

JUDICIAL DEFERENCE TO ADMINISTRATIVE
OVER-EXTENSION AND THE END OF
ENVIRONMENTAL CONTROL:
*CHEVRON, U.S.A. v. NATURAL
RESOURCES DEFENSE COUNCIL*

The Clean Air Act¹ has generated considerable controversy and litigation in the more than two decades since its enactment. Environmental Protection Agency implementation of the Act has been a major issue in much of the litigation. One significant issue Congress left to the EPA² to resolve is the definition of a "source"³ subject to pollution control measures under the Act. One possibility is that each individual

1. Pub. L. No. 84-206, 72 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)). The present form of the Clean Air Act is derived from and incorporates legislation dating to the 1950s. The Air Pollution Control Act, Pub. L. No. 84-159, 69 Stat. 322 (1955), was the first federal air pollution legislation, providing primarily research assistance. Concern about motor vehicle emissions led to the Motor Vehicle Act of 1960, Pub. L. No. 86-493, 74 Stat. 162 (1960), and the Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965), the first direct federal regulation of air pollution. In 1963 Congress enacted the Clean Air Act, *supra*, which left enforcement entirely to the states without effective federal supervision. Congress unsuccessfully attempted to strengthen the Clean Air Act with the Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954 (1966), and the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967). Congress significantly restructured the Clean Air Act in 1970, greatly increasing federal supervision of air pollution control efforts. The Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970); see *infra* notes 18-25 and accompanying text. A second major transformation occurred in 1977 with enactment of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977). In addition, the Clean Air Act has been amended by The Comprehensive Health Manpower Act of 1971, Pub. L. No. 92-157, 85 Stat. 431 (1971), the Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246 (1974), the Safe Drinking Water Act of 1977, Pub. L. No. 95-190, 91 Stat. 1393, 1399-1405 (1977), and other minor amending legislation.

2. The EPA implements the Clean Air Act on the federal level by statute. The Clean Air Act, Pub. L. No. 84-206, 72 Stat. 392 *passim* (1963) (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)).

Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970), 42 U.S.C. § 4321 (1984), *reprinted in* 84 Stat. 2086 (1970), established the EPA as an executive agency. The EPA defines its general function as that of assuring "protection of the environment by abating and controlling pollution on a systematic basis." 40 C.F.R. § 1.3 (1984).

point source within a plant, such as a smokestack, is independently subject to scrutiny and pollution control measures in Act programs. In contrast, use of the "bubble concept"⁴ would define a "source" as an entire plant composed of many point sources which contribute to a single net emission from a hole in an imaginary "bubble" over the entire plant. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*,⁵ the Supreme Court held that the EPA has discretion to use the bubble concept to define a source for Clean Air Act provisions applicable to regions⁶ which have not attained National Ambient Air Quality standards.⁷

In 1981 the EPA promulgated a new definition of "source"⁸ for Clean Air Act nonattainment area⁹ provisions. The new definition allowed plants to maintain or increase pollutant emissions from individual point sources as long as net total plant emissions do not increase.¹⁰

The EPA is to work with state governments "for the treatment of the environment as a single interrelated system." *Id.*

3. For the purpose of this Comment the term "source" is used in a generic sense unless otherwise indicated. The Clean Air Act refers to and defines the word "source" in several ways for different programs. *See, e.g.*, § 110, 42 U.S.C. § 7410 (1982) (defines "stationary sources" and "major statutory sources" for State Implementation Plans); § 111, 42 U.S.C. § 7411 (defines a "stationary source" for New Source Performance Standards as "any building, structure, facility, or installation which emits or may emit any air pollutant"); Title II of the Act, 42 U.S.C. §§ 7521-34 ("mobile sources"); § 303(j), 42 U.S.C. § 7603 (defines a "major stationary source" as a "stationary source or facility" which emits or might emit at least one hundred tons per year of an air pollutant "except as otherwise provided").

4. *See Rhinelander, The Proper Place for the Bubble Concept Under the Clean Air Act*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,406 (1983); Note, *An Overview of the Bubble Concept*, 8 COLUM. J. ENVTL. L. 137 (1982).

5. 104 S. Ct. 2778 (1984).

6. State compliance with many Clean Air Act programs is evaluated by performance within Air Quality Control Regions (AQCR) within a state or an administratively convenient multistate region. *See* Clean Air Act, § 110(a)(1) (codified at 42 U.S.C. § 7410(a)(1) (1982) (state plan for AQCR air quality); § 107 (codified at 42 U.S.C. § 7407) (state responsibility for AQCR air quality).

7. *See infra* note 19 and accompanying text.

8. The EPA proposed the rule at 46 Fed. Reg. 16,280 (1981), and published the final rule at 46 Fed. Reg. 50,766 (1981). The regulation is codified at 40 C.F.R. § 51.18(j)(1)(i), (ii) (1984). The 1981 regulation replaced a significantly different definition adopted one year earlier. *See infra* note 39 and accompanying text.

9. A nonattainment area is an air quality control region which does not meet National Ambient Air Quality Standards for a particular pollutant. Clean Air Act § 172(2), 42 U.S.C. § 7502(2) (1982). *See infra* notes 31-33 and accompanying text.

