The Ozone Saga

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South Coast Air Quality Management District v. EPA *is emblematic of the EPA's failure to put in place air quality standards deemed necessary to protect public health over a decade ago. In a unanimous ruling, the D.C. Circuit rejected the agency's 2004 rule meant to implement those standards because it largely ignored the Clean Air Act's strict regulation of ground level ozone, a pollutant that continues to exact unacceptable tolls on the environment, the economy, and public health. The result was not surprising. The D.C. Circuit had previously vacated a 1997 EPA rule that also employed a discretionary framework in place of the strict scheme called for by the Clean Air Act. On appeal, the Supreme Court disagreed that the exclusive use of the strict regulatory approach was unambiguously mandated by the language of the statute, but affirmed that the EPA's neglect of the scheme was unreasonable. The Court remanded to the agency to produce a sensible rule. Despite the Court's emphasis on the singular importance of the strict approach, the EPA used the opportunity to craft a rule that once again attempted to largely avoid the congressional mandate. In* South Coast, *the D.C. Circuit predictably rejected this abuse of discretion. The language of the Clean Air Act prevailed, but only after regrettable and unnecessary delay.*

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INTRODUCTION

On average, each of us breathes over 3,000 gallons of air a day.[1] Any amount of ground level ozone contained in that air is harmful.[2] Unlike stratospheric ozone, which protects the Earth from ultra violet rays, ground level ozone causes lung disease, and can injure the brain, heart, liver, and immune system.[3] Breathing small amounts of ozone, even over short periods of time, increases the risk of premature death.[4] Ozone is also responsible for significant environmental impacts. It impairs plant photosynthesis, damaging forests and draining billions of dollars from the American economy by reducing crop production.[5] Additionally, ozone is the main component of smog,[6] and is a greenhouse gas that contributes to global warming.[7]

Regulation has largely failed to reduce ozone concentrations to safe levels. Under the Clean Air Act, first passed in 1963 and amended many times since then, the Environmental Protection Agency (EPA) is responsible for setting regulatory standards for six common air pollutants known to be hazardous to

1. U.S. Envtl. Prot. Agency, Air and Radiation: Basic Information, http://www.epa.gov/air/basic.html (last visited July 14, 2008).

2. *See* National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,863 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50).

3. U.S. ENVTL. PROT. AGENCY, EPA/600/R-05/004aF, 1 AIR QUALITY CRITERIA FOR OZONE AND RELATED PHOTOCHEMICAL OXIDANTS 5-1 (2006) [hereinafter EPA AIR QUALITY CRITERIA], *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=149923.

4. *See generally* Michelle L. Bell et al., *A Meta-Analysis of Time-Series Studies of Ozone and Mortality with Comparison to the National Morbidity, Mortality, and Air Pollution Study*, 16 EPIDEMIOLOGY 436 (2005) (providing "evidence of short-term associations between ozone and mortality"); Jonathan I. Levy et al., *Ozone Exposure and Mortality: An Empiric Bayes Metaregression Analysis*, 16 EPIDEMIOLOGY 458 (2005) (conducting a metaregression of published ozone-mortality studies to estimate quantitatively the short-term effects of ozone on mortality); Kazuhiko Ito et al., *Associations Between Ozone and Daily Mortality: Analysis and Meta-Analysis*, 16 EPIDEMIOLOGY 446 (2005) (analyzing "short-term associations between ozone and daily mortality" in seven U.S. cities); Steven N. Goodman, *The Methodologic Ozone Effect*, 16 EPIDEMIOLOGY 430 (2005) (commenting on the above three articles).

5. *See* EPA AIR QUALITY CRITERIA, *supra* note 3, at 9-2, 9-22–24.

6. U.S. Envtl. Prot. Action, Ground-level Ozone, http://www.epa.gov/air/ozonepollution/ (last visited July 14, 2008).

7. EPA AIR QUALITY CRITERIA, *supra* note 3, at 10-1.

public health, including ozone.[8] The Clean Air Act amendments of 1990 specifically targeted ozone, but the problem persists. In 2006, approximately 77 million Americans lived in areas with ozone concentrations in excess of a standard that the EPA has since deemed obsolete and replaced with more stringent regulation.[9] The intractability of the ozone problem has been exacerbated by a lack of agency action and state cooperation, political interference on behalf of interested parties, and protracted litigation.

