
Bursting the Bubble of Environmental Protection: Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.

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**BURSTING THE BUBBLE OF ENVIRONMENTAL
PROTECTION: *CHEVRON, U.S.A., INC. V.
NATURAL RESOURCES DEFENSE COUNCIL, INC.***

The framers of the United States Constitution designed our government to provide for a separation of powers. The Constitution thus gives Congress the lawmaking power, which out of necessity Congress must often delegate to administrative agencies.¹ Administrative agencies have no constituency. Therefore, Congress safeguards its delegation of authority by providing for judicial review of the agency's decisionmaking process. That review ensures that the decision is consistent with congressional intent. Traditionally, courts have provided a meaningful review of agency decisionmaking by searching the agency's rulemaking record to determine whether the agency's decision is rationally supported by the record.² After a recent Supreme Court decision, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,³ however, it appears that Congress is essentially delegating its lawmaking authority to the President when it authorizes an agency to administer a vague statute. Moreover, presidential intervention into the agency's decisionmaking may render the decision unreviewable, thus failing to ensure that Congress's intent is effectuated.⁴

Congress has delegated to the Environmental Protection Agency (EPA) the authority to make laws to protect the public's health from air pollution and its effects, pursuant to the Clean Air Act.⁵ One regulation promulgated by the EPA provides for broad coverage of a permit program that was designed by Congress to restrict economic growth in unhealthy air states, unless that growth was accompanied by progress toward achieving clean air.⁶ President Ronald Reagan took office in 1981, however, and ordered agencies to reevaluate their regulations in order to help ease the burden on industry from excessive regulation.⁷ Pursuant to this order, the EPA changed its prior regulation to significantly reduce the coverage of the permit program.⁸ Because of this change, Congress's intent to allow only limited and conditional growth in unhealthy air states has been thwarted.⁹ When challenged in *Chevron*, however, the Court found that this change was reasonable.¹⁰ Moreover, the Court found that the EPA's reliance upon the President's policy views was proper.¹¹

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1. See *infra* notes 12-18 and accompanying text.
 2. See *infra* notes 46-52 and accompanying text.
 3. 104 S. Ct. 2778 (1984).
 4. See *infra* notes 37-38.
 5. 42 U.S.C. § 7401 (1982).
 6. 40 C.F.R. § 51.18 (1980).
 7. See *infra* notes 32-41 and accompanying text.
 8. 46 Fed. Reg. 50,667 (1981).
 9. See *infra* notes 100-07 and accompanying text.
 10. See *infra* notes 181-203 and accompanying text.
 11. See *infra* note 202 and accompanying text.

The *Chevron* decision raises several important questions. First, it is unclear whether Congress can retain control over an administrative agency's delegated lawmaking authority when the President decides to intervene. Similarly, the extent to which the Court will allow the President to intervene is also uncertain, especially when that intervention results in frustration of congressional policies. Moreover, the safeguard that judicial review provides is now in question. It may be that *Chevron* has reduced judicial review of agency action, following presidential intervention, to a hollow formality.

BACKGROUND

Article I of the United States Constitution vests all lawmaking authority in a politically accountable Congress.¹² The "necessary and proper" clause¹³ of that article allows Congress to delegate some of this authority to the unelected officials of administrative agencies.¹⁴ Because an administrative agency lacks a constituency, ideally Congress is to make broad policy choices and then design a statute aimed at guiding the agency towards effectuating those policies.¹⁵ Instead, Congress oftentimes delegates its policymaking authority by enacting a "goals statute."¹⁶ In contrast to a "rules statute," which specifies rules of conduct, a goals statute specifies the statute's goals and then authorizes the administrative agency to develop rules of conduct to further those goals.¹⁷ The goals statute forces the agency to make the controversial choices avoided by Congress.¹⁸

12. U.S. CONST. art. I.

13. U.S. CONST. art. I, § 8, cl. 8.

14. *Lichter v. United States*, 334 U.S. 742, 778-79 (1948); *ICC v. Cincinnati, N.O. & Tex. Pac. R.R.*, 167 U.S. 479, 494 (1897); see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-17 (1978).

15. *ICC v. Cincinnati, N.O. & Tex. Pac. R.R.*, 167 U.S. 479, 494 (1897).

16. Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 *UCLA L. REV.* 740, 751-55 (1983). David Schoenbrod, a former attorney for the Natural Resources Defense Council, claims that the Clean Air Act is a "goals statute" because Congress has delegated to the EPA the authority to make broad policy determinations to develop rules of conduct under the Act. The Act requires the EPA, for example, to set national air standards, categorize pollutants and list sources which will be subject to the Act's provisions, all under the mandate of protecting the public's health. Congress, however, failed to give the EPA guidance regarding the meaning of the Act's goal of protecting the public's health. The Act merely requires the EPA to set standards that are "adequate" or "ample" for achieving this goal, leaving the EPA to determine the meaning of these ambiguous guidelines. See *id.*

17. *Id.* at 783-89. A "rules statute" might require, for example, that cars are not to be driven in Los Angeles during daylight hours. The corresponding goals statute might authorize an agency to regulate vehicle emissions, with the aim of reducing emissions and improving air quality. Both statutes are designed to achieve essentially the same results, but under the rules statute, the goals serve as an interpretive guide. The goals specified in the goals statute, on the other hand, serve as a mandate under which the agency must promulgate rules. See *id.* at 784.

18. See, e.g., 42 U.S.C. § 7470(1), (3) (1982). The Clean Air Act requires the EPA's Administrator to use his or her judgment in protecting the public's health and welfare. *Id.* § 7470(1). This is to be done while balancing the conflicting policies of allowing economic growth and preserving existing clean air. *Id.* § 7470(3). Inevitably, any compromise between the two

Administrative agencies, as previously mentioned, have no constituency and often have been "captured" by the industry or interests of those they regulate.¹⁹ In an attempt to avoid this problem,²⁰ Congress requires an agency to develop public rulemaking records that explain the justifications for the agency's decisions.²¹ To serve this purpose of open and visible rulemaking, the record must contain articulated criticisms of the proposed action and the agency's genuine reasons for rejecting those criticisms.²² Furthermore, the record must contain the facts and/or a reasoned analysis to support the agency's final decision.²³ Finally, the agency's rationale must not be merely conclusory.²⁴

In addition to the public rulemaking record requirement, agency decision-making can be overseen in two ways.²⁵ First, the President can coordinate and guide the regulatory process.²⁶ Article II of the United States Constitution provides that the President shall appoint agency heads²⁷ and "faithfully execute" the laws of the United States.²⁸ Additionally, the President has the

policies will fail to satisfy either environmentalists, industry, or both. As one commentator remarked, "environmentalists and developers agree that government regulatory agencies figure costs and benefits incorrectly. Environmentalists argue that environmental protection is still being undervalued. Developers contend that arbitrary and time-consuming regulatory requirements add unnecessarily to the cost of doing business." Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 11 (1981).

19. Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267, 1269 (1981).

20. For an example of Congress's continuing attempts to keep agency action in public view, see Government in the Sunshine Act, 5 U.S.C. § 552(b) (1982). See generally Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 966-70 (1980) (discussing Congress's imposition of procedural requirements upon administrative agencies in order to restrain White House control of agency policymaking).

21. See 5 U.S.C. § 553 (1982).

22. See *id.* For an accurate and concise description of what a reviewing court must look for in an agency's rulemaking record, see NRDC v. Nuclear Regulatory Comm'n, 547 F.2d 633, 644 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Vermont Yankee Power Corp. v. NRDC, 435 U.S. 519 (1978).

23. See *supra* note 22.

24. See *Electricity Consumers Resource Council v. Federal Energy Regulatory Comm'n*, 747 F.2d 1511, 1515 (D.C. Cir. 1984) (remanded agency regulation, finding it "almost wholly conclusory, largely short-sighted and patently unpersuasive").

25. Until recently, a third method of oversight was available, the legislative veto. The legislative veto was a device by which Congress could veto an agency decision with a one-house vote. The Constitution, however, requires both houses' consent and the President's signature, before a bill becomes a law. U.S. CONST. art. I, § 7, cl. 2. Thus, the legislative veto was found unconstitutional in *INS v. Chadha*, 103 S. Ct. 2764 (1983). See generally Neustadt, *The Administration's Regulatory Reform Program: An Overview*, 32 AD. L. REV. 129, 147-48 (1980) (discussing what the author perceives as serious dangers posed in the event of a proliferation of legislative veto provisions).

26. *Myers v. United States*, 272 U.S. 52, 135 (1926); see Sunstein, *supra* note 19, at 1271.

27. U.S. CONST. art. II, § 2, cl. 2.

28. U.S. CONST. art. II, § 3. The United States Supreme Court has rarely discussed the President's constitutional powers, however, it did so in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (invalidated President Truman's order to seize the nation's steel mills). See Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 196 (1981).

authority to require executive agencies to report to him.²⁹ Although the President cannot make the laws, the "faithfully execute" clause gives the President the authority to issue orders to manage executive agencies³⁰ in their lawmaking function.³¹

In 1981, President Reagan took office and, consistent with his campaign promise to deregulate, immediately issued Executive Order 12,291.³² The purpose of this order is, among other things, to reduce regulatory burdens, increase agency accountability, and provide for presidential intervention into agency decisionmaking.³³ This order, unprecedented in its scope and effect,³⁴ subjects agency regulations to complete review by a single agency,³⁵ the Office of Management and Budget (OMB).³⁶ This review occurs after the public rulemaking record is closed. The OMB has the authority to alter the regulations based on facts and influences outside of that record.³⁷ Thus, during the review the President or his staff may effectively determine the

29. U.S. CONST. art. II, § 2, cl. 1.

30. See *Myers v. United States*, 272 U.S. 52, 164 (1926).

31. See Rosenberg, *supra* note 28, at 196-97. Rosenberg argues that the President's authority to require written reports falls short of providing the power to control the actions of those reporting. Thus, he argues that the language in the Constitution generally suggests that the President is to serve only in an oversight function. *Id.*

32. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1982).

33. The preamble provides, in pertinent part, that the order is to "reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations . . ." *Id.*

34. For a comprehensive history of presidential intervention in agency rulemaking, see ADMIN. CONFERENCE OF THE U.S., OFFICE OF THE CHAIRMAN, A GUIDE TO FEDERAL AGENCY RULEMAKING 8-15 (1983) [hereinafter cited as A GUIDE TO FEDERAL AGENCY RULEMAKING], and K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:40, at 147-50 (Supp. 1982), and Rosenberg, *supra* note 28. For an overview of regulatory reform under President Carter, see Neustadt, *supra* note 25.

35. Traditionally, an agency's regulations have been reviewed by the courts on the basis of their relationship to the underlying statute. Under Reagan's order, a single agency, the Office of Management and Budget (OMB), reviews all agency regulations on the basis of their cost-benefit analysis. See Sunstein, *supra* note 19, at 1287.

36. All executive agencies must prepare a Regulatory Impact Analysis (RIA) for each major rule, prior to publication of both the proposed and final rule. Exec. Order No. 12,291 § 3, 3 C.F.R. 128-29 (1982), reprinted in 5 U.S.C. § 601 (1982). The RIA is a cost-benefit analysis that the agency must submit to the Director of the OMB. See Exec. Order No. 12,291 § 3(c)(1), 3 C.F.R. 128 (1982), reprinted in 5 U.S.C. § 601 (1982). OMB may then request a consultation with the agency concerning the proposed rule and may further delay publication of the adopted rule until its review is completed and the agency has responded to its comments. See Exec. Order No. 12,291 § 3, 3 C.F.R. 128 (1982), reprinted in 5 U.S.C. § 601 (1982).

37. While the agency is required to include the OMB's views and the agency's response to those views in the rulemaking record, there is no requirement that the facts or policies influencing the OMB's views be included in the record. See Exec. Order No. 12,291 § 3(f)(2), 3 C.F.R. 130 (1982), reprinted in 5 U.S.C. § 601 (1982). One commentator has asserted that the OMB's views will most likely not be documented because much of its decisionmaking process will take place in phone calls and informal meetings. "And, much as our society values openness, it remains true that candor and the flexibility necessary for collaboration or compromise are most

substance of a regulation through private influence.³⁸ The order also substantively affects regulations by requiring agencies to adopt regulations only when the regulation's benefits outweigh its costs.³⁹ This across-the-board requirement ignores the fact that Congress may have previously determined that an agency is to give special weight to particular policies in developing regulations.⁴⁰ Instead, to become law, all regulations must survive the order's cost-benefit analysis.⁴¹

The second means of oversight is through judicial review of agency decisions. Article III of the Constitution gives jurisdiction over cases arising under federal law to the federal courts.⁴² Pursuant to that article, Congress has set forth the appropriate standard of review of agency decisionmaking

likely to flourish in the shade." Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 595 (1984); see also A GUIDE TO FEDERAL AGENCY RULEMAKING, *supra* note 34, at 170 (suggesting that undisclosed private interests may be disguised as presidential suggestions and influences); K. DAVIS, *supra* note 34, § 6:40, at 152-54 (Supp. 1982) (the OMB can alter an agency regulation without the public comment which is required in agency rulemaking, thus the OMB's failure to document facts and views presented to it may leave a reviewing court with an agency record not actually supporting the rule to be reviewed); Rosenberg, *supra* note 28, at 195 (noting that critics of Order 12,291 expressed fears that private interest would be advanced during OMB review and that the true reason that order required a cost-benefit analysis is merely to justify the deregulation of private industry); Verkuil, *supra* note 20, at 950-51 (order possibly violates separation of powers principle by directly reflecting through the executive branch the interests of private industry to deregulate).

38. For an example of the White House as a conduit for private interests, see Verkuil, *supra* note 20, at 951-52 (discussing Quarles-Flanigan incident).

39. See Exec. Order No. 12,291 § 2(b), 3 C.F.R. 128 (1982), *reprinted in* 5 U.S.C. § 601 (1982). Section 2(b) specifies that "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society." Exec. Order No. 12,291 § 2(b), 3 C.F.R. 128 (1982), *reprinted in* 5 U.S.C. § 601 (1982). For an example of a cost-benefit analysis affecting the substance of agency rulemaking, see *American Textiles Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981).

40. See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412-13 (1971) (Congress had already taken cost into account). Perhaps, as one commentator has suggested, Congress will find it necessary to enact future statutes as rules statutes, rather than goals statutes, to assure that the statutes underlying goals will be faithfully carried out. See Schoenbrod, *supra* note 16, at 826-28. A statute authorizing an executive agency to make policy determinations will effectively shift this policymaking authority to the President. See Rosenberg, *supra* note 28, at 215; Comments of William Coleman, former Secretary of Transportation, *reprinted in* Strauss, *supra* note 37, at 664-65.

Although the President is accountable to the public, former Secretary Coleman is wary of the President's order. Presumably, it will not always be the President that provides input once an agency regulation reaches the OMB. Often the President's political advisors will be delegated the authority to guide the OMB in its balancing of policies. The danger in this delegation of authority lies not only in the fact that the advisor is unelected, similar to unelected agency officials, but that the advisor does not even possess the expertise of the agency official. Comments of William Coleman, former Secretary of Transportation, *reprinted in* Strauss, *supra* note 37, at 664-65.

41. Exec. Order No. 12,291 § 2(b), 3 C.F.R. 128 (1982), *reprinted in* 5 U.S.C. § 601 (1982).

42. U.S. CONST. art. III, § 2, cl. 1.

in the Administrative Procedure Act⁴³ and mirrored that standard in individual statutes, including the Clean Air Act.⁴⁴ This standard of review requires reversal of an agency decision that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."⁴⁵

The Supreme Court has found that the arbitrary and capricious standard requires a "searching and careful" inquiry into the agency's decision-making process.⁴⁶ This is where the agency's rulemaking record comes into

43. 5 U.S.C. § 706(2)(A) (1982). Under the Administrative Procedure Act's (APA) scope of review provisions, a reviewing court:

decide[s] all relevant questions of law, interpret[s] constitutional and statutory provisions, and determine[s] the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Id.

