

Rescuing the Clean Air Act from Obsolescence

APPENDIX: Must the EPA Set a NAAQS for Greenhouse Gases?

The CBD bases its claim that the EPA has a mandatory duty to set a NAAQS for greenhouse gases on the case requiring the EPA to set a NAAQS for lead, *NRDC v. Train*. The opinion in this case interpreted §108(a)(1) of the 1970 Clean Air Act, which provided that the EPA “shall” list for preparation of a NAAQS “each pollutant” that (A) the administrator has found is harmful, (B) comes from multiple and diverse sources, and (C) “for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.” The Second Circuit held that the EPA has a mandatory duty to list any pollutant, such as lead, that it has found is harmful and comes from multiple and diverse sources. In 2009, the EPA decided that greenhouse gases are harmful and come from millions of diverse sources. Thus, under *NRDC v. Train*, the EPA must set a NAAQS for greenhouse gases.

However, the EPA, in the ANPR issued under President George W. Bush, suggested that the case lost its force in 1984 when the Supreme Court decided *Chevron v. NRDC*.¹ *Chevron* held that courts must deal with challenges to an agency’s interpretation of statutes in a two-step process. The first step is to ask “whether Congress has directly spoken to the precise question at issue.” If so, the court must enforce the statute. If not, the court proceeds to the second step, in which it gives the agency’s “legislative regulations . . . controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”

Some commentators agree with the EPA that *Chevron* undercuts *NRDC v. Train*.² Others disagree, concluding that the Second Circuit reached a decision of the sort called for in *Chevron* step one: that the statute spoke directly to the precise issue.³

To understand the contours of the debate, the 1970 statute and its background provide helpful guidance, particularly as they relate to the “for which he plans” language in §108(a)(1)(C). Congress anticipated there would be three groups of pollutants for which the EPA would set NAAQS.

1. *The pollutants for which the agency had issued “air-quality criteria” documents before enacting the 1970 statute.* The

statute provides that the EPA must issue such documents to assess the harmful effects of NAAQS pollutants at various levels in the ambient air.

2. *The pollutants that the agency would list within thirty days of enacting the statute in 1970.* Listing a pollutant triggers the duty to issue an air-quality criteria document, which in turn triggers the duty to set a NAAQS.
3. *Pollutants that the EPA would list thereafter.*

The first group is reflected in the first part of subparagraph (C), which relieves the EPA from listing those pollutants for which air-quality criteria had been issued before December 31, 1970. Listing them would have been absurd because the immediate effect of listing is to require the EPA to issue criteria documents, which had already been issued.

The second and third groups are reflected in the double use of “shall” in the opening language of §108(a), which states that the agency “shall within 30 days after the date of enactment of the [1970 statute] publish, and shall from time to time thereafter, revise a list of each pollutant . . .” (emphasis added). Listing triggers a duty to issue an air-quality criteria document and then issue a NAAQS. The agency testified in the hearings before enactment that it planned to issue criteria documents shortly after enactment for five pollutants: fluorides, nitrogen oxides, polynuclear organic matter, lead, and odors.

The district court in *NRDC v. Train*⁴ (and later the Second Circuit) held that the second part of subparagraph (C)—“but for which he plans to issue air quality criteria under this section”—refers only to the second group rather than the third group. This implies that the EPA would have discretion over which pollutants to include in the second group but that it would ultimately be required to list whatever pollutants it finds meet the requirements of subparagraphs (A) and (B). This was the interpretation of the statute that the administrator had published in the *Federal Register* shortly after enactment.⁵

The EPA appealed the district court’s decision to the Second Circuit, arguing that the statute states that it has

a duty to list a pollutant only if subparagraphs (A), (B), and (C) are met. The NRDC responded that the EPA's reading would turn §108 into gibberish by having it say that the EPA "shall" list "each pollutant" that it wants to list. The court concluded: "If the EPA interpretation were accepted and listing were mandatory only for substances 'for which (the Administrator) plans to issue air quality criteria,' then the mandatory language of §108(a)(1)(A) would become mere surplusage."

The Second Circuit also reasoned that listing a pollutant under §108 triggers a host of mandatory duties designed to protect health within a statutorily determined period. The EPA's reading, in contrast, allows the agency to evade this purpose by deciding never to start the clock running. The Second Circuit stated: "The deliberate inclusion of a specific timetable for the attainment of ambient air quality standards incorporated by Congress in §§108–110 would become an exercise in futility if the Administrator could avoid listing pollutants simply by choosing not to issue air quality criteria."

