a, presumably restricting EPA's authority on remand to the promulgation of revised standards that would not be more stringent than the 1-hour standard.

In response to requests for rehearing and reconsideration *en banc*, the full circuit court declined to hear the case. The panel declined to modify its opinion on "nondelegation" or on consideration of the protective effects of a criteria pollutant. 195 F.3d 6, 10, Pet. App. 71a, 82a. After unanimously disagreeing with EPA's contention that it lacked jurisdiction over questions concerning the effect of Subpart 2, the panel, in an opinion and a partial concurrence, affirmed that the revised standard could be enforced "only in conformity with Subpart 2." *Id.* 10, Pet. App. 81a.

SUMMARY OF ARGUMENT

1. This case concerns the bedrock principle that an agency may act only within the limits of the authority delegated to it by Congress. Unless an agency can enunciate the limits of

[50] The court also unanimously remanded the ozone standards because EPA had failed to consider evidence that ozone in the ambient air is protective with regard to exposure to solar ultraviolet radiation that has been associated with skin cancer and cataracts. 175 F.3d. 1051-53, Pet. App. 44a-49a. Furthermore, the court vacated the Agency's new coarse PM standards because the Agency's chosen pollutant indicator, PM_{10}, was "poorly matched to the relevant pollution agent." *Id.* 1055, Pet. App. 53a. Neither of these holdings, which will require further rulemaking on remand, are before this Court.

that delegation, it is not possible for the court to evaluate the validity of its action and it is not possible for the agency to adopt rules that reflect "reasoned" decisionmaking.

In these rulemakings, EPA revised the ozone and PM NAAQS that were previously found "requisite to protect the public health" with an "adequate margin of safety." EPA made its decision based not on findings of demonstrated health effects, but rather based on the Administrator's evaluation of public health risks.

In promulgating the revised NAAQS, EPA described at length factors it used to characterize the risks at issue but was silent on how it went about *managing* those risks. According to the Administrator, her decision was "largely judgmental in nature . . . and may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric." 62 Fed. Reg. 38883, OJA 28; *id.* 38688, PMJA 38. Yet, it is the formulation of this very policy judgment that Congress delegated to EPA under § 109 of the CAA. The absence of any explanation by EPA of the principle that guided that exercise of judgment, based on the authority delegated to it by Congress, renders EPA's actions unlawful.

2. EPA's argument that the courts have no jurisdiction to review EPA's resolution of whether Subpart 2 restricts its NAAQS revision authority is wrong. Respondents agree with EPA that its final ozone NAAQS rules, 40 C.F.R. §§ 50.9(b), 50.10, are facially inconsistent with the legislative program for managing ozone health risks. Under the CAA's pre-enforcement review scheme, and this Court's decision in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), the court of appeals correctly reviewed the validity of these rules—a necessary element of which was the scope of EPA's authority to implement a revised, and more stringent,

ozone NAAQS in light of the comprehensive Subpart 2 program for managing ozone health risks.

3. The language of the statute, the legislative history, and the structure of the Act all make clear that Subpart 2 is Congress' exclusive, long-term program for managing ozone health risks. Because, as EPA concedes, EPA's more stringent revised ozone NAAQS cannot be implemented or enforced under Subpart 2, EPA's decision to revise the ozone NAAQS is neither "appropriate" in accordance with §§ 108 and 109(b) nor lawful, given the comprehensive statutory program.

ARGUMENT

I. EPA IMPROPERLY CONSTRUED THE STATUTE TO PROVIDE NO LEGAL STANDARD, OR "INTELLIGIBLE PRINCIPLE," THAT WOULD GUIDE ITS EXERCISE OF PUBLIC HEALTH RISK MANAGEMENT JUDGMENT.

In reviewing EPA's decisions to revise the ozone and PM NAAQS, the D.C. Circuit invoked the so-called "weak" form of the nondelegation doctrine. 175 F.3d 1038, Pet. App. 14a (distinguishing the "strong" form). This is not a doctrine used by courts to declare statutes unconstitutional.[51] To the contrary, it is a canon of statutory construction designed to preserve the constitutionality of broad congressional delegations of authority. *See infra* note 56. All this doctrine says is that the agency must articulate, based on its authorizing legislation, the decisional principle that Congress

[51] The lower court thus adhered to the principle that courts show restraint when resolving issues implicating separation-of-powers disputes. *See Raines v. Byrd*, 521 U.S. 811, 833 (1997) (Souter, J., concurring).

provided to guide the agency's exercise of rulemaking authority.

This is not unusual. Reviewing courts must always identify the legal standard applied by an agency in order to assess the consistency of the agency's action with the articulated statutory principle. *See, e.g., American Lung Ass'n v. EPA*, 134 F.3d 388, 392-93 (D.C. Cir. 1998).

To be sure, there are several ways the lower court could have reached the same result: that the Agency's refusal to state a reason for its choice among alternative risk management options was "arbitrary and capricious" under the Administrative Procedure Act ("APA");[52] that the Agency did not adequately explain its action;[53] or that EPA misinterpreted the statute as providing no principle to guide its exercise of public health risk management judgment.

Whichever basis for decision one chooses, the essential principle is the same: an agency must explain what it does in light of Congress' delegation of authority. It must explain that for the benefit of the public, the courts that may have to review its actions, the Congress that must exercise oversight, and the future agency decisionmakers that must make consistent decisions. Because EPA has not in this case offered any intelligible principle to guide its exercise of public heath risk management judgment, the court properly sent this case back to EPA.

[52] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). CAA § 307(d)(9) provides for the same review.

[53] *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962).

A. EPA Improperly Claims Unfettered Authority to Exercise Public Health Risk Management Judgment.

This case involves EPA's exercise of "policy" judgment to revise existing NAAQS to provide more "margin of safety" in response to uncertain and overlapping estimates of health risk. In this situation, the CAA calls for EPA to make a decision about how to manage "public health" risk. According to the statute, EPA is to set a standard that provides a level of pollution "requisite" to protect the "public health" with an "adequate margin of safety," CAA § 109,—a standard that must "promote" both public health and welfare and the "productive capacity" of the country. CAA § 101(b).

In this case, EPA merely characterized a range of uncertain risks and selected from that range without identifying any statutory principle that was guiding this selection. That the lower court demanded that EPA identify some legal standard restricting its exercise of discretion is not unusual. Courts commonly set aside agency orders because the agency failed to apply the correct legal standard when it promulgated a rule or took some other action.[54] Similarly, where an agency construes a statute to provide *no legal standard at all* to constrain its discretion, the courts properly have questioned that construction under the nondelegation doctrine.[55] Remanding the case for EPA to construe the Act

[54] For example, in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-19 (1944), Congress authorized the agency to define "area of production" in geographic terms, leading the Court to disapprove a regulation dependent on the number of workers involved instead.

[55] *See, e.g., National Cable Television Ass'n v. United States*, 415 U.S. 336, 342-43 (1974); *International Union, UAW v. OSHA*, 938 F.2d 1310,

to provide an intelligible principle that would constrain how it manages public health risk is in full keeping with the Court's decisions.[56] This Court always has demanded that agencies be guided by an intelligible principle.[57]

EPA suggests that it *has* interpreted the statute to recognize limits on its standard revision authority. According to EPA, it considered the types of health evidence, the severity of harm, the uncertainty of risk, and the size of the sensitive population to define a range of risks. Considering these factors, EPA explains, led it to select a standard greater than zero risk but more stringent than the existing ambient standards. EPA Br. 31-33.

1313 (D.C. Cir. 1991); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388-89, 392 (1999).

[56] *See Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) (nondelegation doctrine requires narrow construction of statutes that might otherwise be unconstitutional); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality) (agency should be allowed to characterize statute in a way to avoid unconstitutional delegation); *National Cable Television Ass'n*, 415 U.S. at 342 ("the hurdles revealed in [*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)] lead us to read the [Independent Offices Appropriation Act] narrowly to avoid constitutional problems"); *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965) (construing statute so as to avoid an invalid delegation); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (the act in question does "not delegate to the Secretary the kind of authority exercised"); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

[57] *See, e.g., Loving v. United States*, 517 U.S. 748, 758, 771 (1996); *Touby v. United States*, 500 U.S. 160, 165 (1991); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 (1976).

EPA's factors, however, *characterize* risk but say nothing about *managing* it.[58] And that is the problem with EPA's rulemaking—EPA identifies no principle to guide its exercise of public health risk *management* judgment.[59]

Risk management judgment involves the selection and justification of a regulatory option. No matter how extensive the Agency's data base for risk predictions, or how elaborate the Agency's risk characterization, characterizing risks is not the same as explaining what risk in the range presented by the Agency is "requisite" to protect "public health" with an "adequate margin of safety." EPA's failure to articulate how it managed the risk presented by these pollutants in light of these statutory standards and the purposes section of the Act contravenes precisely what Congress directed EPA to do in these rulemakings.[60]

For ozone, for example, EPA explains that estimated health risks and exposures decreased with more restrictive

[58] *Cf.* Committee on the Institutional Means for Assessment of Risks to Public Health, National Research Council, *Risk Assessment in the Federal Government: Managing the Process* 28-33 (1983) (identifying the components of risk assessment).