Congress enacted the APA in 1946 to provide guidelines for agency rulemaking and judicial review of that rulemaking. Pub. L. No. 79-404, 60 Stat. 237 (1946), *repealed and replaced by* Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378 (1966) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1982)). Since then, Congress has incorporated the APA's provisions into specific statutes designed to be administered by executive agencies and, in many cases, has expanded upon the APA's provisions within the subsequent statutes. *See* K. DAVIS, *supra* note 34, § 6:10, at 492-94 (2d ed. 1978) (comparing requirements under Clean Air Act with those of APA).

44. 42 U.S.C. § 7607(d)(9)(A) (1982). Section 7607 provides that a reviewing court must set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* Congress intended reviewing courts "to continue their thorough, comprehensive review" of actions taken pursuant to the Clean Air Act. *See* H.R. REP. No. 564, 95th Cong., 1st Sess. 178 (1977); *see also* National Lime Ass'n v. EPA, 627 F.2d 416, 452 (D.C. Cir. 1980) (acknowledging Congress's intent and applying the "hard look" approach).

45. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982); Clean Air Act, 42 U.S.C. § 7607(d)(9) (1982). The Clean Air Act clearly provides that the APA is not applicable to those agency actions subject to judicial review under § 7607 of the Clean Air Act. 42 U.S.C. § 7607(d)(1) (1982).

46. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The Supreme Court first articulated the "searching and careful" approach to reviewing agency action, under the arbitrary and capricious standard, in *Overton Park*. In that case, concerned citizens challenged the Secretary of Transportation's decision to allocate federal funds for the construction of a highway through Overton Park. *Id.* at 406. The Supreme Court found that the lower court had failed to carefully examine the Secretary's decision and so ordered the court to reconsider its decision, keeping in mind that protection of public parks was an important goal of the authorizing statute. *Id.* at 419-20.

The Court stated that informal agency actions were appropriately reviewed under the arbitrary and capricious standard set forth in § 706(2)(A) of the APA. *Id.* at 413-14. The Supreme Court subsequently applied the same arbitrary and capricious standard to review an agency's informal action in *Camp v. Pitts*, 411 U.S. 138 (1978) (*per curiam*).

Commentators note that, although the *Overton Park* Court articulated the arbitrary and capricious standard, the Court appeared to equate this with the "rational basis" and "clear error of judgment" standards. *See* 5 K. DAVIS, *supra* note 34, § 29:5, at 353-54 (2d ed. 1984).

play.⁴⁷ This inquiry, sometimes referred to as a “hard look” review,⁴⁸ does not require a court to redo the agency’s job.⁴⁹ A court does not determine whether an agency’s decision is correct, nor does the court impose additional procedures on the agency’s rulemaking process.⁵⁰ Rather, under the “hard look” approach, the court determines whether the record contains evidence that the agency engaged in well-reasoned decisionmaking.⁵¹ Thus, in order for review to be meaningful, the agency must sufficiently explain its reasoning in the record.⁵² Of course the potentiality exists that a decision may be affected substantively by influences outside the record, such as presidential “prodding,” and yet still have factual support in the record.⁵³ Although the agency would have chosen differently absent the ex parte contact, the court may never know that such contact occurred and thus cannot control the problem.⁵⁴

While the arbitrary and capricious standard is a narrow one, the other two standards broaden the scope of review. Perhaps the Court’s blending of the standards was inadvertent, but arguably the Court intended to add depth to the arbitrary and capricious standard. *See id.*; Note, *Judicial Review of Informal Administrative Rulemaking*, 1984 DUKE L.J. 347, 351 [hereinafter cited as Note, *Judicial Review of Informal Rulemaking*]. In any event, agency rulemakers might correctly pay notice to the message implicit in *Overton Park*, that a factual record must be developed if a regulation is to survive a thorough review. *See A GUIDE TO FEDERAL AGENCY RULEMAKING*, *supra* note 34, at 222-23.

47. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

48. Judge Leventhal coined the term “hard look” to describe a court’s review of agency decisionmaking in *Greater Boston Television Corp.* Judge Leventhal stated that:

If satisfied that the agency had taken a hard look at the issue with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency’s path may reasonably be discerned, though of course the court must not be left to guess as to the agency’s findings or reasons.

Id. at 851. (footnotes omitted).

49. *Sierra Club v. Costle*, 657 F.2d 298, 410 (D.C. Cir. 1981) (court engaged in exhaustive review of emissions standards developed by the EPA only “to see if the result ma[d]e sense, and to assure that nothing unlawful or irrational ha[d] taken place”).

50. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). Read broadly, *Vermont Yankee* prohibits courts from imposing judicially-created procedural requirements upon an agency’s decisionmaking process. Apparently *Vermont Yankee* was all bark and no bite, however, because lower courts have continued to impose such procedures, treating them as substantive considerations. *See, e.g., Alabama Power Co. v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979). The Supreme Court further narrowed the applicability of *Vermont Yankee*, in *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856 (1983), by requiring an agency to consider a specific alternative in its decisionmaking. *See infra* note 64.

51. *Ethyl Corp. v. EPA*, 541 F.2d 1, 36-37 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

52. *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856 (1983); *Sierra Club v. Gorsuch*, 715 F.2d 653, 661 (D.C. Cir. 1983); Stewart, *The Limits of Administrative Law*, in *THE COURTS: SEPARATION OF POWERS* 75, 79 (1983).

53. *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981).

54. *Id.*

Nevertheless, a court does have the authority to review agency decisions made pursuant to executive orders.⁵⁵ The Supreme Court, in *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, recently applied the "hard look" approach to a review of an agency's decision to deregulate in accordance with Reagan's Executive Order 12,291.⁵⁶ In *State Farm*, insurers challenged the National Highway Traffic and Safety Administration's (NHTSA) rescission of its passive restraint standard.⁵⁷ Consistent with Reagan's order to justify each regulation through a cost-benefit analysis,⁵⁸ the Secretary of Transportation rescinded the standard because the costs of complying with the standard outweighed its safety benefits.⁵⁹ The Supreme Court held that NHTSA's decision to rescind was arbitrary and capricious.⁶⁰

The Court stated as a general proposition that an existing rule was

55. See, e.g., *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1220-22 (D.C. Cir. 1983) (pursuant to Executive Order 12,291, change in hours-of-service rules for truck drivers supported by rational justification); see also O'Reilly, *Judicial Review of Agency Deregulation: Alternatives and Problems for the Courts*, 37 VAND. L. REV. 509 (1984) (suggests courts may subject deregulation efforts to a higher standard of review, with an overview of challenged regulation changes pursuant to Reagan's order). *But see* *Chevron, U.S.A., Inc. v. NRDC*, 104 S. Ct. 2778 (1984).

56. 103 S. Ct. 2856 (1983). For an analysis of the *State Farm* decision, see Note, *Judicial Review of Informal Rulemaking*, *supra* note 46, at 361-76.

57. 103 S. Ct. at 2865. The history of the passive restraint standard pertinent to this Note began in June 1976. At that time, Secretary of Transportation William Coleman suspended the existing passive restraint standard, see 41 Fed. Reg. 24,070 (1976), to avoid public opposition to the admittedly feasible standard. The year 1977 brought a new Secretary of Transportation, Brock Adams, and a new passive restraint standard. See 42 Fed. Reg. 34,289 (1977). The new standard required the installation of either airbags or passive seatbelts in all new cars by 1984. NHTSA noted the regulation's significant safety benefits and, as late as 1980, issued reports on the benefits of both airbags and passive seatbelts. *State Farm*, 103 S. Ct. at 2862.

58. See *supra* notes 32-41 and accompanying text. Although NHTSA's decision to deregulate and its use of the cost-benefit analysis were consistent with Reagan's order, NHTSA did not cite the order as a basis for the standard's rescission. See Fed. Reg. 53,419 (1981).

59. President Reagan took office in 1981 and appointed Andrew Lewis as Secretary of Transportation. Faced with economic problems in the automobile industry and consistent with the President's order to reduce regulatory burdens, Secretary Lewis re-examined the standard in February 1981. See *supra* notes 32-41 and accompanying text. NHTSA concluded this re-examination by rescinding the standard in 1977. See 46 Fed. Reg. 53,419 (1981). NHTSA explained that rescission was necessary because the cost of complying with the passive restraint requirement outweighed its safety benefits. *Id.*

60. 103 S. Ct. at 2867-68. While the court of appeals had some difficulty determining the appropriate standard of review, the *State Farm* Court stated without hesitation that the arbitrary and capricious standard was the correct one. *Id.* at 2868. Petitioner Motor Vehicles Manufacturers Association (MVMA) asserted, however, that NHTSA's rescission was close to being nonreviewable. *Id.* at 2866. The MVMA claimed that NHTSA's decision to rescind was equivalent to an agency's decision not to issue a rule. The Court dismissed this argument and stated as a general proposition that an agency reversing its prior position by revoking a rule must more thoroughly explain its reasoning than if the agency had merely failed to act initially. *Id.*

presumed to further congressional policies.⁶¹ The Court noted that a revocation of that rule therefore required a more thorough explanation from the agency than if the agency had merely failed to issue the rule initially.⁶² Moreover, the Court identified three situations in which a court is to find an agency's decision arbitrary and capricious.⁶³ These situations arise when the agency: (1) bases its decision on considerations other than those intended by Congress; (2) overlooks a significant aspect of the problem; or (3) justifies its decision with reasons contradictory to the evidence or completely implausible.⁶⁴

The Court undertook its review of NHTSA's decisionmaking in light of the policies underlying the Motor Vehicle Safety Act.⁶⁵ The purpose of the Act is to protect the public's safety.⁶⁶ The Court noted that the Act was necessary because of industry's insufficient response to safety concerns in the past; thus, the Act was technology-forcing in nature.⁶⁷

The Court also ordered NHTSA to reconsider its balancing of cost and safety considerations, keeping in mind that the primary goal of the Motor Vehicle Safety Act is safety.⁶⁸ This is significant in light of the fact that Reagan's order would require an equal balancing of costs and benefits.⁶⁹ Arguably, the majority's position stands for the proposition that the order to factor costs and benefits equally does not supercede the statute's mandate that greater weight be given to the primary goal of the Act—safety.

Although the *State Farm* majority never directly addressed the issue of

61. *Id.* at 2868.

62. *Id.* While an agency may reconsider its rules and policies on a continuing basis, the Court noted that "the forces of change do not always or necessarily point in the direction of deregulation." *Id.*

63. *Id.* at 2867.

64. *Id.* at 2867-71. The court of appeals and a unanimous Supreme Court found that NHTSA's reasoning was arbitrary and capricious because NHTSA had failed to consider an airbags-only standard. *Id.* at 2868-71. The *State Farm* Court found that NHTSA should have addressed that alternative and then provided reasons for its abandonment. *Id.* at 2869. The MVMA argued that the Court incorrectly required NHTSA to follow specific procedures, contrary to *Vermont Yankee*, by ordering NHTSA to consider an airbags-only alternative. *Id.* at 2870. The *State Farm* Court disagreed with the MVMA's interpretation of *Vermont Yankee*, however, and rejected the MVMA's interpretations of *State Farm's* order to reconsider. *Id.* at 2870-71. The *State Farm* Court, consistent with *Vermont Yankee*, had not imposed specific procedures on the agency, nor required it to consider every policy choice. The Court only required NHTSA to consider an existing technologically feasible alternative found in the rescinded standard. *Id.* The Court ordered NHTSA to consider an airbags-only requirement and to explain its decision if it chose not to retain the requirement. *Id.* at 2874.

65. *Id.* at 2873.

66. *Id.*

67. *Id.* at 2870. The Court stated that "[i]f, under the statute, the agency should not defer to the industry's failure to develop safer cars, which it surely should not do, *a fortiori* it may not revoke a safety standard which can be satisfied by current technology simply because the industry has opted for an ineffective seatbelt design." *Id.*

68. *Id.* at 2873.

69. See *supra* notes 39-41 and accompanying text.

presidential intervention into agency decisionmaking,⁷⁰ the dissenters clearly stated that such intervention was proper.⁷¹ Justice Rehnquist, joined in his dissent by Chief Justice Burger, Justice Powell, and Justice O'Connor, found it reasonable for an agency to reevaluate the costs and benefits of its regulations in light of a change in executive policies.⁷² Nevertheless, all nine Justices endorsed the "hard look" approach to judicial review.⁷³

Just as review of an agency's decision to deregulate, consistent with an executive order, did not change the scope of review, neither will review of a technical regulation.⁷⁴ In *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*,⁷⁵ the Natural Resources Defense Council challenged a decision of the Nuclear Regulatory Commission regarding the licensing of nuclear power plants.⁷⁶ The Commission decided that licensing boards can assume, for the purpose of every licensing determination, that the disposal of certain nuclear wastes will have no significant impact on the environment.⁷⁷ Thus, the fact that nuclear wastes are to be permanently stored at the site is not to affect the decision of whether to license the plant.

Noting the "acute" public awareness concerning the issue of nuclear power, the Supreme Court began a careful review of the factors considered by the agency in its decisionmaking process.⁷⁸ After discussing the agency's

70. See 103 S. Ct. at 2873. The Court found that while an agency may change its policies, its decision to change course must be reasonably explained. *Id.* The Court recognized that NHTSA's rescission was an attempt to deregulate, but failed to cite the President's Executive Order 12,291, as the possible reason. See *id.* at 2866.

71. *Id.* at 2875 (Rehnquist, J., dissenting). The dissent clearly stated that "the agency's changed view of the standard seems to be related to the election of a new President from a different political party." *Id.* at 2875 (Rehnquist, J., dissenting). Assuming congressional mandates will not be overlooked, the dissenters found that an executive order provides a reasonable explanation for an agency's re-examination of its regulations in light of a new cost-benefit analysis. See *id.* at 2875 (Rehnquist, J., dissenting); see also *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 230, 230-36 (1983) (suggests *State Farm* majority may have avoided mention of the political nature of the rescission as a means of rejecting Reagan's policies).

72. 103 S. Ct. at 2875 (Rehnquist, J., dissenting); see *supra* note 71.

73. 103 S. Ct. at 2874.

74. See, e.g., *Interstate Natural Gas Ass'n of Am. v. FERC*, 716 F.2d 1 (D.C. Cir. 1983) (challenge to new approach for measuring energy content of natural gas); *Small Refiners Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983) (challenge to EPA regulations setting standard for lead content in gasoline); *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (challenge to EPA's regulations for controlling emissions from coal-fired power plants); *National Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980) (challenge to EPA's new source performance standards limiting emissions); see also Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974) (Judge Leventhal, of the District of Columbia Circuit, distinguishes courts' review from that of performing the agency's job); Note, *An Evolving Model for Judicial Review of Environmental, Safety and Health Rulemaking: Small Refiners Lead Phase-Down Task Force v. EPA*, 33 CATH. U.L. REV. 1027 (1984) (discusses model developed by District of Columbia Circuit).

75. 103 S. Ct. 2246 (1983).

76. *Id.* at 2250.

77. *Id.* at 2249.

78. *Id.* at 2252.

findings, the Court concluded that these findings rationally supported the agency's choice.⁷⁹ Although the Court categorized this as a technical policy decision,⁸⁰ it was still able to carefully review the process by which the agency reached its decision and to find that decision reasonable. This depth of review was not unique, and was consistent with the application by courts of the arbitrary and capricious standard in reviewing equally technical decisions under other complex statutes, such as the Clean Air Act.⁸¹

The Clean Air Act is a goals statute.⁸² The primary goal of the Clean Air Act is to protect the public's health.⁸³ The Act places the responsibility for achieving this goal on both the state and federal governments.⁸⁴ Due to the states' failure to adequately respond to the problem of air pollution, however, Congress has increasingly placed greater reliance on the federal government to ensure the states' compliance.⁸⁵

79. *Id.* at 2256-57.

80. *Id.* at 2257.

81. See cases cited *supra* note 74.

82. See *supra* note 16 and accompanying text. "The problem with statutes that broadly delegate decisionmaking authority is that they leave key value choices to low visibility decision-makers fearful of making controversial choices." Schoenbrod, *supra* note 16, at 753-54. Schoenbrod asserts that the EPA designs rules, under the Clean Air Act, in such a way as to avoid economic, technical and political objections. Thus, the EPA essentially manipulates and redefines the Act's goals through its discretionary rulemaking. *Id.* at 767-79.

