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The Balancing Act: Will EPA Be Allowed to Reach a Compromise Between Pro-Business and Pro-Environment?

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The Balancing Act: Will EPA Be Allowed to Research a Compromise Between Pro-Business and Pro-Environment?

Sierra Club v. U.S. E.P.A.[1]

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I. INTRODUCTION

In *Sierra Club v. U.S. E.P.A.*, the Ninth Circuit Court of Appeals addressed the scope of the Environmental Protection Agency's ("EPA") grandfathering authority under the Clean Air Act ("CAA"). The case is significant because of the precedential value of the court's interpretation of EPA's grandfathering authority. However, this precedential importance does not come as much from the court's holding as it does from the Ninth Circuit's inappropriate balancing of pro-business and pro-environment considerations in reviewing the EPA's actions under these particular circumstances. Contrary to the Ninth Circuit's opinion in this case, the EPA should have broad discretion in choosing when and how to grandfather in provisions under the CAA. The agency should be able to work with major-emitting facilities in finding the most cost-effective and mutually beneficial methods of achieving the nation's environmental goals.

This note begins by setting forth the facts and events leading to the Ninth Circuit's decision to limit the EPA's grandfathering authority. The second section examines the legal precedent and historic use of grandfathering authority by federal agencies. The third section provides the court's legal analysis, followed by a final section that discusses the policy implications of this decision. Ultimately, the conclusion drawn is that despite the correct holding, *Sierra Club v. U.S. E.P.A*. improperly interpreted Congress's intent on the EPA's grandfathering authority under the CAA, disregarding the agency's inherent authority to implement and enforce the nation's environmental regulations.

[1] 762 F.3d 971 (9th Cir. 2014).

II. FACTS AND HOLDING

On February 15, 2008, Avenal Power Center applied for a Prevention of Significant Deterioration ("PSD") Permit to build and operate a 600-megawatt, natural gas-fired power plant in Avenal, California.[2] The EPA failed to grant or deny the application within one year, as required by the CAA.[3] While Avenal Power's application was under consideration, the EPA tightened its air quality standards.[4] As a result, Avenal Power filed suit on March 9, 2010 in the United States District Court for the District of Columbia seeking to compel the EPA to issue the permit under the standards that would have applied had the EPA acted within the required time frame.[5]

The District Court granted Avenal Power's motion for judgment on the pleadings, and ordered the EPA to make a decision on the permit application.[6] Although the EPA initially said it had to apply the standards applicable at the time the permit was issued, it later changed its ruling and granted Avenal Power's permit under the air quality standards in effect at the time the application was submitted.[7] Initially, the EPA argued that the CAA "prohibits the agency from granting the permit unless Avenal Power complies with the [more stringent] superseding standards."[8] After conducting a policy review, the EPA reversed its decision and issued Avenal Power's permit exempt from the new, tighter air quality standards, citing that "it possessed inherent grandfathering authority even absent express authorization under the CAA or related regulations."[9]

The Sierra Club, Greenaction for Health and Environmental Justice, Center for Biological Diversity, and El Pueblo para el Aire y Agua Limpio

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[2] *Id.* at 973.
[3] *Id.*
[4] "EPA tightened NAAQS for NO_2, capping hourly emissions at 100 parts per billion, with the new regulations to take effect on April 12, 2010." *Id*. at 974.
[5] *Id.* at 975.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

(collectively referred to as "Petitioners")[10] submitted comments to the EPA objecting to the EPA's issuance of the permit and declaration of grandfathering authority.[11] Petitioners were concerned that this project would "adversely impact the environment and health and quality of life of local residents."[12] After the Environmental Appeals Board declined to exercise jurisdiction over the review of the EPA's grandfathering actions, Petitioners filed two petitions for judicial review with the United States Court of Appeals for the Ninth Circuit, challenging the EPA's interpretation of its statutory authority under the CAA.[13] Avenal Power successfully intervened and the two petitions were consolidated for review.[14]

The Court of Appeals granted the petition for review, vacated the decision to issue the permit, and remanded the case for further proceedings consistent with its opinion.[15] Specifically, the Court held that the CAA requires the EPA enforce the regulations in effect at the time each permit is issued, so the EPA's exercise of grandfathering authority in this case was not appropriate.[16]

III. LEGAL BACKGROUND

Enacted in 1970, the purpose of the CAA is to protect and enhance the quality of the country's air resources and to promote the public health, welfare, and productive capacity of its population.[17] Accordingly, major-emitting facilities regulated by the CAA are "subject to the best available control technology for each pollutant" emitted from a facility.[18] Permit