[59] *See, e.g., Industrial Union Dep't*, 448 U.S. at 645-46 (public health regulation must be based on significant public health risks).

[60] In attempting to articulate a more precise standard, EPA added in its rehearing papers that its guiding principle was to set a level "*necessary* for public health protection: neither *more* nor *less* stringent than necessary, but 'requisite.'" 195 F.3d 6, Pet. App. 72a (emphasis in original). Now, EPA asserts that it need not supply a principle that establishes a NAAQS at the "right" level. EPA Br. 27. EPA counsels' evolving view of what the *statute* requires highlights the very inadequacies that troubled the lower court. *See Burlington Truck*, 371 U.S. at 168-69. In any event, post hoc rationalizations of counsel cannot save an agency's inadequate explanation of its action. *Id.*

standards. EPA then argues that there were "important and meaningful" differences in the character of scientific evidence regarding risk for various standards. EPA Br. 33. But EPA's science advisers concluded that none of the standards under consideration, including the current standard, could be distinguished as being significantly more protective of public health.[61] Against this background, the Administrator's assertion that public health impacts were "important and sufficiently large to warrant a standard set at a level of 0.08 ppm," 62 Fed. Reg. 38868, OJA 13, simply reflects unexplained "policy" judgment. As the lower court observed, this is a "self-sufficient justification for every refusal to define limits." 175 F.3d 1037, Pet. App. 12a-13a.

Similarly, for PM, the Administrator observed that while "inherent scientific uncertainties are too great to support [$PM_{2.5}$] standards based on the lowest concentrations measured," revised standards more stringent than the existing standards were appropriate "despite [the] well recognized uncertainties."[62] As the lower court observed, the "increasing-uncertainty argument is helpful only if some principle reveals how much uncertainty is too much." 175 F.3d 1036, Pet. App. 10a.

Ultimately, according to the Administrator, she is authorized by the Act to revise NAAQS based on a "policy judgment" to provide more margin of safety, even if health impacts "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric." 62 Fed. Reg. 38688, PMJA 38; *id.* 38883, OJA 28. It is this assertion of unfettered authority to exercise discretion to which the lower

[61] *See supra* p. 8.

[62] 62 Fed. Reg. 38675, PMJA 25; *see supra* pp. 10-14.

court objected. 175 F.3d 1035, Pet. App. 8a (EPA's revision decision is "nothing more than a statement that lower exposure levels are associated with lower risk to public health.").

By offering as its decisional criteria factors that go *only to risk characterization*, and *not* public heath *risk management*, EPA would turn the Clean Air Act into a statute like the National Environmental Policy Act ("NEPA"), for which judicial review looks only at the procedure the agency followed. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (*citing Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)). If the Agency has followed an elaborate procedure and identified the range of potential health risks, EPA argues, judicial review should cease. There is to be, in effect, no review of its *substantive* decisionmaking at all.

This argument may work for a statute that, like NEPA, requires only "procedure" and not a "substantive" decisionmaking result. It does not work for a statute that, like § 109, demands a substantive outcome: a level of air quality "requisite to protect" the "public health" with an "adequate margin of safety."

EPA in fact comes close to arguing its § 109 decisionmaking is a matter "committed to agency discretion by law" and therefore unreviewable. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). But that cannot be so because, as even EPA concedes, the Clean Air Act unquestionably provides law to apply. EPA Br. 22.

In short, the problem here is that EPA has interpreted the statute to provide no principle to guide its exercise of risk management judgment—a problem so fundamental that, *if* Congress had written the Act as interpreted by EPA, the constitutionality of the statute would have been called into

question. It is for this reason that the court below invoked the nondelegation doctrine.

Since the creation of the Interstate Commerce Commission, this country has engaged in the process of turning over government decisions to specialized agencies. Concomitant with the delegation of decisionmaking authority is a requirement that the decisionmakers remain accountable, and that Congress remains accountable. This means that agency decisionmakers must explain their rationale in light of Congress' delegation of authority.

Agencies must explain the statutory standard that guides their exercise of rulemaking discretion and how consideration of relevant science is applied in reference to that standard. This explanation is important for multiple reasons implicated by the nondelegation doctrine, as the lower court explained. 175 F.3d 1038, Pet. App. 14a. First, an explanation is necessary so that the courts can exercise judicial review.[63] There must be ascertainable standards to which a reviewing court may turn, for "it will not do for a court to be compelled to guess at the theory underlying the agency's action . . . ." *Chenery*, 332 U.S. at 196-97.

Second, an explanation is necessary so that Congress can exercise its own oversight of the agency. For there to be informed legislative oversight, Congress must be able to understand how the agency has interpreted the delegation it

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[63] *See INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-19 (1989); *Industrial Union Dep't*, 448 U.S. at 686 (Rehnquist, J., concurring); *see also* L. Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1440 (April 2000).

has been given.[64] Third, an explanation of the principle underlying a decision is necessary so that agency decisionmakers themselves can, in the future, be consistent. *State Farm*, 463 U.S. at 46-49, 56-57. Fourth, the public has a right to be told what Congress has delegated to the Executive Branch, and whether the Executive Branch has acted within its congressionally delegated powers. *Clinton v. New York*, 524 U.S. 417, 449-53 (1998) (Kennedy, J, concurring).

The requirement that an agency explain the statutory principle that guides its exercise of judgment should be enforced all the more strictly in a case like this one, where the decision being made is of enormous importance in terms of its broad impacts on society. *Cf. Industrial Union Dep't*, 448 U.S. at 686. As the D.C. Circuit stated in remanding a different NAAQS, "[w]here, as here, Congress has delegated to an administrative agency the critical task of assessing the public health and the power to make decisions of national import in which individuals' lives and welfare hang in the balance, that agency has the heaviest of obligations to explain and expose every step of its reasoning."[65] As the court explained, "[u]nless [the Administrator] describes *the standard under which she has arrived at this conclusion*, supported by a '[]plausible' explanation, . . . we have no basis for exercising our responsibility to determine whether her decision is 'arbitrary [or] capricious. . . .'" *American Lung*, 134 F.3d at 392-93 (emphasis added; citation omitted).

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[64] *See* W. Wilson, *Congressional Government* 303 (1885), *cited in Hutchinson v. Proxmire*, 443 U.S. 111, 132 (1979); *see also Loving*, 517 U.S. at 773.

[65] *American Lung Ass'n*, 134 F.3d at 392; *see also FDA v. Brown & Williamson Tobacco Corp.*, 120 S Ct. 1291, 1301 (2000).

If agencies need not explain their decisions in light of the legal standard imposed by Congress, we will be left with a government of men, not of laws. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). Guarding against this result are the checks provided by the coordinate branches—especially judicial review—and, more fundamentally, an insistence on written rules applied as objectively as possible—insistence, in short, on the rule of law. *See United States v. Lopez*, 514 U.S. 549, 575-76 (1995) (Kennedy, J., concurring).

By contrast, the EPA's position in this case furthers the pernicious idea that some decisions are beyond the understanding both of the public and the courts—that some decisions, indeed the most important ones, must ultimately turn on unquantifiable, inexplicable policy "judgment" by the Executive. Reliance on unexplained agency judgment leads to rulemaking by ideology, prejudice, or messianic urge. This is not the "rule of law."

In sum, the agency must first explain the statutory principle it has applied based on Congress' delegation of authority, and the courts must then say what the law is ultimately. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). That is all the D.C. Circuit has asked EPA to do in this case—a most unremarkable outcome when measured against EPA's remarkable claim of unfettered authority to exercise public health risk management judgment.

B. EPA Is Obligated To Identify the Principle that Guides Its Exercise of Rulemaking Authority Even Where Congress Acts By Broad Delegation.

In large part, the Government's argument for waving EPA through the judicial review gate is that the courts have affirmed the constitutionality of other, broad delegations. EPA Br. 26-30; Mass/NJ Br. 39-41. In those cases, however,

parties did not seek review of whether "the will of Congress [had] been obeyed" by the agency, *see Yakus v. United States*, 321 U.S. 414, 426 (1944), but rather whether the statute was drafted so as to make that inquiry impossible (i.e., whether the statute itself created a nondelegation problem).

In those cases, the Court found an ample basis for the agency to articulate, by resort to the statutory language, legislative history, and other indicia of congressional intent, defining principles for making its judgment. As a result, the cases on which EPA relies do not stand for the proposition that an agency may implement delegated authority without articulating an "intelligible principle."

For example, in *Touby*, the Court rejected a challenge to Congress' delegation of power to the Attorney General to add drugs temporarily to the schedule of controlled substances when "necessary to avoid an imminent hazard to the public safety." 500 U.S. at 166. As the Court found, the statute articulated clear boundaries for the Attorney General's discretion, *id* at 167, and the question whether the Attorney General had obeyed this legislative command was not before the Court. By contrast, the question before the court of appeals in this case was whether the delegated agency had acted in accordance with a defined principle grounded in the statutory language and purpose.[66]

That the Court has found in other cases that there were sufficient limits on the agency's discretion to satisfy facial challenges to the constitutionality of a statute does not suggest that an agency need not identify those limits when

[66] *See also Skinner*, 490 U.S. 212 (challenge to the constitutionality of a statute directing the Secretary of Transportation to establish user fees to cover costs of pipeline safety program, *not* to consistency of the resulting regulatory program with the statute).

exercising its discretion.[67] If anything, the Court's careful analysis of the congressional delegation in these cases confirms the need for agency action to be guided by an intelligible principle founded in the language and purposes of the Act.[68]

As the Court has observed, the touchstone of the non-delegation doctrine remains that "private rights are protected by access to the courts *to test the application of the policy* in light of the[] legislative declaration[]." *American Power & Light*, 329 U.S. at 105 (emphasis added). All the lower court's decision says is that EPA cannot construe Congress' broad delegation of NAAQS revision authority to authorize unfettered risk management judgment. Rather, the Agency must explain the statutory principle that constrains its exercise of discretion.