While a goals statute allows unelected officials, such as those within the EPA, to make broad and sometimes compromising policy judgments, a rules approach to the Clean Air Act raises objections as well. Congress lacks the time and expertise required to develop necessarily technical rules. Additionally, the cumbersome legislative rulemaking process makes it difficult for Congress to react quickly to new information. Arguably then, these factors require Congress to delegate its rulemaking authority to an agency that can develop the necessary expertise and will be able to react quickly and efficiently to new problems. Nevertheless, Schoenbrod asserts that the same concerns that weigh against congressional rulemaking have become realities with the EPA as rulemaker under the Act. *Id.* at 803-15. Accordingly, he concludes that rulemaking under the Act should be left to Congress; the rulemaking body which is politically accountable. *Id.*; see also D. CURRIE, AIR POLLUTION—FEDERAL LAW AND ANALYSIS § 1.06 (1981) (discussing arguments for and against delegating executive agencies rulemaking authority).

83. Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 7401(b)(1) (1982)). The primary purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." *Id.*

84. See 42 U.S.C. § 7401(c)(3), (4) (1982).

85. Although the problem of air pollution has plagued the nation for longer than 30 years, the first congressional recognition of the problem occurred in 1955 with passage of a bill authorizing the federal government to provide research, technical, and financial assistance to the states in an effort to combat the problem. Act of July 14, 1955, Pub. L. No. 159, 69 Stat. 322. The Secretary of Health, Education and Welfare was charged with administering the statute, although primary responsibility for developing air pollution control strategies was left to the states. See Act of July 14, 1955, Pub. L. No. 159, § 1, 69 Stat. 322, 322.

Growing concerns with the problems of air pollution, combined with the states' failure to act, soon led Congress to amend the Act. See Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392. Accordingly, the purpose of this amendment was to improve, strengthen and accelerate programs for the prevention and abatement of air pollution. See Clean Air Act of 1963, Pub.

Accordingly, the Act requires the EPA, the executive agency authorized to administer the Act,⁸⁶ to develop two sets of national air standards. First, the EPA develops air quality standards that specify the maximum concentration of known pollutants that may safely be allowed in the air.⁸⁷ These standards set the goals that, when attained, will result in clean air. Second, the EPA develops emission standards that specify the maximum rates at

L. No. 88-206, § 1, 77 Stat. 392, 392-93. The still timid nature of the Act was reflected, however, in § 2(a), which merely provided for encouragement of cooperation between the states. See Clean Air Act of 1963, Pub. L. No. 88-206, § 2(a), 77 Stat. 392, 392.

Another attempt to provide more force to the Act, by actually increasing the federal role, occurred in 1967. See Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485. The 1967 Act required the federal government to create air quality control regions, establish criteria for health protection, and recommend control technology. Air Quality Act of 1967, Pub. L. No. 90-148, § 107, 81 Stat. 485, 490-91. The Act required states to adopt air quality control standards that were subject to federal review and approval. Air Quality Act of 1967, Pub. L. No. 90-148, § 108(c)(1), 81 Stat. 485, 492.

Congress recognized the need for a federal agency to set national air quality standards in its 1970 amendments to the Act. See Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676. Thus, by design, the establishment of the EPA coincided with the enactment of the 1970 Act. See Reorg. Plan No. 3 of 1970 § 2(a)(3), 3 C.F.R. 1072, reprinted in 42 U.S.C. § 4321 (1982). Then, to provide the increased federal control, the Act required the newly-established EPA to, among other things, publish a list of known air pollutants, issue air quality criteria for each pollutant, set national air quality standards, review and approve state implementation plans, and determine which pollutants were hazardous. Clean Air Act of 1970, Pub. L. No. 91-604, §§ 108-112, 84 Stat. 1676, 1678-86. The Act required the states to design plans to implement, maintain, and enforce the standards set by the EPA. Clean Air Act of 1970, Pub. L. No. 91-604, § 110(a)(1), 84 Stat. 1676, 1680.

The Supreme Court recognized Congress's concern with the states' failure to act. In *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976), the Court stated that "the [1970] Amendments reflect congressional dissatisfaction with the progress of existing air pollution programs and a determination to 'tak[e] a stick to the States' in order to guarantee prompt attainment and maintenance of specified air quality standards." *Id.* at 249 (citation omitted). For a detailed history of the Clean Air Act of 1970, see *Train v. NRDC*, 421 U.S. 60 (1975).

86. The Department of Health, Education, and Welfare (HEW) was originally authorized to administer the Clean Air Act. After the EPA's establishment in July 1970, however, HEW's functions pursuant to the Act were transferred to the new agency. See Reorg. Plan No. 3 of 1970 § 2(a)(3), 3 C.F.R. 1072, reprinted in 42 U.S.C. § 4321 (1982).

87. 42 U.S.C. § 7408(a)(1) (1982). That section requires the EPA to publish a list of each air pollutant:

- (A) emissions of which, in [its] judgment cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
- (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
- (C) for which air quality criteria had not been issued before the December 31, 1970, but for which [it] plans to issue air quality criteria under this section.

Id. Section 7409 requires that following publication of this list, the EPA is to establish national primary and secondary ambient air quality standards. Attainment of the primary standards will protect the public health. *Id.* § 7409(b)(1). The secondary standards are necessary to protect the public welfare. *Id.* § 7409(b)(2).

which hazardous pollutants may safely be released into the air.⁸⁸ The emission standards are used to achieve the air quality standards.⁸⁹

The Act requires states to adopt implementation plans designed to meet both sets of national standards.⁹⁰ Each plan must provide for the reduction of existing emissions that exceed emission standards.⁹¹ Furthermore, to prevent new pollution problems, each plan must assure that emissions from new and modified sources meet or fall below the emission standards.⁹² Assuming states would gradually reduce emissions, Congress envisioned the expedient attainment of air quality standards.⁹³ Nevertheless, to force the states to comply, the Act originally required the halt of further economic growth, by way of a ban on construction, in those states failing to attain these stand-

88. 42 U.S.C. § 7412(b)(1)(A) (1982). That section requires the EPA's Administrator to publish a list of all hazardous pollutants "for which he intends to establish an emission standard." *Id.* Section 7412(b)(1)(B) requires the Administrator to establish an emission standard for each hazardous pollutant "at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutants." *Id.* § 7412(b)(1)(B).

Section 7412(a)(1) defines a "hazardous air pollutant" as "an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." *Id.* § 7412(a)(1).

89. Both sets of standards, however, are easily manipulated by where, when, and how they are applied. *See* L. LAVE & G. OMENN, *CLEARING THE AIR: REFORMING THE CLEAN AIR ACT* 7 (1981).

90. 42 U.S.C. § 7410 (1982). That section requires states to submit implementation plans to the EPA for approval. *Id.* These plans must include provisions for: attainment of air quality standards within a specified time period; compliance with applicable emissions standards; review of proposed construction; and assurance that the state's emissions will not interfere with other states' progress toward attainment. *Id.* Although the Act requires states to comply within three years of the plan's adoption, several methods are provided for extending this deadline. *See id.*

The Act gives states nine months, following the promulgation of any national air quality standard, to adopt and submit to the Administrator, a plan for attaining that standard. *Id.* § 7410(a)(1). Section 7410(a)(2)(A) requires attainment of the standards within three years from the plan's approval date. *Id.* § 7410(a)(2)(A). This deadline may be extended, however, as follows: § 7410(b) allows the Administrator, in his discretion, to grant up to an eighteen month extension for a state's submission of the plan, *id.* § 7410(b); and § 7410(e) provides for up to a two-year extension if the necessary technology is unavailable, *id.* § 7410(e). Previously § 7410(f)(1) allowed for the postponement of the deadline with respect to a source (or class of sources) if "good faith efforts have been made to comply." *See* 42 U.S.C. § 7410(f)(1) (1976). Subsection 7410(f) was omitted in the 1977 amendment to the Act and a substitute subsection inserted that relates to national and regional energy emergencies. *See* 42 U.S.C. § 7410(f) (1982).

91. 42 U.S.C. § 7412(c)(1)(B) (1982).

92. *Id.* § 7412(c)(1)(A). That section permits the construction of "any new source or [the] modif[ication of] any existing source which in the Administrator's judgment . . . will not cause emissions in violation of such [emission] standard." *Id.* Additionally, § 7412(d)(1) requires each state to design an implementation plan for "implementing and enforcing" these standards established pursuant to § 7412(c)(1)(A) and § 7412(c)(1)(B). *Id.* § 7412(d)(1).

93. *See* L. LAVE & G. OMENN, *supra* note 89, at 8.

ards.⁹⁴ Unfortunately, many states, despite extensions, were unable to attain these standards by the deadlines established under the 1970 Act.⁹⁵

A significant cause of states' nonattainment under the 1970 Act resulted from Congress's failure to recognize a major weakness of the Act.⁹⁶ While the Act specified a deadline for attainment, it did not require states to demonstrate consistent progress toward that goal. Although states presumably intended to comply, many attempted to do so while continuing to allow the construction of new and modified pollution sources without requiring the installation of necessary pollution control equipment.⁹⁷ Thus, emissions increased rather than decreased as states labored under the false hope that large emission reductions could be achieved just prior to the Act's deadline.⁹⁸ Instead, the continued economic growth resulted in nonattainment of the standards. Moreover, under the Act nonattainment resulted in the halt of further economic growth.⁹⁹

94. 42 U.S.C. § 7410(a)(4) (1982). That section prohibits the construction or modification of a polluting source if the change would prevent the attainment or maintenance of any air quality standard. *Id.* Read strictly, this provision bans all construction subsequent to passage of the attainment deadline because it would technically be impossible to attain the standards after that date. *See* H.R. REP. No. 294, 95th Cong., 1st Sess. 208 (1977).

95. According to the chief sponsor of the Act, Senator Muskie, only 91 of the 247 air quality control regions of the nation had met the air quality standards by the Act's deadline. Additionally, 45 states were notified, subsequent to the deadline, that their implementation plans were inadequate. 123 CONG. REC. 18,015 (1977). The former head of the EPA, Russell Train, found that states had not been able to meet the standards for a variety of reasons, including both economic and enforcement problems. H.R. REP. No. 294, 95th Cong., 1st Sess. 207-08 (1977).

96. S. REP. No. 127, 95th Cong., 1st Sess. 55 (1977).

97. *Id.*

98. *Id.*

99. *See supra* note 94. To avoid this crippling ban and to provide temporary relief as Congress battled to amend the Act, the EPA adopted the Emission Offset Interpretive Ruling in 1976. *See* 40 C.F.R. § 51.18 (1976). The ruling allowed limited industrial growth in states subject to the construction ban if two conditions were met. First, a new or modified polluting source had to be constructed with the best available pollution control technology. Second, any increased emissions from the source were to be offset by a greater reduction in emission from another polluting source within the unhealthy air state. The EPA made it clear, however, that the Act forbade economic considerations to outweigh the primary goal of protecting the public's health. *See id.*

Many members of Congress were critical of the discriminatory effect the ruling had on new companies. *See* S. REP. No. 127, 95th Cong., 1st Sess. 111-14 (1977) (view of Sen. Bentsen); 123 CONG. REC. 16,204 (1977) (comment of Rep. Waxman). The approach of the ruling was also criticized because it made pollution a "marketable commodity" by rewarding polluters who had resisted compliance and could later "sell" available emissions offsets to newcomers. In addition, the ruling acted as a disincentive to modernization for polluters who opted to resist compliance rather than be subjected to the ruling's strict requirements. Moreover, this approach would be ineffective because it only applied to larger polluters. Many small polluters could locate in an unhealthy air state and, although together their net emissions might exceed emission standards, the polluters themselves would not be subject to the ruling's requirements. Finally, since a large polluter could foreseeably buy up small polluters in order to obtain allowable

Congress addressed the nonattainment problem in its 1977 amendments to the Act.¹⁰⁰ Although protection of the public's health remained the Act's "overriding commitment,"¹⁰¹ Congress recognized the need to balance the environmental concern of ensuring steady improvement of air quality with the conflicting economic concern of allowing reasonable economic growth.¹⁰² Thus, through the 1977 amendments, Congress redesigned the Act¹⁰³ to allow growth in the states where national standards are exceeded and the public health remains at risk. That growth, however, is limited so that the eventual attainment of the national air standards is ensured.¹⁰⁴ To accomplish these objectives, the amended Act subjects the proposed construction of new or modified polluting sources within unhealthy air states to a stringent permit program.¹⁰⁵ Additionally, construction of modifications in clean air states remains subject to a less stringent permit program.¹⁰⁶ Under these programs

offsets, a potential monopoly situation could arise. See S. REP. NO. 127, 95th Cong., 1st Sess. 1485 (1977) (view of Sen. Bentsen); 123 CONG. REC. 16,204 (1977) (comment of Rep. Waxman).

100. See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. § 7401 (1982)).

101. The Clean Air Conference Report stated that, although economic considerations are to be taken into account, the overriding commitment of the 1977 Act is to the protection of public health. 123 CONG. REC. 27,070 (1977).

102. By the late 1970's, the ideal of pollution-free economic growth had given way to the realities of high unemployment, an economic recession, and the energy crisis. Congress amended the Act in light of those realities, and specified the two main purposes of the provisions for unhealthy air states as "(1)[the] allow[ance of] reasonable economic growth . . . while making reasonable further progress to assure attainment of the standards by a fixed date; (2)[the] allow[ance of] . . . greater flexibility." H.R. REP. NO. 294, 95th Cong., 1st Sess. 211 (1977).

103. The Act provides that the Administrator is to "designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards." 42 U.S.C. § 7407(c) (1982). States therefore might be subdivided into one or more air quality control regions, with each region classified accordingly. For purposes of this Note, however, each state is referred to as a single air quality control region.

A "clean air state" is defined as having "air quality levels better than national primary or secondary air quality standard[s]," or as a region for which there is insufficient data to classify the air quality. *Id.* § 7470(d)(1)(D), (E). The Act refers to an unhealthy air state, or unhealthy air region within a state, as a "nonattainment area." A nonattainment area is defined as one which exceeds any air quality standard for any pollutant. *Id.* § 7501(2). Since a state is classified based on its compliance with each standard, the state may be classified as both a clean air state for purposes of one pollutant and an unhealthy air state for others.

104. The nonattainment provisions required an unhealthy air state to revise its implementation plan to "provide for attainment of each . . . air quality standard . . . as expeditiously as practicable." *Id.* § 7502(a)(1).

105. See *id.* § 7503; see *infra* notes 111-23 and accompanying text. The Act's provisions for unhealthy air states were designed to give states more flexibility in two ways: first, to chose among available emissions offset combinations, and second, to reclassify regions within their own borders. See H.R. REP. NO. 294, 95th Cong., 1st Sess. 213 (1979).

106. The permit requirements for clean air states require the applicant to, among other things, demonstrate that emissions from the proposed source will not create or significantly

a permit must be acquired before construction of a new polluting source or modification of an existing source can occur.¹⁰⁷

Intended both as a tool for attainment and as a means for continued growth, the permit program is designed to consistently reduce emissions and to force industry to develop and install the most effective pollution control technology.¹⁰⁸ Thus, the permit program reflects Congress's intent to place the burden of pollution control on the polluters themselves.¹⁰⁹ Additionally, Congress intended the program to act as an incentive for existing polluters to comply with the states' implementation plans, because a company resisting compliance receives no permit and thus foregoes the opportunity to expand.¹¹⁰

A permit is issued only when four statutory requirements are met.¹¹¹ First, the EPA must determine that the unhealthy air state has adopted an approved plan for attaining national air standards and that the state is actually carrying out its plan.¹¹² Without an approved and working plan, no industrial growth

contribute to air pollution, and install the best available control technology on the source. See 42 U.S.C. § 7475(a)(3), (4) (1982). The "best available control technology" means "an emission limitation . . . which the permitting authority . . . taking into account energy, environmental and economic impacts and other costs, determines is achievable through application of . . . available [technology]. In no event shall application of 'best available technology' result in emissions of any pollutants which will exceed the [national] emissions [standards]." *Id.* § 7479(3).

107. *Id.* § 7502(b)(6) (nonattainment); *id.* § 7410(a)(2)(b) (general).