Theoretically, the two-part test established in *Chevron v. Natural Resources Defense Council* that courts use to review agencies' interpretations of statutes should mitigate the problem of protracted litigation.[10] In practice, however, as demonstrated by *South Coast Air Quality Management District v. EPA* (*South Coast*), judicial review under *Chevron* may afford agencies additional opportunities to delay.[11] *Chevron* requires courts to employ a two-step analysis.[12] Under step one, the court determines whether the statute at issue has an unambiguous meaning that the agency is bound to follow.[13] If the answer is no, the court asks under step two whether the agency interpretation is reasonable.[14] The agency interpretation need not be the best or even a preferred reading. As long as it is permissible, it stands. By giving agencies a high degree of deference, this seemingly straightforward rule should reduce the need for judicial review by making it clear that reasonable agency actions will be upheld. The formulaic and textualist nature of the test should also clarify the statutory grounds upon which courts reject agency action when judicial review is necessary, and thereby reduce the need for repeat litigation. Decreasing the need to go to court in the first place, and the need to return, should result in quicker implementation of regulatory policies. In practice, however, when a court declares an agency's chosen policy unreasonable under *Chevron* step two, protracted litigation may still result. *South Coast* demonstrates that even when a court remands to an agency under *Chevron* step two with specific instructions to adhere to the statutory scheme, the agency will likely take the lack of a *Chevron* step one ruling as an opportunity to simply re-tool the original, unreasonable policy. In *South Coast*, the D.C. Circuit rejected the EPA's attempt to do just that by advancing an interpretation of the Clean Air Act that

8. U.S. Envtl. Prot. Agency, Understanding the Clean Air Act, http://www.epa.gov/air/caa/peg/understand.html (last visited July 14, 2008); U.S. Envtl. Prot. Agency, Cleaning Up Commonly Found Air Pollutants, http://www.epa.gov/air/caa/peg/cleanup.html (last visited July 14, 2008).

9. U.S. ENVTL. PROT. AGENCY, EPA/600/R-07/045F, EPA'S 2008 REPORT ON THE ENVIRONMENT (FINAL REPORT) 2-23 (2008), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=190806.

10. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (two part test).

11. S. Coast Air Quality Mgmt. Dist. v. EPA (*South Coast*), 472 F.3d 882, 886 (D.C. Cir. 2006).

12. *Chevron*, 467 U.S. at 842.

13. *Id.* at 842–43.

14. *Id.* at 843.

would have largely avoided the statute's strict regulation of ozone.[15] As such, *South Coast* is a victory for the public. When placed within a boundless history of delayed protection and missed deadlines, however, the bittersweet nature of that victory becomes readily apparent. This story should serve as a cautionary tale for those drafting both traditional and market-based regulations designed to tackle climate change.

I. BACKGROUND

South Coast is the third in a series of related decisions by the D.C. Circuit and the Supreme Court regarding EPA implementation of air quality standards for ozone. To place the case in context, a summary of the relevant statutory scheme, EPA actions, and the previous two cases is provided below.

A. The Clean Air Act

The Clean Air Act requires that the EPA promulgate a "National Ambient Air Quality Standard" (NAAQS) for airborne pollutants "requisite to protect the public health."[16] While the federal government sets the goal, it is left to the states to choose what pollution controls they will employ in order to meet, or "attain" the NAAQS.[17] This flexible approach, later known as "Subpart 1," failed to significantly reduce the amount of ozone in the air.[18] As many states were going to miss the first attainment deadline of 1977, Congress extended it to 1987.[19] When that year came and passed without significant progress, pressure built for a stricter set of regulations that culminated in the 1990 amendments.[20] Congress recognized that the problem was largely the result of EPA and state inaction.[21] According to Representative Henry Waxman, a key proponent of the amendments, the legislation's exacting language was intended to prevent further delay and executive branch frustration of the Clean Air Act's purpose.[22] In fact, the legislative history reveals that portions of the bill were specifically designed to reverse relaxed EPA regulation upheld by the very decision that established the *Chevron* standard of review.[23]

The amendments only emerged after a decade-long political battle.[24] The final bill rejected the flexible regulations that had proved ineffective and

15. *South Coast*, 472 F.3d at 905.
16. Clean Air Act § 109, 42 U.S.C. § 7409 (2006).
17. S. Coast Air Quality Mgmt. Dist. v. EPA (*South Coast*), 472 F.3d 882, 886 (D.C. Cir. 2006).
18. *Id.* at 886–87.
19. *See id.* at 886.
20. *See id.* at 886–87.
21. S. REP. NO. 101-228 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3397.
22. Henry A. Waxman, *Overview and Critique: An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1743–44 (1991).
23. S. REP. NO. 101-228 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3410.
24. Waxman, *supra* note 22, at 1723.

established an elaborate command and control regulatory structure.[25] In the words of Representative Waxman, "The product of all this effort is a sweeping collection of programs that dwarfs previous environmental laws. Any one of the 1990 Amendments' five major titles would ordinarily be an act in itself."[26] In order to combat the ozone problem, the amendments replaced the flexible Subpart 1 with Subpart 2.[27] The difference between the two is dramatic, and central to future litigation. Subpart 1 granted the states wide discretion in designing programs to address ozone, Subpart 2 mandates action. The 1990 amendments contain a table, approximated below, that classified geographic areas with ozone concentrations in excess of 0.12 parts per million (ppm) from "Marginal" to "Extreme," according to the degree to which they violated the standard.[28]