C. There Is Law To Apply To Guide EPA's Exercise of Risk Management Judgment.

Where an agency, as here, has interpreted a statute to provide *no* principle to guide its exercise of discretion, the court must look to the statute and congressional intent to ascertain whether there is law to apply. *See Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). Thus, in every challenge to a statute under the nondelegation doctrine, this Court has analyzed the statute and congressional intent to ascertain whether Congress has identified legal standards for

[67] *See, e.g., American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932).

[68] *See also FPC v. Conway*, 426 U.S. 271 (1976) (Commission must use statutory "undue discrimination" principle when selecting a standard from the "zone of reasonableness").

the agency to use in deriving an intelligible principle for its exercise of discretion.[69]

Rather than simply remanding the case to EPA to determine whether there is law to apply that would save the constitutionality of the statute, therefore, this Court, in the exercise of its Article III function, must itself resolve whether the CAA provides guidance for the development of an "intelligible principle." To find the law, this Court should ask, as a first step, whether Congress has unambiguously stated its intention. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984). Congress has done so.

As explained by APC and ATA in Case No. 99-1426, Congress intended that EPA exercise its public health risk management judgment based on consideration of the overall impact of its decision on society. EPA cannot merely characterize risks to individual health that might be caused by breathing a pollutant and then, without explanation, choose a risk level that EPA declares is "sufficiently large" to justify a revised NAAQS. *See supra* pp. 26-27. Instead, EPA must explain why the regulatory option chosen satisfies the decisional criteria in § 109, why it promotes the statutory purposes in § 101, and why it was selected and other options rejected. APC Br. 27-45.

Once the Court determines that there is law to apply under a *Chevron* Step 1 analysis, thereby defining the scope of EPA's discretion under § 109, EPA can then exercise its discretion under the Act in a manner consistent with *Chevron* Step 2, and in a manner that is not arbitrary and that reflects reasoned decisionmaking. The Agency is not required, as EPA argues, to develop a precise metric for the exercise of

[69] *See, e.g., Touby*, 500 U.S. at 166; *Mistretta* 488 U.S. at 374-77.

risk management judgment. *See* EPA Br. 26. Rather, as the lower court observed, what is required is "reasonable coherence" based on application of the statutory language and purposes. 175 F.3d 1039-40, Pet. App. 17a-18a.

In this case, EPA's failure to explain itself runs afoul of *Chevron* in the same way the FCC did in *AT&T Corp.* There the Court struck down the FCC's interpretation of a statute as unreasonable because the FCC had failed to supply any "limiting standard, rationally related to the goals of the Act." 525 U.S. at 388; *see also* Bressman, *supra* note 63, at 1434.

Here the nondelegation doctrine and *Chevron* converge to a crystalline point: that the agency must explain the "limiting standard" that guided its exercise of public health risk management judgment. Only if this Court finds that the normal meaning of "public health," the language of §§ 108 and 109, and the statutory purposes of the Act provide *no* guidance for the Agency's exercise of public health risk management judgment would there be a *statutory* nondelegation problem—one that could not be overcome by the Agency by interpreting the Act under *Chevron* Step 2.

II. EPA'S REVISION TO THE OZONE NAAQS, TOGETHER WITH ITS REVOCATION OF THE EXISTING STANDARD, IS REVIEWABLE FINAL AGENCY ACTION.

In Subpart 2 of Part D of Title I of the Act, Congress enacted a comprehensive program for reducing ozone following decades of unrealistic deadlines and control measures that proved inadequate to the task. The court below held that Subpart 2 "must preclude the EPA from requiring areas to comply either more quickly or with a more stringent ozone NAAQS." 175 F.3d 1049, Pet. App. 40a. As the court observed, if EPA could adopt and implement a more

stringent ozone standard under a more expeditious schedule, this comprehensive Subpart 2 "risk management" program adopted by Congress "would have been stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments." *Id.* 1050, Pet. App. 42a.

Even though Subpart 2 precludes EPA from requiring areas to comply "more quickly or with a more stringent ozone NAAQS," the court refused to set aside the standard on this basis because, in its view, the "appropriateness" language of § 109(d) does not allow EPA to reject a standard revision based on "implementation" factors. Nevertheless, in remanding the ozone NAAQS on nondelegation grounds, the court made clear that the ozone "standard is [un]likely to engender costly compliance activities *in light of our determination that it can be enforced only in conformity with Subpart 2*." 195 F.3d 10, Pet. App. 81a (emphasis added).

For the reasons discussed below, the court of appeals had jurisdiction to resolve petitioners' challenges based on Subpart 2. While the court properly held that Subpart 2 is the exclusive congressional risk management program for addressing ozone health risks (and thereby restricts EPA's authority to implement or to enforce a more stringent ozone NAAQS), it was wrong when it held that the primary and the identical secondary 8-hour standard could be adopted and remain in effect during the remand proceeding.

A. EPA's Determination of Its Authority To Revise the Ozone NAAQS Is Final Action.

EPA argues that the lower court's decision concerning the interplay between Subpart 2 and the revised NAAQS was "premature[]," an argument EPA first detailed in its rehearing petition. EPA Br. 35. The court rejected this argument, because EPA "reached a final decision regarding its power to

implement its revised ozone standard." 195 F.3d 9, Pet. App. 78a.

Section 181(a) of Subpart 2 explains how Congress intended areas to be classified as nonattainment "for ozone," for purposes of imposing statutorily-mandated compliance deadlines and attainment measures. Section 181(b) explains how areas designated as in attainment for ozone are to be redesignated to nonattainment if their ozone air quality deteriorates in the future. In these provisions, Congress provided that all of the Act's requirements and timetables "for ozone" are to be implemented to attain and maintain the ozone NAAQS that existed in 1990. This is confirmed by other Subpart 2 provisions, as discussed in Part III below.

In the rulemaking at issue here, EPA promulgated a rule that simultaneously established a more stringent 8-hour ozone NAAQS and made the 1-hour ozone NAAQS and related Subpart 2 program automatically inapplicable to an area once EPA determines that its air quality meets the 1-hour NAAQS. 40 C.F.R. §§ 50.9(b) & 50.10. Industry and States petitioned the D.C. Circuit to review EPA's rule as facially inconsistent with the ozone risk management plan codified by Congress in Subpart 2—asking the court to resolve "[w]hether EPA is authorized to substitute its policy judgment for that of Congress by replacing the statutory ozone reduction program designed specifically to implement the 1-hour NAAQS with a new program to implement a different [more stringent] NAAQS."[70]

EPA recognizes in its brief that it would be "impossible" to implement the more stringent 8-hour NAAQS that EPA

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[70] Non-State CAA Pet'rs & Intervenors' Br. (D.C. Cir. No. 97-1441) 2, 29; *see also* APC Resp. to Pet. for Cert. (99-1257) 22.

adopted in a manner that was consistent with Congress' ozone attainment program in Subpart 2. EPA Br. 47; *see also* Mass/NJ Br 47-48 (applying Subpart 2 to that standard would be "bizarre"). Precisely for this reason, and because EPA's 8-hour NAAQS addressed no new health effects associated with ozone, those seeking review of EPA's revised ozone NAAQS argued that Subpart 2 "codified" the 1-hour NAAQS and that a more stringent, revised ozone NAAQS therefore was not "appropriate" under § 109(d). Non-State CAA Pet'rs and Intervenors' Br. (D.C. Cir. 97-1441) 33.

By rejecting these arguments, EPA's final rule resolved the interplay of Subpart 2 and EPA's authority to establish a more stringent ozone NAAQS. This is a final Agency action, and review of that action had to be sought within 60 days of its publication in the *Federal Register*. CAA § 307(b)(1); *see also Harrison*, 446 U.S. at 587-94.

EPA now argues that petitioners below really challenged not a rule, but "preamble statements" that are not "final agency action." *See supra* p. 18. EPA is wrong. *EPA's promulgation of its more stringent 8-hour standard presents facial inconsistencies* with the Subpart 2 risk management program. Consequently, that action's validity *vel non* can be resolved only by resolving whether Subpart 2 restricts EPA's authority to adopt and to implement a more stringent revised ozone NAAQS. The court's review of EPA's statements in the final rule preamble is entirely appropriate to permit the court to understand that rule's nature, purpose, and basis. *See, e.g., Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 158 (1982).[71]

[71] *See also HRI, Inc. v. EPA*, 198 F.3d 1224, 1244 n.13 (10th Cir. 2000) ("preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules") (quoting *Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999)).