10. 46 Fed. Reg. 16,280 (1981).

In response, environmental organizations,¹¹ including the Natural Resources Defense Council (NRDC), petitioned the United States Court of Appeals for the District of Columbia¹² for judicial review of the new regulation. The District of Columbia Circuit Court vacated the regulation as inconsistent with the purposes of Act provisions for nonattainment regions.¹³ In *Chevron*, the Supreme Court unanimously reversed,¹⁴ holding that EPA construction of the Act merited judicial deference.¹⁵

Although Congress enacted the Clean Air Act in 1963,¹⁶ state non-compliance rendered it ineffective.¹⁷ Congress adopted the present framework of the Act in the Clean Air Amendments of 1970.¹⁸ The 1970 Amendments created a complex scheme of joint state and federal responsibility to improve air quality. The cornerstone of the 1970 Amendments is the requirement that the EPA establish National Ambient Air Quality Standards (NAAQS) for individual pollutants.¹⁹ Congress gave the states responsibility²⁰ and considerable flexibility to

11. The petitioners were the Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and the Northwestern Ohio Lung Association. *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718, 718 (D.C. Cir. 1982).

12. The Clean Air Act provides that only the United States Court of Appeals for the District of Columbia may review EPA actions and regulations. Clean Air Act §307(b)(1), 42 U.S.C. § 7607(b)(1) (1982).

13. *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718 (1982).

14. Six Justices participated in the decision. Justices Marshall, Rehnquist and O'Connor did not participate.

15. 104 S. Ct. 2778 (1984).

16. Pub. L. No. 84-206, 72 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)).

17. See Rhinelander, *The Bubble Concept: A Pragmatic Approach to Regulation Under the Clean Air Act*, 1 VA. J. NAT. RESOURCES L. 177 (1981); 116 CONG. REC. 32901 (1970) (comments of Sen. Muskie).

18. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended in scattered sections of 42 U.S.C.).

19. Clean Air Act § 108, 42 U.S.C. § 7409 (1982). The Clean Air Amendments of 1970 require the EPA to establish uniform national primary and secondary ambient air quality standards for individual air pollutants. § 109(d), 42 U.S.C. § 7409(d). Primary ambient air quality standards are those determined to protect public health. § 109(b)(1), 42 U.S.C. § 7409(b)(1). Secondary ambient air quality standards specify a level of pollutant to protect public welfare. § 109(b)(2), 42 U.S.C. § 7409(b)(2). "Welfare" is defined to include a wide range of agricultural, economic, and aesthetic interests. § 302(h), 42 U.S.C. § 7602(h) (1982). To date the EPA has established NAAQS for only six pollutants: sulfur oxides, particulates, carbon monoxide, ozone, nitrogen oxides, and lead. 40 C.F.R. §§ 50.4-50.12 (1984).

20. Section 107(a) of the Clean Air Act (codified at 42 U.S.C. § 7407(a) (1982))

attain the NAAQS in a manner responsive to local concerns. The 1970 Amendments required states to develop and carry out State Implementation Plans (SIPs) to meet NAAQS²¹ by statutory deadlines.²² The 1970 Amendments also required the EPA to set technology-based²³ New Source Performance Standards (NSPS)²⁴ to put strict limits on emissions from new or modified "sources."²⁵ In theory, limits on new source emissions will accelerate air quality improvement in regions subject to NAAQS as polluters replace old equipment with equipment capable of meeting NSPS.

Because many regions of the country failed to meet initial deadlines for attaining NAAQS,²⁶ combined with fears of decreasing air quality in unpolluted regions of the country,²⁷ Congress enacted the Clean Air Act Amendments of 1977.²⁸ The 1977 Amendments included Prevention of Significant Deterioration (PSD) provisions²⁹ to ensure

declares that "each state shall have primary responsibility for assuring air quality" within a state.

21. Within nine months of EPA promulgation of primary NAAQS for a pollutant, a state must submit a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS within the state. Clean Air Act § 110(a)(1), 42 U.S.C. § 7410(a)(1) (1982). The EPA must approve all SIPs. Section 110(a)(2), 42 U.S.C. § 7410(a)(2).

22. The 1970 Amendments required that SIPs provide for attainment of primary NAAQS "as expeditiously as practicable," but "in no case" more than three years from the date the state filed the plan. 42 U.S.C. § 7410(a)(2)(A) (1982). Secondary NAAQS were to be met within a "reasonable time." *Id.* Two year extensions are available upon application to the EPA by a state governor. 42 U.S.C. § 7410(e) (1982).

23. New Source Performance Standards were to "reflect the degree of emission limitations achievable through the application of the best system of emission reduction" that the EPA determined to be "adequately demonstrated." Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1683 (1970) (codified as amended at 42 U.S.C. § 7411(a) (1982)).