[10] *Id.* at 973.
[11] *Id.* at 974.
[12] *Id*.
[13] *Id.* at 976.
[14] The United Association of Plumbers and Pipefitters Local 246, International Brotherhood of Electric Workers Local 100, and Insulators Local 16 successfully filed a brief as amici curiae. *Id.*
[15] *Id*. at 984.
[16] *Id*. at 983.
[17] 42 U.S.C. § 7401(b)(1) (2012).
[18] 42 U.S.C. § 7475(a)(4) (2012).

applications under the CAA are to be granted or denied within one year of the date the application was filed by a facility.[19]

According to *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, when reviewing an agency's construction of a statute, if Congress has spoken directly to the precise issue and its intent is clear, the matter is considered resolved.[20] However, if the statute is silent or ambiguous with respect to the issue, the court must determine an acceptable construction of the statute.[21] In that case, the Supreme Court applied the *Chevron* two-part test to EPA's Emissions Offset Interpretive Ruling, which stated that construction of new major-emitting facilities has to meet "the lowest achievable emission rate" under the current standards for that type of facility.[22] The Court pointed out that the tension permeating such issues of agency authority is the legislative struggle "between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs."[23]

Although not directly related to the CAA, *Brock v. Pierce County* considered the scope of an agency's statutory flexibility in the granting of regulatory permits.[24] At issue in *Brock* was a provision of the Comprehensive Employment and Training Act ("CETA"), which required the Secretary of Labor to investigate and make a determination as to whether a grant recipient was misusing CETA funds within 120 days after it received a complaint.[25] The U.S. Supreme Court considered whether the Secretary of Labor loses its power to recover misused CETA funds after the required 120-day period has expired.[26] In that case, Respondent, who had received two grants, was ordered to repay the costs arising out of employees hired who were not eligible to participate in the CETA program.[27] Respondent argued that the

[19] 42 U.S.C. § 7475(c) (2012).
[20] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).
[21] *Id.* at 843.
[22] *Id*. at 848. *See also* 41 Fed. Reg. 55525 (Dec. 21, 1976).
[23] *Id*. at 847.
[24] Brock v. Pierce Cty., 476 U.S. 253 (1986).
[25] *Id.* at 254-55.
[26] *Id*. at 255.
[27] *Id*. at 256-57.

Secretary of Labor could not issue such an order because the final determination had been made considerably more than 120 days after the submission of the audit report, thereby prejudicing Respondent.[28] Looking at CETA's history and purpose, the Court reasoned that when there are important public rights in question, and less drastic remedies are available for failure to meet a statutory deadline, a court should not assume that Congress intended for the agency to lose its power to act.[29] The Court thus held that the provision in question, standing alone, did not divest the Secretary of Labor of jurisdiction to act if the 120 days expired.[30]

The EPA first asserted its grandfathering authority in the context of the CAA after the agency passed the 1977 Amendments to the Act. Soon after, a lawsuit was filed to challenge an inconsistency between provisions where a later section of the Act had the effect of allowing permits to be issued for the construction of projects for which permits would otherwise have been barred by an earlier provision of the Act.[31] To resolve the inconsistency, the EPA chose to delay making the earlier provision valid and grandfathered certain projects from its requirements. In examining the validity of the EPA's actions, the United States Court of Appeals for the District of Columbia reasoned that the Act's purpose to protect the quality of the nation's air should be balanced against economic loss or delay that may result from increased environmental standards.[32] The Court held that the EPA has the authority to "fashion, via rulemaking," a compromise between the inconsistent provisions.[33]

Later that same year, the United States Court of Appeals for the District of Columbia specified in *Alabama Power Co. v. Costle* that grandfathering provisions in the CAA were only intended to grandfather existing industries, not to "constitute a perpetual immunity from all standards."[34] At issue in that case was the extent of the EPA's exemption

[28] *Id*. at 257.
[29] *Id*. at 260.
[30] *Id*. at 266.
[31] Citizens to Save Spencer Cnty.v. E.P.A., 600 F.2d 844, 853-54 (D.C. Cir. 1979).
[32] *Id*. at 869.
[33] *Id*. at 874.
[34] Alabama Power Co. v. Costle, 636 F.2d 323, 400 (D.C. Cir. 1979).