The EPA further argued that the court should not require it to list lead as a NAAQS pollutant because it made better policy sense to protect health through a combination of a national regulation of lead in gasoline under §211 and new stationary sources of lead under §111(a) as well as state regulation of existing stationary sources under §111(d)—in other words, the "other" pollutant track. The Second Circuit responded, "If Congress had enacted §211 as an alternative to, rather than as a supplement to, §§108–110, then one would expect a similar fixed timetable for implementation of the fuel control section. The absence of such a timetable for the enforcement of §211 lends support to the view that fuel controls were intended by Congress as a means for attaining primary air quality standards rather than as an alternative to the promulgation of such standards."

The Second Circuit stated its conclusion in *Chevron* step-one terms: "the Act leave[s] no room for an interpretation which makes issuance of [NAAQS] for lead under §108 discretionary. The Congress sought to eliminate, not perpetuate, opportunity for administrative foot-dragging. Once the conditions of §108(a)(1)(A) and (B) have been met, the listing of lead and the issuance of air quality standards for lead become mandatory." Of course, *Chevron* had not yet been decided and the Second Circuit was not working in the shadow of review under that case. However, even before *Chevron*, the Supreme Court had taken a *Chevron*-like approach

to cases arising under the Clean Air Act. As the court stated in *Union Electric v. EPA*, "we have previously accorded great deference to the Administrator's construction of the Clean Air Act,"⁶ and it went on to do the same in *Union Electric* itself.

The CBD has the additional argument that Congress in 1977 ratified *NRDC v. Train* in reenacting the Clean Air Act comprehensively, and in particular §108(a)(1). The House committee report on the 1976 bill cites the district court's decision in the lead case, and the House committee report on the 1977 bill, leading up to the passage of the 1977 Clean Air Amendments, likewise cites the Second Circuit's affirmance.⁷ The reports disavow any intention to change the courts' decision as to whether §108(a)(1) imposes a mandatory duty. As the Supreme Court stated, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."⁸ Here, not even a presumption is needed. Thus, a court could conclude that Congress in 1977 ratified the EPA's duty to list pollutants that are harmful and come from multiple and diverse sources.

Congress was, of course, not thinking of greenhouse gases when it mandated listing under §108, just as it was not thinking of greenhouse gases when it mandated setting new vehicle emissions standards under §202. The Supreme Court dealt with such a concern in *Massachusetts v. EPA*:

While the Congresses that drafted §202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. . . . [T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. . . . It demonstrates breadth. Because greenhouse gases fit well within the Clean Air Act's capacious definition of "air pollutant," we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.⁹

The *Massachusetts v. EPA* opinion, in essentially forcing the EPA to deal with the politically charged issue of greenhouse gases, observes that the "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other

agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute.”¹⁰ This can be read as a prediction about the law: the Clean Air Act, read in light of *Chevron*, allows the EPA broad flexibility in how to proceed. Or it can be read as a political commitment: having put the agency in the crossfire, the court will allow it ample opportunity to bob and weave to avoid political or administrative strain. Or it can be read as an observation: the Clean Air Act does have play at the joints, but only so much.

Notes

1. *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*

2. For example, Inimai M. Chettiar and Jason A. Schwartz, *The Road Ahead: EPA's Options and Obligations for Regulating Greenhouse Gases* (New York: Institute for Policy Integrity, New York University School of Law, 2009).

3. See, for example, Nathan Richardson, *Greenhouse Gas Regulation under the Clean Air Act: Does Chevron v. NRDC Set the EPA Free?* (Resources for the Future Discussion Paper 09-50, Washington, DC, 2009), 19–26; and Patricia Ross McCubbin, “EPA’s Endangerment Finding for Greenhouse Gases and

the Potential Duty to Adopt National Ambient Air Quality Standards to Address Global Climate Change,” *Southern Illinois University Law Journal* 33 (2009): 437, 453–58, 468.

4. *Natural Resources Defense Council Inc. v. Train*, 411 F.Supp. 864 (SDNY 1976).

5. 36 Fed. Reg. 1515 (1971). Reading “but for which he plans to issue air quality criteria under this section” to refer only to the list to come out within thirty days of enactment is further bolstered by its being included in §108(a)(1)(C), which was plainly directed at this list, rather than a separate §108(a)(1)(D).

6. *Union Electric Co. v. EPA*, 427 US 246 (1976).

7. Committee on Interstate and Foreign Commerce, Clean Air Act Amendments of 1977, HR Rep. No. 95-294, at 41 (May 12, 1977); and Committee on Interstate and Foreign Commerce, Clean Air Act Amendments of 1976, HR Rep. No. 94-1175, at 27 (May 15, 1976).

8. *Forest Grove School District v. T.A.*, 129 S.Ct. 2484, 2492 (2009), quoting *Lorillard v. Pons*, 434 US 575, 580 (1978). Congress did in fact change §108(a)(1), but in a way that strengthened the position of environmental advocates. See Committee on Interstate and Foreign Commerce, Clean Air Act Amendments of 1977, at 43–51.

9. *Massachusetts v. EPA*, 549 US 497 (2007) at 532.

10. *Ibid.* at 533.