108. In a Senate debate of the 1977 amendments, Senator Muskie made the following remarks:

Concern has been expressed with the fact that the Clean Air Act does not permit new sources of pollutants to locate in areas where ambient standards for those pollutants are presently exceeded The committee position is—and the Clean Air Act supports the argument—that so long as a new source will not "prevent attainment or maintenance of standards, it can be located in a dirty air region The benefit of forcing both best available technology on the sources and assured compliance with applicable emissions limits.

122 CONG. REC. 25,877 (1976).

109. During the Senate consideration of the Conference Report, Senator Waxman stated that, "[b]y making it prohibitively expensive to engage in further delays, we have provided the strongest incentive to recalcitrant polluters for them to clean up the air." 123 CONG. REC. 27,076 (1977). This is to be done by charging a penalty for those companies failing to comply, at a rate which makes it equally expensive to resist compliance as it is to comply. He further stated that, "[n]o longer will [industries] find it cheaper to send lawyers into court instead of purchasing and installing necessary pollution control equipment." *Id.*; see also 42 U.S.C. § 7420 (1982) (section providing for the assessment and collection of noncompliance penalty).

Polluters should be required to pay the cost for using the public's clean air. See D. CURRIE, *supra* note 82, § 1.10. Currie suggests that the polluter may be required to pay for its use of our air through the use of private lawsuits or through emissions charges or taxes. He concludes, however, by finding that such lawsuits are ineffective and that an emission tax would most likely be arbitrary and unenforceable. *Id.* Thus, the logical conclusion, despite its deficiencies, is to resort to government regulation.

110. 123 CONG. REC. 18,018 (1977) (remarks of Act's sponsor, Sen. Muskie).

111. 42 U.S.C. § 7503 (1982).

112. *Id.* § 7503(4). That section provides that one requirement for permit issuance is that "the applicable implementation plan is being carried out for the nonattainment area in which the proposed source is to be constructed or modified" *Id.*

is allowed in the state. The promise of growth is therefore intended to provide an incentive for unhealthy air states to comply with the Act.¹¹³

Second, the state agency must determine that increased emissions from the proposed new or modified source will be offset by a reduction in emissions elsewhere in the area.¹¹⁴ Reducing emissions is necessary to avoid a major weakness of the 1970 Act.¹¹⁵ Consistent reductions in emissions will allow for steady progress toward the attainment of air quality standards. Thus, the unhealthy air state will not be forced to make drastic emissions reductions as the deadline for attainment under the 1977 amendments approaches.¹¹⁶

Third, the applicant must bring all of its other noncomplying facilities within the unhealthy air state into compliance with that state's plan.¹¹⁷ This requirement forces polluting companies to clean up facilities that are contributing to the state's unhealthy air status prior to receiving the economic reward of industrial expansion.¹¹⁸

113. *Id.* § 7413(a)(5). Existing industries wishing to expand and new industries wishing to locate in that state will be forced to seek locations in other states, thus depriving the unhealthy air state of needed economic expansion. One commentator asserts that this is unfair to newcomers to the state. Simply because the state has failed to force existing companies to comply, the new company is denied permission to construct. See D. CURRIE, *supra* note 82, § 6.10.

114. 42 U.S.C. § 7503(1) (1982). Before a permit is issued, the permitting agency must determine that:

- (1) by the time the source is to commence operation, total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources allowed under the applicable implementation plan . . . so as to represent . . . reasonable further progress . . . ; or
- (2) that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to [exceeded] emissions levels.

Id. This offset policy is similar to the "bubble concept" discussed *infra* notes 132-34 and accompanying text. The difference is that the bubble concept allows trade-offs between sources within a facility, while the offset policy allows trade-offs between entire facilities. L. LAVE & G. OMENN, *supra* note 89, at 23.

115. See *supra* notes 96-99 and accompanying text.

116. "Reasonable further progress" must be made towards reaching air quality standards. Although the House sought to require progression in specific yearly increments, the conference agreement determined that this term was intended to mean regular, consistent emissions reduction. See H.R. REP. NO. 564, 95th Cong., 1st Sess. 158 (1977); 123 CONG. REC. 26,613 (1977). Senator Muskie defined this term to mean that "further control to existing facilities, development of further production process controls, and new innovative control techniques must be applied on all sources." 123 CONG. REC. 18,019 (1977).

117. 42 U.S.C. § 7503(3) (1982). This section provides that "the owner or operator of the proposed new or modified source [must] demonstrate that all major stationary sources owned or operated by [him] . . . in such State are subject to emission limitations and are in compliance, or on a schedule for compliance with all applicable emission limitation and standards" *Id.*

118. This is one way of forcing compliance on those companies that have resisted compliance in the past, but seek to expand facilities or build new facilities in the area. This requirement may be "disproportionate to the offense," however, because the owner may not be intentionally resisting compliance. It may be that the owner is unable to reasonably prevent the violation. See D. CURRIE, *supra* note 82, § 6.10.

Fourth, the applicant must ensure that the proposed new or modified source will be equipped with the most effective pollution control technology to obtain the lowest achievable emission rate.¹¹⁹ That rate is defined as the lower of either the lowest rate for that type of source in any state or the lowest rate achieved in practice.¹²⁰ Thus, the applicant is forced to develop technology, when none exists, to achieve this rate.¹²¹ This concept, known as technology-forcing,¹²² places the burden of developing new technology on industry, the group most responsible for polluting the air. More importantly, it places the burden on those companies seeking to increase pollution in an area where the public health remains at a risk.¹²³

A permit is required prior to the construction or modification of a polluting source in an unhealthy air state.¹²⁴ An existing source is modified when it is physically or operationally changed so that the change results in a pollution increase.¹²⁵ Whether there is a pollution increase, however, depends upon

119. 42 U.S.C. § 7501(2) (1982).

120. *Id.* § 7501(3). That section defines the term "lowest achievable emissions rate" as: that rate of emissions which reflects—(a) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or (B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

Id.

121. *Id.* § 7501(3).

122. Use of the term "technology-forcing" was initially seen in published materials and cases in 1975. See Note, *Forcing Technology: The Clean Air Act Experience*, 88 YALE L.J. 1713, 1713 n.3 (1979); see, e.g., *Train v. Natural Resources Defense Council*, 421 U.S. 60, 75-77 (1975) (discussion of technology-forcing provisions in Clean Air Act).

123. In clarifying the purpose and intent of the 1977 Amendments, the Clean Air Act Conference Report specified that "this year's legislation retains and even strengthens the technology-forcing and technology encouraging goals of the 1970 Act." 123 CONG. REC. 27,070 (1977). In the Senate's consideration of the Conference Report, Senator Muskie commented that the application of the best available control technology is a strategy that can best achieve a reduction in gross national emissions. He also made clear the fact that those who use environmental resources should bear the cost of protecting the environment. *Id.* at 18,016.

Under the Act, polluters are encouraged to develop superior technology through the EPA's granting of conditional extensions. A facility may be granted an extension for compliance only if it is currently developing or installing a means of emission limitation better than that which is presently available. 42 U.S.C. § 7413(d)(4) (1982).

124. In developing its implementation plan, a state must "require permits for the construction and operation of new or modified major stationary sources." 42 U.S.C. § 7502(b)(6) (1982). While the provisions for unhealthy air states do not provide guidance as to the meaning of the term "major stationary source" or "stationary source," § 7501(4) incorporates by reference the definition for "modified" from § 7411(a)(4) of the Act. See *id.* § 7501(4). Section 7411(a)(4) defines a "modification" to be "any physical change in, or change in the method or operation of, a stationary source which increases the amount of any pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.* § 7411(a)(4).

125. *Id.* § 7411(a)(4).

whether the entire plant in which the modification occurs is considered the "source," or whether the individual device that is modified is considered the source.¹²⁶ Thus, while a permit is clearly required prior to the construction of any new polluting source,¹²⁷ it is unclear whether a permit is required for all pollution-increasing modifications.¹²⁸ The coverage of the permit program therefore depends upon the EPA's interpretation of the term source.

The term source has been interpreted in one of two ways. As an illustration, take the case of a polluting company seeking to alter the method of operating a furnace so that the furnace will emit an entirely new pollutant. First, employing a broad interpretation of the term source, the furnace itself is considered a pollution-emitting source. Because the furnace's modification will increase pollution, it is subject to the permit program.¹²⁹ This means that the company must assure that its entire plant, in addition to any other facilities it owns in the state, are in compliance with the state's implementation plan.¹³⁰ The company must also install pollution control equipment on the modified furnace allowing it to achieve the lowest possible emission rate.¹³¹

The second and narrower interpretation of the term source, however, subjects the proposed modification to the permit program only if the entire plant, rather than the individual furnace, increases pollution. This interpretation applies what is known as the "bubble concept" to the permit program.¹³² Under the bubble concept, the entire plant is treated as though it is encased within a single "bubble." Pollution is therefore measured by the total amount escaping from an imaginary hole at the top of the bubble. Thus, under the bubble concept the polluting company can shut down a non-productive furnace in an attempt to offset any increased pollution resulting from a modification to a different furnace. If the resulting emissions reduction is large enough to offset the increase from the furnace the company intends to modify, the total pollution from the plant does not increase. The

126. See *infra* notes 135-58 and accompanying text.

127. See 42 U.S.C. § 7502(b)(6) (1982).

128. See *id.* §§ 7502(b)(6), 7411(a)(4).

129. Assuming that the furnace is a major stationary source, its modification will subject it to the permitting process because a "change in the method of [its] operation . . . [will] result in the emission of a [new] air pollutant." *Id.* § 7411(a)(4).

130. See 42 U.S.C. § 7503(3) (1982).

131. *Id.* § 7503 (2).

132. One study defines the bubble concept as "an Environmental Protection Agency program that permits choice within a plant of which specific pollution sources to abate, so long as the overall emissions from the plant do not exceed the allowable limit." L. LAVE & G. OMENN, *supra* note 89, at 50. The authors support the broad use of the bubble concept. They argue for its adoption because it allows polluters flexibility to control emissions in the least costly way to the polluters, while assuring that overall emissions do not increase. *Id.* But see Note, *The EPA's Bubble Concept After Alabama Power*, 32 STAN. L. REV. 943 (1980) [hereinafter cited as Note, *The Bubble Concept*].

company thus avoids the need for a permit.¹³³ This means that the company need not bring its other plants into compliance, nor install the most effective pollution control equipment on the modified furnace.¹³⁴ The company is allowed to modify the plant regardless of whether it owns four plants in the unhealthy air state that violate every applicable emissions standard, or whether this is its only plant and the plant is completely equipped with the most modern pollution control technology. Applying the bubble concept, there is no distinction between those complying and those resisting compliance when an existing source is modified.

The Act and its history contain no reference to the applicability of the bubble concept, or the plantwide interpretation. Indeed, the Act's only specific guidance regarding this issue is found in the ambiguous definition of the term "stationary source."¹³⁵ A stationary source is defined as "any building, structure, facility or installation" which emits pollution.¹³⁶ With this limited guidance, Congress delegated to the EPA the task of determining whether the bubble concept was appropriate in a given program under the Act. Not suprisingly, the EPA has interpreted the definition of a "source" differently for different types of programs, and each of these interpretations has been promptly challenged in the courts.¹³⁷

133. If a change in a plant has no effect on emissions, it does not fall within the Act's definition of a modification. Thus, only modifications which increase emissions or add new pollutants, are subject to the permit requirements. See 42 U.S.C. § 7503(1) (1982).

134. This may be one reason why industry has so strongly supported application of the bubble concept to the provisions for unhealthy air states. Although it may be burdensome to go through the red tape of the permit program, the real burden to industry comes in the form of forced compliance and technology-forcing. Had these industries complied with the Act's original deadlines, however, they presumably would not be subject to this burdensome process now because their states would have clean air.

135. A stationary source is defined under new source review in the general provisions of the Act. See 42 U.S.C. § 7411(a)(3) (1982). While the Act's provisions for unhealthy air states refer to the new source review provision to define a modification, there is no corresponding reference for a stationary source or major stationary source. The Act's provisions for clean air states similarly do not define or refer to a definition for stationary source, however, a major stationary source is defined within those provisions as "stationary sources with the potential to emit 250 tons or more of any pollutant." *Id.* § 7491(g)(7). Presumably, the definitions are applicable to all of the Act's provisions, although the obvious omissions almost appear to have been intentional.

136. *Id.* § 7411(a)(3).

137. See *infra* notes 138-58, 175 and accompanying text. The challenges take place pursuant to 42 U.S.C. § 7607(b)(1) (1982), which provides in pertinent part, that "a petition for [judicial] review of action of the Administrator in promulgating any nationally . . . applicable regulations . . . may be filed only in the United States Court of Appeals for the District of Columbia." *Id.* The section further provides that "[a]ny petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register" *Id.*

Congress provided for review of nationally applicable rules in a single court to allow a uniform and efficient reviewing process. Review is appropriate in the court of appeals rather than the

The first application of the bubble concept to a permit program occurred in 1976. That application involved a permit program that was designed to improve air quality.¹³⁸ The EPA adopted a plantwide definition for the term "source," thereby subjecting a proposed modification within a plant to the permit program only if an emissions increase was not offset by a reduction elsewhere within the plant. In defining a "source" for this program, however, the EPA had essentially redrafted the statutory definition to include the phrase, "any one or a combination of" facilities.¹³⁹

The Sierra Club challenged the EPA's interpretation in *ASARCO Inc. v. EPA*,¹⁴⁰ claiming that the Act defined a "source" as an individual facility, not as a combination of facilities. The Court of Appeals for the District of Columbia Circuit agreed with the Sierra Club and found that the EPA had exceeded its statutory authority by rewriting the definition.¹⁴¹ Moreover, the court stated that the plantwide definition frustrated the purpose of the permit program, which was to improve air quality, because that interpretation merely maintained existing air quality.¹⁴² The bubble concept was thus found to be inappropriate.¹⁴³

district court because the appeals court takes no evidence, but merely reviews the agency's rulemaking record. *Id.* § 7607(d)(7)(A). Within 60 days of a rule's promulgation, a petition for review must be filed to timely determine the binding effect of the regulation. *Id.* Without an early review, the rulemaking record and the agency's procedural defects become stale. Once the 60 day period elapses, the unchallenged rule cannot later be judicially reviewed during an enforcement proceeding. *Id.* § 7607(b)(2). This provision creates a potential problem, however, because the regulation's future impact may be uncertain until its initial enforcement. Thus, those potentially affected may not realize this fact until the 60 day period has long since run. See R. MELNICK, REGULATION AND THE COURTS 56 (1981); Currie, *Judicial Review Under Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1258 (1977) (Currie asserts that the 60 day requirement may be unconstitutional because those entering into a business affected by the regulation but subsequent to the sixtieth day are precluded from asserting the invalidity of the regulation).

138. See 40 C.F.R. § 60.2(d) (1976).

139. The EPA defined a stationary source to be "any building, structure, facility, or installation which emits or may emit any air pollutant and which contains any one or a combination of the following: 1) Affected facilities. 2) Existing facilities. 3) Facilities of the type for which no standards have been promulgated in this part." *Id.*

140. 578 F.2d 319, 326 (D.C. Cir. 1978).

141. *Id.* at 327-29.

142. *Id.* at 327-28. The court reasoned that Congress had provided for new source review after realizing that state implementation plans alone would not achieve air quality standards. *Id.* at 327. These standards had to be met to achieve the goal of improving air quality and new source review was a means for achieving that goal. *Id.* The means, however, were undercut by the EPA's "applying the bubble concept [and] thus postpon[ing] the time when best technology must be employed and at best maintain[ing] the present level of emissions." *Id.* at 328.