authority.[35] The Court held that although the EPA may make exemptions in "de minimis situations," the agency bears the burden of showing that the matters at issue are trivial or of administrative necessity.[36] It was noted, however, that this narrow exemption for modifications does not provide a basis for the "EPA to exercise 'revisory power' to exclude new sources as well as modifications."[37]

In 2003, as older grandfathered power plants came under the new environmental compliance standards, the fair notice doctrine was introduced into CAA legislation.[38] The District Court for the Southern District of Indiana declined to accept one power plant's argument that it did not have fair notice of its obligations under the CAA, as amended.[39] The court stated that "notice that matters for the fair notice doctrine are the statements the defendant receives before the alleged violation begins."[40] Thus, the plant's argument that it was deprived notice of the EPA's interpretation of routine maintenance did not hold merit.[41] In the end, the Court left it up to the EPA to make a case-by-case determination of whether a project at a power plant rose to the point of modification, therefore triggering CAA compliance, "by weighing

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[35] *Id*.
[36] *Id*. at 360.
[37] *Id.* at 361.
[38] United States v. S. Ind. Gas & Elec. Co., 245 F. Supp. 2d 994, 1010 (S.D. Ind. 2003).
[39] *Id.* at 1024.
[40] *Id*.
[41] *Id.* The power plant's notice primarily consisted of the Clay Memo and *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990), which discussed the routine maintenance provision and "made it 'ascertainably certain' that the EPA would make a case-by-case determination by weighing the nature, extent, purpose, frequency, cost, and other relevant factors, to make a common-sense finding." *Id*. The Clay Memo expressed EPA's stance on NSR determination and was intended to make a clear public statement to the regulated community on how EPA interpreted the CAA and accompanying regulations like the routine regulations like the routine maintenance exemption. *Id.* at 1018. The court also pointed out that reading the regulation in context gives notice to companies that the routine maintenance exemption is not be construed broadly. *Id*. at 1015. In addition, a 1989 letter by the Utility Air Regulatory Group ("UARG"), representing numerous members of the utility industry, confirmed that the regulated community understood how EPA interpreted routine maintenance in the Clay Memo. *Id*. at 1019. Finally, there were two public statements made by the Assistant EPA Administrator in 1991, and a 1992 statement in a Federal Register Preamble, which discussed the scope of the routine maintenance exemption. *Id.* at 1020.

the nature, extent, purpose, frequency, cost and other relevant factors to make a common-sense finding."[42] The District Court for the Southern District of Ohio agreed, holding that only de minimis activities serve to trigger the routine maintenance exemption, and any other changes at a power plant trigger the most updated CAA regulations.[43]

In 2006, the United States Court of Appeals for the Seventh Circuit echoed a similar conclusion, pointing out that although Congress initially grandfathered in some provisions of the CAA for existing power plants, the intent was that once those power plants were retired, new power plants would be built and maintained subject to current, more rigorous pollution controls.[44]

In 2011, the United States District Court for the Western District of Pennsylvania considered a case where modifications undertaken at grandfathered units of a coal-fired plant allegedly should have triggered more rigorous CAA emissions standards.[45] In that case, although the court sympathized with the plaintiffs' frustrations that society carried the brunt of the significant SO_2 emissions from the grandfathered facility,[46] the Court chose to adhere to the plain text of the CAA, which stated that no major-emitting facility may be constructed unless each of the statutory conditions are met.[47] Specifically, the court pointed out that although the Prevention of Significant Deterioration ("PSD") program was initially aimed at the construction of new facilities, the 1977 amendments applied the PSD requirements to modifications of grandfathered plants, like the one at issue here, which would result in significant net emissions increases.[48]

Currently, EPA's grandfathering authority is formalized in § 7601[49] of the CAA and in the Administrative Procedure Act.[50] These sections outline

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[42] *Id.*
[43] United States v. Ohio Edison Co., F. Supp. 2d 829, 888 (S.D. Ohio 2003).
[44] United States v. Cinergy Corp., 458 F.3d 705, 709 (7th Cir. 2006).
[45] United States v. EME Homer City Generation, L.P., 823 F.Supp.2d 274, 280 (W.D. Pa. 2011).
[46] *Id.* at 297.
[47] *Id.* at 281.
[48] *Id.* at 280.
[49] "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or

formal notice and comment rulemaking procedures to which the EPA must adhere when invoking any exemptions or amending regulations on a case-by-case basis. Last year, for example, the EPA used its grandfathering authority in the implementation of new standards for a particulate matter, but only after publishing a public notice of a draft permit which explicitly built in new regulations for pending permit applications by an operative date.[51]

For years, agencies and courts have struggled to balance the preservation of the nation's air standards and the social and economic progressivity of businesses. *Sierra Club v. U.S. E.P.A.* once again attempts to find the perfect balance.

