

(edited version)

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT; COMMONWEALTH OF MASSACHUSETTS, ET
AL., INTERVENORS; AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS v. UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT; COMMONWEALTH OF
MASSACHUSETTS, ET AL., INTERVENORS

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

195 F.3d 4; 1999 U.S. App. LEXIS 28109

October 29, 1999, Decided
October 29, 1999, Filed

DISPOSITION: EPA's petition for rehearing Granted in part and denied in part.

OPINION: ORDER

This matter is before the court for consideration of respondent Environmental Protection Agency's (EPA) petition for panel rehearing in Nos 97-1440 and 97-1441, the responses thereto, and the petitions for panel rehearing of intervenors-respondents New Jersey and Massachusetts in Nos. 97-1440 and 97-1441, Citizen for Balanced Transportation, et al. in No. 97-1440, and the American Lung Association in Nos. 97-1440 and 97-1441. Upon consideration of the foregoing, it is

ORDERED that the petitions of EPA, New Jersey and Massachusetts, and the American Lung Association be granted in part. The court accordingly modifies Parts III.A.2 & .3 and the conclusion of the court's original opinion as set forth in the opinion of the court filed herein this date. It is

FURTHER ORDERED that the remainder of EPA, New Jersey and Massachusetts, and the American Lung Association's petitions be denied and that Citizen for Balanced Transportation's petition be denied.

Per Curiam

Date: October 29, 1999

Opinion per curiam on petitions for rehearing.

Opinion concurring in partial grant of rehearing and dissenting in part from the panel's denial of rehearing filed by Circuit Judge TATEL.

Opinion for the Court filed PER CURIAM:

The Environmental Protection Agency petitions for rehearing, challenging this court's holdings that: (1) with respect to the factors the agency uses to determine the degree of public health concern associated with different levels of a pollutant, it "appears to have articulated no 'intelligible principle' to channel its application of these factors; nor is one apparent from the statute," *American Trucking Ass'ns v. United States Environmental Protection Agency*, 175 F.3d 1027, 1034 (D.C. Cir. 1999); (2) "Subpart 2, not Subpart 1, provides the classifications and attainment dates for any areas designated nonattainment under a revised primary ozone NAAQS, and the EPA must enforce any revised primary ozone NAAQS under Subpart 2," *id.* at 1050; and (3) "EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under § 108 and NAAQS under § 109," *id.* at 1052. For the following reasons, we grant the petition for rehearing in part and deny it in part.

I. Delegation

In the EPA's petition for rehearing, counsel for the agency argue that § 109 of the Clean Air Act contains the following principle limiting the agency's discretion: "The levels [set in a NAAQS] must be necessary for public health protection: neither more nor less stringent than necessary, but 'requisite.'" EPA Pet. at 8 (emphases in original). Further, counsel claim that in setting the NAAQS at issue in this case the agency applied corollaries of this principle, one for particulate matter, one for ozone, n1 to derive determinate standards.

-----Footnotes-----

n1 For particulate matter, counsel now state that the EPA's decision was determined by the norm of "the 95 percent confidence level to separate results that could be the product of chance from more convincing evidence of causation." EPA Pet. at 15. For ozone, counsel now state that EPA inferred the existence of effects below 0.08 ppm, but nonetheless concluded that they were "less serious because they are 'transient and reversible.'" EPA Pet. at 16.

-----End Footnotes-----

In denying the EPA's petition for rehearing on this issue, we note that the agency previously put forward neither the assertedly intelligible principle its counsel now claim to find in the statute nor the corollaries its counsel now implicitly derive

therefrom. To be sure, in the rulemakings that set the NAAQS, the EPA mentioned the corollary propositions its counsel now claim served as intelligible limiting principles, but the agency did not identify either as a limit upon its discretion; the EPA never suggested that it could not (or in a later rulemaking would not) base a NAAQS upon evidence that did not meet the 95 percent confidence level or that revealed adverse but transient effects. n2 In its briefs defending the NAAQS, the EPA merely asserted that the Clean Air Act provides an intelligible principle; it failed both to state that principle and to argue that its revised NAAQS were promulgated in accordance with that principle. EPA PM Brief at 145-49; EPA Ozone Brief at 77-80. Indeed, the EPA's briefs in each of these two cases contained the same four sentences assuring the court that the statute provides a principle without explaining what the agency understands that principle to be:

[Section] 109(b)(1) requires EPA to promulgate NAAQS based on air quality criteria issued under § 108 that are "requisite to protect the public health" with "an adequate margin of safety." This language and related legislative history provide directions for EPA to follow in setting the NAAQS. Moreover, EPA has consistently interpreted §109(b)(1) to provide further decisionmaking criteria to guide the standard setting process. Thus, the CAA provides a more than sufficient "intelligible principle" to guide EPA's discretion. EPA Ozone Brief at 78; see also EPA PM Brief at 148.