24. Clean Air Act § 111(b), 42 U.S.C. § 7411(b) 91982).

25. Congress defined a "new source" subject to NSRS as "any building, structure, facility, or installation which emits or may emit any air pollutant." Clean Air Act § 111(a)(2),(3), 42 U.S.C. § 7411(a)(2),(3) (1982). A modification subject to NSPS is "any physical change in or change in method of operation" of a source "which increases the amount of any air pollutant emitted by such source or which results in the emissions of any air pollutant not previously emitted." Clean Air Act § 111(a)(4), 42 U.S.C. § 1411(a)(4) (1982).

26. S. REP. NO. 127, 95th Cong., 1st Sess. 55 (1977); 41 Fed. Reg. 55,524-25 (1976).

27. S. REP. NO. 127, 95th Cong., 1st Sess. 7, 8, 11, 12 (1977).

28. Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified in scattered sections of 42 U.S.C.).

29. Clean Air Act §§ 160-69A, 42 U.S.C. §§ 7470-91A (1982).

nondegradation of air quality in regions that already had attained NAAQS.³⁰ The 1977 Amendments also included the nonattainment area provisions at issue in *Chevron*.³¹ Congress intended the nonattainment legislation³² to accelerate and ensure NAAQS attainment in regions that failed to do so by statutory deadlines.³³ Congress required states to follow statutory guidelines to develop new SIPs with measures to attain NAAQS as "expeditiously as practicable."³⁴ One element of the nonattainment provisions requires that states adopt permit programs that significantly limit construction of new or modified sources in nonattainment areas.³⁵ By the time a new or modified source begins operation, total emissions, including the new source, must be less than the emission levels present prior to applying for the permit.³⁶ Additionally the new or modified source emissions must be the "lowest achievable."³⁷

EPA implementation of the Clean Air Act reflects shifting environ-

30. The PSD provisions expressly state that they are intended to assure that any decision to increase air pollution is made only after extensive analysis of the consequences. Clean Air Act § 160(5), 42 U.S.C. § 7410(5) (1982). See also *Alabama Power Co. v. Costle*, 636 F.2d 323, 346-64 (a comprehensive analysis of the development of the PSD provision); Landau, *Alabama Power Co. v. Costle: An End to a Decade of Controversy Over the Prevention of Significant Deterioration of Air Quality?*, 10 ENVTL. L. 585 (1980) (overview of legislative responses to deterioration of air quality and litigation on the issue).

31. Clean Air Act §§ 171-78, 42 U.S.C. §§ 7501-08 (1982).

32. The EPA initiated the nonattainment area concept in 1976 when it issued an interpretative ruling applicable to SIP requirements. 41 Fed. Reg. 55,524 (1976). The EPA issued the ruling in response to widespread concern about whether the EPA would allow construction of new pollution sources in regions which did not meet NAAQS. *Id.* at 55525. The EPA added, however, that Congressional action would be preferable on a matter of such environmental and economic significance. "Believing that a statutory clarification of the question [was] needed," Congress adopted the general approach of the EPA in the Clean Air Act Amendments of 1977. S. REP. NO. 127, 95th Cong., 1st Sess. 55 (1977).

33. Clean Air Act §§ 171-78, 42 U.S.C. §§ 7501-08 (1982).

34. Clean Air Act § 172, 42 U.S.C. § 7502 (1982).

35. See Clean Air Act § 110(a)(2)(I), 42 U.S.C. § 7410(a)(2)(I) (1982) (no new construction without permit); Clean Air Act § 173, 42 U.S.C. § 7503 (1982) (permit requirements).

36. Clean Air Act § 173(1)(A), 42 U.S.C. § 7503(1)(A) (1982).

37. Clean Air Act § 173(2), 42 U.S.C. § 7503(2) (1982). The 1977 Amendments defined the "lowest achievable emission rate" as:

(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

mental, economic and political concerns of the United States. The regulatory approach adopted by the EPA significantly affects the balance between air quality improvement and associated economic and social costs. In 1980 the EPA promulgated a definition of source for nonattainment areas that subjected *both* individual point sources and entire plants to construction permit requirements.³⁸ One year later, however, under a different administration, the EPA adopted a bubble concept definition of source for nonattainment areas.³⁹ The new regulation allows a polluter to increase emissions at one point within a plant, without triggering expensive pollution control requirements, if less expensive emission reductions elsewhere in the plant do not result in increased net emissions.⁴⁰ Supporters of the bubble concept argue that cost effective regulation, such as the bubble concept, is the most realistic approach for inducing industrial cooperation to achieve environmental goals.⁴¹ Critics of the concept, however, argue that it

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

Clean Air Act § 171(3), 42 U.S.C. § 7501(3) (1982).