IV. INSTANT DECISION

In *Sierra Club v. U.S. E.P.A.*, the United States Court of Appeals for the Ninth Circuit ruled against the EPA, concluding that the EPA must apply air emissions standards in effect at the time it issues a permitting decision, rather than the standards in effect at the time the permit application was filed.[52] A circuit judge wrote for a three-judge panel addressing two issues: (1) whether Petitioners had standing to seek review,[53] and (2) whether the EPA exceeded its authority under the CAA by grandfathering emissions standards in a Prevention of Significant Deterioration Permit issued to Avenal Power.[54]

The Court found that Petitioners, as associations, had standing to bring the suit on behalf of their members, provided their members would have standing to bring the suit in their own right.[55] To analyze whether the

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employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to section 7607(d) of this title, as he may deem necessary or expedient." 42 U.S.C. § 7601(a)(1) (2012).

[50] 5 U.S.C. § 553 (2012).

[51] National Ambient Air Quality Standards for Particulate Matter, 78 Fed.Reg. 3,086, 3,249 (Jan. 15, 2013).

[52] 762 F.3d 971, 983 (9th Cir. 2014).

[53] *Id.* at 977.

[54] *Id.* at 979.

[55] *Id.* at 977. In addition, the interest at stake must be germane to the association's purpose and the participation of individual members in the lawsuit must not be required.

Petitioners' individual members had standing, the Court looked at whether the members suffered an injury-in-fact, whether the alleged wrongful conduct caused the injury, and whether the injury could be redressed by a favorable decision.[56] Applying these criteria, the Court concluded that Petitioners' individual members would have standing to bring the suit in their own right. As such, the Court was satisfied that the majority of Petitioners had Article III standing and proceeded to decide the case on the merits.[57]

On the second issue, the Court reviewed the EPA's interpretation of the CAA, which, in part, requires the EPA to enforce current air emission standards and to act on permit applications within one year.[58] The Court began its inquiry by looking at the statute's plain and unambiguous meaning.[59] The Court concluded that the CAA clearly requires the EPA to apply the standards in effect at the time of the permitting decision because the role of the EPA is to make sure that permit applicants comply with all current air quality control regulations.[60] In fact, in its initial memorandum, the EPA wrote that it "has previously concluded that the relevant provisions cover any NAAQS that is in effect at the time of issuance of any permit."[61] This is supported by Supreme Court case law.[62] Specifically, the Ninth Circuit cited *Ziffrin Inc. v. United States*, 318 U.S. 73, 78 (1943), which stated that administrative agencies must mimic the appellate process, so that orders are not issued contrary to existing legislation.[63]

According to the CAA, a delay in granting a permit application provides a private cause of action to compel timely action.[64] Delaying the permitting decision does not impede the EPA from enforcing its current

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Id. Avenal Power conceded these two points. *Id.*
[56] *Id.*
[57] *Id.* at 978. As long as one Plaintiff has Article III standing, the Court does not need to determine whether the other Plaintiffs have Article III standing. *Id.*
[58] *Id.* at 978-79.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 979.
[62] *Id.*
[63] *Id.* at 980.
[64] *Id.*

emissions standards.[65] Therefore, the EPA's claim that it could not determine from the statute which standards to apply because it missed the application's one-year deadline fails, because the EPA could work with the applicant to ensure the applicant is in compliance with outstanding regulations.[66] In fact, Avenal Power did work with the EPA for years to make sure the power plant was in compliance, but when those efforts failed, the EPA chose to waive the newly effective regulations on an ad hoc basis.[67]

However, the court found that the EPA's traditional exercise of grandfathering authority did not align with the agency's actions in this case because it did not follow its former procedures.[68] On prior occasions, the EPA identified an operative date, followed formal notice and comment rulemaking procedures, and then grandfathered in pending permit applications with built-in new regulations.[69] In contrast, the court found that in this case, the EPA did not set any precedential value, but instead acted as a matter of convenience, inappropriately claiming authority to waive the law's requirements at will.[70] Overstepping the bounds of the agency's statutory authority[71] violated the CAA, which requires the EPA to enforce regulations in effect at the time each permit is issued.[72]

