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How Much Would You Pay for Clean Air? The Role of Cost/Benefit Analysis in Setting NAAQS

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COMMENT

HOW MUCH WOULD YOU PAY FOR CLEAN AIR? THE ROLE OF COST/BENEFIT ANALYSIS IN SETTING NAAQS

I. INTRODUCTION

Man's ability to alter his environment to achieve perceived goals has undoubtedly made an enormous contribution to his economic and social well-being. This undertaking is not, however, without attendant costs. One of these costs is the toll that these alterations may exact on the environment itself and, in turn, the dangers that this may pose for the public health and welfare. Unfortunately, man's ability to alter the environment often far outstrips his ability to foresee with any degree of certainty what untoward effects these changes may bring.[1]

In an ideal world, pollution would be controlled using inexpensive and technologically feasible techniques. Industries would be able to easily comply with environmental regulations without spending prohibitive amounts of money or shutting down socially beneficial businesses. Unfortunately, environmental scientists find it difficult to determine either appropriate safety levels for pollutants, or appropriate methods to control pollution within economic restraints.[2] In some situations, no economically feasible technology exists that adequately controls pollution emissions. In other situations, scientific findings conclude that certain pollutants are toxic in any amount: to be effective, safety standards requisite to protect the public health would require no emissions at all.[3]

Environmental standards that base acceptable pollution levels on the risk to human health often become economically inefficient.[4] This comment examines the issue of whether the Environmental Protection Agency ("EPA") may consider economic factors in setting environmental standards. Over twenty years ago, the Supreme Court held that the Clean Air Act ("CAA"), as passed by Congress, did not allow the EPA to consider economic factors in setting National Ambient Air Quality Standards ("NAAQS").[5] Recently, the Supreme Court was asked to revisit the issue.[6] The result was a strong blow to industries looking for break, and a boon to environmentalists who seek to protect the environment.

II. THE CLEAN AIR ACT IS BORN

Congress passed the Clean Air Act in 1963.[7] Congress thought "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments," but also recognized "that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution."[8] The Federal financial assistance and leadership came in two forms: first, the direct funding for state air pollution control programs, and second, the ability of the Federal Government to set standards for states who were unable to address pollution problems.[9]

The federal government was also authorized to develop air quality criteria, but the criteria were only advisory.[10] However, the authorization of intervention by the federal government signaled an implicit acceptance by the federal government of responsibility for air pollution problems.[11]

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[1] *Lead Industries Assn., Inc. v. EPA*, 647 F.2d 1130, 1135 (D.C. Cir. 1980).
[2] Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613, 1619 (1995).
[3] *Guidelines for Carcinogenic Risk Assessment*, 51 Fed. Reg. 33992 (1986).
[4] March Sadowitz, *Tailoring Cost-Benefit Analysis to Environmental Policy Goals*, 2 B.U. J. Sci & Tech. L.11 para. 17.
[5] *Lead Industries*, 647 F.2d at 1130.
[6] *Whitman v. American Trucking*, 531 U.S. 457 (2001).
[7] 77 Stat. 392 (1963). *See* Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control*, 36 Hous. L. Rev. 679 (1999).
[8] 77 Stat. at 393.
[9] *See* Frank P. Grad, *Treatise on Environmental Law* § 2.03, at 2-66 (1999).
[10] 77 Stat.392 (1963).
[11] Grad, *supra* n. 10, at 2-66.

In 1967 Congress passed the Air Quality Act.[12] The Act authorized the Federal government to "develop and issue to the States such criteria of air quality as ... may be requisite for the protection of the public health and welfare."[13] These criteria, however, did not equate to national standards, but instead functioned as guidelines against which states were required to consistently develop and implement ambient air quality standards for air quality control regions that were within the state's boundaries.[14] The air quality control regions encompassed "communities with common air pollution problems."[15] Enforcement procedures similar to those set out the 1963 Act remained, but poor utilization of the enforcement methods and an absence of clearly defined goals left the Act flawed, and little progress was made.[16]

Congress reacted to the poor results of the Air Quality Act by passing the Clean Air Amendments of 1970.[17] Under the amendments, the newly created EPA was authorized to establish primary and secondary NAAQS for those air pollutants which the Administrator of the EPA, "in his judgment," determines to have "an adverse effect on public health or welfare."[18] The EPA was required to set primary NAAQS at levels "which in [its] judgment . . . based on such [air quality] criteria and allowing an adequate margin of safety, are requisite to protect the public health."[19] The EPA was also required to divide the nation into air quality control regions.[20] States were required to adopt a State Implementation Plan ("SIP") for its air quality control regions.[21]