38. 45 Fed. Reg. 52,676, 52,743-45 (1980). The EPA's 1980 regulation employed a "dual definition" of source. *See id.* at 52,696-97. The EPA defined a "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act." *Id.* at 52,746. The regulations, in essence, defined a "building," "structure," or "facility" to be an entire plant. *Id.* The EPA, however, defined an "installation" as "an identifiable piece of process equipment," thereby subjecting sources within a plant to regulation. *Id.*

The EPA provided two reasons for its use of the dual definition of source. First, the EPA referred to the legislative history of the nonattainment provision to support its conclusion that Congress intended to apply new source review to "the greatest extent possible." *Id.* at 52,697. The EPA, therefore, chose the dual definition because it "would bring in more sources for review than would the plantwide definition." *Id.* Second, the EPA cited recent court decisions as evidence that the bubble concept was inconsistent with the Congressional purpose behind the nonattainment provisions. *Id.*

39. 40 C.F.R. § 51.18(j)(1)(i),(ii) (1984). The EPA justified its position reversal on the bubble concept in two ways. First, the EPA indicated that the new regulation reduced regulatory complexity, "confusion and inconsistency." 46 Fed. Reg. 16,280-81 (1981). In a masterpiece of circular logic the EPA attacked the dual definition because it forbid new construction or modifications on individual pieces of equipment "even where no increase in emissions at the plant would result." *Id.* Second, the EPA stated that adoption of the bubble concept flowed from the Congressional policy of state involvement in Clean Air Act implementation. 46 Fed. Reg. 50,766-67 (1981). The bubble concept, the EPA contended, provided states with greater flexibility to meet the mandate of the Clean Air Act. *Id.* One is left with the impression that "flexibility" is a euphemism for reduced pressure on local industry to comply.

40. 46 Fed. Reg. 16,280 (1981); 40 Fed. Reg. 58,416-17 (1975).

41. *See* 40 Fed. Reg. 58,416-17 (1975); Landau, *Economic Dreams or Environmen-*

encourages extended use of old and inefficient polluting equipment as economically pressed heavy industry and utilities seek to avoid installation of expensive pollution control equipment as long as possible.⁴² The bubble concept, ironically, puts industries that want to construct an entire modern and efficient plant at a significant economic disadvantage to established, inefficient industries.⁴³ Implicit in this view is that the bubble concept substantially prolongs NAAQS attainment.⁴⁴ In addition, companies can use the concept as a delay tactic to wait for a favorable Congressional amendment to the Act.

The United States Court of Appeals for the District of Columbia circuit has reviewed⁴⁵ EPA use of the bubble concept to define source for three Clean Air Act programs. In *ASARCO, Inc. v. EPA*,⁴⁶ several industries,⁴⁷ as well as the Sierra Club,⁴⁸ petitioned for review of EPA use of the bubble concept to determine applicability of NSPS. The 1975 regulation at issue⁴⁹ applied NSPS to all newly constructed facili-

tal Nightmare? The Legality of the "Bubble Concept" in Air and Water Pollution Control, 8 B.C. ENVTL. AFF. L. REV. 741 (1980); Rhinelander, *supra* note 4; Comment, *An Overview of the Bubble Concept*, 8 COLUM. J. OF ENVTL. L. 137 (1982).

42. 46 Fed. Reg. 50,766, 50768 (1981). In 1980 the EPA itself criticized the bubble concept definition of source because "the limited number of cost-effective opportunities to reduce emissions will in fact be used to avoid review." 45 Fed. Reg. 52,676, 52,697 (1980).

43. 40 Fed. Reg. 58,416-17 (1975).

44. 45 Fed. Reg. 52,676, 52,697-98 (1980).

45. *See supra* note 12.

46. 578 F.2d 319 (D.C. Cir. 1978).

47. ASARCO, Incorporated, Newmont Mining Corporation, and Magna Copper Company, all engaged in metal smelting. These industrial petitioners argued unsuccessfully that the EPA regulations should use the bubble concept in all instances to determine applicability of NSPS to new construction. *ASARCO*, 578 F.2d at 329.

48. The Sierra Club successfully argued that the EPA may not use the bubble concept at all to determine applicability of NSPS. *Id.* at 326-29.

49. Section 111 of the Clean Air Act defines a "new source" as any stationary source, the construction or modification of which is commenced after the publication "of NSPS for the type of source involved." Clean Air Act § 111(a)(2), 42 U.S.C. § 7411(a)(2) (1982). Section 111 defines a "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." § 111(a)(3), 42 U.S.C. § 7411(a)(3) (emphasis added). The EPA proposed the definition in 1974, 39 Fed. Reg. 36,946 (1974) and announced its final rule in 1975, 40 Fed. Reg. 58,416 (1975). The EPA promulgated the regulation in response to critics' concern over how much a polluter could modify existing equipment before becoming subject to NSPS. 39 Fed. Reg. 36,946 (1974). The EPA justified use of the bubble concept to exempt plant modifications from NSPS as a way to give a plant owner "flexibility" to avoid large control cost expenditures. 40 Fed. Reg. 58,416 (1975).

ties,⁵⁰ but allowed some changes⁵¹ within a plant to escape NSPS under the bubble concept. The court held that any use⁵² of the bubble concept to determine NSPS application was inconsistent with the statutory language and purpose of the NSPS provisions of the Clean Air Act.⁵³ The court found that the EPA altered the statutory definition of source for NSPS in a manner plainly contradictory to the language of the statute.⁵⁴ Furthermore, the court found that though Congress designed the NSPS to enhance air quality, the bubble concept "at best maintains the present level of emissions."⁵⁵

The District of Columbia Circuit Court subsequently reviewed EPA application of the bubble concept to PSD programs in *Alabama Power Co. v. Costle*.⁵⁶ The regulatory scheme,⁵⁷ as in *ASARCO*,⁵⁸ exempts

50. See *supra* notes 24-25.

51. The EPA defines "reconstruction" by a complex formula tied to the relationship between expenditures for the plant changes and the cost of total plant replacement. 40 Fed. Reg. 58,420 (1975). The EPA regulation subjected new construction and "reconstruction" of a plant to NSPS, but did not subject less significant changes that did not increase the total plant emissions. 40 Fed. Reg. 58,419 (1975).

