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Michigan v. United States Environmental Protection Agency: The Power of EPA in Curing the Difficulty Downwind

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MICHIGAN v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY: THE POWER OF EPA IN CURING THE DIFFICULTY DOWNWIND

I. INTRODUCTION

Responding to growing concern over ozone migration across state lines and its effects on the ability of Northeastern and Mid-Atlantic states to meet National Ambient Air Quality Standards (NAAQS), Congress enacted subchapter I of the Clean Air Act (CAA) in 1990. Accordingly, the Environmental Protection Agency (EPA) has called for more rigorous emissions standards in twenty-two states and the District of Columbia. In an attempt to alleviate the interstate transport of ozone, EPA mandated that these states submit revised State Implementation Plans (SIPs) containing provisions that prevent nonattainment of NAAQS in downwind states.


2. See Larman, supra note 1, at 603 (discussing measures EPA has taken to combat ozone transport); see also Michigan v. EPA, 213 F.3d 663, 669 (D.C. Cir. 2000) (discussing EPA action to mandate twenty-three jurisdictions revise their State Implementation Plans (hereinafter SIPs) in order to mitigate ozone transport).

3. See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Re-
In *Michigan v. United States Environmental Protection Agency*, the District of Columbia Circuit Court of Appeals addressed EPA's statutory authority to police SIPs. Based on its statutory interpretation


A nonattainment area is defined as a geographical region "in which the level of criteria air pollutant is higher than the level allowed by federal standards." EPA Office of Air Quality Planning and Standards, *The Plain English Guide To The Clean Air Act*, available at http://www.epa.gov/oar/oaqps/peg_caa/pegcaal0.html (last visited Feb. 6, 2001).

4. 213 F.3d 663 (D.C. Cir. 2000).

5. See id. This Note addresses one of three key issues in Part I of the *Michigan* decision. Specifically, this Note addresses EPA's construction of significant contribution with respect to the following sub-issues: (1) whether EPA unlawfully overrode past precedent with respect to significant contribution; (2) whether EPA's consideration of the cost involved in reducing NOx emissions violated CAA § 7410(a)(2)(D)(i)(I); (3) whether EPA's Uniform Controls scheme was arbitrary and capricious; and (4) whether EPA's construction of CAA § 7410(a)(2)(D)(i)(I) violated the nondelegation doctrine. See *Michigan* 213 F.3d at 669, 674-82. The *Michigan* court rejected the two remaining issues in Part I. See id. at 669, 671-74. Though not discussed in this Note, these issues included a determination of whether EPA is permitted to call for SIP revisions without convening a transport commission, whether EPA failed to carry out an adequately state-specific determination of ozone contribution and whether EPA properly construed significant contribution under CAA § 7410(a)(2)(D)(i)(I). See id.

Part II of the *Michigan* decision addressed whether EPA properly included Wisconsin, Missouri, Georgia and South Carolina in its SIP call. See id. at 681-85. Ultimately, the court determined that EPA's inclusion of Wisconsin, Missouri and Georgia was improper. See id. Additionally, in Part III the *Michigan* court rejected the claim that EPA violated the Regulatory Flexibility Act and impermissibly infringed on the rights of states to design their SIPs. See *Michigan* 213 F.3d at 670, 685-89.

In Part IV, the *Michigan* court addressed four issues. See id. at 670, 689-95. The court first considered whether "EPA arbitrarily revised the definition of 'NOx budget unit.'" Id. at 670-89. The *Michigan* court rejected this claim. See id. at 670, 690. The second issue involved several challenges by the Council of Industrial Boilers, asserting that: (1) EPA's SIP call was arbitrary and capricious based on EPA's failure to determine whether non-electricity generating units [hereinafter non-EGUs] were significant contributors; (2) EPA employed flawed cost assumptions in cost-effective control measures for non-EGU budgets; (3) EPA erroneously calculated non-EGU budgets; and (4) EPA arbitrarily redefined the term "EGU." See id. at 690-92. The *Michigan* court rejected all of the claims raised by the Council of Industrial Boilers except for the claim challenging EPA's change in the definition of EGU. See id. at 670, 693.