Under Federal law, the NAAQS were set as the national quality standard for ambient air.[22] Ambient air is "that portion of the atmosphere, external to buildings, to which the general public has access." A NAAQS is an expression "in terms of concentration of the pollutant in the air." After the 1970 Amendments, the EPA was required to perform several steps before establishing a NAAQS for a given air pollutant.[23] First, the EPA must include a pollutant in a list of those pollutants, emissions of which, in [the judgment of the Administrator] cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria.[24] Pollutants listed as such are called "criteria pollutants."[25] The EPA is then required to promulgate primary NAAQS, "requisite to protect the public health" and "allowing an adequate margin of safety."[26] Secondary NAAQS are also to be based upon the previously issued air quality criteria, but the secondary NAAQS must be "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air."[27]

The Clean Air Act was amended by the Clean Air Act Amendments of 1977[28] and again by the Clean Air Act Amendments of 1990.[29] The 1977 Amendments provided "a much longer and more realistic time frame for states to achieve the NAAQS."[30] The 1977 Amendments also set forth measures to bolster NAAQS compliance by those areas whose air did not attain the proscribed NAAQS ("nonattainment areas").[31] The 1977 Amendments also required the creation of an independent scientific advisory committee to advise the Administrator on criteria document and air quality

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[12] 81 Stat. 485 (1967).
[13] *Id.* at 491.
[14] *See id.* at 492.
[15] Grad, *supra* n. 10, at 2-68.
[16] Theodore L. Garret & Sonya D. Winner, *A Clean Air Act Primer: Part I*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10, 161 (Mar. 1992).
[17] 84 Stat. 1676 (1970).
[18] *Id.* at 1678. The air pollutants to which the statute refers are (1) those pollutants for which air quality criteria had been issued prior to the 1970 Amendments; and (2) those pollutants listed, and for which criteria were issued, after the enactment of the 1970 Amendments. *See id.* at 1679.
[19] *Id.*
[20] *See* Grad, *supra* n. 10, at 2-77.
[21] *Id.*
[22] 42 U.S.C. § 7409(a) (1999).
[23] *Id.*
[24] 42 U.S.C. § 7408 (1999).
[25] *Id.*
[26] 42 U.S.C. § 7409(b)(1).
[27] 42 U.S.C. § 7409(b)(2).
[28] 91 Stat. 685 (1977).
[29] 104 Stat. 2399 (1990).
[30] 91 Stat. 685 (1977).
[31] *See* Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy* 776 (2d ed. 1996).

standard revisions.[32] Finally, the 1977 Amendments required the EPA to review thoroughly, at five-year intervals, the existing NAAQS and promulgate new standards as appropriate.[33]

The 1990 Amendments left the existing NAAQS structure intact, but the Amendments strengthened the provisions relating to the attainment and maintenance of the NAAQS by imposing "obligations to prepare new implementation plans, particularly where there are more stringent standards applicable to areas in which attainment is still in the distant future."[34] Five new classifications were established for the areas far from attaining the ozone NAAQS, ranging from marginal to extreme.[35] Deadlines were set for these areas to reach attainment based on the classifications.[36]

III. The Health Of The Public v. Economic Reality: *Lead Industries Ass'n v. EPA*

The first major assault against the EPA's authority to set NAAQS came in 1978.[37] The Lead Industries Association ("Lead Industries") petitioned the EPA for reconsideration and a stay of the newly promulgated lead NAAQS. The EPA denied Lead Industries' petition in 1979.[38] Lead Industries then filed a petition for review of the lead standards in the Court of Appeals for the District of Columbia Circuit.[39]

Lead Industries claimed that the EPA exceeded its authority by promulgating a primary air quality standard for lead that was more stringent than necessary to protect the public health.[40] Lead Industries claimed the EPA was setting standards which protected against "sub-clinical" effects, which are not harmful to heath.[41] Lead Industries asserted that Congress only authorized the EPA to set primary air quality standards that protected the public against health effects that were known to be clearly harmful.[42] The reason behind this restriction, Lead Industries argued, was that Congress was concerned that the EPA would set excessively stringent air standards that could cause massive economic problems.[43]