Table 1

Area Classification	***Ozone Concentration [in parts per million (ppm)]***	***Attainment Deadline***
Marginal	0.121 up to 0.138	1993
Moderate	0.138 up to 0.160	1996
Serious	0.160 up to 0.180	1999
Severe	0.180 up to 0.280	2005
Extreme	0.280 and above	2010

While Subpart 2 grants areas with worse pollution more distant attainment deadlines, it requires category-specific pollution controls, such as vehicle smog checks, in order to assure progress from one classification to the next.[29] The more extreme the problem, the more stringent and more numerous the controls required.

B. The 1997 Revision of the NAAQS

In 1997, the EPA finally revised the NAAQS for ozone in response to concerns which emerged a decade earlier that the ozone standard that served as the basis for Table 1, 0.12 ppm measured over a one-hour period, was insufficient to protect public health.[30] The Clean Air Act requires the EPA to

25. *See* Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1049 (D.C. Cir. 1999), *modified*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part, rev'd in part*, 531 U.S. 457 (2001).

26. Waxman, *supra* note 22, at 1723–24.

27. *See Am. Trucking*, 175 F.3d at 1046.

28. Clean Air Act § 181(a), 42 U.S.C. § 7511(a) (2006).

29. *Am. Trucking*, 175 F.3d at 1046; 42 U.S.C. § 7511.

30. National Ambient Air Quality Standards for Ozone—Final Decision, 58 Fed. Reg. 13,008, 13,008 (Mar. 9, 1993) (to be codified at 40 C.F.R. pt. 50) (recognizing scientific concerns but declining to revise the NAAQS for ozone); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg.

review the standards at five-year intervals in order to assure they reflect current science.[31] After reviewing the NAAQS in 1993, the EPA declined to act, despite scientific concern that the existing standard failed to account for longer-term exposure.[32] In the years that followed, it became clear that such concerns could no longer be ignored.[33] In 1997, the EPA replaced the one-hour 0.12 ppm NAAQS with a standard of 0.08 ppm measured over an eight-hour period.[34] Nevertheless, the change was not as radical as it might appear. As the old one-hour measure is roughly equivalent to an eight-hour standard of 0.09 ppm, the newer NAAQS of 0.08 ppm is only 0.01 ppm more stringent.[35]

C. Implementing the 1997 NAAQS: Abandoning the Subpart Two Regulatory Structure

Faced with the inherent difficulties of transitioning to a new standard, the EPA decided to simply abandon the strict requirements codified by the 1990 amendments in Subpart 2 under the new standard.[36] The EPA relied upon what it perceived as an ambiguity in the statutory scheme. While the Clean Air Act requires that the NAAQS be reviewed and revised as necessary, it fails to specify how to *implement* the new standards.[37] To illustrate a typical problem that results from this lack of clear instruction, consider an area labeled "Serious" under the 1990 classification scheme. Table 1 indicates the area has until 1999 to attain the old one-hour standard of 0.12 ppm. As the new eight-hour 0.08 ppm standard is marginally stricter, should the deadline be extended? If so, until when? What about areas that fail to meet the new standard, which were not originally classified by Table 1 because they met the old standard? Faced with such questions, instead of adapting Table 1 to the new standard, creating new deadlines, and reclassifying areas accordingly, the EPA decided to abandon the strict Subpart 2 regulatory structure created by the 1990 amendments.[38] In the rule that revised the NAAQS, the agency announced that the new standards were to be implemented under the old Subpart 1.[39] In doing so, the EPA essentially repealed Congress's comprehensive plan for solving the ozone problem. Subpart 1 lacks the mandated controls included in Subpart 2,

38,856, 38,856 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50) (deciding to revise the NAAQS for ozone).

31. Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1047 (D.C. Cir. 1999), *modified*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part, rev'd in part*, 531 U.S. 457 (2001). 42 U.S.C. § 7409.

32. National Ambient Air Quality Standards for Ozone—Final Decision, 58 Fed. Reg. at 13,015.

33. *See* S. Coast Air Quality Mgmt. Dist. v. EPA (*South Coast*), 472 F.3d 882, 888 (D.C. Cir. 2006).

34. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,856.

35. *Id.* at 38,858.

36. *See* Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1048 (D.C. Cir. 1999), *modified*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part, rev'd in part*, 531 U.S. 457 (2001).

37. *See id.*

38. *See id.*

39. S. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 888 (D.C. Cir. 2006).

and grants states the discretion that had resulted in decades of missed deadlines. Not surprisingly, a legal battle ensued that continues to this day.