The third issue in Part IV involved two claims asserted by the Interstate Natural Gas Association of America [hereinafter INGA]. See id. at 693-94. The *Michigan* court upheld the first claim that, in determining state NOx budgets, EPA failed to give adequate notice and opportunity for comment on the control level for large stationary internal combustion engines in determining state NOx budgets. See id. at 670, 693. The *Michigan* court, however, rejected INGA's second claim that EPA
of CAA section 7410(a)(2)(D)(i)(I), the Michigan court ruled that EPA was within its statutory authority when it required twenty-two states and the District of Columbia to revise their SIPs by reducing nitrogen oxide (NO\textsubscript{x}) emissions by amounts that could be removed for $2,000 dollars or less per ton in order to alleviate ozone transport.\footnote{See Michigan, 213 F.3d at 669 (holding EPA decision did not supersede its statutory authority); see also 42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994) (requiring SIPs include provisions prohibiting emissions activities that prevent nonattainment of other state’s NAAQS); Final Rule, 63 Fed. Reg. 57,356 (Oct. 27, 1998) (requiring twenty-two states and District of Columbia to revise SIPs by reducing NO\textsubscript{x} emissions by amounts capable of being removed for $2,000 dollars or less per ton).}

This Note examines the statutory authority of EPA concerning section 7410(a)(2)(D)(i)(I) and considers the holding of the Michigan court with respect to EPA’s legal authority to regulate NO\textsubscript{x} emissions based on cost considerations. Section II of this Note begins with a brief summary of the facts of Michigan.\footnote{For a further discussion of the facts of Michigan, see infra notes 12-20 and accompanying text.} Section III surveys the underlying principles behind section 7410(a)(2)(D)(i)(I) and explains the relevant case law surrounding the statute.\footnote{For a further discussion of the underlying principles behind CAA § 7410(a)(2)(D)(i)(I) and relevant case law, see infra notes 21-74 and accompanying text.} Section IV discusses the Michigan court’s analysis of relevant case law and statutory language.\footnote{For a further discussion of the Michigan court’s analysis of relevant case law and the statutory language of CAA § 7410(a)(2)(D)(i)(I), see infra notes 75-109 and accompanying text.} Section V evaluates whether the Michigan court’s analysis was proper.\footnote{For a further discussion of the propriety of the Michigan court’s analysis, see infra notes 110-61 and accompanying text.} Finally, section VI of this Note considers the impact of the Michigan court’s holding in regard to EPA’s authority under section 7410(a)(2)(D)(i)(I).\footnote{For a further discussion of the impact of the Michigan court’s decision upon EPA’s authority under CAA § 7410(a)(2)(D)(i)(I), see infra notes 162-66 and accompanying text.}

II. FACTS

In October 1998, EPA published its Final Rule mandating that twenty-two states and the District of Columbia revise their SIPs to
reduce NO\textsubscript{x} emissions (an ozone precursor) and ozone transport across state lines.\textsuperscript{12} EPA required each state to establish controls capable of eliminating NO\textsubscript{x} emissions at a cost of $2,000 dollars or less per ton.\textsuperscript{13} In making its initial determination of which states were significant contributors to ozone pollution, EPA considered the “magnitude, frequency, and relative amount of each state’s ozone contribution to a nonattainment area.”\textsuperscript{14} Although EPA applied a low threshold in its determination of how much ozone would constitute a significant contribution under section 7410(a)(2)(D)(i)(I), EPA decided that twenty-three regions need only eliminate a portion of their contribution by reducing ozone levels “by the amount achievable with ‘highly cost-effective controls.’”\textsuperscript{15} Accordingly, once a state was nominally deemed a significant contributor, it could satisfy section 7410(a)(2)(D)(i)(I) by reducing its NO\textsubscript{x} emissions using controls capable of removing those emissions for $2,000 dollars or less per ton.\textsuperscript{16} Under EPA’s interpretation, the labeling of a state as a significant contributor hinges on the differences in the costs of reducing NO\textsubscript{x} emissions in each state.\textsuperscript{17} Thus, EPA ultimately sought to uniformly limit NO\textsubscript{x}