V. COMMENT

What started out as a technicality tested the limits of the EPA's statutory authority and flexibility in implementing air quality control regulations under the CAA. In this case, the Ninth Circuit came to the politically defensible conclusion that major-emitting facilities must adhere to

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[65] *Id.*
[66] *Id.* at 981.
[67] *Id.*
[68] *Id.* at 983.
[69] *Id.*
[70] *Id.*
[71] *See* Morton v. Ruiz, 415 U.S. 199, 231-32, 94 S. Ct. 1055, 39 L.Ed.2d 270 (1974) (holding that "[t]he 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[,]" but noting that "[n]o matter ho rational or consistent with congressional intent a particular decision might be, [such decision] cannot be made on an ad hoc basis…").
[72] *Id*.

current air emissions standards as determined at the issuance of an EPA permit. However, this decision left the EPA's grandfathering authority in the same place – a restrictive formal procedure – and pushed the EPA back into its statutory box of almost impractical goals and formal procedures. Although on its face the court reasoned correctly, the Ninth Circuit missed an opportunity to validate the authority the EPA must inherently have in order to fulfill its duties in implementing and enforcing environmental laws.

Any time the EPA is involved, two competing interests battle for balance: pro-business versus pro-environment. Bold accusations are often made about the EPA's involvement in the industries it regulates. For example, the U.S. Chamber of Commerce describes the EPA's actions as "a series of one-sided, politically-charged regulations that are intended to take the place of legislation that cannot achieve a consensus in Congress."[73] The alleged political overreach stems from the amplified financial burden placed on private companies that see their costs rise due to stringent industry regulation.

In this case, Avenal Power was not able to meet the EPA's air emissions requirements because of administrative mistakes on the EPA's part. The two parties tried to work the problem out, but when they were unsuccessful, the EPA made an exception for Avenal Power by grandfathering in provisions that were applicable at the time the permit application was submitted in 2008. Pro-business interest and saving face for the EPA won out.

As a result, environmental supporters alleged that allowing less stringent regulations would increase air pollution from the Avenal Energy Project and cause or exacerbate health problems of people living nearby.[74] The Ninth Circuit found that these were cognizable injuries in fact and gave petitioners standing to bring this lawsuit.[75] As in *U.S. v. EME Homer City*

[73] U.S. Chamber of Commerce, *Regulatory Areas, Energy & Environment*, http://www.uschamber.com/regulations/areas (Last visited October 7th, 2015).
[74] 762 F.3d 971, 977 (9th Cir. 2014).
[75] *Id.*

Generation L.P. in 2011, the court disregarded the impact on business in favor of promoting political interests of preserving the environment.[76]

The Ninth Circuit correctly applied the *Chevron* test[77] and all legal precedents, but this case highlights a weakness in the first prong of the *Chevron* test (i.e., whether Congressional intent on the precise issue is clear) when applied to the CAA. When the CAA's purpose is to "protect and enhance the quality of the Nation's air resources as to promote the public health and welfare and the productive capacity of its population,"[78] pro-business arguments are essentially destined to lose. On top of that, the Obama administration has made environmental issues a political and social priority, with the following pro-environment considerations: "That bright blue ball rising over the moon's surface, containing everything we hold dear – the laughter of children, a quiet sunrise, all the hopes and dreams of posterity – that's what's at stake. That's what we're fighting for. And if we remember that, I'm absolutely sure we'll succeed."[79]

The EPA is mandated to set emissions limits based upon what a facility can achieve using adequately demonstrated technology.[80] Certain CAA provisions, like the PSD program, are aimed at a group of facilities[81] which, due to their size, are considered to be primarily "responsible for emission of the deleterious pollutants that befoul our nation's air," and are financially able to bear the substantial regulatory costs imposed upon them.[82] However, the environmental priorities continue to hold far greater weight than cost feasibility, primarily due to Congressional intent and CAA's

[76] Citizens to Save Spencer Cty. v. E.P.A., 600 F.2d 844, 853-54 (D.C. Cir. 1979).
[77] Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
[78] Sierra Club v. U.S. E.P.A., 762 F.3d 971, 983-84 (9th Cir. 2014).
[79] President Barack Obama, June 25, 2013. http://www.whitehouse.gov/energy.
[80] Nat. Resources Def. Council v. Thomas, 805 F.2d 410, 428-29 (D.C. Cir. 1986).
[81] *See* Alabama Power Co. v. Costle, 636 F.2d 323, 353 (D.C. Cir. 1979) (An emitting facility is "major" if it either "(1) actually emits the specified annual tonnage of any air pollutant, or (2) has the potential, when operating at full design capacity, to emit the statutory amount…. When determining a facility's potential to emit air pollutants, EPA must look to the facility's 'design capacity' a concept which not only includes a facility's productive capacity (a criterion employed by EPA) but also takes into account the anticipated functioning of the air pollution control equipment designed into the facility").
[82] *Id.*

legislative history. The Senate Report for the 1970 amendment made it clear that the EPA must develop air quality standards independently of technical feasibility or cost concerns:[83]