Moreover, the preamble statements signed by the Administrator[72] are authoritative explanations of EPA's position on its authority to implement its more stringent 8-hour ozone NAAQS under Subpart 1. That position, which in any event is embodied in the rule's text, 40 C.F.R. § 50.9(b), will "alter the legal regime" to which EPA, States, and regulated parties are subject. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (reviewing Fish & Wildlife Service's Biological Opinion as final action under Endangered Species Act). Such preamble statements are themselves reviewable,[73] and review is particularly warranted here, where § 307(b) directs review of *any* final Administrator action. *Harrison*, 446 U.S. at 589.

Finally, in a separate but related case, EPA has acknowledged that its decision regarding the relationship between the revised ozone NAAQS and Subpart 2 was reviewable below as final action in the present case. In *EDF v. Browner*, D.C. Cir. 98-1363, EPA argued the court lacked subject matter jurisdiction in that case to hear EDF's challenge to EPA's determination that the 1-hour NAAQS and Subpart 2 were inapplicable in specific areas that had met the 1-hour NAAQS. EPA Br. (D.C. Cir. 98-1363) 27-28, App. 22a-23a. According to EPA, "[o]ther participants in the [ozone] NAAQS rulemaking understood the implications of

[72] *See supra* p. 18; *see also* 62 Fed. Reg. 38424, PMJA 198 (memorandum from President Clinton).

[73] Indeed, EPA recently argued to the D.C. Circuit that a preamble statement *itself* may be reviewable action. *See Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000).

EPA's interpretation and challenged aspects of it in the pending *ATA* litigation"—the case before this Court. *Id.* 29, App. 23a.

In sum, EPA's promulgation of a new standard to replace the 1-hour standard and the statutory Subpart 2 ozone attainment program was final agency action that was reviewable under § 307(b) of the Clean Air Act.

B. EPA's Decision To Replace Subpart 2 Is Ripe.

As discussed above, whether the Act precludes EPA from replacing the 1-hour ozone NAAQS with a new, more stringent NAAQS that cannot be implemented under Subpart 2 is a pure question of law that requires no further factual development. *See also* 195 F.3d 8-9; Pet. App. 77a-79a.

As this Court has recognized, federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[74] In § 307(b) of the Act, Congress authorized courts of appeals to review *any final EPA action* under the Act. CAA § 307(b); *Harrison*, 446 U.S. at 589. The sweeping nature of Congress' directive that judicial review of "any" final CAA actions occur immediately is clear on the statute's face, *id.* at 588, and the legislative history confirms Congress' purpose. *Id.* at 589-90. Quick resolution of the validity of EPA actions is crucial, *inter alia*, to maintain "the integrity of the time sequences provided through the Act." *See* S. Rep. No. 91-1196, at 41 (1970), *reprinted in* 1 Sen. Comm. on Pub. Works, *A Legislative History of the Clean Air Amendments of 1970*, at 441 (Comm. Print 1974).

[74] *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821); *see also Harrison*, 446 U.S. at 593. There is no constitutional barrier to giving effect to Congress' judicial review directive in § 307(b). Because the petitions for review raised a purely legal issue, i.e., whether Subpart 2 provides EPA's sole authority to enforce ozone NAAQS, the court was fully able to review that issue.

As a result, the justiciability concerns underlying *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), are absent here. That is, *Abbott Labs*' two-pronged ripeness test embodies the prudential doctrine that "courts, through avoidance of premature adjudication, [should refrain] from entangling themselves in abstract disagreements over administrative policies, and also [is intended] to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way . . . ." *Id.* at 148. As seen above, however, Congress in the CAA specifically instructed courts to review final actions "pre-enforcement" in order to ensure early resolution of challenges to EPA's execution of the CAA. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) (action was "unlike agency rules that Congress has specifically instructed the courts to review 'pre-enforcement'") (*citing Harrison*, 446 U.S. at 592-93; CAA § 307(b)).[75]

Because Congress directed that all final EPA actions under the CAA be subject to immediate review, and because the issue presented requires no further development, the lower court did not err in reviewing the action here.[76]

[75] For the same reason, EPA's reliance on *Lujan v. National Wildlife Fed'n*, *see* EPA Br. 36, is misplaced. *See* 497 U.S. 871, 891 (1990) (noting that challenges may be brought under certain "statutes [that] permit . . . judicial review, directly, *even before the concrete effects normally required for APA review are felt*") (emphasis added).

[76] Even if the Court deems the issue presented for review to the lower court subject to *Abbott Labs*, this Court should find the issue ripe. As explained above, the question of EPA's legal authority under Subparts 1 and 2 is "purely legal," and hardship from delayed review would ensue from the disruption to State and industry planning and control efforts.

III. SUBPART 2 RESTRICTS EPA'S AUTHORITY TO REVISE THE OZONE NAAQS.

EPA claims "[t]he only issue involving 'implementation' before the court of appeals . . . was whether the participants were correct that the Section 181(a) scheme precluded EPA from promulgating the revised standard." EPA Br. 35.[77] Addressing this issue, however, requires an understanding of Subpart 2 and how it restricts EPA's authority with respect to a more stringent revised NAAQS for ozone. The facial incompatibility between Subpart 2 and EPA's establishment of the more stringent 8-hour ozone NAAQS shows that EPA lacked authority to implement or enforce a more stringent NAAQS, and indeed lacked authority to replace the 1-hour ozone NAAQS as the template for Congress' detailed statutory "risk management" program.

A. Subpart 2's Plain Language Precludes EPA From Replacing the Existing Ozone NAAQS.

Section 107(d) contains the requirements for designations and redesignations of areas as attainment, nonattainment, or unclassifiable for any criteria pollutant. Section 107(d)(4) requires States and EPA to designate areas for ozone within 240 days after enactment of the 1990 CAA Amendments. Under § 107(d)(3), areas may later be "redesignated." And

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See State Resp. Br. (99-1257) § III.B.3. Moreover, in fashioning a remedy, 195 F.3d 10, Pet. App. 81a-82a, it was appropriate for the court to review EPA's implementation authority under Subpart 2. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982).

[77] This was not the only implementation issue raised by Industry petitioners, as intervenors supporting EPA below recognize. *See* Mass/NJ Pet. for Cert. (99-1263) 14, 22.

§ 107(d)(1) addresses area designations under a new or revised NAAQS.

Subpart 2 requires that "[e]ach area designated nonattainment for ozone *pursuant to section 107(d)* of this Act"—not any specific paragraph of § 107(d), but *any* part of § 107(d)—be classified "by operation of law" under Subpart 2 and then regulated pursuant to Subpart 2's timetables and control measures. CAA § 181(a)(1) (emphasis added). Congress also directed in § 181 that "*[a]ny area* that is designated attainment or unclassifiable *for ozone* under section 107(d)(4) of this Act, *and that is subsequently redesignated to nonattainment for ozone* under section 107(d)(3) of this Act, shall, at the time of the redesignation, be classified by operation of law in accordance with table 1 under subsection (a) of Section 181." CAA § 181(b)(1) (emphasis added).

Thus, Subpart 2 by its plain terms governs management of ozone indefinitely, until Congress changes the statutory scheme. The Subpart 2 deadlines have *not* all run; indeed, as the second sentence of § 181(b)(1) makes clear, they will be reset and run anew *any time* an area initially designated under § 107(d)(4) becomes nonattainment "for ozone."

Moreover, as the lower court recognized, Congress provided in § 172(a)(1)(C) that EPA's generic authority under Subpart 1 to classify areas for purposes of applying an attainment date "shall not apply with respect to nonattainment areas for which classifications [and attainment dates] are specifically provided under other provisions of [Part D]." 175 F.3d 1048, Pet App. 37a. Likewise, Congress provided in § 172(a)(2)(D) that Subpart 1's attainment dates "shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other

provisions of [Part D]." As noted above, Subpart 2 specifically provides classifications and attainment dates for "[e]ach area designated nonattainment *for ozone* pursuant to section 107(d)" (emphasis added).

Contrary to claims by Massachusetts, New Jersey and ALA, therefore, Congress made clear in § 172(a) that EPA's Subpart 1 authority to classify and to regulate nonattainment areas is expressly limited, because Congress has "specifically provided" a scheme for classification and attainment deadlines under Subpart 2. EPA argues, however, that because Subpart 2 addresses the 1-hour ozone NAAQS, Subpart 2 does not "specifically provide[]" an alternative to Subpart 1 for an ozone NAAQS designed to replace the 1-hour ozone NAAQS. *Id.* This argument is entirely circular.

As the lower court found, EPA's position ignores the plain language of § 181(a), which makes Subpart 2 broadly applicable to "[e]ach area designated nonattainment *for ozone* pursuant to section 107(d)" (emphasis added). EPA's argument also ignores § 181(b), which makes Subpart 2 applicable to *any* area that is "subsequently redesignated to nonattainment *for ozone*" (emphasis added). The lower court correctly found under "Step 1" of *Chevron* that the statute on its face disposes of EPA's arguments by establishing a comprehensive and long range risk management program for ozone. 175 F.3d 1048, Pet. App. 38a-39a.