143. *Id.* at 327-29. In addition to finding that the EPA had no authority to rewrite a statutory definition, in the majority opinion, Judge Wright also found the definition inconsistent with Congress's intent to use new source review as a means for technology-forcing. See *id.* at 327. The court also noted that the EPA had agreed to this compromise with the nonferrous

In 1978, the EPA again employed the bubble concept, this time in a permit program for clean air states, that is, states that had attained national air standards.¹⁴⁴ Thus, the program was designed to maintain air quality rather than improve it. This permit program for clean air states also contained an EPA revision of the statutory definition of the term "source." The EPA had added the words "equipment," "operation," and "or combination thereof" to the definition.¹⁴⁵ When this interpretation was challenged in *Alabama Power Co. v. Costle*,¹⁴⁶ the Court of Appeals for the District of Columbia Circuit again found that the EPA lacked the authority to rewrite the Act's definition and thus set aside the EPA's definition. Nevertheless, relying on *ASARCO*, the court found that the EPA could interpret the statutory definition of "source" to mean an entire plant. The court reasoned that this interpretation was allowable because the permit program was only designed to maintain air quality. Thus the court found that the EPA could apply the bubble concept to a permit program designed to maintain existing air quality.¹⁴⁷ Taken together, *ASARCO* and *Alabama Power* create a test whereby it is appropriate to use the bubble concept in a program designed to maintain air quality and inappropriate to use that concept in a program intended to improve air quality.¹⁴⁸

In 1980, the EPA issued a regulation adopting a dual definition for the term "source."¹⁴⁹ For purposes of the permit program for clean air states,

smelting industry only because failure to do so would result in "strong opposition from the smelting industry and the Department of Commerce." *Id.* at 328 n.30.

Both the concurring opinion of Judge Leventhal and the concurring and dissenting opinion of Judge MacKinnon, however, found that the EPA had the authority to interpret the term stationary source flexibly. *See id.* at 330 (Leventhal, J., concurring); *id.* at 331-32 (MacKinnon, J., concurring and dissenting). Judge MacKinnon specifically pointed out that the term "facility" could refer to an entire industrial grouping. *See id.* at 333-34 (MacKinnon, J., concurring and dissenting); *see also* R. MELNICK, *supra* note 137, at 296 (Melnick asserts that Judge Wright, the author of the *ASARCO* opinion, consistently protects the public's right to a clean environment as opposed to industry's right to avoid regulatory burdens).

144. *See* 40 C.F.R. §§ 51.24(b)(4), 52.21 (1978).

145. For purposes of the permit program for clean air states, the EPA defined a "source" as "any structure, building, facility, equipment, installation or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned and operated by the same person." *Id.* § 51.24(b)(4).

146. 636 F.2d 323, 396 (D.C. Cir. 1979).

147. *Id.* The Court found that, although the EPA had no authority to add language to the statutory definition, it did have discretion to interpret the statutory definition applying the bubble concept, as long as the interpretation was "reasonable." *Id.*

148. Currie argues that these two cases failed to determine whether a plantwide definition is appropriate for the term stationary source as both cases merely dealt with the problem of drafting. *See* D. CURRIE, *supra* note 82, § 3.05.

149. *See* 40 C.F.R. § 51.18 (1980). Although industry challenged the 1980 regulations in *Chemical Mfrs. Ass'n v. EPA*, No. 80-1973 (D.C. Cir. filed Aug. 15, 1980), consolidated with No. 79-1112 (D.C. Cir. filed Dec. 15, 1980), a settlement was reached in response to the issuance of the 1981 regulation. *See NRDC v. Gorsuch*, 685 F.2d 718, 724 n.28 (1983), *rev'd sub nom. Chevron, U.S.A., Inc. v. NRDC*, 104 S. Ct. 2778 (1984).

the EPA interpreted the term "source" to mean an entire plant, thus employing the bubble concept. For purposes of the permit program for unhealthy air states, however, the EPA interpreted the term source to mean both an entire plant and each installation within the plant, and thus the bubble concept was not employed.

The EPA supported its use of the dual definition by relying on the test developed by the courts of appeals in *ASARCO* and *Alabama Power*.¹⁵⁰ The EPA found that because Congress designed the permit program for clean air states to merely maintain existing air quality, the narrow plantwide definition was appropriate. The EPA further found that because Congress intended the permit program for unhealthy air states as a tool to improve air quality, that program required use of the broader definition encompassing both an entire plant and each installation within the plant. Significantly, the EPA itself claimed that the interpretation was justified because the broad coverage of the permit program in unhealthy air states was consistent with Congress's intent.¹⁵¹ Congress had intended to accomplish the three goals of reducing emissions, improving air quality, and technology-forcing in those states.¹⁵² Moreover, the EPA realized that the dual definition would complicate the permitting process.¹⁵³ In some instances, a state might be an unhealthy air state with respect to some pollutants and a clean air state with respect to others, thereby subjecting a single modification emitting various pollutants to one permit program and not the other.¹⁵⁴ Nevertheless, the EPA found the anticipated burden to be outweighed by the need for the permit program's broad coverage in unhealthy air states.¹⁵⁵

In response to President Reagan's order to reexamine regulatory burdens,¹⁵⁶ in 1981 Anne Gorsuch Burford, the new head of the EPA, proposed a reversal of the EPA's 1980 regulation.¹⁵⁷ The EPA planned to reduce regulatory burdens and complexities by adopting a plantwide definition of the term "source" for the permit programs under both the clean air states' provisions and the unhealthy air states' provisions. Thus, in deciding to use the broad definition for unhealthy air states the EPA reversed its 1980 decision.¹⁵⁸ While the notice of the proposed reversal specified that its primary purpose was the reduction of regulatory burdens,¹⁵⁹ the final notice indicated that the purpose for the reversal was to give states more flexibility in designing their implementation plans as required by the Act.¹⁶⁰

150. See 45 Fed. Reg. 52,697 (1980).

151. *Id.*

152. See *supra* notes 100-10 and accompanying text.

153. See 45 Fed. Reg. 52,696-67 (1980).

154. See *supra* note 103.

155. 40 C.F.R. § 51.18 (1980).

156. See *supra* notes 32-41 and accompanying text.

157. See 46 Fed. Reg. 16,280-82 (1981).

158. See *id.*

159. *Id.*

160. *Id.* at 50,767. In particular, the EPA concluded in its final notice of the proposed regulation that two concerns warranted the plantwide definition:

The EPA advanced four reasons to justify its decision to reverse its 1980 position.¹⁶¹ First, the EPA claimed that subjecting every modification to the permit program acted as a disincentive to compliance.¹⁶² Plant owners would chose not to replace inefficient pollution control equipment with new advanced technology because the replacement would be subject to the permit program.¹⁶³ The plantwide definition, the EPA claimed, would encourage improvements in existing plants because many existing plant owners could now avoid the permitting process.¹⁶⁴

Second, the EPA stated that if the modification caused the plant as a whole to significantly increase pollution, the modification would still be subject to the permit program.¹⁶⁵ The EPA determined this to mean that emissions would not, therefore, increase under the plantwide definition.¹⁶⁶

Third, the EPA concluded that the plantwide definition would reduce regulatory burdens.¹⁶⁷ By simplifying the regulatory process and narrowing the scope of the permit program's coverage, confusion and inconsistency would be reduced. A modification to an existing plant would now be exempt from both permit programs if the state were considered to be both a clean

First, today's action means that both the [provisions for clean air states] and [provisions for unhealthy air states] will use the same definition of "source." This alone will reduce regulatory complexity. Sources will no longer have to figure out what an "installation" is, which should lessen any confusion engendered by [the 1980 regulation].

Second, and more important, by removing the requirement that states adopt a dual definition, EPA is acting consistently with [the provisions for unhealthy air states] of the Act. Congress expressly provided that states are to play the primary role in pollution control It is also intended that states retain the maximum flexibility to balance environmental and economic concerns in designing plans to clean up [unhealthy air areas].

Id. (citations omitted).

161. *See id.* at 50,766-67.

162. *Id.* at 50,766. The EPA, however, failed to support this reason with any data except to point to two potential situations which might arise, supplied by industry commentators. *Id.*

163. *Id.* at 50,767.

164. *Id.* at 50,768. The EPA pointed out that the plantwide definition was especially needed in areas subject to the construction ban. In those areas, a proposed modernization would be denied even though it would not increase air pollution. *See id.* The EPA failed to note, however, that the plantwide definition does not apply to modernizations only, but to any modification. *See supra* notes 124-25 and accompanying text. Arguably, the plantwide definition would not actually encourage modernization at all.

States without approved and working implementation plans are subject to a construction ban. These states therefore do not have the added safeguard of reasonable further progress towards attainment that is required in an approved plan. The EPA's 1981 regulation allows construction in states where none was intended. *See infra* text accompanying notes 323-24.

165. 46 Fed. Reg. 50,766-69 (1981).

166. *Id.* at 50,767.

167. *Id.* at 50,766. The EPA set forth its reasons for originally adopting the plantwide definition to be as follows:

[The] EPA adopted [the 1980 regulation] in order to most effectively use [new source review] to aid in the clean up of [unhealthy air states] . . . [because] a narrower

air state for some pollutants and an unhealthy air state for others.¹⁶⁸ Moreover, the regulatory burdens would be greatly reduced due to a significant decrease in the coverage of the permitting process as a whole.¹⁶⁹

Fourth, the EPA claimed that the plantwide definition provided the states with more flexibility.¹⁷⁰ Although this would not relieve states of the Act's requirement of reasonable further progress toward the Act's goals,¹⁷¹ states would be given the flexibility to either adopt or reject the plantwide definition, depending on the states' individual needs.¹⁷²

Thus, under the 1981 regulation, an unhealthy air state is free to continue largely unrestricted economic growth with the hope that it will ultimately attain the standards by the Act's deadline.¹⁷³ Regardless of the state's choice, however, the Act's deadlines will have to be met.¹⁷⁴ In short, the EPA justified its regulation change by claiming that modernization was more likely to occur, emissions would not increase, confusion and inconsistency would be alleviated, and states would still be required to comply with the Act. Based on this reasoning, the EPA reduced the broad coverage of the permit program for unhealthy air states.

THE CHALLENGE TO THE 1981 REGULATION

Natural Resources Defense Council, Citizens for a Better Environment, and North Western Ohio Lung Association promptly challenged the 1981 regulation.¹⁷⁵ In *Natural Resources Defense Council v. Gorsuch*,¹⁷⁶ the Court

definition of source brings in more sources for review, which [would] enable states to ensure more reduction in emissions

Id. The EPA then asserted that the 1981 regulation was necessary to "reduce these regulatory burdens and complexities associated with [new source review]" by significantly reducing the coverage of new source review. *Id.*

168. *Id.* at 50,767-78. The EPA reasoned that sources subject to the permitting process under both sets of provisions would "no longer have to figure what an 'installation' is, which should lessen . . . confusion." *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 50,768-69. The EPA argued that, although a state could adopt the plantwide definition, the 1981 regulation did not forbid a state from subjecting all plant modifications to the permit program. What the EPA failed to point out, however, was that a state would generally not choose a definition that would put it at a disadvantage to its neighboring states. Indeed, the Act itself has been amended many times to give the federal government increased control after discovering that states were reluctant to, among other things, set strict air quality standards. *See supra* note 85.

173. *See supra* notes 96-110 and accompanying text.

174. 46 Fed. Reg. 50,766-69 (1981).

175. The final notice of the proposed 1981 regulation provided that "under section [7607](b)(1) of the Clean Air Act, judicial review may be sought only in the United States Circuit Court of Appeals for the District of Columbia Circuit. Petitions for judicial review must be filed on or before December 14, 1981." 46 Fed. Reg. 50771 (1981); *see supra* note 137.

176. 685 F.2d 718, 726 (D.C. Cir. 1982), *rev'd sub nom.* Chevron, U.S.A., Inc. v. NRDC, 104 S. Ct. 2778 (1984).

of Appeals for the District of Columbia Circuit found that the bubble concept could not be used for a permit program in unhealthy air states, because the purpose of the program was to improve air quality. In reaching its conclusion, the court relied on the *ASARCO-Alabama Power* test.¹⁷⁷ Although the EPA asserted that the regulation was necessary to give the states flexibility, the court dismissed that argument. The court found that flexibility was not a goal of the Act, but only a possible means for achieving the Act's goal of improving air quality.¹⁷⁸ Moreover, the court stated that because the Act required states to submit proposed permit programs to the federal government for approval, it seemed unlikely that Congress intended states to then determine the applicability of the permit programs.¹⁷⁹ Therefore, the court found that the EPA's 1981 regulation was arbitrary and capricious.¹⁸⁰

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁸¹ the Supreme Court reversed the appellate court's decision and found that the EPA's regulation was reasonable. The Court stated that the regulation should be set aside only if it was "arbitrary, capricious, or manifestly contrary to the statute."¹⁸² This standard of review, the Court stated, required an examination of the Act and its history to determine whether Congress

177. See 685 F.2d at 726-27. In a footnote, the court addressed and quickly dismissed the EPA's contention that *ASARCO* and *Alabama Power* should be read to create a different test. *Id.* at 726 n.38. The EPA asserted that the line should be drawn between programs that are intended to be technology-forcing and those intended to reduce overall emissions. In *ASARCO*, the use of the bubble concept was inappropriate in a technology-forcing program, and in *Alabama Power*, use of the bubble concept was mandated in a program designed to reduce overall emissions. Thus, the EPA claimed that because the provisions for unhealthy air states focus on emissions reductions, the bubble concept was mandated. The court disagreed, however, finding that the provisions are intended to be both technology-forcing and emissions-reducing. *Id.* at 726 n.38. Moreover, the court found that the EPA had based its analysis on an improper reading of the cases. *Id.* at 727.

Arguably, the court decided *ASARCO* based upon an incorrect finding, as to the purpose of the provisions for new source review. See D. CURRIE, *supra* note 82, § 3.05. The *ASARCO* court failed to cite any materials which expressly indicated that enhancing air quality was the purpose of these provisions and in fact the Senate Report states that the purpose was "the elimination of new pollution problems." See *id.*

178. 685 F.2d at 725.

179. *Id.*

180. *Id.* at 727 n.41. The court, in footnote 41, also discussed the EPA's inconsistent positions in 1980 and 1981. *Id.* The court noted that in 1980, the EPA had claimed that providing broad coverage under the permit program was consistent with Congress's intent to improve air quality. In contrast, the EPA claimed in 1981 that broad coverage slowed air quality improvement by discouraging plant modernizations. The court did not find the EPA's change in position justified by "any study, survey or support" in the record. The court stated that because the EPA was required to explain why the 1980 regulation was no longer implementing congressional policies, its decision "would not rise to the level of reasoned decision-making" if based on this rationale. *Id.*

181. 104 S. Ct. 2778, 2781 (1984).

182. *Id.* at 2782.

had any specific intent regarding the use of the bubble concept in the permit program for unhealthy air states.¹⁸³ The Court, however, made no mention of its duty to review the EPA's decisionmaking process.¹⁸⁴ Nevertheless, finding an absence of congressional intent, the Court concluded that the 1981 regulation represented a reasonable policy choice.¹⁸⁵

The Court first discussed the formulas for proper review of an administrative agency regulation. The Court's initial inquiry was whether Congress had expressed any intention regarding the precise question at issue.¹⁸⁶ The Court noted that if Congress had expressed no intention, a reviewing court must then determine whether the agency's interpretation of the statute was reasonable.¹⁸⁷ Furthermore, unless the agency's interpretation was arbitrary and capricious, it must be given deference by a reviewing court.¹⁸⁸ Additionally, the Court stated that an agency's decision involving a technical and complex policy question must not be set aside unless an examination of the statute and its history reveal an intention contrary to the agency's interpretation.¹⁸⁹ The Court found that the appellate court had therefore erred when, in the absence of specific congressional intent, it imposed a judicial interpretation on the EPA rather than determining whether the EPA's interpretation was reasonable.¹⁹⁰

The Court next turned to an examination of both the Act and its history to determine whether Congress had addressed the precise question at issue. The only guidance the Court found in the Act itself for determining the appropriateness of the bubble concept in this case was in the Act's general definition of the term "stationary source."¹⁹¹ Looking to the legislative history of what the Court referred to as a technical and complex Act,¹⁹² the

183. *Id.* at 2783.

184. *See supra* notes 46-54 and accompanying text.

185. 104 S. Ct. at 2783.

186. *Id.* at 2781.

187. *Id.* at 2782.

188. *Id.*

189. *Id.* at 2783.