D. The 1999 D.C. Circuit Rejection of the EPA Plan

Although *American Trucking Associations, Inc. v. EPA* is best known for its unsuccessful revival of the non-delegation doctrine which called broader EPA authority into question, the specific holding most relevant to *South Coast* is the D.C. Circuit's rejection of the EPA's implementation plan, which attempted to replace Subpart 2 with the discretionary Subpart 1.[40] Using a *Chevron* step one analysis, the court held that the 1990 Clean Air Act made it unambiguously clear that Congress intended for ozone to be regulated under Subpart 2.[41] The court vacated the rule; the case was soon appealed.[42]

E. The Supreme Court Closes the Door on Non-Delegation, but Opens the Door to Delay

On appeal, the Supreme Court rejected the lower court's non-delegation argument and modified the lower court's *Chevron* analysis.[43] The Court assured that the renaissance of the non-delegation doctrine was stillborn, restoring the EPA's authority to revise NAAQS as it had in 1997 and stabilizing the grounds upon which the administrative state rests.[44] If the Court had stopped there, the EPA would have been bound by the D.C. Circuit's opinion requiring the exclusive use of Subpart 2 to regulate ozone, and *South Coast* might have never come into being. However, the Supreme Court disagreed that the statute was clear under *Chevron* step one.

Specifically, the Court identified two gaps in which the Act was ambiguous. Table 1 did not classify areas that met the old standard, which is roughly equivalent to 0.09 ppm over eight hours.[45] As a result, areas that met the old standard but did not meet the new standard of 0.08 ppm needed to be classified and the statute failed to specify how that should be done.[46] The Court more or less asked, what happens when the goalposts are moved? In addition to the classification gap, a timing gap existed because Table 1 established

40. *Am. Trucking*, 175 F.3d at 1033, 1046 (holding that the rationale under which the EPA had revised the NAAQS in 1997 "effect[ed] an unconstitutional delegation of legislative power."). This was not only a direct assault on the authority of the EPA to regulate ozone, but a threat to countless forms of administrative regulation.

41. *See* Am. Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4, 10 (D.C. Cir.,1999), *modifying* 175 F.3d 1027 (D.C. Cir. 1999), *aff'd in part, rev'd in part*, 531 U.S. 457 (2001).

42. Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1048 (D.C. Cir. 1999), *modified*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part, rev'd in part*, 531 U.S. 457 (2001).

43. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472–76, 481–84 (2001).

44. *See id.* at 474–76.

45. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,858 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50).

46. *Whitman*, 531 U.S. at 483.

deadlines ranging from 1993–2010, many of which had already passed by the time the NAAQS were revised in 1997.[47] When the goalposts are moved, what happens to the game clock?

Having identified the classification and timing gaps, the Court declared it was not *Chevron* step one clear that Subpart 2 was intended to be the "exclusive, permanent means of enforcing a revised ozone standard" and therefore it would defer to the EPA to resolve the ambiguity.[48] However, the Court agreed with the D.C. Circuit that simply abandoning Subpart 2 was unreasonable.[49] The Court made it clear that such an interpretation was impermissible under *Chevron* step two. In the Court's words:

> To use a few apparent gaps in Subpart 2 to render its textually explicit applicability to nonattainment areas under the new standard utterly inoperative is to go over the edge of reasonable interpretation. The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.[50]

The Court remanded to the EPA to craft a reasonable rule.[51] After two years of inaction, several environmental groups filed suit in 2003 to force the agency to act as required by the Clean Air Act and the Supreme Court.[52] The EPA consented to their demands and produced a rule one year later.[53]

F. The 2004 Rule Reinvents the Mistakes of 1997

Once the final regulation was issued and the public was given the opportunity to review its substance, it became apparent that further litigation would ensue. The 2004 rule revoked the one-hour standard of 0.12 ppm and created a new Table 1 classification scheme based on the eight-hour standard of 0.08 ppm.[54] Some areas were re-designated to a lower classification, i.e., from "Serious" to "Moderate."[55] These areas appeared to be subject to fewer and less stringent pollution controls than they had been previously. The EPA recognized that this ran afoul of the Clean Air Act's anti-backsliding provision, section 172(e), which stipulates that controls may not be removed when NAAQS are relaxed.[56] The logical inference is that controls may not be removed when NAAQS are made *stricter*, as was the case when the standards were revised in

47. *See id.* at 483–84.
48. *Id.* at 484.
49. *Id.* at 485.
50. *Id.*
51. *Id.* at 486.
52. *See* S. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 886 (D.C. Cir. 2006).
53. Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards, 69 Fed. Reg. 23,858 (Apr. 30, 2004) (to be codified at 40 C.F.R. pt. 81).
54. *South Coast*, 472 F.3d at 889.
55. *See id.* at 889–90.
56. *Id.* at 890. Section 172(e) reads, "Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." 42 U.S.C. § 7502(e).