EPA nevertheless argues that the court of appeals erred by not interpreting the plain language of CAA § 181(a) (which refers to "[e]ach area designated nonattainment for ozone pursuant to section 107(d)") to refer only to those areas designated under § 107(d)(4). The court below found, however, that "Congress intentionally referred to § 107(d) as a whole," 175 F.3d 1049, Pet. App. 39a, making Subpart 2 applicable to *all areas* that are "designated nonattainment for

ozone pursuant to section 107(d)." CAA § 181(a). As the court concluded, "the reference to § 107(d) in § 181(a)(1) appears to have been purposeful and not the drafting error EPA's interpretation implies." 175 F3d 1048, Pet. App. 39a.

The legislative history confirms that Congress rejected a limited scope for the Subpart 2 risk management scheme. The Senate's version of Subpart 2 classified only initial designations.[78] Moreover, this Senate Bill did not require using "design values" based on the 1-hour NAAQS, as did § 181(a) as enacted, but tied classification to the degree the area was in nonattainment with the ozone NAAQS. *Id.*

Similarly, the Bill referred to the House Energy and Commerce Committee would have made the Subpart 2 scheme applicable only to designations under § 107(d)(4)'s predecessor.[79] Subsequently, that Committee replaced that specific reference to § 107(d)(4) with the general reference to all nonattainment designations "for ozone pursuant to section 107(d)."[80] The Conference Committee then reported the text of the revised House Bill in lieu of the Senate's,[81] and the conferees' version was enacted. This change in legislative language that reflects a congressional intent to adopt a comprehensive and exclusive risk management program for ozone must be given effect. *Cf. Russello v. United States*, 464 U.S. 16, 23-34 (1983).

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[78] *See* S. 1630, 101st Cong., §§ 101, 107, *reprinted in* 3 *1990 Legis. Hist.*, *supra* note 3, at 4124-25, 4195.

[79] *See* H.R. 3030, 101st Cong., §§ 101(a), 103, *reprinted in* 2 *1990 Legis. Hist.*, *supra* note 3, at 3748-49, 3795-96.

[80] H.R. Rep. No. 101-490, pt. 1, at 3-6, 17, *reprinted in* 2 *1990 Legis. Hist.*, *supra* note 3, at 3027-30, 3041.

[81] *See* H.R. Rep. No. 101-952, at 27-28, *reprinted in* 1 *1990 Legis. Hist.*, *supra* note 3, at 1477-78.

In a final effort to find some supportive language in the statute, EPA notes § 181(a)'s subheading: "Classification and attainment dates for 1989 nonattainment areas." But "[t]he title of a statute . . . cannot limit the plain meaning of the text. For interpretative purposes, [statutory headings are] of use *only when* [they] shed light on some ambiguous word or phrase." *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (emphasis added). In any event, this subheading does not contradict § 181(a)'s plain meaning, EPA Br. 47; it reflects Congress' intent that it is the existing 1-hour ozone NAAQS that EPA is supposed to administer, *not a revised, more stringent one "for ozone."* *Cf.* § 181(b).

Furthermore, contrary to Massachusetts and New Jersey's suggestion, Subpart 2's plain language does *not* make superfluous Congress' grant to EPA of authority to review and revise the NAAQS and to designate and to classify nonattainment areas under Subpart 1. Mass/NJ Br. 47. EPA's review of the ozone NAAQS, for example, would inform Congress of the adequacy of the statutory ozone program as "appropriate." Moreover, even under the court of appeals' decision, § 109(d) and Subpart 1 still apply to *other* criteria pollutants for which Congress has not provided a comprehensive risk management program based on a specific NAAQS. For example, in Subpart 4 of Part D, Congress enacted an exclusive risk management program for the attainment of PM_{10}, CAA §§ 188-190,[82] but no such program for $PM_{2.5}$. Likewise in Subpart 5, Congress provided no program comparable to Subpart 2 for any of three other criteria pollutants: sulfur oxides, nitrogen dioxide, and lead. *See* CAA § 191. Thus, Subpart 1 applies to a revised

[82] *See also* CAA §§ 186-187 (establishing carbon monoxide program).

NAAQS for these criteria pollutants, and to NAAQS for any new criteria pollutants EPA may list. By contrast, allowing EPA to replace the ozone NAAQS makes Subpart 2 superfluous. As a result, this interpretation must be rejected. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 & n.11 (1988).

B. Subpart 2's History and Structure Confirm It Is the Exclusive Plan for Managing Ozone.

EPA's revision of the ozone NAAQS also ignores Congress' description of Subpart 2 as the comprehensive risk management program for ozone. As the House noted when it modified its version of Subpart 2 to cover all ozone designations, "[i]n 1977, Congress tried to waive [*sic*] a 'magic wand' and command that all [ozone] nonattainment areas will meet the applicable [NAAQS]. . . by . . . December 31, 1987 . . . [That] date [has] come and gone and it is clear that . . . we had no 'magic' solutions."[83] As a result, Congress enacted Subpart 2 to "address the failure of our nonattainment areas to achieve ambient air quality deadlines in existing law . . . . We have not [in Subpart 2], however, simply continued to tell the states to do a [Subpart 1] plan to clean their air. That did not work."[84]

Congress, in 1990, thus concluded that legislating *how to attain* the ozone standard was as important, from a public

[83] H.R. Rep. No. 101-490, pt. 1, at 146-47, *reprinted in* 2 *1990 Legis. Hist.*, *supra* note 3, at 3170-71, OJA 3557-58.

[84] 136 Cong. Rec. H12867 (daily ed. Oct. 26, 1990) (Rep. Fields), *reprinted in* 1 *1990 Legis. Hist.*, *supra* note 3, at 1236, OJA 3543; *see also* 136 Cong. Rec. 132, *reprinted in* 4 *1990 Legis. Hist.*, *supra* note 3, at 4837 (Sen. Chafee).

health standpoint, as setting the standard itself.[85] According to the House Committee, a long-term strategy that mandated control measures and sanctions for failure to achieve required ozone reductions was necessary.

This is precisely what Subpart 2 accomplishes. Subpart 2, uniquely, reflects Congress' response to risk management, not by imposing deadlines and general requirements that must be developed by states and then seeing these deadlines and general requirements fail to achieve the desired ozone reductions, but by adopting a comprehensive risk management program that Congress concluded embodies sound public health policy with respect to reducing ambient ozone concentrations.

Subpart 2 provides a detailed timetable for attaining the ozone NAAQS, both in areas currently in nonattainment and areas becoming nonattainment in the future. CAA § 181(a), (b).[86] It provides a manner for reducing ozone levels depending on the severity of the pollution. *See, e.g.*, § 182(a)-(e). It provides a legislative check on EPA's use of a methodology for determining ozone air quality. § 183(g). It provides interstate ozone pollution requirements. § 184; *see also supra* pp. 4-5.

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[85] *See* H.R. Rep. No. 101-490, pt. 1, at 145-49, *reprinted in* 2 *1990 Legis. Hist.*, *supra* note 3, at 3169-73 (discussing the failure to attain reductions of ozone under Subpart 1), OJA 3556-60.

[86] Although ALA points to EPA's treatment of some nonattainment areas as "submarginal," ALA Br. 39-40, as evidence that Subpart 2 does not apply comprehensively to all nonattainment areas, EPA has indicated that submarginal areas are "subject to the time schedule of subpart 2" if their air quality calls for reclassification under Table 1. 57 Fed. Reg. 13525. Thus, Subpart 2 is a comprehensive response to the ozone nonattainment problem.

The only reasonable interpretation of this comprehensive and long term risk management program is that Congress meant for Subpart 2 to be the *exclusive* federal statutory program for lowering ambient ozone levels. EPA's establishment of its 8-hour ozone NAAQS renders irrelevant this carefully crafted legislation. Given Congress' detailed legislation, it is not plausible to conclude EPA retained authority to adopt a NAAQS inconsistent with this program. *Cf. Brown & Williamson*, 120 S.Ct. at 1301 (legislation regulating sale of tobacco confirmed Congress' intent to restrict FDA authority to regulate tobacco as "drug").

C. Subpart 2 Renders the Revised Ozone NAAQS Unlawful.

Section 109(d) authorizes EPA to revise a NAAQS only as "appropriate" in accordance with CAA §§ 108 and 109(b). As discussed above, the court of appeals was correct that a revised, more stringent NAAQS could not be implemented or enforced except in conformity with Subpart 2. But if a more stringent revised NAAQS cannot be enforced except in conformity with Subpart 2, and as EPA explains, only the 1-hour NAAQS can be implemented and enforced under Subpart 2, it is not "appropriate" to revise that NAAQS under § 109(d) to establish a more stringent NAAQS for ozone. Because Subpart 2 is Congress' comprehensive and long term program for managing ozone, and because this program applies to "ozone nonattainment areas" generally,[87] this

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[87] Section 181(a) addresses "primary standard[s]" only in specifying outer dates for attainment of the 1-hour NAAQS. Subpart 2 otherwise simply addresses "area[s] designated nonattainment for ozone."

conclusion applies with equal force to primary and secondary ozone NAAQS.[88]

This Court therefore should affirm the lower court's holding that Subpart 2 restricts EPA's authority to enforce a more stringent ozone NAAQS, should reject that court's holding that EPA may promulgate a standard that is contrary to § 109(d) and Subpart 2, and should vacate the revised ozone NAAQS as inconsistent with the congressional program for achieving ozone reductions.

CONCLUSION

For these reasons, the Court should order vacatur of the revised NAAQS for ozone and $PM_{2.5}$.