These sentences begged the key question about that intelligible principle: "What is it?"

-----Footnotes-----

n2 The court's opinion mentioned EPA's observation in the record that effects of ozone concentrations below the standard selected were "transient and reversible," 175 F.3d at 1035, but only in connection with the dissent's suggestion, see id. at 1059, that this was the controlling principle.

-----End Footnotes-----

As we noted in our first opinion in this case, when "statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038. Counsel for the EPA have now extracted from the statute what they contend is an intelligible principle limiting the EPA's discretion. We express no opinion upon the sufficiency of that principle; only after the EPA itself has applied it in setting a NAAQS can we say whether the principle, in practice, fulfills the purposes of the nondelegation doctrine. See *Yakus v. United States*, 321 U.S. 414, 424-26, 88 L.

Ed. 834, 64 S. Ct. 660 (1944); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (Leventhal, J., for three-judge panel).

A final word about our nondelegation holding: The Supreme Court has long held that an ambiguous principle in a statute delegating power to an agency can gain "meaningful content from the purpose of the Act, its factual background and the statutory context in which [it] appears." *American Power & Light Co. v. SEC*, 329 U.S. 90, 104, 91 L. Ed. 103, 67 S. Ct. 133 (1946); see also *Federal Radio Comm'n v. Nelson Bros. Bond & Mort. Co.*, 289 U.S. 266, 285, 77 L. Ed. 1166, 53 S. Ct. 627 (1933) (upholding delegation to Federal Radio Commission to grant licenses "as public convenience, interest or necessity requires" in light of "its context [and] the nature of radio transmission and reception"); *Fahey v. Mallonee*, 332 U.S. 245, 250, 91 L. Ed. 2030, 67 S. Ct. 1552 (1947) (upholding delegation to the Federal Home Loan Bank Board to promulgate regulations for the appointment of a conservator for savings and loan associations in view of the banking industry's "well-defined practices for the appointment of conservators"). This court has done the same. See, e.g., *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 218 U.S. App. D.C. 348, 675 F.2d 367, 376 n.12 (1982) (finding an intelligible principle to guide the tribunal in disbursing cable royalty fees in "specific statements in the legislative history and in the general philosophy of the Act itself"); *Amalgamated Meat Cutters*, 337 F. Supp. at 747-49 (interpreting the Economic Stabilization Act of 1970 in light of "the historic context of government stabilization measures" in order to "negative[] a conclusion that the whole program was set adrift without a rudder"). To choose among permissible interpretations of an ambiguous principle, of course, is to make a policy decision, and since *Chevron* it has been clear that "the responsibilities for assessing the wisdom of such policy choices ... are not judicial ones." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Accordingly, just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority. But see *Kenneth Culp Davis, A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969) (arguing that "judicial inquiries [under the nondelegation doctrine] should shift from statutory standards to administrative safeguards"). In sum, the approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of *Chevron*. See *Industrial Union Dep't v. American Petroleum Inst. (Benzene)*, 448 U.S. 607, 642, 646, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (1980) (Stevens, J., plurality) (interpreting § 3(8) of the Occupational Health and Safety Act to require "a threshold finding ... that significant risks are present," thereby finding in the statute an intelligible principle). n3

-----Footnotes-----

n3 We note that Judge Silberman's dissent from the denial of rehearing en banc turns largely on his dim view of the Court's use of the non-delegation doctrine in Benzene, which he characterizes as "only a makeweight, tossed into the analysis ... to help justify the result." Whatever the merits of Judge Silberman's critique of Benzene, we do not see how a lower court can properly rest its jurisprudence on the rejection of a Supreme Court decision.