Lead Industries also argued[44] that the EPA erred by refusing to consider the economic and technological feasibility in setting the air quality standard for lead.[45] This claim was predicated on the idea that the statutory scheme requires the EPA to allow an "adequate margin of safety" in setting primary air quality standards.[46] In order to determine the allowance for the "adequate margin of safety", it was argued that the EPA must consider the economic impact of the proposed standard on industry and the economic feasibility of compliance by emission sources.[47] Lead Industries argued, that by refusing to consider these factors, the EPA abused its discretion, and furthermore that the lead air quality standards would have a disastrous economic effect on industrial sources of lead emissions.[48]

The court held that these arguments were completely without merit.[49] First, the court looked at the language of the statute or its legislative history. The court found that not only did the statute and its legislative history not support Lead Industries' arguments, but rather that the "statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards."[50]

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[32] 42 U.S.C. § 7409(d).
[33] 91 Stat. at 691.
[34] 42 U.S.C. §§ 7470-7515 (1999).
[35] *See* 42 U.S.C. § 7511(a)(1), tbl. 1 (marginal areas are have an ozone concentration in the ambient air of 0.121 ppm up to 0.138 ppm; extreme areas have an ozone concentration in the ambient air of 0.280 ppm and above).
[36] *See id.* The deadline in marginal areas for attainment of the primary NAAQS is three years after November 15, 1990; the deadline for extreme areas is 20 years after November 15, 1990. *Id.*
[37] *Lead Industries*, 647 F.2d at 1145.
[38] *Id.*
[39] *Id.* St. Joe Minerals Corporation also joined the lawsuit against the EPA. *Id.*
[40] *Id.* at 1148.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] This argument was put forth by St. Joe Mineral Corporation. *Id.*
[45] *Id.*
[46] *Id. See also* 42 U.S.C. § 7409(b).
[47] *Lead Industries*, 647 F.2d at 1148.
[48] *Id.*
[49] *Id.*
[50] *Id.*

In reaching this holding, the court first noted that "[w]hen Congress intended the [EPA] to be concerned about economic and technological feasibility, it expressly so provided."[51] The statute at issue, however, only spoke of the public health and welfare.[52] Second, the court found that the legislative history of the Clean Air Act showed that the omission of a provision accounting for economic and technological feasibility was deliberate, because Congress subordinated economic concerns to the achievement of health goals.[53] Frustrated by the lack of progress by the states in dealing with air pollution under the Air Quality Act of 1967, Congress took "a stick to the states in the form of the Clean Air Amendments of 1970."[54] The court found that according to Senate committee reports, it was determined that "the heath of the people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible."[55]

Thus, the *Lead Industries* court held that economic or technological factors should not be considered when setting ambient air quality standards.[56] The court could find no legislative intent to allow the consideration, and the court stated that "when Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of its statutory authority by taking other factors into account."[57] The court felt that the industry had an obligation to try and meet the NAAQS standards.[58] If the industries were not able to meet the standards, then the court instructed them to lobby Congress to modify the policy.[59]

IV. THE SUPREME COURT REVISITS THE *LEAD INDUSTRIES* DECISION

A. Whitman v. American Trucking: The Lower Court Decision

The CAA requires the Administrator of the EPA to promulgate NAAQS[60] for each air pollutant for which "air quality criteria" have been issued.[61] The first is the "primary standard," which is a concentration level requisite to protect the public health with an adequate margin of safety.[62] The "secondary standard" is the level "requsite to protect the public welfare."[63] Once a NAAQS has been promulgated by the EPA, the standard must be reviewed by the Administrator of the EPA every five years for appropriate revisions to be made at that time.[64]

On January 18, 1997, the Administrator revised the NAAQS for particulate matter ("PM")[65] and ozone.[66] Several parties, led by American Trucking Associations, Inc. ("American Trucking") petitioned the Court of Appeals for the District of Columbia Circuit to review the revised NAAQS.[67] First, American Trucking claimed that § 109(b)(1) of the CAA[68] delegated legislative power to the Administrator of the EPA in violation of the United States Constitution.[69]

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[51] *Id.* The court cites 42 U.S.C. § 7411, which directs the EPA to consider economic and technological feasibility in establishing standards of performance for new stationary sources of air pollution based on the best available control technology. *Id.*

[52] *Id.*

[53] *Id.* at 1149.