Respectfully submitted,

DAVID E. MENOTTI
WILLIAM F. PEDERSEN
JEFFREY A. KNIGHT
SHAWPITTMAN
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8675
Counsel for American Forest & Paper Association, American Iron & Steel Institute, and Alliance of Automobile Manufacturers

HENRY V. NICKEL
F. WILLIAM BROWNELL
(Counsel of Record)
JAMES N. CHRISTMAN
LUCINDA M. LANGWORTHY
HUNTON & WILLIAMS
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500
Counsel for Appalachian Power Co., et al., American Public Power Association, and National Association of Home Builders

G. WILLIAM FRICK
M. ELIZABETH COX
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8250
Counsel for American Petroleum Institute

MAURICE H. MCBRIDE
NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION
1899 L Street, N.W.
Washington, D.C. 20036
(202) 457-0480
Counsel for National Petrochemical & Refiners Association

NEWMAN R. PORTER
LEWIS AND ROCA
40 N. Central Avenue
Phoenix, AZ 85004
(602) 262-5786
Counsel for Nevada Mining Association, Newmont Gold Company, and Meridian Gold Company

DAVID F. ZOLL
ALEXANDRA DAPOLITO DUNN
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5165
Counsel for American Chemistry Council

JULIE BECKER
ALLIANCE OF AUTOMOBILE MANUFACTURERS
1401 H STREET, N.W.
Suite 900
Washington, D.C. 20005
(202) 326 5500
Counsel for Alliance of Automobile Manufacturers

HAROLD P. QUINN, JR.
NATIONAL MINING ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 463-2652
Counsel for National Mining Association

[88] In any event, the court of appeals was correct to remand the secondary NAAQS due to the extent EPA relied on the primary NAAQS in promulgating it. 175 F.3d 1040; Pet. App. 18a.

KURT E. BLASE
O'CONNOR & HANNAN
Suite 500
1666 K Street, N.W.
Washington, D.C. 20006-2803
(202) 887-1400
Counsel for Kennecott Holdings Corporation, Kennecott Energy and Coal Company, Kennecott Services Company, and National Stone Association

RUSSELL S. FRYE
COLLIER, SHANNON, RILL & SCOTT, PLLC
3050 K Street, N.W.
Suite 400
Washington, D.C. 20007
(202) 342-8878
and
RICHARD WASSERSTROM
AMERICAN FOREST & PAPER ASSOCIATION, INC.
1111 19th Street, N.W.
8th Floor
Washington, D.C. 20036
(202) 463-2582
Counsel for American Forest & Paper Association, Inc.

MARCELLE SHOOP
Associate General Counsel
KENNECOTT UTAH COPPER CORPORATION
8315 West 3595 South
P.O. Box 6001
Magna, Utah 84044-6001
(801) 252-3000
Counsel for Kennecott Holdings Corporation, Kennecott Energy and Coal Company, and Kennecott Services Co.

TIMOTHY L. HARKER
THE HARKER LAW FIRM
9500 Accord Drive
Potomac, MD 20854
(301) 983-0964
and
THOMAS J. GRAVES
NATIONAL PAINT AND COATINGS ASSOCIATION, INC.
1500 Rhode Island Ave., N.W.
Washington, D.C. 20005
(202) 462-6272
Counsel for National Paint and Coatings Association

GRANT CRANDALL
General Counsel
UNITED MINE WORKERS OF AMERICA, AFL-CIO
8315 Lee Highway
Fairfax, VA 22031
(703) 208-7200
and
EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
(304) 258-1977
Counsel for United Mine Workers of America, AFL-CIO

DUANE J. DESIDERIO
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 861-2146
Counsel for National Association of Home Builders

September 9, 2000

DAVID M. FLANNERY
JACKSON & KELLY
P.O. Box 553
1600 Laidley Tower
Charleston, WV 25322
(304) 340-1017
Counsel for Midwest Ozone Group, and West Virginia Chamber of Commerce

PETER S. GLASER
SHOOK, HARDY & BACON
600 14th Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 639-5627
Counsel for Western Fuels Association, Inc.

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 789-6000
Counsel for Phoenix Cement Co.

APPENDICES

APPENDIX A

40 C.F.R. § 50.9 National 1-hour primary and secondary ambient air quality standards for ozone (Excerpt)

* * *

(b) The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard. Area designations are codified 40 CFR part 81.

APPENDIX B

S.1630, 101st Cong., 2d Sess., § 107 (1990) (Additional Requirements for Ozone Nonattainment Areas) (excerpt)

ADDITIONAL REQUIREMENTS FOR OZONE NONATTAINMENT AREAS

Sec. 107. Part D of the Clean Air Act is amended by adding the following new subpart at the end thereof:

"SUBPART 2—ADDITIONAL PROVISIONS REGARDING OZONE NONATTAINMENT AREAS
"CLASSIFICATIONS OF OZONE NONATTAINMENT AREAS

"SEC. 181. (a) CLASSIFICATION BY OPERATION OF LAW.—Each area designated nonattainment for ozone under section 107(f)(3) is hereby classified by operation of law in one of the following categories based upon the percentage by which such standard is exceeded:

"Area classification	Amount by which standard exceeded
Moderate ozone nonattainment area	Not greater than 20 per centum
Serious ozone nonattainment area	More than 20 per centum but less than 50 per centum
Severe ozone nonattainment area	Equal to or greater than 50 per centum but not more than 120 per centum
Extreme ozone nonattainment area	More than 120 per centum

"(b) DATA AND METHODS FOR CLASSIFICATION.–For purposes of determining the

percentage by which the national primary ambient air quality standard for ozone is exceeded in any area –

"(1) the most recent monitoring data available as determined by the Administrator shall be used; and

"(2) the interpretation methodology issued by the Administrator most recently before the date of enactment of this subpart for determining attainment of the standard shall be applicable (including the design value, reference methods, and guidelines for interpretation of ozone air quality standards).

Not later than thirty days after the enactment of this subpart, the Administrator shall publish a notice of the percentages by which the national primary ambient air quality standard for ozone was exceeded in each area referred to in subsection (a).

"(c) DEADLINES FOR ATTAINMENT.–The following deadlines apply to the ozone nonattainment areas classified in accordance with subsection (a):

"Area classification	Applicable attainment due (in years after enactment of the Clean Air Act Amendments of 1989)
Moderate Area	5 years
Serious Area	10 years
Severe Area	15 years
Extreme Area	20 years

"(d) REFERENCES TO TERMS.–Any reference in this subpart to a 'moderate area', a 'serious area' a 'severe area', or an 'extreme area' shall be considered a reference to a moderate ozone nonattainment area, a serious ozone nonattainment area, a severe ozone nonattainment area, or an

extreme ozone nonattainment area as classified under this section.

"(e) Any area that is not designated nonattainment for ozone under section 107 as of the date of enactment of this section, and that is subsequently redesignated to nonattainment for ozone under section 107, shall, at the time of the redesignation, be classified by operation of law in accordance with the table under subsection (a). Upon its classification, the area shall be subject to the same requirements under section 110, subpart 1 of this part, and this subpart that would have applied had the area been so classified as of the time of the classification under subsection (a), except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between the date of enactment of this section and the date the area is classified.

* * *

APPENDIX C

H.R. 3030, 101st Cong., 2d Sess., § 103 (1990) (Additional Provisions for Ozone Nonattainment Areas) (excerpt)

SEC. 103. ADDITIONAL PROVISIONS FOR OZONE NONATTAINMENT AREAS.

Part D of title I is amended by adding the following new subpart at the end thereof:

"Subpart 2 –Additional Provisions for Ozone Nonattainment Areas

"SEC. 181. CLASSIFICATIONS AND ATTAINMENT DATES.

"(a) CLASSIFICATION AND ATTAINMENT DATES FOR 1989 NONATTAINMENT AREAS.–(1) Each area designated nonattainment for ozone pursuant to section 107(d) shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area. The design value shall be calculated according to the interpretation

methodology issued by the Administrator most recently before the date of the enactment of the Clean air Act Amendments of 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1.

"TABLE 1

Area class	Design Value*	Primary standard attainment date**
Marginal	0.121 up to 0.138	3 years after enactment
Moderate	0.138 up to 0.160	6 years after enactment
Serious	0.160 up to 0.180	9 years after enactment
Severe	0.180 up to 0.280	15 years after enactment
Extreme	0.280 and above	20 years after enactment

*The design value is measured in parts per million (ppm).

**The primary standard attainment date is measured from the date of the enactment of the Clean Air Amendments of 1990.

"(2) Notwithstanding table 1, in the case of a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years (in lieu of 15 years) after the date of the enactment of the Clean Air Amendments of 1990.

"(3) At the time of publication of the notice under section 107(d)(4) (relating to area designations) for each ozone nonattainment area, the Administrator shall publish a notice announcing the classification of such ozone nonattainment area. The provisions of section 172(a)(1)(B) (relating to lack of notice and comment and judicial review) shall apply to such classification.