\textsuperscript{12} See Final Rule, 63 Fed. Reg. at 57,356 (requiring twenty-three jurisdictions to adopt and submit SIP revisions that provide for adequate prohibition of emissions which significantly contribute to nonattainment in downwind states); see also Michigan, 213 F.3d at 669. The states required to amend their SIPs were Alabama, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia and Wisconsin. See id.

\textsuperscript{13} See Michigan 213 F.3d at 669. Because EPA’s Final Rule permits ton-for-ton emissions trading among firms based on state allowances, it is likely that firms with the greatest emission reduction costs will buy up allowances from firms with lower reduction costs because these firms over-controlled their NO\textsubscript{x} emissions. See id. at 676.

\textsuperscript{14} Id. at 675. In one calculation, EPA examined the number of NO\textsubscript{x} parts per billion [hereinafter ppb] that a contributing state’s emissions produced in downwind locations. See id. The court went on to state that Indiana was deemed a significant contributor to nonattainment in New York because it contributed “at least two ppb to four percent of the one-hour ozone exceedance in New York City.” Id. Yet, Alabama, Georgia, South Carolina, Massachusetts, Wisconsin, Tennessee and Missouri were not classified as states that contribute significantly to New York City nonattainment since they did not contribute more than two ppb to a one-hour exceedance. See id.

\textsuperscript{15} Id. at 675 (citing Final Rule, 63 Fed. Reg. at 57,403).

\textsuperscript{16} See Michigan, 213 F.3d at 675 (discussing EPA’s threshold of contribution); see also Final Rule, 63 Fed. Reg. at 57,403 (mandating twenty-three regions revise their SIPs to mitigate ozone transport).

\textsuperscript{17} See Final Rule, 63 Fed. Reg. at 57,403 (stating that “‘significance,’ whether measured in volume of Nosubx [sic] emitted or arriving in nonattainment areas, would vary from state to state depending on variations in cutback costs.”).
emissions in these states by an amount that could be achieved for less than $2,000 dollars per ton.\textsuperscript{18}

Because EPA based its decision on cost considerations rather than "amounts of pollutants" as provided in section 7410(a)(2)(D)(i)(I), numerous petitions for review were filed disputing EPA's Final Rule for twenty-three SIPs.\textsuperscript{19} Looking to both the language of the statute and the intent of Congress, the D.C. Circuit determined that EPA is not barred from considering costs in its application of section 7410(a)(2)(D)(i)(I).\textsuperscript{20}

## III. BACKGROUND

### A. The Clean Air Act

The Clean Air Act, last amended in 1990, provides a comprehensive program for controlling NAAQS for ozone via state and federal regulation.\textsuperscript{21} Pursuant to CAA, EPA is responsible for establishing NAAQS and for identifying primary and secondary sources of air pollution that compromise public health and welfare.\textsuperscript{22} Following EPA's promulgation of NAAQS, each state is required to adopt and submit a SIP that provides for the implementation, main-
tenance and enforcement of NAAQS. Once a SIP is approved, EPA may subsequently call for plan revisions if it determines the SIP is inadequate to attain NAAQS.

Under the 1990 CAA Amendments, SIPs must contain provisions prohibiting emissions within a state from contributing significantly to nonattainment of NAAQS in another state. This amendment reflects Congress’ recognition that both ozone and its precursors can be transported great distances by wind and weather patterns, thereby affecting the ability of downwind states to attain NAAQS.