52. 578 F.2d at 329. The opinion of the court in *ASARCO* stated that "any version of the bubble concept is incompatible with the language of the Act and is contrary to its purpose" (emphasis provided). *Id.* In subsequent cases, however, the District of Columbia Circuit Court apparently has confined *ASARCO* to its facts when reviewing other uses of the bubble concept. See National Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982) (nonattainment areas); *Alabama Power Co. v. Costle*, 636 F.2d 323, 402 (D.C. Cir. 1979) (PSD programs). One reason for the limitation of the *ASARCO* holding may be that each of the three judges wrote an opinion which varied on the appropriate degree of discretion the court should permit the EPA to have. Judge Wright wrote the opinion for the court. Judge Leventhal concurred, but argued that the EPA should have more latitude than Wright's opinion implied. *ASARCO*, 578 F.2d 319 at 331. Judge McKinnon's lengthy dissent argued that the EPA acted well within its "discretion in applying the bubble concept only to modified and not to new or reconstructed facilities." *Id.* at 337.

53. 578 F.2d at 337, 329.

54. *Id.* at 338. The court found that the statutory definition of source for NSPS, *supra* note 49, which defined a source as any "building, structure, facility, or installation," did not contemplate the regulatory definition that referred to a "combination" of facilities as a source. *Id.* at 336.

55. *Id.* at 327-28. The court stated that the regulations at issue would "undercut Section 111 by allowing operators to avoid installing the best pollution control equipment as long as the emissions of the entire plant do not increase." *Id.* at 328. Significantly, the court rejected the EPA's contention that the bubble concept was necessary to provide plant owners flexibility. *Id.* Furthermore, the court rejected the rationale that the bubble concept was necessary because of the allegedly greater cost of retrofitting existing facilities compared to installation of pollution control equipment during initial construction. *Id.*

56. 636 F.2d 323 (D.C. Cir. 1980).

plants from PSD requirements despite increased emissions from a modified emission point within the plant if net plant emissions do not increase.⁵⁹ The court held that, in the absence of contrary Congressional intent,⁶⁰ the statutory definition of source for NSPS applies by analogy to PSD programs.⁶¹ The court stated, however, that the EPA has discretion to define components of the statutory definition differently for NSPS and PSD programs.⁶² The court distinguished the purposes of NSPS and PSD provisions, finding that Congress intended PSD provisions to prevent increased pollution,⁶³ whereas, it intended NSPS to reduce air pollution. On that basis the court held that the bubble concept must be used for PSD permit programs.⁶⁴ The court supported its conclusion by adding that the bubble concept is "precisely suited to preserve air quality within a framework that allows for cost efficient

57. In general, EPA regulations for PSD programs are found in 40 C.F.R. §§ 51.21, 52.24 (1984). In the context of PSD programs the bubble concept arises out of a regulatory definition for "stationary sources" for which a construction permit is required in PSD regions. See Clean Air Act §§ 165, 169(1), 42 U.S.C. §§ 7475, 7479(1) (1982). The PSD provisions of the Clean Air Act do not expressly define "stationary source" or "source" as do the provisions for NSPS. See *supra* note 25. The EPA defined a "stationary source" for PSD purposes as "any structure, building, facility, equipment, installation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." 40 C.F.R. §§ 51.24(b)(4), 52.21(b)(4) (1978) (codified as amended at 40 C.F.R. §§ 551.24(b)(5),(6), 52.21(b)(5),(6) (1984)). Standards for PSD review of construction also apply by statute to the "modification of any source or facility." Clean Air Act § 169(2)(C), 42 U.S.C. § 7479(2)(C) (1982). The Act further defines a modification as a physical or operational change which "increases the amount of any air pollutant emitted by such source." Clean Air Act § 111(a)(4), 42 U.S.C. § 7411(a)(4) (1982). The EPA regulates only "major modifications" which it defines as those resulting "in a significant net emissions increase," (codified as amended at 40 C.F.R. §§ 51.24(2), 52.21(2) (1984)), thereby extending the bubble concept to plant modifications as well as new construction.

58. See *supra* notes 49-51 and accompanying text.

59. See *supra* note 57.

60. Unlike the NSPS regulations at issue in *ASARCO*, Congress did not provide an express statutory definition of source for PSD provisions.

61. 636 F.2d at 395-96.

62. *Id.* at 396-98.

63. *Id.* at 401-02.