"(4) If an area classified under paragraph (1) (Table 1) would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, by the procedure required under paragraph (3), adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

"(5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the 'Extension Year') the date specified in Table 1 of subsection (a) if–

"(A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

"(B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

"(b) NEW DESIGNATIONS AND RECLASSIFICATIONS.–

"(1) NEW DESIGNATIONS TO NONATTAINMENT.–Any area that is designated attainment or unclassifiable for ozone under section 107(d)(4), and that is subsequently redesignated to nonattainment for ozone under section 107(d)(3), shall, at the time of the redesignation, be classified by operation of law in accordance with Table 1 under subsection (a). Upon its classification, the area shall be subject to the same requirements under section 110, subpart 1 of this part, and this subpart that would have applied had the area been so classified at the time of the notice under subsection (a)(3), except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between the date of the enactment of the Clean Air Act Amendments of 1990 and the date the area is classified under this paragraph.

"(2) RECLASSIFICATION UPON FAILURE TO ATTAIN.—(A) Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with Table 1 of subsection (a) to the higher of—

(i) the next higher classification for the area, or

(ii) the classification applicable to the area's design value as determined at the time of the notice required under subparagraph (B).

No area shall be reclassified as Extreme under clause (ii).

(B) The Administrator shall publish a notice in the Federal Register, no later than 6 months following the attainment date, identifying each area that the Administrator has determined under subparagraph (A) as having failed to attain and identifying the reclassification, if any, described under subparagraph (A).

"(3) VOLUNTARY RECLASSIFICATION.—The Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with Table 1 of subsection (a) to a higher classification. The Administrator shall publish a notice in the Federal Register of any such request and of action by the Administrator granting the request.

(4) FAILURE OF SEVERE AREAS TO ATTAIN STANDARD.—(A) If any Severe Area fails to achieve the national primary ambient air quality standard for ozone by the applicable attainment date (including any extension thereof), the fee provisions under section 185 shall apply within the area, the percent reduction requirements of section 182(c)(2)(B) and (C) relating to reasonable further progress demonstration and NO_x control) shall continue to apply to the area, and the State shall demonstrate that such percent reduction has been achieved in each 3-year interval after such failure until the standard is attained. Any failure to make such a demonstration shall be subject to the sanctions provided under this part.

(B) In addition to the requirements of subparagraph (A), if the ozone design value for a

Severe Area referred to in subparagraph (A) is above 0.140 ppm for the year of the applicable attainment date, or if the area has failed to achieve its most recent milestone under section 182(g), the new source review requirements applicable under this subpart in Extreme Areas shall apply in the area and the term 'major source' and 'major stationary source' shall have the same meaning as in Extreme Areas.

"(C) In addition to the requirements of subparagraph (A) for those areas referred to in subparagraph (A) and not covered by subparagraph (B), the provisions referred to in subparagraph (B) shall apply after 3 years from the applicable attainment date unless the area has attained the standard by the end of such 3-year period.

"(D) If, after the date of the enactment of the Clean Air Act Amendments of 1990, the Administrator modifies the method of determining compliance with the national primary ambient air quality standard, a design value or other indicator comparable to 0.140 in terms of its relationship to the standard shall be used in lieu of 0.140 for purposes of applying the provisions of subparagraphs (B) and (C).

"(c) REFERENCES TO TERMS.—(1) Any reference to this subpart to a 'Marginal Area', a 'Moderate Area', a 'Serious Area', a 'Severe Area' or an 'Extreme Area' shall be considered a reference to a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area as respectively classified under this section.

"(2) Any reference in this subpart to 'next higher classification' or comparable terms shall be considered a reference to the classification related to the next higher set of design values in Table 1.

* * *

APPENDIX D

H.R. Rep. No. 101-952, 101st Cong., 2d Sess. (1990) (Additional Provisions for Ozone Nonattainment Areas) (excerpt)

SEC. 103. ADDITIONAL PROVISIONS FOR OZONE NONATTAINMENT AREAS.

Part D of title I of the Clean Air Act is amended by adding the following new subpart at the end thereof:

"Subpart 2 –Additional Provisions for Ozone Nonattainment Areas

SEC. 181. CLASSIFICATIONS AND ATTAINMENT DATES.

"(a) CLASSIFICATION AND ATTAINMENT DATES FOR 1989 NONATTAINMENT AREAS.—(1) Each area designated nonattainment for ozone pursuant to section 107(d) shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme

Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before the date of the enactment of the Clean Air Act Amendments of 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1.

"TABLE 1

Area class	Design Value*	Primary standard attainment date**
Marginal	0.121 up to 0.138	3 years after enactment
Moderate	0.138 up to 0.160	6 years after enactment
Serious	0.160 up to 0.180	9 years after enactment
Severe	0.180 up to 0.280	15 years after enactment
Extreme	0.280 and above	20 years after enactment

*The design value is measured in parts per million (ppm).

**The primary standard attainment date is measured from the date of the enactment of the Clean Air Amendments of 1990.

"(2) Notwithstanding table 1, in the case of a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years (in lieu of 15 years) after the date of the enactment of the Clean Air Amendments of 1990.

"(3) At the time of publication of the notice under section 107(d)(4) (relating to area designations) for each ozone nonattainment area, the Administrator shall publish a notice announcing the classification of such ozone nonattainment area. The provisions of section 172(a)(1)(B) (relating to lack of notice and comment and judicial review) shall apply to such classification.

"(4) If an area classified under paragraph (1) (Table 1) would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, by the procedure required under paragraph (3), adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

"(5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the 'Extension Year') the date specified in table 1 of paragraph (1) of this subsection if–

"(A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

"(B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

"(b) NEW DESIGNATIONS AND RECLASSIFICATIONS.–

"(1) NEW DESIGNATIONS TO NONATTAINMENT.–Any area that is designated attainment or unclassifiable for ozone under section 107(d)(4), and that is subsequently redesignated to nonattainment for ozone under section 107(d)(3), shall, at the time of the redesignation, be classified by operation of law in accordance with table 1 under subsection (a). Upon its classification, the area shall be subject to the same requirements under section 110, subpart 1 of this part, and this subpart that would have applied had the area been so classified at the time of the notice under subsection (a)(3), except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between the date of the enactment of the Clean Air Act Amendments of 1990 and the date the area is classified under this paragraph.

"(2) RECLASSIFICATION UPON FAILURE TO ATTAIN.—(A) Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with table 1 of subsection (a) to the higher of—

"(i) the next higher classification for the area, or

"(ii) the classification applicable to the area's design value as determined at the time of the notice required under subparagraph (B).

No area shall be reclassified as Extreme under clause (ii).

"(B) The Administrator shall publish a notice in the Federal Register, no later than 6 months following the attainment date, identifying each area that the Administrator has determined under subparagraph (A) as having failed to attain and identifying the reclassification, if any, described under subparagraph (A).

"(3) VOLUNTARY RECLASSIFICATION.—The Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with table 1 of subsection (a) to a higher classification. The Administrator shall publish a notice in the Federal Register of any such request and of action by the Administrator granting the request.

(4) FAILURE OF SEVERE AREAS TO ATTAIN STANDARD.—(A) If any Severe Area fails to achieve the national primary ambient air quality standard for ozone by the applicable attainment date (including any extension thereof), the fee provisions under section 185 shall apply within the area, the percent reduction requirements of section 182(c)(2)(B) and (C) relating to reasonable further progress demonstration and NO_ control) shall continue to apply to the area, and the State shall demonstrate that such percent reduction has been achieved in each 3-year interval after such failure until the standard is attained. Any failure to make such a demonstration shall be subject to the sanctions provided under this part.

(B) In addition to the requirements of subparagraph (A), if the ozone design value for a Severe Area referred to in subparagraph (A) is above 0.140 ppm for the year of the applicable attainment date, or if the area has failed to achieve its most recent milestone under section 182(g), the new source review requirements applicable under this subpart in Extreme Areas shall apply in the area and the term 'major source' and 'major stationary source' shall have the same meaning as in Extreme Areas.

"(C) In addition to the requirements of subparagraph (A) for those areas referred to in subparagraph (A) and not covered by subparagraph (B), the provisions referred to in subparagraph (B) shall apply after 3 years from the applicable attainment date unless the area has attained the standard by the end of such 3-year period.

"(D) If, after the date of the enactment of the Clean Air Act Amendments of 1990, the Administrator modifies the method of determining compliance with the national primary ambient air quality standard, a design value or other indicator comparable to 0.140 in terms of its relationship to the standard shall be used in lieu of 0.140 for purposes of applying the provisions of subparagraphs (B) and (C).

"(c) REFERENCES TO TERMS.—(1) Any reference to this subpart to a 'Marginal Area', a 'Moderate Area', a 'Serious Area', a 'Severe Area', or an 'Extreme Area' shall be considered a reference to a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area as respectively classified under this section.

"(2) Any reference in this subpart to 'next higher classification' or comparable terms shall be

considered a reference to the classification related to the next higher set of design values in table 1.

* * *

APPENDIX E

Brief of Respondent United States Environmental Protection Agency, *Environmental Defense Fund v. Browner* (D.C. Cir. No. 98-1363) (excerpt)

ORAL ARGUMENT SCHEDULED
FOR SEPTEMBER 7, 1999

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

No. 98-1363

ENVIRONMENTAL DEFENSE FUND, et al.,
Petitioners,
v.