> In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health ... Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down.[84]

Relying on these statements, in *Union Elec. Co. v. E.P.A.,* the Supreme Court held that the 1970 CAA amendments were "expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible."[85]

Fortunately, courts have softened their reliance on the above Senate statements. Most recently, in *Energy Corp. v. Riverkeeper, Inc.,* the Supreme Court held that the EPA permissibly relied on a cost-benefit analysis in promulgating regulations under the Clean Water Act.[86] Specifically, the Court's analysis focused on how the judicial branch should apply the *Chevron* test when a statute is silent on whether the agency should make a cost-benefit analysis in issuing regulations and site-specific variances from

[83] *See* Whitman v. Am. Trucking Associations, 531 U.S. 457, 486 (2001) (holding that, especially in complex cases, "EPA may not consider implementation costs in setting primary and secondary NAAQS under § 109(b) of the CAA").
[84] S. Rep. No. 91-1196, pp. 2-3 (1970).
[85] Union Elec. Co. v. EPA, 427 U.S. 246, 257 (1976).
[86] Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009). Petitioners requested review of an EPA final rule under the Clean Water Act regulating cooling-water intake structures at existing power plants.

national performance standards.[87] In the end, the court concluded that the "EPA's current practice is a reasonable and hence legitimate exercise of its discretion to weigh benefits against costs that the agency has been proceeding in essentially this fashion for over 30 years."[88] Nonetheless, with such strong statements preserved in the CAA's legislative history, environmental goals continue to take priority over economic feasibility.

The pecuniary impact of environmental upgrades on power plants is quite significant. According to the EPA, the Obama administration's most recent goal to reduce carbon emissions by 30 percent before 2030 is estimated to cost businesses between $4 and $9 billion per year in compliance alone.[89] This means that regulation of carbon dioxide emissions alone will cost the American economy $50 billion per year between now and 2030.[90] The cost of compliance hurts more than a company's bottom line.

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[87] *Id.* at 223 ("The regulations permit the issuance of site-specific variances from the national performance standards if a facility can demonstrate either that the costs of compliance are 'significantly greater than' the costs considered by the agency in setting the standards, 40 CFR § 125.94(a)(5)(i) (2012), or that the costs of compliance 'would be significantly greater than the benefits of complying with the applicable performance standards,' § 125.94(a)(50(ii)."). *Id.* at 215.

[88] *Id.* at 224. *See* In re Public Service Co. of New Hampshire, 1 E.A.D. 332, 340 (1977) (holding that although 33. U.S.C.A § 1326(b), which instructs EPA to set standards for cooling water intake structures that reflect "the best technology available for minimizing adverse environmental impact," does not require cost-benefit analysis, it is not reasonable to "interpret § 1326(b) as requiring use of technology whose cost is wholly disproportionate to the environmental benefit to be gained). *See also* In re Central Hudson Gas and Electric Corp., EPA Opinions, General Counsel, NPDES Permits, No. 63, pp. 371, 381 (July 29, 1977) ("EPA ultimately must demonstrate that the present value of the cumulative annual cost of modifications to cooling water intake structures is not wholly out of proportion to the magnitude of the estimated environmental gains); Seacost Anti-Pollution League v. Costle, 597 F.2d 306, 311 (C.A.1 197) (rejecting challenge to an EPA permit decision that was based in part on EPA's determination that further restrictions would be "wholly disproportionate to any environmental benefit).

[89] John Miller, *New EPA Carbon Regulation: What will the Impacts be on Consumer Power Costs?*, THE ENERGY COLLECTIVE (July 14, 2014), http://theenergycollective.com/jemillerep/409346/new-epa-carbon-regulation-impacts-existing-states-market-based-greenhouse-gas-prog.

[90] *Energy Institute Report Finds That Potential New EPA Carbon Regulations Will Damage U.S. Economy*, U.S. Chamber of Commerce Press Release (May 28, 2014, 10:00 AM), https://www.uschamber.com/press-release/energy-institute-report-finds-potential-new-epa-carbon-regulations-will-damage-us.