1997. In accordance with the anti-backsliding provision, the 2004 rule stated that such areas were obligated to retain controls required under the previous standard.[57]

While creating a new Table 1 to accommodate the revised NAAQS and respecting the anti-backsliding provision was in line with the requirements imposed by the courts and the Clean Air Act, the EPA did not stop there. In the 2004 rule, the agency stated that its goal was to grant states greater flexibility in crafting their regulations.[58] This aim was frustrated by the anti-backsliding provision that required the retention of existing pollution controls. Undaunted, the EPA decided to re-invent the word "controls" so that various regulatory measures—including New Source Review (which imposes new technology on old sources of pollution), penalty provisions for missed deadlines, demonstrations that automobile emissions would not prevent attainment, and contingency plans for when initial plans proved inadequate—would no longer be required.[59] This end run around the anti-backsliding provision respected the form of the Clean Air Act, while significantly gutting its substance. The excluded controls were key parts of the 1990 amendments' solution to the ozone problem.

Turning to the classification gap identified by the Supreme Court, the 2004 rule stated that previously unclassified areas failing the new standard (those with eight-hour ozone concentrations between 0.08 ppm and 0.09 ppm) would be regulated under the flexible Subpart 1.[60] In other words, only areas with ozone concentrations greater than 0.09 ppm, thereby violating both the old and new standards, would be regulated under Subpart 2. In conjunction with other aspects of the rule, this meant that 76 of 122 areas would avoid Subpart 2, Congress's comprehensive solution to the ozone problem.[61] Addressing the timing gap, the EPA decided to simply reset the game clock. The deadlines imposed in 1990 would restart as of 2004.[62] An area with a 1990 Table 1 deadline of three years post enactment, resulting in a deadline of 1993, would have a deadline of three years post NAAQS revision, resulting in a deadline of 2007.

In essence, the rule codified the EPA's goal of providing states with maximum flexibility. Attainment deadlines were extended. The majority of areas were no longer subject to the 1990 Clean Air Act's exacting mandates under Subpart 2, and for those that were, their impact was reduced by the exclusion of critical pollution controls.

57. *Id.*
58. 69 Fed. Reg. at 23,958.
59. *See* 472 F.3d at 890.
60. *See id.* at 889.
61. *Id.*
62. *Id.* at 890.

II. THE RESULTING LITIGATION: *SOUTH COAST*

A. All The Parties and All Their Claims

Not surprisingly, the rule was challenged by a mass of interested parties from all sides. The National Petrochemical and Refiners Association asserted that the creation of the new Table 1 was "flawed."[63] The State of Ohio argued that the rule failed to push back the deadline far enough.[64] Another industry group, the Chamber of Greater Baton Rouge, contended that areas reclassified to a lower status should be freed from all applicable pollution "controls," not just the ones the EPA did away with by redefining the word.[65] Conversely, various state and environmental petitioners argued that the anti-backsliding provision required that all of the controls previously in place be maintained and that placing 76 of 122 areas under Subpart 1 instead of the more exacting Subpart 2 violated the Clean Air Act.[66] Finally, the environmental groups argued that EPA did not have the authority to revoke the one-hour standard.[67]

B. The Many Rulings

With a few notable exceptions, the D.C. Circuit sided with the various state and environmental groups, rejecting much of the 2004 rule as an impermissible interpretation of the Clean Air Act.[68] The court concluded it was clear under *Chevron* step one that areas with air quality in violation of the old standard (those with ozone concentrations greater than 0.09 ppm over eight hours) were subject to the rigid Subpart 2.[69] For areas falling into the classification gap (i.e., with eight-hour concentrations between 0.08 and 0.09 ppm), the court stated that the EPA erred when it choose to use Subpart 1 instead of Subpart 2.[70] The court reasoned that the 1990 amendments were meant to limit EPA discretion and clearly intended Subpart 2 to be the primary means of regulating ozone. Accordingly, to preference Subpart 1 in order to maximize state flexibility was impermissible under *Chevron* step two.[71] The Court also held that the anti-backsliding provision required keeping all controls previously in place and that attempting to define "controls" in order to avoid the obligation was indefensible.[72] Finally, the court concluded that the EPA had the authority to retract the one-hour standard of 0.12 ppm, dismissed

63. *Id.*
64. *Id.* at 891.
65. *See id.* at 898.
66. *Id.* at 890–92.
67. *Id.* at 891.
68. *Id.* at 905.
69. *Id.* at 895.
70. *Id.* at 894–895.
71. *Id.*
72. *Id.* at 900.