[54] *Id.* (*quoting Train v. Natural Resources Defense Counsel, Inc.*, 421 U.S. 60, 64 (1975)).

[55] *Lead Industries*, 647 F.2d at 1149-50.

[56] *Id.*

[57] *Id.* (*quoting American Oversees Airlines, Inc. v. CAB*, 254 F.2d 744, 748 (D.C. Cir. 1958)).

[58] *Lead Industries*, 647 F.2d at 1150.

[59] *Id.*

[60] 42 U.S.C. § 7409(a).

[61] 42 U.S.C. § 7408.

[62] *Id.*

[63] *Id.*

[64] 42 U.S.C. § 7409(d)(1).

[65] *NAAQS for Particulate Matter*, 62 Fed. Reg. 38652 (July 18, 1997); 40 CFR § 50.7 (1999).

[66] *NAAQS for Ozone*, 62 Fed. Reg. 38856 (July 18, 1997); 40 CFR §§ 50.9, 50.10 (1999).

[67] *American Trucking Assoc., Inc. v. EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999)("*American Trucking I*"); *American Trucking*, 531 U.S. at 460. Challenging the revision were Small Business Practitioners (claims 97-1440 and 97-1441), the Non-State Clean Air Act Petitioners (claim 97-1441), the states of Ohio (claims 97-1440 and 97-1441), Michigan (claims 97-1440 and 97-1441), West Virginia (claims 97-1440 and 97-1441), Massachusetts (claim 97-1441), New Jersey (claim 97-1441), Connecticut (claim 97-1441), Vermont (claim 97-1441), New York (claim 97-1441), New Hampshire (claim 97-1441), the American Lung Association (claims 97-1440 and 97-1441), Non-State Petitioners on Fine Particulate Matter National Ambient Air Quality Standards (claim 97-1440), Environmental Group and Citizen Petitioners (claim 97-1440), and Industry Petitioners on Coarse Particulate Matter National Ambient Air Quality Standards (claim 97-1440). The appeals were filed pursuant to 42 U.S.C. § 7607(b)(1).

[68] 42 U.S.C. § 7409(b)(1).

Furthermore, American Trucking claimed that the EPA had construed CAA provisions "so loosely as to render them unconstitutional delegations of legislative power."[70] The Court of Appeals held that the EPA had interpreted the statute in such a way as to provide no "intelligible principle" to guide the agency in decision making.[71] The Court of Appeals did suggest, however, that the EPA could possibly avoid the unconstitutional delegation by adopting a much more restrictive construction of the CAA.[72] The court then remanded the NAAQS to the EPA for revision[73].

Second, American Trucking also argued that the EPA erroneously failed to consider the economic costs of implementing the standards in setting the NAAQS.[74] American Trucking claimed that in *Lead Industries*, the court only held that the CAA did not compel the EPA to consider the cost of implementation in setting a NAAQS.[75] The court rejected this argument, finding that on the contrary, the CAA precludes the EPA from considering costs of implementation, because "the statute and its legislative history make clear that economic considerations play no part in the promulgation of NAAQS."[76]

American Trucking also claimed that the *Lead Industries* decision, while applicable to the CAA in regards to *setting* the NAAQS, did not apply to the CAA in regards to *revising* the NAAQS.[77] The court rejected this argument also, finding that they could "discern no legally relevant difference in the two sections that would make *Lead Industries* inapplicable" to the section regarding revising the NAAQS.[78]

The EPA petitioned for rehearing by the panel, arguing that the EPA had discerned a limiting principle from the statute.[79] The EPA found that NAAQS levels must be "necessary" to protect the public health and that a standard 95 percent confidence interval separates health effects that could be the product of chance from heath effects caused by a regulated pollutant.[80] Unfortunately, the court rejected the EPA's argument as too late.[81] "Only after the EPA itself has applied the principle in setting a NAAQS," the court held, "can we say whether the principle, in practice, fulfills the purposes of the nondelegation doctrine.[82]