Although the 1990 CAA Amendments attempted to reduce ozone transport by establishing ambient air quality standards, EPA continued to struggle with how to diminish levels of pollution throughout vast portions of the nation. Section 7410(a)(2)(D)(i)(I) requires SIPs to contain adequate provisions that prohibit "any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will contribute significantly to nonattainment in...any other State with respect to any such national primary or secondary ambient air quality standard.


25. See 42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994) (mandating SIPs prohibit any source or emissions activity from emitting "any air pollutant which will...contribute significantly to nonattainment in, or interfere with maintenance by any other state with respect to any such primary or secondary ambient air quality standard.

26. See DeSalvo, supra note 1, at 356-61 (discussing ozone transport). Ozone is formed naturally in the atmosphere by complex "light-driven reactions" involving emitted volatile organic compounds [hereinafter VOCs], such as NOx, which react in the presence of sunlight. See id. at 356-57; see also Larman, supra note 1, at 605-06 (discussing ozone formation).

27. See Larman, supra note 1, at 603 (discussing challenge of reducing ambient levels of ozone for large segments of nation).
B. Effects of Ozone Transport on Nonattainment

Due to weather patterns that cause emissions from industrialized areas of the South and Midwest to flow north across state lines, ozone transportation affects the ability of Northeastern and Mid-Atlantic states to attain NAAQS. Long-range effects of ozone transport have resulted in regional disputes over ozone pollution and its precursors. In light of the regional conflicts surrounding ozone transport, EPA exercised its delegated authority under CAA to promulgate stricter emissions regulations. Accordingly, EPA called for more rigorous emissions requirements in twenty-three regions for NO\textsubscript{x}, a precursor to ozone found to cause serious health problems.


29. See 42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994) (setting forth SIPs requirements); see also Michigan, 213 F.3d at 697 (Sentelle, J., dissenting) (discussing Congress’ failure to define both “significant contribution” and “amount”).

30. See Larman, supra note 1, at 608-10. Due to factors such as weather patterns, topography and dense sources of pollution located east of the Continental Divide, ozone transport has a more significant impact on air quality in the Eastern portion of the United States. See id. Ozone pollution is exacerbated by stagnant air masses that facilitate ozone expansion in the atmosphere. See DeSalvo, supra note 1, at 357. When these air masses spread downwind, they tend to accumulate over urban areas along the East Coast, increasing in levels of ozone as they move farther north. See id.

31. See Larman, supra note 1, at 608-10. Disputes have recently arisen because of the severe burden ozone flows and emissions from pollutant sources in industrialized areas of the South and Midwest place upon Northeastern states, making it difficult for many Northeastern states to attain NAAQS. See id.; see also DeSalvo, supra note 1, at 357 (stating ozone pollution can be problematic in non-industrial areas of Eastern United States).

32. See Larman, supra note 1, at 610 (discussing EPA’s recent regulatory action against ozone transport).

33. See Final Rule, 63 Fed. Reg. at 57,515 (codified at 40 C.F.R. §§ 51.121(a)(2), (c), 96.1 (1999)) (calling for twenty-three regions to submit SIP revisions containing measures that ensure reductions in NO\textsubscript{x} emission levels that will not impede NAAQS attainment in downwind states); see also Michigan, 213 F.3d at 669 (discussing EPA’s Final Rule mandate that twenty-two states and District of Columbia change SIPs); Larman, supra note 1, at 610 (discussing EPA’s action to attempt to address problems that ozone transport presents). NO\textsubscript{x} contributes to the production of ground-level ozone by reacting with VOCs. See id.; see also DeSalvo, supra note 1, at 358 (discussing principal sources of NO\textsubscript{x} emissions). In
C. Past Precedent

Prior to 1990, CAA section 7410(a)(2)(E)(i) required EPA to call for SIP provisions that adequately prevented sources within states from emitting air pollutants that would “prevent attainment . . . [of air quality standards] by any other state.”34 Hearing cases involving interstate disputes over regional ozone transport, the Second and Sixth Circuits found minimal impacts allowable under the previous statutory language.35