64. *Id.* at 401. The court indicated that failure to use the bubble concept under the PSD provision would be "unreasonable and contrary to the expressed purposes of the PSD provisions of the Act." *Id.* The court concluded that Congress intended to require construction permits "only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase." *Id.*

flexible planning for industrial expansion and improvement."⁶⁵

The District of Columbia Circuit Court reviewed the use of the bubble concept in EPA nonattainment area regulations in *Natural Resources Defense Council, Inc. v. Gorsuch*.⁶⁶ The *Gorsuch* court rejected the main contention of the EPA that the bubble concept promotes the purpose of nonattainment area provisions by granting states flexibility in developing SIPs.⁶⁷ The court reconciled *ASARCO* and *Alabama Power Co.* by analyzing the purposes of the legislation at issue in each case.⁶⁸ The court's analysis yielded a "bright line test" to govern use of the bubble concept in Clean Air Act programs.⁶⁹ The court stated that the bubble concept must be used in programs to maintain air quality, but should not be used in programs to improve air quality.⁷⁰ The court applied the test to the nonattainment provisions of the Clean Air Act and concluded that it is not permissible to use the bubble concept to improve air quality in nonattainment areas.⁷¹ Accordingly, the court vacated the EPA nonattainment area definition of source.⁷²

The Supreme Court reversed *Gorsuch* in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁷³ Initially, the Court explained the standard of judicial review for administrative agency decisions.⁷⁴ The Court stated that a reviewing court should defer to an agency decision out of respect for agency expertise in the subject matter.⁷⁵ The Court engaged in a two-part inquiry: first, did Congress

65. *Id.* at 402.

66. 685 F.2d 718 (D.C. Cir. 1982).

67. *Id.* at 727-28.

68. The court interpreted *ASARCO* as prohibiting use of the bubble concept because it conflicted with the purpose of NSPS to improve air quality. *Id.* at 726. The court viewed *Alabama Power Co.* as narrowing the scope of *ASARCO*. The court further believed that *Alabama Power Co.* mandates court investigation of the purpose of the specific Clean Air Act program at issue. *Id.* at 726 & n.27. *Cf. supra* note 53. The court's facile reconciliation of *ASARCO* and *Alabama Power Co.* has been criticized as an overly simplistic evaluation of the rationales in those cases. *Reed, NRDC v. Gorsuch: D.C. Circuit Bursts EPA's Nonattainment Bubble*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 10,089, 10,094-96 (1982).

69. 685 F.2d at 726.

70. *Id.*

71. *Id.* at 726-27.

72. *Id.* at 728.

73. 104 S. Ct. 2778 (1984).

74. *Id.* at 2781-83.

75. *Id.* at 2782. *See also* *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), in which Justice Stevens (author of *Chevron* opinion), dissenting, states that an

express an intent to apply the bubble concept to nonattainment programs, and second, if not, was the Administrator's application of the bubble concept reasonable.⁷⁶

The Court searched for Congressional intent in the history of the Clean Air Act.⁷⁷ Finding no reference to the bubble concept prior to the 1977 Amendments, the Court focused on the 1977 Amendments themselves.⁷⁸ The Court specifically searched the legislative history for any indications as to the purpose of the amendments or their intent regarding use of the bubble concept.⁷⁹ The Court concluded that Congress designed the nonattainment program to "accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality."⁸⁰ The Court further noted a desire on the part of Congress to allow states to administrate nonattainment programs.⁸¹

The Court rejected the respondent's legislative history contentions. It found them untenable, and explained that, if at all, the history supported the bubble concept.⁸² The Court found that the bubble, in furthering economic growth, was related to one of the purposes contemplated by Congress.⁸³

The Court then reviewed the language of the statute, but quickly dismissed it as not dispositive.⁸⁴ Throughout its inquiry, the Court rejected statutory interpretations submitted by the respondent as completely unpersuasive.⁸⁵ Further, the Court viewed the EPA's shifting policies as evidence of a flexible and, therefore, admirable policy position.⁸⁶

administrative "contemporaneous construction" of a statute is entitled to considerable weight. *Id.* at 287 n.5.

76. *Chevron*, 104 S. Ct. at 2781-82.

77. *Id.* at 2783-84.

78. *Id.*

79. *Id.*

80. *Id.* at 2786.

81. The Court focused on a statement of Senator Muskie which discussed the options available to states. *Id.* at 2787, citing 123 CONG. REC. 26,847 (1977).

82. *Id.*

83. *Id.* Nowhere does the Court examine the petitioners' interpretation.

84. *Id.* See *supra* note 20 and accompanying text.

85. *Chevron*, 104 S. Ct. at 2793-94.