The EPA also asserted that the Court lacked jurisdiction.[83] The EPA argued that because it had taken no final action implementing the revised NAAQS, the Court could not review the standard.[84] The CAA limited the Court of Appeals for the District of Columbia Circuit to jurisdiction in order to review "nationally applicable regulations promulgated, or final agency action taken, by the Administrator."[85] However, the Court found that the revised NAAQS were not tentative, and that they were "unambiguous and devoid of any suggestion that it might be subject to subsequent revision."[86] The court also noted that the revised NAAQS imposed a number of requirements on the states, which indicated a finality to the NAAQS which made them ripe for review.[87] The Court thus held that it had jurisdiction to hear the case, and denied the EPA's claim.[88]

The EPA petitioned the Supreme Court for review.[89] The EPA challenged the holding of the Court of Appeals that the CAA delegates legislative power to the Administrator of the EPA, and argued that the EPA's interpretation of the

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[69] *American Trucking I*. 175 F.3d at 1034.
[70] *American Trucking I*. 175 F.3d at 1034-40.
[71] *Id.*
[72] *Id.* at 1038.
[73] *Id.*
[74] *Id.* at 1040.
[75] *Id.*
[76] *Id.* (*quoting Lead Industries*. 647 F.2d at 1148).
[77] *American Trucking I*. 175 F.3d at 1040.
[78] *Id.*
[79] *American Trucking Associations, Inc. v. EPA*. 195 F.3d 4. 8 (D.C. Cir. 1998)("*American Trucking II*").
[80] *Id.* at 6.
[81] *Id.* at 6-7.
[82] *Id.* at 7.
[83] *American Trucking II*. 195 F.3d at 4.
[84] *Id.* at 8.
[85] 42 U.S.C. § 7607(b).
[86] *American Trucking II*. 195 F.3d at 9: citing *Her Majesty the Queen ex rel. Ontario v. EPA*. 912 F.2d 1525. 1532 (D.C. Cir. 1990): and referencing *Final Rule: National Ambient Air Quality Standards for Ozone*. 62 Fed. Reg. 38865. 38885 (1997).
[87] *American Trucking II*. 195 F.3d at 9.
[88] *Id.* at 10.
[89] *American Trucking*. 51 U.S. at 464.

CAA pertaining to the power to promulgate NAAQS was improper.[90] The EPA also challenged the jurisdiction of the Court of Appeals.[91] American Trucking conditionally cross-petitioned for review on whether the Administrator may consider the costs of implementation in setting NAAQS.[92] The Supreme Court granted certiorari both petitions, and consolidated the cases for its decision.[93]

B. The Supreme Court Decision

The Supreme Court, in *American Trucking*, was presented with four issues.[94] The first issue was whether the CAA delegates legislative power to the Administrator of the EPA.[95] The second was whether the Administrator of the EPA may consider the costs of implementation in setting NAAQS.[96] The third was whether the Court of Appeals had jurisdiction to review the EPA's interpretation of the CAA[97] with respect to implementing the revised ozone NAAQS.[98] The fourth and final issue was, if the Court of Appeals had jurisdiction, whether the EPA's interpretation of the revised ozone NAAQS was permissible.[99] The main focus of this comment is on the second issue.

C. The Costs of Implementation as a Factor in Setting NAAQS

In *Whitman v. American Trucking*, the Supreme Court held that the costs of implementation may not be used as a factor in setting NAAQS.[100] The CAA instructs the EPA to set primary ambient air quality standards "the attainment and maintenance of which... are requisite to protect the public health" with "an adequate margin of safety."[101] The Court found that it was "fairly clear that this text does not permit the EPA to consider costs in setting the standards."[102] The language was noted as "absolute."[103]

The Court instructed that the EPA, based on the information about health effects contained in the technical criteria documents compiled under the CAA[104] is to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an "adequate" margin of safety, and set the standard at that level.[105] The Court found that "[n]owhere are the costs of achieving such a standard made part of the initial calculation."[106]

The Supreme Court rejected American Trucking's argument that the meaning of the term "public health" did not mean the standard definition of "the health of the community," but rather "the ways and means of conserving the health of the members of a community."[107] The Court followed the standard rule that "words that can have more than one meaning are given content, however, by their surroundings."[108] In the context of the CAA, the definition espoused by American Trucking did not make sense, according to the Court.[109] "Congress could not have meant to instruct the Administrator to

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[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] 42 U.S.C. §§ 7501-7515.
[98] *American Trucking*, 531 U.S. at 463.
[99] *Id.*
[100] *Id.* at 465.
[101] 42 U.S.C. § 7409(b)(1).
[102] *American Trucking*, 531 U.S. at 465.
[103] *Id.*
[104] 42 U.S.C. § 7408(a)(2).
[105] *American Trucking*, 531 U.S. at 465.
[106] *Id* at 466.
[107] *Id.*
[108] *Id.* (*citing FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000)).
[109] *American Trucking*, 531 U.S. at 466.