CAROL M. BROWNER, et al.,
Respondent,

ON PETITION FOR REVIEW OF FINAL ACTION
OF THE U.S. ENVIRONMENTAL
PROTECTION AGENCY

FINAL BRIEF OF RESPONDENT
U.S. ENVIRONMENTAL PROTECTION AGENCY

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural
Resources Division

OF COUNSEL:

JAN M. TIERNEY
Office of General Counsel
U.S. Environmental
Protection Agency
401 M Street, S.W.
Washington, D.C. 20604
(202) 260-5095

ALICE L. MATTICE
Attorney, Environmental
Defense Section
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-2327

Date: June 21, 1999

* * *

Section 307(b) of the Act establishes a sixty-day period for seeking judicial review of agency rules. 42 U.S.C. § 7607(b). This Court has "repeatedly held that temporal limitations on judicial review are jurisdictional in nature." *National Mining Ass'n v. Department of the Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995); *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 911-12 (D.C. Cir. 1985). The time limits on petitions for review of agency rules reflect a deliberate congressional choice to impose finality on agency decisions, in order to conserve agency resources and provide guidance and stability to those affected by the agency action. *Eagle-Picher*, 795 F.2d at 911-12.

Petitioners' central claim in this case is that EPA's criterion for phasing out the one-hour ozone NAAQS is unlawful because it does not require redesignating "clean" nonattainment areas to attainment pursuant to section 107(d)(3)(E) of the Act, 42 U.S.C. § 7407(d)(3)(E)(iv), and therefore does not require States to submit plans for maintaining the one-hour NAAQS indefinitely after

attainment. Pet.Br. 2, 21, 31-33, 42.[19] However, that issue was resolved by EPA's 1997 Rule. 40 C.F.R. § 50.9(b).

The 1997 Rule is clear on its face. The Rule states, without qualification, that the one-hour standard "will no longer apply" to an area once EPA determines that it has "air quality meeting the 1-hour standard." 40 C.F.R. § 50.9(b). Thus, "air quality meeting the 1-hour standard" is the only criterion for revocation. The Rule also specifically states that "[a]rea designations are codified in 40 CFR part 81," which includes the list of designations of areas for the one-hour ozone standard. *Id.* The inclusion of this reference provides notice that the designations for the one-hour standard in 40 C.F.R. part 81 would be affected by EPA's action. *Id.*

Petitioners attempt to draw an artificial distinction between the revocation of the one-hour standard (which they appear to concede was addressed in the 1997 Rule) and the allegedly "separate" decision to remove the associated *designations* for revocation areas in 40 C.F.R. part 81. Pet.Br. 30. However, designations are for a particular NAAQS and are linked to that NAAQS. *E.g.*, 42 U.S.C. § 7407(d)(1)(A)(i)-(ii) ("attainment" and "nonattainment" designations defined as meeting or not meeting a particular

---

[19] Although they now challenge the removal of attainment or unclassifiable designations in summary fashion (Pet.Br. 2, 4), Petitioners did not object to the removal of attainment or unclassifiable designations in their comments, and therefore cannot do so here. *See* EDF Comments, JA 182-188; NRDC Comments, JA 189-194. *Linemaster Switch Corp. v. EPA*, 938 F. 2d 1299, 1308-09 (D.C. Cir. 1991). In any event, Petitioners' alleged injury - an asserted "gap" in PSD requirements for areas designated attainment or unclassifiable - is illusory. As discussed above, Petitioners read EPA's PSD regulations too narrowly. PSD will in fact continue to apply to such areas. *Supra* 21.

NAAQS); *see infra* 43-44.[20] In its implementation policy statement issued contemporaneously with the ozone NAAQS proposal, *supra* 13, EPA made clear that it viewed revocation of the one-hour standard as also revoking the associated designations: "the designations [for the one-hour standard] would remain in effect so long as the current 1-hour ozone NAAQS remains in effect," 61 Fed. Reg. at 65,754 -- and, by necessary implication, would not remain in effect thereafter.

As discussed above, EPA initially proposed an approach similar to the one Petitioners urge here, whereby the Agency would delay revocation of the one-hour standard (and thus the associated designations) until it made designations for the revised eight-hour standard. *Id.*; *see supra* 13. However, EPA changed that approach in light of its revised legal interpretation of the interplay of Subpart 2 and EPA's NAAQS revision authority. 62 Fed. Reg. at 38,873; *supra* 13-14. In this context, the decision to revoke the one-hour standard necessarily meant that EPA was also revoking the designations associated with it. Petitioners were active and highly sophisticated participants in both the NAAQS rulemaking and the discussions on implementation, and could not reasonably have understood otherwise.[21]

[20] Petitioners elsewhere assert (Pet.Br. 36, 38-39) that designations are linked to "the pollutant ozone," not to particular NAAQS. As demonstrated below, that argument is not supported by the statutory language and is plainly incorrect. *Infra* 43-45.

[21] EDF and NRDC submitted comments on the proposed ozone and particulate matter NAAQS revisions and on EPA's proposed implementation guidance. Further, EDF and NRDC were members of the Subcommittee for Ozone, Particulate Matter, and Regional Haze, part of the Clean Air Act Advisory Committee created pursuant to the Federal Advisory Committee Act. The Subcommittee's purpose was to develop and recommend to EPA strategies for the implementation of the ozone and particulate matter standards and the regional haze strategy, which EPA was then developing.

Further, if there were any room for doubt as to EPA's meaning, the Presidential Memorandum, issued contemporaneously with and referenced in the preamble to the 1997 Rule (at 62 Fed. Reg. 38,856) removed it. The Memorandum was explicit, stating that under the 1997 Rule States "will not have to provide maintenance plans for those areas that attain the [one]-hour standard." 62 Fed. Reg. at 38,424. Petitioners thus had clear notice that EPA was *not* requiring States to develop maintenance plans. Because maintenance plans are required only as a prerequisite for redesignation under section 107(d)(3)(E), Petitioners also had clear notice that EPA was not retaining the one-hour designations that would otherwise have made maintenance plans relevant.

Other participants in the NAAQS rulemaking understood the implications of EPA's interpretation and challenged aspects of it in the pending *ATA* litigation concerning the revised ozone NAAQS. Indeed, those arguments are premised on their recognition that the one-hour standard (and thus the programs associated with it) would *not* be revoked for an area until the standard was met, but then *would* be revoked. Specifically, in *ATA*, industry and State petitioners argued that the continued applicability of the one-hour standard and Subpart 2 prohibited EPA from revising the one-hour standard and associated designations *at all*, in part because EPA's action created an alleged "patchwork" of different control requirements associated with different

standards.[22] Thus, the petitioners in *ATA* well recognized that the 1997 Rule removed all planning requirements for the one-hour standard for an area, once that standard was revoked.

Petitioners here were similarly on notice of the issues resolved by the 1997 Rule; indeed, they now challenge EPA's determination regarding the interplay between the pre-existing one-hour and the revised eight-hour standard from a different perspective. Having apparently made a decision not to raise those issues at that time, they cannot do so now. Further, even if Petitioners had some doubt,[23] their proper course would have been to file a protective petition for review and let the Court decide whether the case was properly brought. *See Eagle-Picher*, 759 F.2d at 914 (in the analogous ripeness context, ". . . if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being time-barred") (emphasis in original). As *Eagle-Picher* instructs, *id.* at 912, the risk of guessing wrong should fall on Petitioners, not the Court, EPA, or the communities and States relying on EPA's rule.

* * *

[22] *See American Trucking Ass'ns, Inc., et al. v. EPA*, No. 97-1441 and consolidated cases, Brief of Non-State Clean Air Act Petitioners and Intervenors 22-25, JA 211-215; Brief of Petitioner States 5-9 & n.4, JA 217-221; Reply Brief of Petitioner States 8-10, JA 223-225.

[23] Petitioners do not address the timeliness issue in their brief. At most, they hint obliquely that the Revocation Rule was the first time they understood that EPA was removing designations associated with the one-hour standard, and was not requiring areas previously designated nonattainment to prepare maintenance plans for the one-hour standard. Pet. Br. 28, 43-44. As demonstrated above, their asserted confusion is not credible.

APPENDIX F

Appalachian Power Co., *et al.*, Petition for D.C. Circuit Review of EPA Ozone NAAQS Rulemaking

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPALACHIAN POWER COMPANY, et al., Petitioners,	)	
v.	)	Docket No.__
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITION FOR REVIEW

Pursuant to Rule 15 of the Federal Rules of Appellate Procedure, and § 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), Appalachian Power Company, et al., hereby petition the Court to review a final rule issued by Respondent United States Environmental Protection Agency. This rule revises the national ambient air quality standards (NAAQS) for ozone. The rule is entitled "National Ambient Air Quality Standards for Ozone," and it was published on July 18, 1997 at 62 Federal Register 38,856-96. The Petitioners are listed in Attachment A to this petition. Petitioners own and operate facilities that will be affected by this final rule. A copy of the Federal Register notice announcing this final rule is Attachment B to this petition.

Respectfully submitted,

Henry V. Nickel
F. William Brownell
Lucinda Minton Langworthy
Ross S. Antonson
HUNTON & WILLIAMS
1900 K Street, N.W., Suite 1200
Washington, D.C. 20006
(202) 955-1500

Counsel for Appalachian Power Company, et al.

Dated: August 15, 1997