Ohio's claim on the ground that it was not timely, and rejected the industry's argument that the creation of the new Table 1 was flawed.[73] The court vacated the 2004 rule and remanded to the EPA.[74]

The EPA asked for a rehearing, arguing that the D.C. Circuit failed to recognize the discretion granted to them by the Supreme Court's identification of the timing and classification gaps.[75] The court denied the petition and reiterated that favoring Subpart 1 in order to maximize state flexibility was an impermissible interpretation of the Clean Air Act, as it was clear the 1990 amendments were intended to limit discretion.[76] By request, the court also limited the scope of its ruling in order to prevent unnecessary delay, making it clear that elements of the rule not specifically rejected remained valid.[77] The court remanded to the agency with the following directive: "EPA is urged to act promptly in promulgating a revised rule that effectuates the statutory mandate by implementing the eight-hour standard, which was deemed necessary to protect the public health a decade ago."[78]

C. Analysis

1. Qualified Victory

South Coast demonstrates the potential for strong statutory language to check agency resistance to congressional mandates. The inconspicuous anti-backsliding provision, section 172(e), provided the D.C. Circuit with a clear statutory basis for rejecting attempts by the EPA and industry to discard many of the Clean Air Act's most important pollution control measures. In the words of the court, "[t]he Act placed states onto a one-way street whose only outlet is attainment."[79] The opinion also decisively rejected the EPA's attempt to redefine the word "controls."[80] The court's reading of the statute restored measures that constitute much of the core of the Clean Air Act's ozone regulation.

Constrained by the Supreme Court opinion, the D.C. Circuit could not, as it had seven years prior, hold that the Clean Air Act unambiguously required the use of Subpart 2 under *Chevron* step one. Nonetheless, the same result was accomplished by declaring the use of Subpart 1 unreasonable under *Chevron* step two. There are only two relevant alternatives under the Clean Air Act. By

73. *See id.* at 891–92.

74. *Id.* at 905.

75. S. Coast Air Quality Mgmt. Dist. v. EPA, 489 F.3d 1245, 1246–47 (D.C. Cir. 2007), *denying reh'g to* 472 F.3d 882 (D.C. Cir. 2006).

76. *Id.* at 1247.

77. *Id.* at 1248.

78. *Id.* at 1248–49.

79. S. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 900 (D.C. Cir. 2006).

80. *See id.*

eliminating one of them, the court left the EPA with a single possibility—Subpart 2. The court effectively nullified the EPA's attempt to reinstate the regulatory scheme Congress had rejected in 1990. The 2004 rule would have relegated 76 of 122 nonattainment areas to the same Subpart 1 that proved ineffective for the twenty years preceding the amendments. In place of the failed flexible approach, Subpart 2 mandates the use of specific pollution controls and leaves little room for inaction. The court's protection of Subpart 2 represents a victory for prescriptive regulation in an era in which flexible market mechanisms have been heavily favored. Administration critics greeted *South Coast* enthusiastically. In the words of Barbara Boxer,

> I am pleased that the Court of Appeals has seen through EPA's transparent attempts to weaken implementation of the Clean Air Act's rules for smog . . . . Sadly, we have once again had to rely on the court to tell EPA how to read the text of the Clean Air Act in a way that protects people, not polluters.[81]

South Coast highlights the EPA's failure to adequately address the ozone problem. In the late 1980s, there were already indications that the 1979 standard of 0.12 ppm insufficiently protected public health.[82] In the 1990s, a growing consensus emerged that the one-hour standard was inadequate.[83] In 1997, the EPA revised the standards in response to those concerns.[84] Eleven years later, the standards have yet to be fully implemented, even though the EPA has just announced new NAAQS. In March 2008, the EPA finalized a rule lowering the ozone standard to 0.075 ppm over eight hours in response to a finding by the scientific advisory board that the 1997 rule addressed in *South Coast* of 0.08 ppm insufficiently protected public health.[85] The scientific advisory committee recommended an even lower standard but was ignored by the politically appointed EPA administrator.[86] In any case, it is striking that the 1997 standard at issue in this series of cases has been deemed obsolete before it was even fully implemented. The new 0.075 ppm NAAQS will undoubtedly be challenged by all stakeholders and the line of cases examined here does not bode well for swift implementation.

81. Press Release, U.S. Senator Barbara Boxer, Boxer Statement on Court of Appeals Decision on Smog (Dec. 22, 2006), *available at*: http://boxer.senate.gov/news/releases/record.cfm?id=267098.

82. *See, e.g.*, National Ambient Air Quality Standards for Ozone—Final Decision, 58 Fed. Reg. 13,008, 13,014–15 (Mar. 9, 1993) (to be codified at 40 C.F.R. pt. 50).

83. *See* National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,863 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50).

84. *Id.*

85. National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436, 16,436, 16,470–72 (Mar. 27, 2008) (to be codified at 40 C.F.R. pts. 50 and 58).