86. *Id.* at 2791-92. By contrast, the lower court was critical of EPA's shifting policies. *Id.*

Finally, the Court dismissed all of the respondent's policy arguments.⁸⁷ The Court stated that legislators and administrators, rather than courts, should balance the competing interests that shape policy decisions.⁸⁸ EPA's judgment was reasonable, the Court held, because "the agency considered the matter in a detailed and reasoned fashion."⁸⁹ As a result, the Court deferred to EPA's judgment.⁹⁰ The lower court's judgment, impliedly made on the basis of the judges' personal policy preferences, disregarded the judicial duty to respect an agency's legitimate policy choices.⁹¹

Chevron will be a very influential case. It is the first case to analyze the bubble concept in four years, and stands as the only Supreme Court decision addressing the issue. Unfortunately, the Court's analysis lacks the depth needed to address such an important case. The Court correctly states that, because legislative intent about application of the bubble concept is unclear,⁹² the Court must defer to the agency unless its policy is unreasonable.⁹³ The agency, however, bears the burden of proof to show support for its contention that adoption of the bubble concept is reasonable.⁹⁴ Nowhere, however, does the Supreme Court consider this. In fact, the Court appears to shift the burden to the respondents. It never demands the EPA to meet its evidentiary burden, but instead refutes respondent's contentions.⁹⁵

The Supreme Court also did not adequately consider the evidence itself. Stevens begins his legislative history with the 1977 amendments because the Court, in effect, found no prior legislative mention of the

87. *Id.* at 2792-93. See *supra* note 40 and accompanying text.

88. *Id.* at 2793. But see *infra* notes 107-11 and accompanying text.

89. *Chevron*, 104 S. Ct. at 2793. "The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

90. *Chevron*, 104 S. Ct. at 2793.

91. *Id.*

92. See *supra* notes 77-80 and accompanying text.

93. See *supra* notes 74-76 and accompanying text.

94. It was EPA's failure to meet the burden of proving reasonableness that caused the Court of Appeals, in part, to rule against it. 685 F.2d 718, 727 n.41 (D.C. Cir. 1982), *rev.*, 104 S. Ct. 2778 (1984).

95. Additionally, the Court ignores the burden imposed on petitioners due to their appeal of the lower court decision. The Court never examines why petitioners assign error to the court of appeals' decision, let alone what proof they have to support their contention.

bubble concept.⁹⁶ This is an apparent oversight by the Court and indicates a cursory attitude. In addition, the Court, by summarily considering the 1977 amendments, did not carefully examine the intricacies of the nonattainment provision.⁹⁷ The Court chose to emphasize the economic rationale for the amendments and did not consider their underlying environmental purpose.⁹⁸ There were many objectives to the 1977 Amendments, and to choose the economic objective over all others is an oversimplification.⁹⁹

The greatest omission, however, was in the Court's overview of events subsequent to the enactment of the 1977 Amendments. The Court expounded upon EPA's vacillating policy, yet completely ignored the decisions in *ASARCO* and *Alabama Power*.¹⁰⁰ The Court never resolved the confusion surrounding their relationship, and indeed never addressed the "bright-line test" derived by the lower court.¹⁰¹ It is surprising that the Supreme Court would render an opinion without weighing the only two cases on point, let alone disregarding the test used by the lower court.

96. 104 S. Ct. at 2785-86.

97. The legislative history reveals great confusion and many plausible rationales for the amendments, as shown in the three opinions in *ASARCO*. See *supra* note 52. The Court, however, finds no difficulty in selecting one possible reason for the amendments and focusing solely upon it.

98. The Court erred in not considering the Act's environmental purpose. Once the Court stressed the economic aspect over the environmental aspect, it easily changed the Clean Air Act from an environmental law into an almost purely economic one. See *supra* note 80 and accompanying text. Most likely the Court was following a prior EPA publication which similarly distorted the Act. The Clean Air Act has conveniently been transformed from a statute originally designed to keep industry from interfering with efforts to abate air pollution into a statute that keeps pollution control from interfering with industrial expansion.

99. The Court's heavy reliance on Senator Muskie's "economy versus pollution" comments, see *supra* note 81, may be ill-placed. "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). Additionally, the Court ignores the goal of achieving pollution control measures "as expeditiously as practicable." See *supra* note 34 and accompanying text. Likewise, the technology-advancing requirements (such as LAER and BACT) are ignored by the Court.

100. See *supra* notes 46-65 and accompanying text. While it may be within the Court's discretion to ignore these decisions, the result is greater confusion in an area of law begging for consolidation of judicial views.

101. See *supra* notes 69-70 and accompanying text. The Court never applied the test it articulated, that of the reasonableness of the agency's decision. The Court merely decided the case by its own standards and then labeled the decision reasonable. In this sense, the Court was mimicking the actions it disapproved of in the lower court.

Finally, the Supreme Court refused to consider the respondents' policy arguments because the EPA "considered the matter in a detailed and reasoned fashion."¹⁰² There is no evidence, however, that EPA did any such research. The Court merely claims that EPA did so without reference to any studies.¹⁰³ Without legislative history or statutory language, the Court did not have adequate information to resolve issues concerning the bubble concept other than the Court's own sense of logic.¹⁰⁴ Indeed, the Court's decision appears to be predicated upon such an analysis.¹⁰⁵

Considering the policy arguments now, one sees that, despite some possible economic advantages to the use of the concept,¹⁰⁶ a long-term analysis militates against such use in nonattainment areas. Not only does it create a risk of harm to nonattainment goals,¹⁰⁷ but it also does

102. *Chevron*, 104 S. Ct. at 2792.