-----End Footnotes-----

II. Subpart 2 and the Revised Ozone Standard

In its petition for rehearing, the EPA challenges the holdings in Parts III.A.2 and III.A.3 of our original opinion, see 175 F.3d at 1048-51, as well as our jurisdiction to reach those issues. We address the jurisdictional point first.

A. Jurisdiction

The EPA argues that because it has taken no final action implementing the revised NAAQS this court lacks jurisdiction to reach the question whether Subpart 2 prevents the agency from implementing a revised ozone NAAQS under Subpart 1. See 42 U.S.C. § 7607(b) (limiting this court's jurisdiction to review of "nationally applicable regulations promulgated, or final agency action taken, by the Administrator"); see also *Sierra Club v. Thomas*, 264 U.S. App. D.C. 203, 828 F.2d 783, 792 (D.C. Cir. 1987). n4 That this claim is raised for the first time in a petition for rehearing does not, of course, alter our obligation to "satisfy ourself ... of [our] own jurisdiction." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 1012-13, 140 L. Ed. 2d 210 (1998).

-----Footnotes-----

n4 The EPA has yet to designate an area nonattainment. Therefore, although the agency does not so argue, if it were correct, then this court would also lack jurisdiction to decide, as it did, that Subpart 2 does not alter the agency's power to designate areas as nonattainment under a revised NAAQS. See 175 F.3d at 1047-48.

-----End Footnotes-----

Whether agency action is final for purposes of § 7607(b) entails a functional, not a formal, inquiry. See *NRDC v. EPA*, 306 U.S. App. D.C. 43, 22 F.3d 1125, 1132-33 (D.C. Cir. 1994); *Ciba-Geigy Corp. v. EPA*, 255 U.S. App. D.C. 216, 801 F.2d 430, 436 (D.C. Cir. 1986) ("Once the agency publicly articulates an unequivocal position ... and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review"). In this case, "there is nothing tentative about the EPA's interpretation of [Subpart 2]; it is unambiguous and devoid of any

suggestion that it might be subject to subsequent revision." Her Majesty the Queen ex rel. Ontario v. EPA, 286 U.S. App. D.C. 171, 912 F.2d 1525, 1532 (D.C. Cir. 1990); see also Final Rule: National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,885/2 (1997) ("There is no language in sections 181 or 182 that precludes the implementation of a different [ozone] standard under other authority [i.e., Subpart 1]; those provisions [i.e., Subpart 2] simply govern the implementation of the 1-hour, 0.12 ppm O₃ standard"). Moreover, by promulgating a revised ozone NAAQS the EPA has triggered the provisions of §§ 107(d)(1) and 172, which impose a number of requirements upon the states, the first being that the Governor of each state must determine which areas do not presently comply with the revised NAAQS; those areas that do not comply will ultimately be required to do so. The EPA, therefore, has reached a final decision regarding its power to implement its revised ozone standard, which this court has jurisdiction to review. n5

-----Footnotes-----

n5 The EPA attempts to buttress its jurisdictional argument by reference to 42 U.S.C. § 7502(a)(1)(B), which it claims "defers challenges to EPA's implementation decisions classifying areas for setting attainment dates until EPA takes final action on a SIP ... or triggers sanctions ... [after] a state fails to submit a SIP." EPA Pet. at 19. The section to which the EPA refers states as follows: "The Administrator shall publish a notice in the Federal Register announcing each [attainment or nonattainment] classification.... Such classification ... shall not be subject to judicial review until the Administrator takes final action under [the statutes the EPA cites in its petition]." That is, the EPA's decision to classify a particular area as attainment or nonattainment is not subject to review merely because the EPA published that decision in the Federal Register. Neither this section nor the analogous § 7511(a)(3), to which the EPA also cites, prevents a court from deciding, prior to the classification of a particular area, whether the agency has validly promulgated a revised standard.

-----End Footnotes-----

The EPA also argues that the statements in its preamble regarding implementation are not "ripe for review," a point which it raised in a single sentence in its original brief to this court. EPA Pet. at 19; EPA Ozone Brief at 74. The question whether Subpart 2 prevents the EPA from designating an area as nonattainment under its revised ozone standard or from implementing that designation except in conformity with Subpart 2 is a pure question of law, the resolution of which would not benefit from a more concrete setting. As the agency's action is undoubtedly final, the question is fit for review. See Rio Grande Pipeline Co. v. FERC, 178 F.3d 533, 540-41 (D.C. Cir. 1999).