86. Juliet Eilperin, *EPA Tightens Pollution Standards; But Agency Ignored Advisers' Guidance*, WASH. POST, Mar. 13, 2008, at A1.

2. The Usual Culprits

There are a number of institutions to whom the responsibility for this seemingly endless delay can be assigned. For present purposes, three will be addressed: Congress, the EPA, and *Chevron*-based judicial review as practiced by the Supreme Court.

Congress failed to prevent the problem by neglecting to incorporate clear procedures into the 1990 amendments for transitioning to revised NAAQS. This was an unfortunate oversight because the problem was entirely foreseeable. The Clean Air Act mandates that NAAQS be reviewed at five-year intervals.[87] In fact, even before the 1990 amendments were passed, the EPA issued a technical staff paper indicating that the NAAQS might need revision.[88] Congress should have specified how such revisions would alter the classifications and deadlines codified in Table 1. Clear legislative instruction would have prevented decades of litigation and delay.

Although unfortunate, Congress's omission is easily explained. The 1990 amendments were one of the most contested pieces of legislation in modern times.[89] Following a decade of debate, it seems plausible that even if the transition problem had been identified, it might not have been addressed for fear of further delaying the badly needed legislation, or worse yet, jeopardizing its enactment. After declaring the old flexible approach to regulating ozone null and replacing it with an elaborate new scheme, it would seem reasonable for Congress to assume that the EPA would not use a marginal revision of air quality standards as an opportunity to effectively repeal the statutory provisions. While the legislature failed to specify how to transition to new standards, this is by no means extraordinary nor unusual. Congress cannot predict every problem and prescribe matching solutions. In fact, delegation to the administrative state is meant to address this reality.

Turning to the EPA, the agency tasked with fulfilling the mandates of the Clean Air Act, it seems irrefutable that they failed to do so in this matter. A lay reading of the 1990 amendments would suggest that Congress clearly intended Subpart 2 to be the primary means of regulating ozone. Given that both the D.C. Circuit and the Supreme Court stated as much, it is remarkable that the EPA would once again promulgate a rule that attempted to do the opposite. Did the agency believe that the D.C. Circuit, which had previously declared it clear under *Chevron* step one that Congress intended Subpart 2 to be the exclusive means of regulating ozone, would accept a rule that placed 76 of 122 areas under Subpart 1? The attempt to redefine the word "controls" in order to avoid the anti-backsliding provision would seem equally certain to face judicial

87. Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1047 (D.C. Cir. 1999), *modified*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part, rev'd in part*, 531 U.S. 457 (2001); 42 U.S.C. § 7409.

88. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 485, 481–84 (2001).

89. Waxman, *supra* note 22, at 1723.

scorn. If such a relatively unsophisticated legal analysis could have predicted the outcome of *South Coast*, why did the EPA fail to do so? Was the rule calculated to create further delay? Perhaps rejection by the D.C. Circuit was anticipated, and the goal was to prevail on appeal, or at least buy time doing so.

Although exploration of the EPA's motivation is beyond the scope of this analysis, it appears that the problems of delay and political interference the 1990 amendments attempted to eliminate could not be cured by legislation. Despite the mandate that NAAQS be reviewed at five-year intervals in order to reflect current science, the standards have been revised infrequently and often only after lawsuits by public interest groups. While the Clean Air Act gave the courts a firm statutory basis for vacating EPA rules that eschewed the strict regulation of ozone, the years spanned by this series of cases demonstrates the inability of judicial review to force a pace of change that matches the rate at which pollution enters the air.

In fact, it seems that *Chevron* deference, as practiced by the Supreme Court, is partially responsible for enabling this delay. The Court's use of the test appears doctrinally sound. As discussed above, the Clean Air Act is ambiguous, in so far as it fails to specify how to incorporate revised ozone standards. The Supreme Court took this legislative oversight as proof that it was ambiguous whether Congress intended Subpart 2 to be the "exclusive" means of regulating ozone.[90] This inference is not necessarily logical, and certainly not inevitable. Simply because the statute deferred to the EPA in order to incorporate revised ozone standards does not mean Congress intended that implementation to occur under any regulatory scheme other than the one designed specifically for ozone. Why would the legislature have devoted so much time and effort to craft an elaborate and comprehensive solution, only to allow the EPA to avoid it whenever air quality standards were revised? The Supreme Court essentially said as much when it took the extraordinary step of declaring the 1997 rule impermissible under *Chevron* step two, stating that "[t]o use a few apparent gaps in Subpart 2 to render its textually explicit applicability . . . inoperative is to go over the edge of reasonable interpretation."[91] The Court seemingly agreed with the D.C. Circuit that it was clear under *Chevron* step one that Congress intended Subpart 2 to be the *primary* means for regulating ozone. Nevertheless, by failing to state that Subpart 2 was intended to be *exclusive*, the Court invited further delay. Despite the Court's extraordinary rejection of the EPA's interpretation under *Chevron* step two's highly deferential standard, the agency took the lack of a *Chevron* step one directive as an opportunity to once again avoid the requirements of the Clean Air Act. Given the historical failure of the EPA in tackling ozone, the Court should have anticipated the effect of its decision. It is unfortunate that a nominally different application of the *Chevron* doctrine would enable an

90. *Whitman*, 531 U.S. at 484.