190. *Id.*

191. *Id.* at 2790-91. Although the provisions for unhealthy air states do not explicitly define the term stationary source, the Court concluded that the definition for a stationary source in the Act's general provisions for new source review could be employed. *Id.* at 2790-91 & n.32. The Court also noted that the EPA had used the language of that definition in other regulations regarding the permit program, despite the EPA's argument that the definition did not apply. *Id.* at 2791 & n.32.

The Court was not persuaded by respondent's assertion that each word of the definition—building, structure, facility, and installation—mandated the interpretation of source to mean a separate device within a facility. *Id.* at 2790. Instead, the Court found that Congress's use of these general terms was apparently intended to give the EPA flexibility in defining the term stationary source for different programs under the Act. *Id.* at 2792.

192. *Id.* at 2791. The Court first referred to the Act as being "lengthy, detailed, technical, complex, and comprehensive," *id.* at 2785, and then concluded that it lacked the expertise to engage in a substantive review, *id.* at 2793.

Court found that the Act's history was silent regarding the precise question at issue.¹⁹³ The history did, however, reveal to the Court the two policy concerns facing Congress when it enacted the statute. Without discussion, the Court concluded that the 1981 regulation was consistent with the concern of allowing reasonable economic growth. Moreover, the Court concluded that the EPA's statements that the environmental concerns would also be served by the regulation were supported by the EPA's reasoning.¹⁹⁴ To support its conclusion that the environmental objectives of the Clean Air Act were being served, the Court briefly noted that the rulemaking record and certain private studies supported the EPA's explanation.¹⁹⁵

The Court then addressed, and quickly dismissed, respondents' argument that the 1981 regulation should not be given deference due to its inconsistency with prior regulations.¹⁹⁶ The Court found that the EPA had always interpreted the term "stationary source" differently for different permit programs. The Court noted that such varied definitions supported the idea that the statutory definition was intended to be flexible.¹⁹⁷ Moreover, the Court stated that the agency must continually reevaluate its decisions based on wise policy changes.¹⁹⁸ In any case, the Court added, the EPA's 1980 regulation resulted primarily from the judicial creation of the *ASARCO-Alabama Power* test rather than from the EPA's attempt to further congressional intent.¹⁹⁹

The Court then turned to a discussion of policy considerations. Stating that the judiciary lacks the authority to balance competing policies,²⁰⁰ the Court suggested four reasons that might explain why Congress left this balancing to the EPA. Congress may have: (1) struck a balance, but failed to do so with respect to this very specific issue; (2) intentionally left balancing to EPA expertise; (3) failed to consider the issue; or (4) been unable to agree on an acceptable balance. Regardless of Congress's intent, however, the Court found the EPA's balance of economic and environmental concerns to be reasonable. The EPA had reconciled conflicting policies under a technical and complex Act and therefore, according to the Court, its decision was entitled to deference.²⁰¹

Significantly, the Court stated its general view regarding the policymaking roles among the different governmental branches. The Court stated as a

193. *Id.* at 2792.

194. *Id.* at 2792. The Court expanded on this important point no more than to add two short footnotes which provided no guidance as to the EPA's reasoning. *See id.* at 2792 nn. 36 & 37. Both footnotes in fact did not even support the EPA's reasoning that the Act was intended to provide the states more flexibility because both footnotes spoke in terms of providing the plant owners more flexibility. *See id.*

195. *Id.* at 2792.

196. *Id.*

197. *Id.* at 2793.

198. *Id.*

199. *Id.* at 2792.

200. *Id.* at 2793.

201. *Id.*

general proposition that once Congress delegates its policymaking responsibility to an agency, that agency may properly rely upon the President's concept of wise policy in making its own decision.²⁰² Moreover, the Court stated that the judiciary, which has no constituency, must not impose its own policy views on an agency but must uphold reasonable policy choices made by those accountable to the public. Thus, the Supreme Court upheld the EPA's 1981 regulation as representing a reasonable policy choice.²⁰³

ANALYSIS

The proper standard for reviewing the EPA's regulation change was the arbitrary and capricious standard.²⁰⁴ The *Chevron* Court's application of that standard, however, ended with the Court's recitation of the words "arbitrary and capricious." Apparently, the Court chose to ignore its recent, well-reasoned *State Farm* opinion,²⁰⁵ in much the same way that it had allowed the EPA to ignore its recently reversed 1980 regulation. Had the Court applied the arbitrary and capricious standard as set forth in *State Farm* just twelve months earlier, the *Chevron* Court would have taken a "hard look" at the EPA's justifications for its regulation change and ultimately remanded the regulation for the EPA's reconsideration. Instead, the Court adopted an approach that virtually exempted the EPA's decision-making process from review. The Court relied on the mere recital of the appropriate standard to summarily conclude that the EPA had provided some reasoning to indicate that the regulation change would serve the Act's environmental concerns as well as its economic concerns.²⁰⁶

The words "arbitrary and capricious" are virtually meaningless until a court applies them.²⁰⁷ Almost exactly one year prior to *Chevron*, Justice White, writing for the majority in *State Farm*, gave meaning to those words. Justice White began, as Justice Stevens had in *Chevron*, by reciting the appropriate reviewing standard.²⁰⁸ The *State Farm* Court, however, did not

202. *Id.*

203. *Id.*

204. Section 7607(d)(9) of the Act does not expressly provide for review of a regulation regarding the requirements for state implementation plans. Congress, however, has expressed no intention that such a regulation should be unreviewable. Indeed, the Court incorporated by reference the standard articulated in § 7607(d)(9). See 104 S. Ct. at 2782. The Court stated that the 1981 regulation was to be "given controlling weight unless [it] was arbitrary, capricious, or manifestly contrary to the statute." *Id.*; see also Currie, *supra* note 137, at 1221, 1238 (appellate courts have, without discussion, entertained challenges to implementation plans).

205. For a discussion of *State Farm*, see *supra* notes 56-73 and accompanying text.

206. 104 S. Ct. at 2792.

207. Compare *EDF v. Costle*, 657 F.2d 275 (D.C. Cir. 1981) (similar to *Chevron* in that court merely recited standards but failed to apply them) with *NRDC v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979) (similar to *State Farm* in that court gave the standard of review meaning in its application). For an analysis of this comparison, see K. DAVIS, *supra* note 34, § 29.00-3, at 540-43 (Supp. 1982).

208. 103 S. Ct. at 2866-67.

end there. Reflecting upon the purpose for reviewing an agency's decision to change its rules, the *State Farm* Court found that an abrupt change in the agency's policies may require even greater justification in the rulemaking record.²⁰⁹ Before examining the rulemaking record in *State Farm*, the Court outlined three situations in which a reviewing court must find that an agency's decision is arbitrary and capricious. An arbitrary and capricious decision is one that is based on considerations other than those intended by Congress, which overlooks a significant aspect of the problem, or is justified with reasons contradictory to the evidence or completely implausible.²¹⁰ Moreover, the Court declared that when an agency reverses a prior regulation, it is to be presumed that the prior regulation would have been more effective in carrying out Congress's intent.²¹¹ Accordingly, the agency has a greater burden in justifying a change in an existing regulation.

Similar situations faced the Court in both *Chevron* and *State Farm*. Both involved informal rulemaking by an executive agency administering a statute intended to protect the public—one public health, the other public safety.²¹² Each agency had originally claimed that its rule was consistent with the purposes of the statute under which the rule was promulgated.²¹³ The statutes themselves are both technology-forcing in nature and were both enacted because of the need to regulate industry.²¹⁴ Additionally, consistent with an order from the then new Reagan Administration and followed by the President's appointment of a new administrator to each agency, both rules were re-examined.²¹⁵ Finally, after re-examination, both agencies apparently concluded that because industry had effectively avoided the existing rule, the rule was no longer achieving its purpose.²¹⁶ Thus, both rules were changed—

209. *Id.* at 2866.

210. *Id.* at 2867.

211. *Id.* at 2866.

212. The purpose of the Motor Vehicle Safety Act is to reduce "traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381 (1982). The purpose of the Clean Air Act is to protect the public's health. 42 U.S.C. § 7401 (1982).

213. When the rescinded passive restraint standard in *State Farm* was first issued, NHTSA claimed that requiring either airbags or seatbelts would save approximately 9,000 lives and avoid an estimated 65,000 injuries per year. *See* 42 Fed. Reg. 34,289-99 (1977). Similarly, the EPA had claimed that the broad coverage of the permit program was consistent with Congress's intent to clean the air, reduce emissions, and force technology. *See* 46 Fed. Reg. 50,766-67 (1980).

214. *Compare State Farm*, 103 S. Ct. at 2871 (discussing the technology-forcing nature of the MVSA) with *Train v. NRDC*, 421 U.S. 60, 91 (1975) (discussing technology-forcing nature of the Clean Air Act).

215. *See* Note, *Judicial Review of Informal Rulemaking*, *supra* note 46, at 363 n.104; *supra* notes 58-59, 156-60 and accompanying text.

216. NHTSA argued that because automobile manufacturers had opted for the less effective alternative under the standard, the standard was no longer effective. *See* 46 Fed. Reg. 53,419 (1981); *supra* note 50. The EPA claimed that polluting companies would opt against modernization rather than be subjected to the permit program. Thus, due to polluting industries' avoidance of the permit program, the EPA decided that the regulation acted as a disincentive. *See* 40 C.F.R. § 51.18 (1984).

one modified, the other rescinded.²¹⁷ An important difference lies, however, in the Court's review of each rule and in the results of that inconsistent treatment. One rule was upheld and the other remanded for reconsideration.²¹⁸

Reviewed under the arbitrary and capricious standard as employed in *State Farm*, the EPA's decision to reverse its 1981 regulation would similarly have been remanded for reconsideration. Using the *State Farm* approach, the *Chevron* Court would have performed a close substantive review not of the EPA's final choice, but of the EPA's decisionmaking process. The *Chevron* Court, however, failed to discuss the EPA's decisionmaking process.

The EPA's initial decision to re-examine the 1980 regulation resulted from the President's order to eliminate burdensome regulations.²¹⁹ After receiving that order, the EPA decided to change the 1980 regulation to reduce regulatory burdens and to provide unhealthy air states with greater flexibility.²²⁰ These justifications for the regulation change, standing alone, satisfied the *Chevron* Court.²²¹ They would not, however, have survived review under the *State Farm* approach. A careful review of the EPA's decisionmaking process would have revealed that all three situations articulated in *State Farm*,²²² which give rise to an arbitrary and capricious finding, were present in *Chevron*.

Applying the *State Farm* approach, the *Chevron* Court would have found that the EPA, in deciding to reverse its 1980 position, considered factors other than those Congress intended to be considered. The purpose of the statutory scheme for unhealthy air states is to allow the states reasonable economic growth as they progress towards achieving healthy air status.²²³ The EPA is thus mandated to balance environmental and economic factors, keeping in mind that the overriding commitment of the Act is the protection of the public's health.²²⁴ Similarly, the *State Farm* Court required NHTSA to reconsider its balance of economic and safety concerns in light of the fact that the Motor Vehicle Safety Act's primary goal is safety.²²⁵

When necessary, the EPA is to balance environmental and economic factors, giving special weight to the protection of the public health as the Act requires.²²⁶ Here, however, the EPA's decision was based on the desire to provide unhealthy air states with both regulatory relief and flexibility in

217. See 46 Fed. Reg. 53,419 (1981) (NHTSA's rescission of standard); 40 C.F.R. § 51.18 (1984) (EPA's modification of 1980 regulation).

218. Compare *State Farm*, 103 S. Ct. at 2874 (rescission of standard vacated) with *Chevron*, 104 S. Ct. at 2794 (modification of regulation upheld).

219. See *supra* notes 156-60 and accompanying text.

220. See *supra* note 160.

221. See 104 S. Ct. at 2792.

222. See 103 S. Ct. at 2867.

223. See *supra* note 102.

224. See *supra* note 101.

225. 103 S. Ct. at 2873.

226. See *supra* notes 101-02 and accompanying text.

applying the permit program.²²⁷ Neither the desire to allow polluting companies to expand with greater ease, nor the desire to allow unhealthy air states unrestricted economic growth, were factors that Congress intended the EPA to consider if balancing became necessary. Arguably, Congress had already struck a balance here by the very fact that it designed the permit program.²²⁸ With the permit program, unhealthy air states could have limited economic growth. Without the program, there could be no growth in these states.²²⁹ But even if the EPA was required to balance in this situation, it was not authorized to do so at the expense of considering the primary factor that it was mandated to consider—protection of the public's health.

Indeed, it was because these unhealthy air states and the industries within them had failed to comply with the 1970 Act that it became necessary for Congress to amend the Act in 1977.²³⁰ In amending the Act, Congress increased federal responsibility and control.²³¹ Nevertheless, both of the factors considered by the EPA favor reduced federal control and responsibility and thus appear contrary to Congress's intent. As the Court of Appeals for the District of Columbia Circuit correctly suggested, it seems unlikely that the Act would require unhealthy air states to adopt a stringent permit program and then turn around and allow those states to determine which sources will be subject to the program.²³² Had the *Chevron* Court actually reviewed the EPA's decisionmaking process, it would have found that the EPA based its decision on factors other than those intended by Congress. Thus, a close look under the *State Farm* approach would have revealed that the EPA engaged in arbitrary and capricious decisionmaking.

Moreover, the *Chevron* Court would have found that the EPA engaged in arbitrary and capricious decisionmaking under the second situation specified in *State Farm*. The EPA overlooked a significant aspect of the problem when it failed to consider the effect that the 1980 regulation had on the overall reduction of pollution.²³³ The EPA supported its regulation change

227. See *supra* notes 158-60 and accompanying text.

228. See *supra* notes 100-10 and accompanying text.

229. See *supra* notes 100-07 and accompanying text.

230. See *supra* note 85 and accompanying text.

231. See *id.*

232. *NRDC v. Gorsuch*, 685 F.2d 718, 727-28 (D.C. Cir. 1981), *rev'd sub nom.* *Chevron, U.S.A., Inc. v. NRDC*, 104 S. Ct. 2778 (1984). Two additional problems arise when allowing unhealthy air states the flexibility to use the bubble concept in their implementation plans. First, the EPA will inevitably approve a state plan to avoid political pressure because economic expansion would cease if a plan were not approved. Second, in balancing the concern of flexibility with that of reducing the risks to public health, flexibility must outweigh the risk to allow the application of the bubble concept under the Act. The risks, however, are greater than any benefits attained from increased flexibility. Thus, allowing unhealthy air states the use of the bubble concept is inconsistent with the Act's primary goal of protecting the public's health. See Note, *The Bubble Concept*, *supra* note 132, at 973.

233. Respondents asserted this argument relying on the *State Farm* opinion. Brief for Respondents Natural Resources Defense Council at 44-47, *Chevron*, 104 S. Ct. 2778 (1984). The *Chevron* Court, however, failed to address the argument.

with the claim that pollution control progress was slowed under the 1980 regulation because that regulation discouraged companies from modernizing.²³⁴ Even if this conclusory justification would have been acceptable standing alone, it did not justify thwarting the broad coverage under the 1980 regulation.²³⁵ Congress thought long and hard to devise a method by which pollution could be reduced while allowing continued economic growth.²³⁶ The tool Congress designed for achieving these goals was the permit program; the broad coverage of that program under the 1980 regulation was consistent with Congress's intent.

The 1980 regulation allowed a polluting company to modify its existing facility only if the polluter improved the overall air quality in two ways. First, the 1980 regulation required the polluter to bring into compliance any of its other plants within the state.²³⁷ Second, it required the polluter to install the most effective pollution control technology on its modified device.²³⁸ If such technology was unavailable yet feasible, its development was required.²³⁹ Through these requirements, the permit program was designed to and, according to the EPA in 1980,²⁴⁰ could accomplish the goal of reducing pollution overall. The EPA, however, failed to even address this goal of the permit program in its re-examination of the 1980 regulation.