103. EPA's brief offers no proof of its "detailed studies." The only research EPA produced was a pair of "conclusionary, two-page comments, each alleging one specific instance in which a modernization project was said to be retarded." Brief for Respondent at 22, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984). EPA failed to produce even these limited materials for the lower court. "EPA had failed to produce any study, survey, or support for the proposition that new source review under the prior source definition 'retards improvement of air quality in the aggregate.'" *Id.*, citing *Gorsuch*, 685 F.2d at 727 n.41.

104. Both sides attempted to argue policy in their briefs, but the Court ignored such attempts. See Brief for Appellant, *Chevron v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984); Brief for Respondent, *Chevron v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984).

105. "Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress." *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943). See also *Skidmore v. Swift*, 323 U.S. 134 (1944), in which the Court stated that it determines the weight of administrative rulings by "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements. . . ." *Id.* at 140.

106. One report states that in a study done on the bubble concept's economic effects, 70 industries using the concept saved an average of two million dollars in environmental costs. *Industry Unsure Economic Incentives for Clean Air Will Work*, A.P.C.A. Hears, 11 ENVTL. REP. (BNA) 1857 (1980). The report, however, is deceptive. Any industry can cut costs by dropping a program. No one doubted that the Clean Air Act would impose cost increases. The point is that Congress felt these costs necessary. The same is also true for EPA's claim that the bubble reduces administrative costs, since EPA administers less by using the bubble. Again, however, Congress felt increased costs were necessary in order to abate pollution.

107. There is fundamental error in calling the concept a "bubble," because EPA regulates only "net" emissions which come from standard outlets, such as smokestacks. EPA does not regulate "fugitive" emissions, such as those that escape from windows. Additionally, EPA has also narrowed the definition of emission, ruling that any emis-

not fit within the theory,¹⁰⁸ or regulation¹⁰⁹ of nonattainment area programs. The bubble concept, as applied to nonattainment area programs, is neither practicable,¹¹⁰ nor economical.¹¹¹

The Supreme Court in *Chevron* summarily washed its hands of the "bubble concept" issue. The Court never resolved the issues of legislative intent, agency autonomy, or conflicting case history. The probable effect of this case will be two-fold. First, EPA is now virtually free of judicial scrutiny. Although a lower court still has the authority to review EPA implementation of the Clean Air Act, this case sends a powerful message to defer. Thus, EPA, and those who dictate its course, will be able to advance almost any end, as long as it is accompanied by the most tenuous reasoning. Second, *Chevron* will dissuade environmental activist groups, such as the Natural Resources Defense Council or Sierra Club, from challenging EPA action, because such a challenge will probably be futile and costly. Without such challenges, however, an important check on EPA environmental policy is lost. Fewer challenges to EPA, coupled with judicial deference, will allow use of the

sion under 25 to 40 tons per year (depending on type of emission) is "insignificant." This means that EPA, in discussing "net emissions," is ignoring the combined fugitive and "insignificant" emissions. Given that a "major source" produces emissions of over 100 tons per year, it is hard to understand why a source which emits almost half that amount is "insignificant." See 46 Fed. Reg. 50,769 (1981) (codified at 40 C.F.R. § 52.24 (1984)).

108. The goal of implementing pollution control measures "as expeditiously as practicable" remains a priority for the EPA. EPA admitted previously that Congress intended new source review to be "an important tool in the drive towards attainment of ambient air quality standards." 45 Fed. Reg. 52,697 (1980) (codified at 40 C.F.R. § 52.24 (1984)). The bubble, however, reduces new source review, and EPA has begun to drop requirements that occur only a few times. 46 Fed. Reg. 50,766 (1981) (codified at 40 C.F.R. § 52.24 (1984)). This approach will soon completely negate new source review.

109. It is apparent that the bubble has slowed down SIPs, as evidenced by the numerous extensions given for NAAQS deadlines. See Current Developments, 12 ENVTL. REP. (BNA) 147-48, 739-41, 765-81 (1981).

110. The bubble concept will eat away nonattainment programs from the inside. Previously regulated machines are now "modifications" and are not subject to new source review if a company makes offsets elsewhere in its plant. Thus, incentives to use environmentally efficient machines are gone. Further, with each state setting its own standards, air quality will revert to pre-Act days when industry forum-shopped for lenient laws. The states thus have no economic incentives to enforce strict laws. Finally, the evertightening budget of agencies such as EPA guarantees less enforcement.

111. EPA will only impose new source requirements on new industries, thereby disadvantaging new competition and creating a privileged group among already existing industries. EPA shelters older industries by giving them a price advantage, because they do not have to meet new requirements by updating their equipment.

bubble concept to expand. Prior to *Chevron*, use of the concept allowed industry to decrease emissions maintenance and to delay NAAQS deadlines. *Chevron* removes virtually all restraints on the use of the bubble concept. States will now consider the economies of a SIP before considering its environmental impact, a priority for which the Clean Air Act was not meant.

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RECENT DEVELOPMENT