B. Subpart 2 and the EPA's Authority to Enforce a Revised Ozone Standard

The EPA's arguments in its petition for rehearing do not convince us that we erred in rejecting the EPA's contention that "the reference to § 107(d) in § 181(a)(1) relates only to designations made under § 107(d)(4)," 175 F.3d at 1050, and in holding instead that " § 181(a) clearly encompasses nonattainment designations made under all subsections of § 107(d)." *Id.* Indeed, we note that the EPA has abandoned its original position, arguing now that the "most logical reading" of § 181(a) is that the reference to § 107(d) includes §§ 107(d)(1)(C) and 107(d)(4). EPA Pet. at 24. We find this new reading no more persuasive than the old. As the EPA notes, all five Subparts of the Clean Air Act providing requirements for nonattainment areas begin with a reference to § 107(d). See 42 U.S.C. §§ 7502(a)(1)(A), 7511(a)(1), 7512(a)(1), 7513(a), 7514(a). It is by no means clear, however, that the references to § 107(d) in Subparts 1 and 3 through 5 include only designations made under §§107(d)(1)(C) and (d)(4). Not only does the EPA never argue that they are so limited, but on its theory the reference to §107(d) in Subpart 1 also encompasses designations made under § 107(d)(1)(A). EPA Pet. at 25. Accordingly, we reject the EPA's new interpretation of § 181(a), for it is contrary to "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 131 L. Ed. 2d 1, 115 S. Ct. 1061 (1995).

Still, the EPA does raise two points relating to Subpart 2 which lead us to grant the EPA's petition for rehearing in part and to make the following revisions to our opinion.

The EPA correctly points out that we erroneously treated the attainment dates in the table in Subpart 2 as representing the Congress's judgment about what is "as expeditiously as practicable" in reducing the level of ozone in an area; in fact, those dates represent what the Congress set as outer limits. See 42 U.S.C. § 7511(a)(1) ("For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1"). EPA Pet. at 25 n.35. Accordingly, we grant the EPA's petition for rehearing to the extent of deleting the final three sentences of Part III.A.3, see 175 F.3d at 1051, and substituting for them the following sentence:

Therefore, we conclude that Subpart 2 erects no bar to the EPA's requiring compliance with a revised secondary ozone NAAQS "as expeditiously as practicable."

The EPA also contends that the conclusion to Part III.A.2, see *id.* at 1050 ("the EPA must enforce any revised primary ozone NAAQS under Subpart 2"), conflicts with our description of that same conclusion at the end of the opinion, see *id.* at 1057 (revised ozone NAAQS "cannot be enforced by virtue of [Subpart 2]"). We agree that the two sentences are in tension. To clarify the matter, we

grant the EPA's petition for rehearing to the extent of making the following two revisions to our original opinion. First, we replace the final paragraph of Part III.A.2, see *id.* at 1050, with the following:

In sum, because the reference to § 107(d) in § 181(a)(1) includes the designation of an area as nonattainment for ozone under a revised ozone NAAQS, that is, under § 107(d)(1), the EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2.

Second, we replace the second sentence of the Conclusion, see *id.* at 1057, with the following:

We do not vacate the new ozone standards because the parties have not shown that the standard is likely to engender costly compliance activities in light of our determination that it can be enforced only in conformity with Subpart 2.

As with the PM_{2.5} NAAQS, our decision not to vacate the ozone NAAQS "is without prejudice to the ability of any party to apply for vacatur in the future, should circumstances develop in which the presence of this standard threatens a more imminent harm." *American Trucking Ass'ns, Inc. v. EPA*, No. 97-1440 (D.C. Cir. Jun. 18, 1999).

III. Beneficent Health Effects

The arguments in the EPA's petition for rehearing give us no reason to doubt the correctness of our conclusion that "all identifiable effects," as used in CAA § 108(a)(2), "on its face ... includes beneficent effects." 175 F.3d at 1051. Nor do those arguments warrant consideration in a published opinion. We express no opinion, of course, upon the effect, if any, that studies showing the beneficial effects of tropospheric ozone, see *id.* at 1052, might have upon any ozone standard the EPA may promulgate on remand.

IV. Conclusion

For the above reasons, the EPA's petition for rehearing is

Granted in part and denied in part.