Under the 1981 regulation, consistent emissions reductions will not take place because there has been a significant reduction in the coverage of the permit program. Accordingly, the development of new technology is significantly reduced. Industries that allegedly found the permit program to be a disincentive to modernization most certainly will not now voluntarily comply with the program's technology-forcing requirement. Of course, the actual

234. 40 C.F.R. § 51.18 (1984). Although the EPA claimed that this regulatory burden acted as a disincentive to modernization, it supplied no examples of a company deciding not to expand based on this regulatory burden. The EPA's argument is similar to that of industry's in opposing the permit program prior to the 1977 amendments. Industry's arguments were equally specious. According to Senator Muskie, the proposed new source review policy "was greeted with a storm of protest from industry" claiming "such careful scrutiny" would make it impossible to build new facilities. 123 CONG. REC. 18,017-18 (1977). During the committee's deliberations, it was informed of several large, job-creating, tax-generating projects that would most certainly be killed by the stringent policy. Rather than kill these projects, however, the policy had the specific effect which Congress intended. Existing companies in the areas improved their own pollution controls in order to provide emissions offsets for the new projects, and existing, previously uncontrolled emissions were "discovered" which, once controlled, also provided offsets. *See id.*

235. *See State Farm*, 103 S. Ct. 2856, 2869 (1983).

236. *See supra* notes 90-98 and accompanying text.

237. Under the 1980 regulation, the polluter seeking to modify would have been subject to the permit requirements set forth in the provisions for unhealthy air states. Section 7503(3) requires the polluter to bring all other sources into compliance prior to modification. 42 U.S.C. § 7503(3) (1982).

238. *Id.* § 7503(2).

239. *Id.* § 7501(3).

240. *See* 45 Fed. Reg. 52,697 (1980).

determination of whether and how the bubble concept will affect the overall reduction in pollution control is properly left to the expertise of the EPA.²⁴¹ Nevertheless, the *Chevron* Court should have at least required the EPA to address this significant aspect of the problem. Thus, had the *Chevron* Court applied the *State Farm* approach, it would have found that the EPA engaged in arbitrary and capricious decisionmaking by failing to consider a significant aspect of the problem.

The *Chevron* Court also would have found the EPA's decision to be arbitrary and capricious under the third situation articulated in *State Farm*. The EPA justified its decision with a reason contrary to the evidence. The EPA claimed that requiring states to have approved implementation plans was a sufficient safeguard to assure timely compliance with the Act.²⁴² Requiring an approved plan, however, does not lead to the conclusion that clean air standards will be timely met. Congress in fact designed the permit program to prevent the reoccurrence of the nonattainment problem, which arose because of a similar misconception.²⁴³ Prior to the 1977 amendments, states had mistakenly allowed unlimited industrial expansion, expecting to significantly reduce emissions just prior to the deadline for compliance under the Act. This false expectation resulted in noncompliance by a great many states and forced Congress to develop specific provisions for unhealthy air states.²⁴⁴ Included in these provisions is the very permit program to which the 1981 regulation now applies.²⁴⁵

The 1981 regulation raises the concern that unhealthy air states will again fail to meet the Act's deadline, especially now that they are allowed increased economic growth without a corresponding decrease in emissions. In addressing this concern, the EPA stated that an unhealthy air state must be given the discretion to run the risk if it so chooses.²⁴⁶ The safeguard, according to the EPA, is that the state must assure that it still plans to meet the Act's deadline.²⁴⁷ The *Chevron* Court should have found that the EPA's short-sighted reasoning contradicted the reality of the states' past actions and Congress's intent to prevent that action from reoccurring.²⁴⁸ Thus, under the *State Farm* approach, the Court would have found this reasoning to be arbitrary and capricious.

241. See *State Farm*, 103 S. Ct. at 2872 (an agency must rely upon its own expertise in determining feasibility of plans).

242. 46 Fed. Reg. 50,769 (1981).

243. See *supra* notes 100-10 and accompanying text.

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

245. See 42 U.S.C. § 7503 (1982).

246. 46 Fed. Reg. 50,766 (1981). The EPA stated that "[i]f a state wishes to use a plantwide definition and run [this] risk . . . then the state has the discretion to do so" *Id.*

247. *Id.*

248. See *supra* notes 96-99 and accompanying text.

Had the Court correctly applied the arbitrary and capricious standard employing the *State Farm* approach, one final step in the Court's review would have been to note that the EPA's reasons for justifying its 1981 regulation contradicted its stand in 1980. In 1980, the EPA claimed that the permit program's broad coverage was consistent with Congress's intent to use the program to reduce emissions.²⁴⁹ The 1981 regulation, on the other hand, exempts from the permit program many modifications that, if regulated, would have provided reductions needed to meet Congress's intent. According to the *State Farm* Court, an existing regulation is presumed to carry out the policies of Congress.²⁵⁰ The *Chevron* Court should therefore have required the EPA to reasonably explain its change in course. Because the EPA failed to do so, the *Chevron* Court should have found the EPA's decisionmaking to be arbitrary and capricious.

In summary, the *Chevron* Court clearly arrived at an incorrect result by failing to examine the rulemaking record as required in *State Farm*. Had the *Chevron* Court engaged in a meaningful review of the EPA's decision-making process, it would have found that the EPA's decision was arbitrary and capricious for each of the reasons articulated in *State Farm*. Instead, the *Chevron* Court avoided any discussion of the EPA's decisionmaking process by summarily concluding that the EPA's decision was reasonable.

Despite the similarities in these two cases, the *Chevron* Court did not follow, nor even cite *State Farm*.²⁵¹ This apparent inconsistency can be resolved, however, by focusing not on the proper scope of judicial review but on whether judicial review was in fact proper. The *Chevron* Court clearly indicated its view of the proper separation of powers with regard to administrative agency policymaking.²⁵²

The Supreme Court took the opportunity provided for it by *Chevron* to express, for the first time in a majority opinion, its view regarding presidential intervention into agency decisionmaking. The Court stated that, while Congress has the first shot at determining policy when it enacts law, once Congress decides to leave that responsibility to an executive agency the

249. 45 Fed. Reg. 52,697 (1980).

250. 103 S. Ct. at 2866.

251. Respondents argued that based on *State Farm*, the *Chevron* Court should find the 1981 regulation arbitrary and capricious because the EPA failed to consider an important aspect of the problem, the regulation's aggregate effect on emissions. Brief for Respondents Natural Resources Defense Council at 44-47, *Chevron*, 104 S. Ct. 2778 (1984). Petitioners mentioned the case only in a footnote in the Reply Brief. See Reply Brief for the Administrator of the Environmental Protection Agency at 16 n.22, *Chevron*, 104 S. Ct. 2778 (1984). There petitioners distinguished the case by claiming that the EPA, unlike NHTSA, had given a "full and reasoned explanation" for its change. Reply Brief for the Administrator of the Environmental Protection Agency at 16 n. 22, *Chevron*, 104 S. Ct. 2778 (1984).

252. 104 S. Ct. at 2793.

President can intervene.²⁵³ In addition, the Court stated that the federal judiciary cannot review legitimate policy choices made by either the President or Congress.²⁵⁴ Therefore, had the EPA alone made the policy choice challenged in *Chevron*, arguably the Court would have engaged in a "hard look" review of the EPA's decision.

The Court, however, found that the EPA had not made the policy choice involved with its 1980 regulation and intimated that the EPA did not make the policy choice relating to its 1981 regulation change.²⁵⁵ The 1980 regulation was based on a policy decision that the Court found had been made by the Court of Appeals for the District of Columbia Circuit.²⁵⁶ Indeed, the EPA had indicated that it based its dual definition in the 1980 regulation on the *ASARCO-Alabama Power* test.²⁵⁷ Similarly, the *Chevron* Court noted that the 1981 regulation change was based on Executive Order 12,291, which embodies President Reagan's policy of deregulation.²⁵⁸

This is in contrast to NHTSA's decision in *State Farm*. Although NHTSA's rescission of the passive restraint standard was based on a determination that the standard's costs outweighed its safety benefits, NHTSA did not specifically indicate that this cost-benefit analysis was performed pursuant to Reagan's order.²⁵⁹ The majority in *State Farm* noted that changing circumstances do not necessarily require deregulation.²⁶⁰ Apparently the Court recognized, but avoided discussing, possible presidential influence over NHTSA's decision.²⁶¹ As one commentator has suggested, that Court may also have been rejecting the deferential standard of review endorsed by President Reagan in deciding instead to revive the "hard look" approach.²⁶² The dissenters in *State Farm*, however clearly recognized the coincidence of President Reagan's order to deregulate and NHTSA's corresponding rescission of its regulation.²⁶³ Justice Rehnquist stated that a change in the administration's policies would provide proper justification for an executive agency to reevaluate its regulations.²⁶⁴

Dealing with a regulation that was specifically changed in response to President Reagan's order, however, the six Justices participating in *Chevron* agreed that presidential intervention is proper when Congress has left a policy gap.²⁶⁵ This fact alone, however, still does not explain the Court's

253. *Id.*

254. *Id.*

255. *Id.* at 2787-89.

256. *Id.* at 2789.

257. *Id.* at 2792; see *supra* notes 149-155 and accompanying text.

258. 104 S. Ct. at 2789.

259. See *supra* note 58.

260. *State Farm*, 103 S. Ct. at 2871.

261. See *supra* notes 70-73 and accompanying text.

262. See *The Supreme Court, 1982 Term, supra* note 71, at 236.

263. 103 S. Ct. at 2871 (Rehnquist, J., dissenting).

264. *Id.* (Rehnquist, J., dissenting).

265. *Id.* at 2872 (Rehnquist, J., dissenting).

approach to judicial review in *Chevron*. The *Chevron* approach signifies virtually no review at all. If the Court had determined that Congress had struck a balance between competing policies, arguably the Court would have performed the traditional review. Such a review would mean scrutinizing the EPA's rule-making record to ensure that the EPA engaged in well-reasoned decision-making pursuant to Congress's balance.²⁶⁶ Determining instead that presidential policies were responsible for the regulation change, however, the *Chevron* court completely avoided review of the EPA's decisionmaking process. Although the Court indicated that the federal judiciary was not to interfere in policy choices made by those responsible for making such choices,²⁶⁷ the Court here was charged with reviewing the EPA's decisionmaking process, not the policy choice of the President.²⁶⁸ Arguably, therefore, the Court agreed with the President's policy. Had it disagreed, as one commentator suggested in discussing *State Farm*,²⁶⁹ the Court merely had to review the EPA's decision, as discussed above, and find that it was arbitrary and capricious.

The *Chevron* Court also justified its failure to review the decision by claiming that the subject matter was too technical and complex for review.²⁷⁰ The Supreme Court, however, tackled review of an equally, if not more technical and complex, policy choice by the Nuclear Regulatory Commission in *Baltimore Gas & Electric*.²⁷¹ Possibly, the Court decided to substantively review the technical rule in *Baltimore Gas & Electric* not because the Court felt itself more capable, but because of the Court's notice of the "acute" public awareness of the issue of nuclear energy.²⁷² While air pollution was also a topic of great public concern at one time, that concern has apparently given way to what are now perceived as more imminent dangers.²⁷³ This relaxed public concern, combined with the President's influence over the EPA's decision, might be the real factors that prompted the *Chevron* Court to conclude that it lacked the expertise and authority to review the EPA's technical policy choice. Indeed, as discussed above, if the Court had reviewed the EPA's decisionmaking process, it would have found that the regulation was arbitrary and capricious. Moreover, striking down the EPA's attempt to ease regulations would have been inconsistent with President Reagan's deregulation policy.

IMPACT

The *Chevron* decision raises three significant concerns in the field of administrative law. First, although the Constitution vests Congress with

266. See *supra* notes 46-52 and accompanying text.

267. 104 S. Ct. at 2793.

268. See *supra* notes 50-52 and accompanying text.

269. See *The Supreme Court, 1982 Term, supra* note 71, at 237 n.54.

270. 104 S. Ct. at 2793.

271. See *supra* notes 75-81 and accompanying text.

272. See 103 S. Ct. at 2252.

273. See *supra* notes 159-60 and accompanying text.

lawmaking authority, it is now unclear how extensively that function may be usurped once Congress has delegated its authority to an administrative agency. Clearly, the *Chevron* Court would require an agency to abide by specific congressional intent when the agency engages in decisionmaking pursuant to a statute.²⁷⁴ Thus, after *Chevron*, when Congress provides only vague guidelines for agency action or delegates policymaking authority to the agency, it runs the risk that its intent will be frustrated. In such a situation, the agency may decide on its own whether furtherance of a given policy is appropriate. One problem this creates is that broad policy decisions affecting the general public are then being made by those who have no constituency.²⁷⁵ More importantly, such decisions may be immune from challenge.

Judicial review of the agency's decisionmaking could provide an effective safeguard to any abuse of an agency's delegated authority.²⁷⁶ Nevertheless, after *Chevron* meaningful judicial review may not be guaranteed. Until recently, Congress had its own, albeit imperfect, safeguard to check an agency's decisions—the legislative veto. The legislative veto, however, has been found unconstitutional.²⁷⁷

Once Congress delegates policymaking authority to an agency, *Chevron* allows the President to intervene in the agency's decision.²⁷⁸ The President may require the agency to consider policies other than those Congress intended to be considered. Additionally, the President may require the agency to balance congressional policy considerations in a different manner than Congress intended. If the resulting decision did not actually conflict with the underlying statute, that decision would be upheld under *Chevron*. Thus, *Chevron* enables the President to effectively frustrate Congress's intent.

Congress can avoid this situation, however, by amending the statute that gives the agency its policymaking authority.²⁷⁹ In so amending the statute Congress can make its intent clear by providing an agency with specific guidelines and standards to use in the agency's decisionmaking.²⁸⁰ Although it is difficult, if not impossible, for Congress to always foresee or agree on potential policy issues, the attempt would prove worthwhile. By delegating less policymaking authority to an agency, it is more likely that congressional intent, along with the concern of accountability, will be served. Arguably, however, this solution would be inefficient. It would return to the hands of

274. 104 S. Ct. at 2781-82.

275. See *supra* note 15 and accompanying text.

276. See *supra* notes 42-52 and accompanying text.

277. See *supra* note 25.

278. 104 S. Ct. at 2793.

279. See Rosenberg, *supra* note 28, at 215; Schoenbrod, *supra* note 16, at 826-28.

280. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (President's authority to act may depend on whether Congress has spoken); Verkuil, *supra* note 20, at 950 n.41 (if Congress's intent is clear, President must respect it).

Congress much of the workload that it had originally intended to spread among administrative agencies.

To avoid the specific effects of Executive Order 12,291, Congress can amend a statute, such as the Clean Air Act, to alter the status of the rulemaking agency. An agency can be changed from an executive to an independent agency.²⁸¹ Although the order requires compliance by executive agencies, consistent with the President's constitutional authority, it only requests compliance from independent agencies.²⁸² Thus, converting an administrative agency into an independent agency insulates agency decision-making from presidential influence.

The second concern that *Chevron* raises in the area of administrative law involves the scope of presidential intervention into agency decisionmaking. While the *Chevron* Court clearly endorsed the idea of presidential oversight and input into agency decisionmaking,²⁸³ the extent of this oversight needs further judicial clarification. *Chevron* did not specifically discuss Executive Order 12,291. Although the general proposition of presidential intervention into agency decisionmaking is proper, and even necessary,²⁸⁴ the scope of Executive Order 12,291 may be improper.

A challenge to this order on the ground that it conflicts with an underlying statute would most likely be fruitless. The order is effective only "to the extent permitted by law."²⁸⁵ Nevertheless, the order appears to conflict with existing statutes both procedurally and substantively.

The procedures that an agency must follow during rulemaking are set forth in both the Administrative Procedure Act and individual statutes.²⁸⁶ The Supreme Court, in *Vermont Yankee Nuclear Power Corp. v. NRDC*,²⁸⁷ held that a court may not require an agency to adopt procedures in excess of the statutory requirements. In contrast, Executive Order 12,291 imposes additional rulemaking procedures on agencies, such as the requirement of a cost-benefit analysis.²⁸⁸ Courts, however, have continued to require agencies

281. See K. DAVIS, *supra* note 34, § 6:40, at 151 (Supp. 1982); Verkuil, *supra* note 20, at 964. Arguably, however, Congress intended to have the President control the EPA. Because Congress knows that it can politically insulate an agency by making it independent, Congress's failure to do so assumes Congress intended the present result. See Verkuil, *supra* note 20, at 964.

282. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1982).