set NAAQS at a level 'requisite to protect' 'the art and science dealing with the protection and improvement of public health.'"[110]

The Supreme Court also rejected American Trucking's argument that other factors besides air pollution affect public health, and that the economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains achieved in cleaning the air.[111] The Court noted that while American Trucking's argument was unquestionably true, Congress was aware of the problem and provided for that precise exigency.[112] The CAA permitted the Administrator to waive the compliance deadline for stationary sources if sufficient control measures were unavailable and the continued operation of such sources was essential to the public health or welfare.[113] In addition, the CAA permitted or required that economic costs be taken into account in implementing the air quality standards.[114] The Court therefore "refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted."[115]

In order for American Trucking to prevail, according to the Court, there must be "a textual commitment of authority to the EPA to consider costs in setting NAAQS."[116] Since the provision of the CAA providing for NAAQS is "the engine that drives nearly all of Title I of the CAA," the "textual commitment must be a clear one."[117] Congress, the Court noted, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."[118]

American Trucking argued that the terms "adequate margin" and "requisite" in the CAA leave room to pad health effects with cost concerns.[119] The Court, however, held that "it was implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards."[120] American Trucking also argued that while the Administrator's judgment about what is requisite to protect the public health must be based on the criteria documents developed under the CAA, it need not be based solely on those criteria, and that while the criteria must include "effects of public health or welfare which may be expected from the presence of such pollutant in the ambient air," they are not necessarily limited to those effects.[121] The Court held that even if the arguments were conceded as true, they would not conclude that one of the unenumerated factors that the agency could consider would be the cost of implementation.[122] The cost was considered a factor "both so indirectly related to public health and so full of potential for canceling the conclusion drawn from the direct health effects that it surely would have been expressly mentioned in [the CAA] had Congress meant it to be considered."[123]

American Trucking's final argument was that a number of provisions of the CAA do require attainment cost data to be generated,[124] and that these provisions make no sense unless costs are to be considered in setting the NAAQS.[125] The court rejected that argument, noting that "these provisions enable the Administrator to assist the States in carrying out their role as primary implementers of the NAAQS."[126] The States are primarily responsible for deciding what emissions reductions will be required from which sources.[127] Federal Clean Air legislation directs federal agencies to develop and transmit implementation information data, including cost data to the States, in order to assist states in choosing the means

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[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id* at 466-67.
[114] *Id.* at 467.
[115] *Id. see Union Elec. Co. v. EPA*. 427 U.S. 246. 257 (1976); *General Motors Corp. v. US*. 496 U.S. 530. 538. 541 (1990).
[116] *American Trucking*. 531 U.S. at 468.
[117] *Id.*
[118] *Id. see MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*. 512 U.S. 218. 231 (1994); *Brown & Williamson Tobacco*, 529 U.S. 159-160.
[119] *American Trucking*. 531 U.S. at 468.
[120] *Id.* accord *Christensen v. Harris County*. 529 U.S. 57. 590 (2000).
[121] *American Trucking*. 531 U.S. at 469.
[122] *Id.*
[123] *Id.*
[124] *See* 42 U.S.C. § 7408(b)(1). and 42 U.S.C. § 7409(d)(2)(C)(iv).
[125] *American Trucking*. 531 U.S. at 469-70.
[126] *Id.*
[127] *Id. see* 42 U.S.C. §§ 7407(a). 7410.

by which to implement the standards.[128] The Court held that the collection of implementation data for this purpose "is perfectly sensible, and has no bearing upon whether cost considerations are to be taken into account in formulating the standards."[129]

After considering all the arguments, the Court held that the text, as "interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS- setting process, and thus ends the matter for us as well as the EPA."[130]

V. THE PROPRIETY OF CONSIDERING ECONOMIC FACTORS IN SETTING NAAQS

The Supreme Court was correct to uphold the *Lead Industries* decision, and hold that economic considerations may play no part in the promulgations of NAAQS. The statute that instructs the EPA on how to set primary ambient air quality standards only allows for the consideration of a standard "requisite to protect the public health" with "an adequate margin of safety."[131] The plain meaning of the statute is clear that economic considerations are not to be considered by the EPA when setting standards.