Consumers also feel the impact of the alleged benefits of preserving the environment through emissions regulations. According to the Energy Institute, as a result of increased regulation of air emissions, consumers "pay significantly more for electricity, see slower economic growth and fewer jobs, and have less disposable income, while a slight reduction in carbon emissions will be overwhelmed by global increases."[91]

There is no doubt that saving the environment is a noble goal, but it is not as simple as changing out your car for a bike on your daily commute. To achieve the government's environmental goals, the brunt of the burden is on the energy industry, which operates with very costly and immutable assets. In 2011, when the EPA proposed its first national standard for mercury emissions from coal-burning power plants, it not only noted that the proposed regulations may force a number of older plants to shut down, but also that the estimated total annual cost of compliance would be about $10 billion.[92] Households would also bear some of those costs and could see their electric bills rise by $3 to $4 per month, once the regulations are in full force after 2015.[93]

For example, Kansas City Power & Light recently filed a request with the Missouri Public Service Commission to increase electric service rates by 15.8 percent (about $13 per month), to about 270,000 of its 564,000 Missouri residential customers.[94] One primary reason for the proposed increase is the company's need to recover costs for federal and state-mandated environmental upgrades[95] at one of the utility's coal-fired power plants.[96]

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[91] *Id.*
[92] John M. Broder and John Collins Rudolph, *Mercury Emission Limits for Coal Plants Proposed by E.P.A.*, N.Y. TIMES, Mar. 16, 2011.
[93] *Id.*
[94] *KCP&L requests rate increase to cover upgrade costs at coal-fired power plant.* POWER ENGINEERING. (Nov. 3, 2014), http://www.power-eng.com/articles/2014/11/kcp-l-requests-rate-increase-to-cover-upgrade-costs-at-coal-fired-power-plant.html.
[95] The environmental improvements include the installation of baghouses and wet scrubbers, a new chimney to serve both units, and a selective catalytic reduction system, all of which will reduce emissions at the power plant. *Id.*
[96] *Id.* (Other reasons for the rate increase include "the numerous infrastructure and system improvements KCP&L has made to maintain the overall reliability of its electrical system and modernize the grid."). *Id.*

Initially, when Congress passed the CAA, it recognized the uphill battle of environmental rehabilitation. As the Seventh Circuit pointed out in *U.S. v. Cinergy Group*, Congress gave the EPA the authority to grandfather in certain provisions for existing power plants with the reasoning that once those power plants were retired, new power plants would be built and maintained subject to current rigorous pollution controls.[97] Today, most of these grandfathered old power plants are out of commission. However, expensive problems arise when a company chooses to modify a power plant instead of building a new one, in an attempt to save on the cost of complying with increasingly rigorous environmental regulations.

As the court observed in *U.S. v. EME Homer City Generation L.P.,* because the purpose of the Prevention of Significant Deterioration ("PSD") program is to preserve air quality in already clean areas, PSD requirements are forward-looking in terms of what utilities must do before commencing construction.[98] Although some courts have interpreted this to mean that the PSD program requirements applied only to newly constructed power plants, the Sixth Circuit noted that by adding a "modification rule"[99] into the grandfathered provisions of the CAA, Congress intended to "ensure that pollution control measures are taken when they can be most effective, at the time of new *or modified* construction."[100] *U.S. v. Ohio Edison Co.* solidified the bright-line rule that anything above de minimis routine maintenance triggers the modification rule, and hence, compliance with the most current CAA regulations.[101]

[97] United States v. Cinergy Corp., 458 F.3d 705, 709 (7th Cir. 2006).
[98] United States v. EME Homer City Generation, L.P., 823 F.Supp.2d 274, 281 (W.D. Pa. 2011).
[99] The Clean Air Act provides that "routine maintenance, repair or replacement activities are exempt from the general rule that a modification project triggers CAA compliance. The term "modification" is defined as "any physical change in, or change in the method of operation, of a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4) (2012).
[100] National-Southwire Aluminum Co. v. U.S. E.P.A., 838 F.2d 835, 843 (6th Cir. 1988) (Boggs, J. dissenting).
[101] United States v. S. Ind. Gas & Elec. Co., 245 F. Supp. 2d 994, 1024 (S.D. Ind. 2003).