283. 104 S. Ct. at 2782.

284. See *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

285. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1982); see also Bagby, *Regulatory Impact Analysis: Toward A Reasonable Economic Impact From Federal Regulations*, 19 NEW ENG. L. REV. 533, 542-46 (1983) (reviewing court not likely to find order improper); Raven-Hanses, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 285, 307-11 (1983) (agencies may not be bound to comply because order is not "law").

286. See *supra* notes 43-44 and accompanying text.

287. 435 U.S. 519, 548 (1978).

288. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1982).

to follow additional procedures, despite *Vermont Yankee*, by categorizing the additional requirements as substantive rather than procedural.²⁸⁹ Because the force of *Vermont Yankee* has largely been diluted, it is unlikely that a reviewing court would object to the order's additional imposition of procedures.

The order substantively affects regulations by requiring agencies to justify each major regulation with a cost-benefit analysis that places equal weight on economic effects and the statute's intended goals. The statute that gives the agency authority, however, may not require such an analysis. For example, when NHTSA engaged in a cost-benefit analysis to justify its regulation rescission, the *State Farm* Court found such an analysis inappropriate under the Motor Vehicle Safety Act.²⁹⁰ NHTSA was thus ordered to reconsider its balancing of costs and benefits in light of the fact that safety is the primary goal of the Act.²⁹¹ Earlier, in *American Textile Manufacturers Institute v. Donovan*,²⁹² the Supreme Court set aside a standard for cotton dust in the workplace because the agency developing that standard had improperly used the cost-benefit analysis. The *Donovan* Court found that the agency could not engage in a cost-benefit analysis when Congress failed to require such an analysis on the face of the statute.²⁹³ Perhaps the Court would have found differently had the agency, in the absence of express congressional authorization, relied upon presidential authorization to engage in the cost-benefit analysis. *Chevron* arguably would support such a result.

Nevertheless, a cost-benefit analysis may be inappropriate when the benefits that a statute is designed to achieve are largely immeasurable.²⁹⁴ The Clean Air Act's regulations generally are designed to prevent or lessen pollution.²⁹⁵ Benefits under the Act that cannot be measured include both the negative benefits of the prevention of sickness, employee absenteeism, and environmental damage,²⁹⁶ and the positive financial benefits to the manufacturer and installer of the pollution control equipment required by the regulation.²⁹⁷ Of course, extra costs will be imposed on those industries with the least effective technology.²⁹⁸ But overlooked in such a cost-benefit

289. See, e.g., *State Farm*, 103 S. Ct. at 2867.

290. *Id.* at 2871; see *supra* notes 68-69 and accompanying text.

291. 103 S. Ct. at 2871.

292. 452 U.S. 490 (1981).

293. *Id.* at 510-11.

294. See Costle, *Environmental Regulation and Regulatory Reform*, 57 WASH. L. REV. 409, 412 (1982). Douglas Costle, former Administrator of the EPA, argues that policymakers are mistakenly trying to provide regulatory relief, rather than much-needed regulatory reform. *Id.*

295. See *id.*

296. See *id.* at 415-16.

297. See Bagby, *supra* note 285, at 546 (argues that "all economic justification procedures are inherently deregulatory").

298. See, e.g., *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 78 (1980) (discussing expensive but cost-worthy compliance by industry with the Federal Water Pollution Control Act).

analysis is the fact that these short term costs are necessary in order to achieve the Act's goal.²⁹⁹ Once the large initial expense of installing the most effective equipment is undertaken and the Act's goal is met, the cost of the regulation would be significantly reduced.

Additionally, a cost-benefit analysis is too subjective under statutes such as the Clean Air Act.³⁰⁰ For example, if the EPA chooses to impose strict regulations on industry, it merely has to place a high value on protecting public health. If the EPA chooses to provide regulatory relief, however, it need only place a lesser value on that protection. The substance of a regulation is therefore designed not so much to further the Act's goals, as to further the President's policies.³⁰¹

Although the *Chevron* Court allowed the EPA to balance cost against environmental benefits when it promulgated its 1981 regulation, it is unclear whether the Court would allow this balancing in every situation. Viewing *Chevron* in light of the Court's decisions in both *State Farm* and *Donovan*, it may be proper for an agency to engage in a cost-benefit analysis only when the underlying statute does not forbid such analysis and when the agency engages in the analysis pursuant to an executive order. It is difficult to determine, however, whether the Court's decision will rest upon these two factors, or upon the Court's view of the appropriate result.

The third concern raised by *Chevron* involves the courts' role in overseeing administrative agency decisionmaking. It is now uncertain whether meaningful judicial review is required of every challenged regulation. The *Chevron* Court determined that the EPA's decision had involved policymaking and suggested that the EPA had relied on President Reagan's view of wise policy, rather than its own, to make its decision.³⁰² The Court then proceeded to summarily conclude that the EPA's decision was reasonable.³⁰³

The Court overlooked the purpose and scope of judicial review of agency decisionmaking. The purpose of review is to insure that an agency has engaged in reasonable decisionmaking.³⁰⁴ Absent a careful judicial review, unelected agency officials can make broad policy choices affecting millions of citizens, without accountability. Apparently, accountability of the agency was of little concern to the *Chevron* Court, because the Court implied that the politically accountable executive branch had made the policy decision for the EPA.³⁰⁵ Thus, *Chevron* arguably stands for the proposition that

299. *See id.*

300. *See* Sunstein, *supra* note 19, at 1276 (suggests that factors in cost-benefit analysis may be easily manipulated to result in the desired outcome).

301. *See id.*

302. 104 S. Ct. at 2793.

303. *Id.*

304. *See supra* notes 46-52 and accompanying text.

305. *See* 104 S. Ct. at 2793.

judicial review of agency decisionmaking is unnecessary when elected officials are actually responsible for an agency's policy choices. Review in such a situation may even be improper after *Chevron*, because the Court stated that federal judges must respect policy decisions made by elected officials.³⁰⁶

The proper scope of review, however, has never required a court to substitute its own view for that of the agency³⁰⁷ as *Chevron* appears to suggest.³⁰⁸ A court is merely required to review an agency's decisionmaking process, not the agency's decision. This is done to determine whether the agency's reasoning supports its policy choice, or whether that choice was arbitrary and capricious.³⁰⁹

Perhaps the Court avoided review of the EPA's decisionmaking process in *Chevron* because, as discussed above, the EPA's reasoning did not in fact support its policy choice. Possibly the EPA's choice was not supported in the rulemaking record because the choice was actually made after that record was closed and forwarded to the OMB pursuant to Executive Order 12,291. Because facts and influences affecting a regulation as it passes through the OMB need not be included in the rulemaking record, it might be difficult, if not impossible, for a court to review the record and find that it supported the agency's decision.³¹⁰ In such a case, the agency's rulemaking record would only be a "fictional account" of the actual decisionmaking process because of the ex parte contacts.³¹¹ Review of the record therefore would not be meaningful.

If this was the case in *Chevron*, the Court may have been expressing its own policy choice favoring deregulation when it upheld a regulation with apparently no rational support in the rulemaking record. The Court, however, expressed no view with respect to the propriety of ex parte contacts and the restrictions they place on judicial review. Therefore, it may be that the rulemaking record was accurate and that the Court simply favored deregulation, or that the Court recognized the existence of outside influences but declined to address them.

The *Chevron* Court, however, did attempt to justify its apparent failure to engage in a meaningful review. The Court claimed that it lacked the necessary expertise to review the regulation.³¹² Nevertheless, a look at past decisions reveals the Court's apparent ability to address other highly technical issues.³¹³ This Court and lower courts have accomplished such technical

306. *Id.*

307. See *supra* notes 50-51 and accompanying text.

308. 104 S. Ct. at 2793.

309. See *supra* notes 46-52 and accompanying text.

310. See Verkuil, *supra* note 20, at 951 (court's role in review can only be fulfilled when basis for agency decision is apparent); *supra* notes 37, 53-54 and accompanying text.

311. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 15 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

312. 104 S. Ct. at 2793.

313. See *supra* note 74 and accompanying text.

reviews by appropriately examining the agency's decisionmaking process, not the agency's decision. If *Chevron* does stand for the proposition that courts need not review technical decisions, however, Congress must take steps to provide either an alternative method of review or an alternative to agency decisionmaking. Commentators have suggested the development of regulations through agency-industry negotiation,³¹⁴ the review of agency decisionmaking by an administrative review board,³¹⁵ and the use of scientific law clerks to aid federal judges.³¹⁶ Another solution could be the development of a specialty court.

A special environmental court would possess the expertise necessary to conduct a thorough review of technical and complex regulations like the regulation challenged in *Chevron*. Congress could create a specialized court in one of two ways. First, it could create an article III court, with the requisite protections of salary and tenure for the court's judges.³¹⁷ Creation of an article III court for environmental issues is unlikely, however, given that Congress considered, but rejected, such a proposition when it recently established the United States Court of Appeals for the Federal Circuit.³¹⁸ Congress declined to give that new court subject matter jurisdiction over environmental cases.³¹⁹ A second option is for Congress to create a legislative,

314. See Stewart, *supra* note 52, at 84-86 (weighs pros and cons of approaching rulemaking through negotiation).

315. See *id.* at 83-84.

316. See B. ACKERMAN, *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* 147-61 (1974).

317. See U.S. CONST. art. III, § 1. Article III provides that the "judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* Article III judges "shall hold their offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in office." *Id.*

318. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.).

319. A proposal by the Department of Justice recommended the establishment of a national court to hear civil tax, patent, and environmental appeals. See OFFICE FOR IMPROVEMENTS IN THE ADMIN. OF JUSTICE, U.S. DEPT. OF JUSTICE, *A PROPOSAL TO IMPROVE THE FEDERAL APPELLATE SYSTEM* (July 21, 1978) (draft report); accord Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U.L. REV. 881 (1975) (Judge Leventhal, of the Court of Appeals for the District of Columbia Circuit, proposed a national court of appeals with subject matter jurisdiction over tax, labor, environmental, patent, and securities law cases). The final bill adopted, however, substantially limited the subject matter jurisdiction of the Federal Circuit. See 28 U.S.C. § 1295 (1982) (Court of Appeals for the Federal Circuit given jurisdiction over all patent appeals and government claims). For statements of senators concerned with setting a precedent for the establishment of specialty courts, see S. REP. No. 275, 97th Cong., 1st Sess. 39 (1981) (view of Sen. Leahy) ("would be very detrimental to our tradition of diversity and independence of the bench"), and S. REP. No. 275, 97th Cong., 1st Sess. 40 (1981) (view of Sen. Baucus) ("will lead to a proliferation of Federal specialty courts"). See generally Petrowitz, *Federal Courts Reform: The Federal Courts Improvement Act of 1982—And Beyond*, 32 AM. U.L. REV. 543 (1983) (comprehensive review of development of the Court of Appeals for the Federal Circuit).

Although Congress appears to be opposed to the idea, arguably it has already "created" an

or article I, court. Such a court could be created pursuant to Congress's "necessary and proper" powers found in article I.³²⁰ If Congress should choose to create an article I court, however, it must take care to avoid vesting that court with all the powers of an article III court because such a delegation of authority will inevitably be found unconstitutional.³²¹

It is unlikely that *Chevron* stands for the proposition that courts may no longer engage in meaningful judicial review under all circumstances. *State Farm* had been applauded by many as a revival of the "hard look" approach to review.³²² While *Chevron* represents a retreat from this position, it clearly does not overrule *State Farm*. Arguably, courts will continue to employ the "hard look" approach except where, as in *Chevron*, the court finds that a politically accountable body, and not the agency, is responsible for the policy choice.

Not to be overlooked is the impact that *Chevron* may have on the environment and public health. *Chevron* undercuts the overriding commitment of the Clean Air Act. That commitment, to protect public health,³²³ was pushed aside in order to exempt polluters from permit requirements for the sake of regulatory relief and flexibility. Moreover, the 1981 regulation uses the bubble concept to allow existing polluters to avoid reducing pollution overall.

article III specialty court to hear environmental cases. Pursuant to 42 U.S.C. § 7607(b) (1982), a petition for review of many discretionary actions by the EPA may be filed only in the United States Court of Appeals for the District of Columbia. *See supra* note 175. Not only does this provision provide national uniformity in decisions regarding the Clean Air Act, but it also allows the District of Columbia Circuit judges to develop expertise in environmental matters.

320. *See* U.S. CONST. art. I. Congress relies on its powers enumerated in Article I, along with the necessary and proper clause, to create legislative courts. There are currently three types of legislative courts: (1) The Tax Court, *See* 26 U.S.C. § 7441 (1982); (2) the United States Court of Military Appeals, *see* 10 U.S.C. § 867 (1982); and, (3) the Claims Courts, *see* 28 U.S.C. § 171(a) (1982). A legislative court functions as an "adjunct" to article III courts. *See* *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2875 (1982). For a discussion of special courts in general, *see* L. REDDEN, *FEDERAL SPECIAL COURT LITIGATION* (1982).

A fourth type of legislative court, the Bankruptcy Court, was recently found to be unconstitutional because it was vested with all the powers of article III courts. *Northern Pipeline*, 102 S. Ct. at 2858. For a detailed analysis of the *Northern Pipeline* decision and suggestions for allocations of judicial power, *see* Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197. *See also* King, *The Unmaking of a Bankruptcy Court: Aftermath of Northern Pipeline v. Marathon*, 40 WASH. & LEE L. REV. 99 (1983) (comprehensive history of bankruptcy courts).

321. For example, the article I Claims Court now replaces the former article III Court of Claims, pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified at 28 U.S.C. § 171(a) (1982)). Commentators suggest, however, that the new Claims Court may be found unconstitutional based upon the Supreme Court's recent decision in *Northern Pipeline*. *See* Baker, *Is the United States Claims Court Constitutional?*, 32 CLEV. ST. L. REV. 55 (1983); Swennen & Weich, *The Constitutionality of the New Claims Court*, 29 FED. B. NEWS & J. 477 (1982).

322. *See, e.g., The Supreme Court, 1982 Term, supra* note 71.

323. *See supra* note 83.

Take, for example, a polluting company that owns four plants in an unhealthy air state. The polluter has resisted compliance up to this point, thereby helping to place the state in the unhealthy air category. Although the polluter wanted to tear down an old plant and replace it with a new one, it had previously decided against this choice. The permit program's requirement to first bring the polluter's other three plants into compliance would have been costly. Under the bubble concept, however, the polluter may now simply replace the old plant, piece by piece. Unless emissions increase overall, the 1981 regulation will not subject these replacements to the permit program. Thus, no emissions reductions will occur and the polluter's other three plants can and will remain in noncompliance. Additionally, the polluter can and will continue to avoid investing in the development and installation of advanced pollution control technology. Absent these reductions in emissions and the development of improved technology, progress toward reaching the clean air standards will be brought to a standstill. Without obtaining clean air standards, public health remains at risk.³²⁴ Thus, the *Chevron* Court's decision will have the practical result of substantially injuring the public's health. Moreover, this result is totally contradictory to Congress's intent underlying the Clean Air Act.

CONCLUSION

Chevron represents a rare occasion in which the United States Supreme Court has spoken regarding its view of presidential power. The Supreme Court clearly endorsed the notion of presidential intervention into agency decisionmaking. While explicit congressional directives must be adhered to when Congress delegates policymaking authority to an agency, under *Chevron* that delegation may be properly usurped by the President.

Once the President intervenes in an agency's decisionmaking, the availability and the extent of judicial review of the decision are unclear. Although *Chevron* represents a significant retreat from the "hard look" approach recently articulated in *State Farm*, courts are unlikely to completely avoid review in all cases of presidential intervention. One can only speculate, however, on the unspoken factors which will influence the courts' decision to avoid a meaningful review.

In *Chevron*, the Court's failure to meaningfully review the agency's decision resulted in frustration of the congressional intent to protect the public health. Thus, a court that favors presidential policy may choose to frustrate congressional policies by applying the *Chevron* approach in cases in which the President has influenced the agency's decision. With courts allowing agency decisionmaking to thereby go unchecked, one can only hope that the policy views the agency relied upon are truly those of the President and not those of private industry.

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324. See *supra* notes 87-88 and accompanying text.