The terms of the CAA standard for setting NAAQS should be read to exclude all factors not specifically set out in the statute. While some would argue that since the terms of the statute do not preclude consideration of the costs of implementing air quality standards, then the costs of implementing the statute may be considered,[132] this author disagrees. Statutes are generally read according to "plain meaning." While some statutes are ambiguous on their face, this is not one of those statutes. The wording has been described as "absolute."[133] The statute does not need any additional criteria added to the standard in order to help interpretation, or to bring it into accord with other laws.

The Constitution requires that when "Congress confers decisionmaking authority upon agencies, Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"[134] In the case of the CAA, Congress "must provide substantial guidance on setting air standards that affect the entire national economy."[135] The Supreme Court has found that the scope of discretion the CAA allows "is well within the outer limits of our nondelegation principles."[136] However, the lower courts struggled with the question of whether the CAA provided an "intelligible principle" to the EPA for setting NAAQS.[137] It would seem that adding additional criteria, not put into the statute by Congress, but instead just "inferred" into the statute would make the present guidelines meaningless.

To add additional criteria based on economic considerations would not make the CAA guidelines any clearer or easier to formulate. If economic considerations are added, they will, in most cases, increase the amount of acceptable pollutants in the air according to the NAAQS. To take into account economic considerations would not complement the present requirements for standards "requisite for the public health". Instead, it would lessen the NAAQS to a standard that is not "requisite for the public health".

Another issue is how economic considerations in formulating the standard would be used. Since there is nothing in the statute allowing for economic considerations, there is also nothing that sets forth the required "intelligible principle" that would guide the use of economic considerations. While analogous or similar statutes may be used for guidance, they are not binding. Without specific guidance on how and when economic considerations are to be used, there is no way to control for the standards. In essence, the question becomes: who decides what is an economic burden sufficient to deviate from the "requisite for the public health" standard?

Finally, the most important reason, and one often overlooked in the cases, is that the NAAQS are set up for the protection of the health of the people. It is the responsibility of the EPA to determine what pollutants are dangerous, and

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[128] *American Trucking*, 531 U.S. at 471.
[129] *Id.*
[130] *Id.*
[131] 42 U.S.C.§ 7409(b)(1).
[132] *See* C. Boyden Gray, *The Search for an Intelligible Principle: Cost-Benefit Analysis and the Nondelegation Doctrine*, 5 Tex. Rev. Law & Pol. 1 (2000).
[133] *American Trucking*, 531 U.S. at 465 (*quoting* D. Currie, *Air Pollution: Federal Law and Analysis*, 4-15 (1981)).
[134] *American Trucking*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).
[135] *American Trucking*, 531 U.S. at 473.
[136] *Id.* at 474.
[137] *See American Trucking I*, 175 F.3d 1027; *American Trucking II*, 195 F.3d 4.

to take affirmative steps to ensure that industries do not poison or damage our environment. To allow cost considerations to take precedence over the health of the population at large is a foolish view that ignores the long-term benefits of lowered pollution while agonizing over the cost.

Sufficient safeguards exist for situations where cost is truly an insurmountable issue. The CAA allows the EPA to waive the compliance deadline for stationary sources if sufficient control measures are unavailable and the "continued operation of such sources is essential ... to the public health or welfare."[138]

VI. CONCLUSION

Today, federal law governs most aspects of environmental protection. The costs associated with environmental protection have risen greatly over the years, and there is a desire from industries to give greater weight to cost concerns when making environmental decisions.[139] The decision of *Whitman v. American Trucking* was a blow to the many who were hoping that the decision of *Lead Industries* would be cast aside, allowing economic considerations to be used in promulgating NAAQS. However, under the clear and unequivocal wording of the statute, economic considerations should not be used to set NAAQS. The standards necessary for the health of the people should be the main standard, and allowances made for special circumstances were no appropriate pollution-reducing technology is available. To allow the cost considerations to become part of the standard, rather than the exception to the rule, would be to dilute the standards in such a way as to defeat their initial purpose. In an ideal world, pollution would not be an issue. Unfortunately, we do not live in a perfect world, and we must set standards that protect health, not pocketbooks.

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[138] 42 U.S.C. § 7420(f)(1).
[139] Sadowitz, at 4.