Courts have often repeated that, in the beginning, the sustainability of CAA was dependent on grandfathering in certain older power plants. However, until all pre-CAC power plants are decommissioned, voluntarily, and not due to the sky-rocketing costs of maintaining a plant under stringent CAA regulations, the EPA should have generous grandfathering flexibility to work with companies to meet the government's ambitious environmental goals. Fortunately, this fact was recognized by the EPA in recent written comments submitted to the Senate Environment and Public Works Committee, where the agency's administrator Gina McCarthy wrote, "In the event that the EPA does undertake action to address [greenhouse gas] emissions from existing power plants, the agency would ensure, as it always seeks to do, ample opportunity for States, the public and stakeholders to offer meaningful input on potential approaches."[102]

Although the Ninth Circuit came to the correct legal conclusion in this case, the court should have brought the *Chevron* test[103] into a more compromising and cost-efficient position in the context of the CAA. The court would have been better off upholding the EPA's use of grandfathering authority in this case, even if the agency's actions were not codified in the act's formal procedural requirements. The precedential value of such a ruling would have made a powerful impact by signifying that implementation of the CAA, including grandfathering authority, would be left exclusively to the EPA. Even in *Chevron,* the Supreme Court recognized the legislative struggle to balance the government's interest of reducing pollution rapidly with social costs and economic concerns of industrial development.[104] Therefore, when considering Congressional intent behind the CAA, courts should place equal value on pro-environment and pro-business interests, making it a balancing test in every respect.

It is true that ever since the implementation of the CAA, Congress has intended that every emission-emitting facility must meet the "lowest achievable emission rate" under the current standards for that type of

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[102] Daniel Cusick, *U.S. Coal-Fired Power Plants: Update or Close?* SCIENTIFIC AMERICAN (May 20, 2013), http://www.scientificamerican.com/article/us-coal-fired-power-plants-update-close/.
[103] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).
[104] *Id.* at 848.

facility.[105] However, the achievement of this objective must not come at the expense of rising costs for businesses and consumers through expensive asset modifications, escalating electric bills, and litigation over any exception that does not follow the formal procedures of implementing environmental controls.

In this case, Avenal Power should have been required to bring its power plant up to the most recent environmental standards. In fact, for nearly six years, Avenal Power worked with the EPA to meet continually changing emissions touchstones until the agency chose to make an exception and rectify its own violation of a statutory one-year deadline for granting permits. The EPA was not allowing Avenal Power to get away with violating the CAA regulations, however. Instead, the agency was properly using its statutory grandfathering authority to work one-on-one with a company in a situation that was partially created by the EPA's inattention. In effect, by sending the "EPA and Avenal Power back to the drawing board,"[106] the Ninth Circuit, in a roundabout way, instructed the EPA to work one-on-one with Avenal Power to make sure the company found a way to meet the most updated emissions standards.

Per the Ninth Circuit's holding, this case comes full circle to two contradicting considerations: pro-business versus pro-environment. In the aftermath of this decision, depending on how far off Avenal Power is from full compliance, the EPA will either end up grandfathering in provisions for Avenal Power anyway, or the company will be forced to make costly modifications at the expense of its customers' electric bills in order to pacify Congress's lofty intentions of saving the environment. Either way, the decision is once again left up to the EPA, the agency tasked with balancing pro-business and pro-environmental concerns while trying to meet impractical goals. Although this is no easy feat, the EPA's history proves that the agency is capable of implementing and enforcing the environmental standards and goals tasked to it by Congress' necessary implication. Consequently, courts should respect the authority granted to the EPA by allowing it to use grandfathering as a flexible tool of operation.

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[105] 41 Fed. Reg. 55524 (Dec. 21, 1976).
[106] *Sierra Club v. U.S. E.P.A.*, 762 F.3d 971, 984 (9th Cir. 2014).

VI. CONCLUSION

The Ninth Circuit's decision in *Sierra Club v. U.S. E.P.A.* overlooked an opportunity to give greater flexibility to the EPA to enforce environmental standards in the construction of a new power plant. Giving only slight deference to the pro-business arguments, the court narrowly interpreted the EPA's grandfathering authority under the CAA. Although the court sent the parties back to the drawing board, with its legal analysis so heavily focused on promoting environmental goals, the court significantly restricted the EPA's ability to work with Avenal Power to achieve the desired results. This standard will almost certainly limit the EPA's authority to deal with other regulatory issues that will arise the next time a power plant is unable to meet a new environmental regulation on time. As a result, the tension between satisfying pro-business and pro-environment supporters will continue to put pressure on the EPA and its efforts to protect the nation's air resources.