In Air Pollution Control District of Jefferson County v. EPA,36 the Sixth Circuit determined whether EPA violated CAA provisions that prohibited a state’s emissions from preventing attainment of NAAQS in other states.37 While power plants located in Jefferson County spent approximately $138 million removing sulfur dioxide (SO₂) emissions, Gallagher Power Station (Gallagher), located just across the river, faced absolutely no controls on SO₂ emissions.38 As a result of the disparity in emission limits between the power plants, the Air Pollution Control District of Jefferson County filed a petition for interstate pollution abatement.39 Examining CAA’s statutory language, the Sixth Circuit reasoned that the proper test Congress intended was “whether one state ‘significantly contributes’ to NAAQS violations in another state.”40 Applying a broad interpretation of the test, the Sixth Circuit determined that Gal-

addition to environmental concerns, such as the loss of crop yields, acid rain, and widespread forest damage, ozone is also responsible for serious respiratory health concerns. See Larman, supra note 1, at 606.


35. For a complete discussion on the Second and Sixth Circuit’s decisions under the previous statutory language, see infra notes 36-45 and accompanying text.

36. 739 F.2d 1071 (6th Cir. 1984).


38. See id. at 1077. Louisville Gas and Electric, the chief producer of sulfur dioxide [hereinafter SO₂] in Jefferson County, spent approximately $138 million removing SO₂ emissions, while Gallagher’s SO₂ emissions remained unregulated. See id.

39. See id. The petition was filed pursuant to CAA § 7426. See id. Ultimately, the petition called for more stringent controls with respect to Gallagher’s emissions. See id.

40. Id. at 1093. The Sixth Circuit quoted CAA § 7426(a) which provided that all nearby states are entitled to notice of any new pollution source “which may significantly contribute to levels of air pollution in excess of the national ambient air quality standards in any air quality control region outside the state in which such source intends to locate (or makes such modifications).” Id.
lagher did not violate the statute since it only contributed to three percent of the pollutants that violated Jefferson County’s NAAQS. 41

Similarly, in *Connecticut v. EPA*, 42 Petitioners claimed that EPA failed to comply with CAA when it approved New York’s SIP revision, allowing five power plants in Suffolk, New York, to continue burning fuel with a 2.8% sulfur content. 43 Connecticut maintained that permitting the New York plants to continue burning high sulfur fuel would sufficiently impact the quality of Connecticut’s air in violation of CAA. 44 The Second Circuit determined that there was nothing in the legislative history of CAA section 7410 to indicate that the statute was intended to prevent minimal impacts upon another state’s pollution where the affected state has not yet complied with the NAAQS. 45

D. Consideration of Costs and Statutory Authority

In *Natural Resources Defense Council v. EPA (NRDC)*, 46 the D.C. Circuit determined the extent of the EPA Administrator’s authority under CAA to set standards for carcinogenic pollutants with unknown health effects. 47 NRDC argued that the Administrator was required to consider only health-related factors under CAA section 7412 and must prohibit all emissions where there is uncertainty as to the effects of a carcinogenic agent. 48 The Administrator asserted that in situations of uncertainty, he may set standards that reduce emissions to the lowest level attainable by technology when that

41. See *Jefferson County*, 739 F.2d at 1093 (discussing how broad deference required to be accorded to EPA precluded disturbing EPA’s determination).

42. 696 F.2d 147 (2d Cir. 1982).

43. See id. at 151 (discussing factual history of *Connecticut* decision).

44. See id. at 153 (arguing EPA approval of New York’s proposal would violate CAA § 7410(a)(2)(E) and setting forth guidelines for EPA to assess interstate impact of proposed SIP revisions).