91. *Id.* at 485.

agency prone to inaction another opportunity to frustrate a statute meant to clean the air we breathe.

3. Doctrinal Agility

Chevron is meant to offer a simple standard of review, which would theoretically increase predictability and reduce delay. This series of cases proves that declining to stop the inquiry at the first step can result in the opposite result. The conclusions reached under the doctrine will always vary depending upon how questions are framed. In the Supreme Court's view, the lack of instruction as to how to incorporate new ozone standards rendered the whole statute ambiguous. In contrast, the D.C. Circuit took a more sensible approach, and remained convinced that Congress intended for ozone to be regulated under the scheme it created for that very purpose. *Chevron* remains the dominant standard for review of agency interpretation of relevant statutes and will continue to shape future litigation. Indeed, it is one of the top cited cases in American legal history.[92] It provides a deceptively simple framework, upon which both the courts and the administrative state have come to rely.[93] While it has been modified significantly since 2000, *Chevron* is unlikely to disappear any time soon.

The D.C. Circuit, which was largely responsible for establishing *Chevron*'s dominance, [94] managed to check EPA action twice by operating within the Supreme Court's two-step framework. In 1999, the circuit court had little trouble in concluding that it was *Chevron* step one clear that Congress intended ozone to be regulated under Subpart 2. Seven years later, in *South Coast*, constrained by the Supreme Court's opinion that the statute was ambiguous whether Subpart 2 was to be exclusive, the D.C. Circuit did not hesitate to declare the EPA's continued use of Subpart 1 impermissible under *Chevron* step two. This leaves the EPA with Subpart 2 as the only alternative. The D.C. Circuit guaranteed that the 1990 amendments would continue to shape regulation, be it under *Chevron* step one or step two. The result is justified by the clear legislative intent to limit EPA discretion. It is unfortunate that the Supreme Court, which agreed that Congress intended ozone to be addressed primarily under Subpart 2, sought its own version of doctrinal perfection at the expense of air quality. The opportunity the ruling afforded the EPA to revive its bad habits is all the more regrettable given the nation's extended inability to limit the dangers posed by ozone.

92. Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 399, 399 (Peter L. Strauss ed., 2006).

93. *Id.* at 400–01, 422.

94. *Id.* at 422–23.

CONCLUSION

Even the D.C. Circuit's more purposive approach to *Chevron* remains a cumbersome tool for assuring progress. Given that judicial review is painfully slow, statutory omissions are inevitable, and EPA enforcement has been unreliable at best, perhaps the true lesson to be taken from *South Coast* is that comprehensive prescriptive regulation under the Clean Air Act can be delayed to the point of making it unworkable.[95] If this is the case, it would partially justify the ascendancy of market-based regulation, which loftily promises to replace the incentive to delay with the incentive to profit. Given that a national "cap-and-trade" carbon market seems inevitable, the line of litigation examined in this Note appears even more futile. The only effective means of addressing greenhouse gases presently available is to reduce total emissions. Given that such measures must be dramatic in order to mitigate climate change, the corollary reductions in ozone and other regulated pollutants would be orders of magnitude greater than those called for by any NAAQS, including the lower standards just announced by the EPA.

The scale of action needed to address climate change necessitates that any effective market-based regulation will have to place the "cap" well below current emission levels in order to create the scarcity needed to drive the "trade." Given the lack of will demonstrated in this line of cases by the EPA to implement revised ozone standards, essentially a "cap" enforced by other means, and the strength of industry opposition, the challenge of creating meaningful regulation should not be underestimated. Likewise, those drafting legislation establishing a cap-and-trade program would be well advised to include strong language, such as the Clean Air Act's anti-backsliding provision, in order to provide the judiciary with a clear basis for rejecting agency efforts to frustrate progress. If the decades of delay explored in this comment are in any way predictive of the duration of impending challenges to the newly finalized ozone standards, it is unlikely the Clean Air Act will meet its relevant goals any time in the near future. The three cases examined here will almost certainly be subsumed into the historical background section of a future ELQ article on the subject of that coming litigation. *South Coast* is only one chapter in a saga yet to be concluded, a story that will hopefully be rendered all the more meaningless by successful attempts to address climate change.

95. I use the neutral term "prescriptive regulation" in place of the derisive term "command and control."

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.