45. See id. at 164. The *Connecticut* court agreed with EPA’s analysis, which stated that emissions from the New York power plants would have a minimal impact on Connecticut’s NAAQS. See id. at 163. The Second Circuit, also noted that the power plants must comply with New York particulate regulations that are more rigid than Connecticut’s regulations. See id. at 163-64.

46. 824 F.2d 1146 (D.C. Cir. 1987).

47. See id. at 1147-48 (discussing regulation of vinyl chloride, a potent carcinogen used in manufacturing plastics).

48. See id. at 1147 (citing 42 U.S.C. § 7412(b)(1)(B) (1982)). The court explained that CAA also calls for regulation of “air pollutant[s] to which no ambient air quality standard is applicable and which in the judgment of the Administrator cause[,] or contribute[,] to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.” Id. at 1148 (citing 42 U.S.C. § 7412(a)(1) (1982)) (setting forth regulation of hazardous air pollutants “to which no ambient air quality standard is applicable . . . .”).
level is shown to be safe for humans. The D.C. Circuit held that the Administrator is not permitted to consider cost and technological feasibility when determining what is safe. The NRDC court determined that since the statutory language mandates "an ample margin of safety to protect public health," the Administrator is required to make an initial determination of what is safe based entirely on health risks at particular levels before setting the emission standard at the lowest technologically feasible level. The D.C. Circuit stated that the Administrator "cannot under any circumstances consider cost and technological feasibility at this stage of the analysis."

In Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., the United States Supreme Court upheld EPA's construction of a CAA provision requiring EPA to establish regulations whereby states must "require permits for the construction and operation of new or modified major stationary sources" of air pollution. In promulgating the permit requirement, EPA allowed states to consider all of the pollution-emitting devices within one industrial

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49. See id. at 1147-48 (discussing EPA Administrator's inaccurate presumption, with respect to CAA § 7412(a)(1), that he may consider costs before health concerns in determining safe levels of pollution).

50. See id. at 1166. Looking to the legislative history and statutory language, the D.C. Circuit stated that it was "beyond dispute" that Congress' predominant concern in promulgating § 112 was health. See id. at 1163. The NRDC court further noted that in setting the emission standard for vinyl chloride, the Administrator made no findings concerning health effects, safety, or the ability of the chosen emission level to provide an "ample margin of safety." Id.

51. See NRDC, 824 F.2d at 1165 (stating consideration of cost and technology have no relevance with respect to making initial determinations as to what is safe).

52. Id. at 1165. Acknowledging that Congress mandated EPA to provide "an ample margin of safety" in order to safeguard public health, the NRDC court concluded that EPA's initial determination must be based exclusively on the health risks associated with certain emission levels. See id. at 1164; see also 42 U.S.C. § 7412(b)(1)(B) (1982) (mandating EPA to regulate hazardous pollutants by setting emission standards at levels which provide ample margin of safety to protect public health).


54. Id. at 840 n.1, 850 (citing 42 U.S.C. § 7502(b)(6) (1977) (requiring "permits for the construction and operation of... major secondary sources...")) In 1981, EPA promulgated regulations to implement permit requirements that allow a State to adopt a plantwide definition of the term 'stationary source,' under which an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant.

Id. at 837.
group, a single "bubble." The issue presented to the *Chevron* Court was whether EPA permissibly construed the term "stationary source."

The Supreme Court reversed the D.C. Circuit's holding, noting that neither CAA nor its legislative history explicitly defined the meaning of "stationary source." The Supreme Court established a two-pronged test for judicial review of an agency's statutory construction. First, the reviewing court must determine whether Congress has directly addressed the issue. If the intent of Congress is clear, the court must give effect to the "unambiguously expressed intent of Congress." The second prong mandates that, where the statute is silent with respect to the question at issue, the court must determine whether the agency's decision is "based on a permissible construction of the statute." Employing this analysis, the Supreme Court held that EPA permissibly construed the statute when it adopted the "bubble concept."

Applying the *Chevron* analysis, the D.C. Circuit, in *Ethyl Corp. v. EPA*, considered whether the EPA Administrator impermissibly construed a CAA provision that governs the regulation of fuel addi-

55. See id. at 840. EPA permit regulations made it possible for states "to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble.'" Id.

56. See id. (defining issue as flowing from statutory construction). "A 'stationary source' is any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act." Id. at 840 n.2.

57. See id. at 841-42 (noting fundamental legal error of D.C. Circuit was that it adopted "a static judicial definition of the term 'stationary source'" though Congress had not ordered that definition).

58. See *Chevron*, 467 U.S. at 842-43; see also United States v. ILCO, Inc., 996 F.2d 1126, 1130 (11th Cir. 1993) (citing *Chevron*, 467 U.S. at 842-43) (stating "[i]f Congress has clearly and directly spoken to the precise question at issue, effect must be given to the expressed intent of Congress.").

59. See *Chevron*, 467 U.S. at 842-43; see also Western Oil and Gas Ass'n v. EPA, 767 F.2d 603 (9th Cir. 1985) (applying part two of *Chevron* two part test to EPA construction of CAA).

60. *Chevron*, 467 U.S. at 842-43 (setting forth part one of *Chevron* two part test).

61. Id. at 843 (setting forth step two of *Chevron* test).

62. See id. at 866; see also Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 925 (D.C. Cir. 1991) (affirming *Chevron* rule that EPA's statutory construction shall be afforded deference where it is reasonable and Congressional intent is unclear); American Legion v. Derwinski, 54 F.3d 789, 795 (D.C. Cir. 1995) (holding deference to agency must be afforded as mandated by *Chevron*); ILCO, 996 F.2d at 1130 (affirming *Chevron* rule that reasonable agency determinations of unclear statutes are to be afforded deference where statute is silent or ambiguous as to issue in question); Western Oil, 767 F.2d at 606 (applying part two of *Chevron* two part test to EPA's construction of CAA).

63. 51 F.3d 1053 (D.C. Cir. 1995).
tives. The statute prohibits new fuel additives not “substantially similar” to existing fuel additives from being introduced into commerce. The statute also provides that if a manufacturer can demonstrate that a new fuel additive will not contribute to noncompliance of an emissions standard, the manufacturer may apply to the Administrator for a waiver. The issue before the Ethyl Corp. court was whether the EPA Administrator impermissibly construed the statute by considering factors other than emission standards in denying the waiver for the new fuel additive.

In reviewing EPA’s construction of the statute, the Ethyl Corp. court determined that Congress had in fact addressed the question at issue. The D.C. Circuit determined that since the language of the statute was unambiguous, the court was obligated to give effect to “the unambiguously expressed intent of Congress,” which clearly directed the Administrator to consider only emission effects in making waiver determinations.

E. Nondelegation

The D.C. Circuit addressed the issue of nondelegation with respect to CAA in American Trucking Associations, Inc. v. EPA. The

64. See id. at 1054 (enunciating Ethyl Corp.’s central issue).
67. See id. at 1054. Although the statutory provision called for the Administrator to consider emission effects of the new fuel additive in making waiver determinations, the Administrator also considered other factors, including health effects. See id. at 1055.
68. See id. at 1058. Examining relevant statutory language, the Ethyl court determined that the provision clearly directed the Administrator to consider only emission effects in making waiver determinations. See id.
70. 175 F.3d 1027 (D.C. Cir. 1999) (addressing nondelegation issue with respect to CAA), aff’d in part, rev’d in part, remanded by Whitman v. American Trucking Ass’ns, 121 S. Ct. 903 (2001). The Supreme Court affirmed the D.C. Circuit’s holding that CAA § 7409(b)(1) unambiguously barred cost considerations in setting NAAQS. See id. at 919. However, the Supreme Court reversed the portion of the holding that remanded the issue back to EPA for a “reinterpretation that would avoid a supposed delegation of legislative power.” Id. 912-14. The Court argued that an agency interpretation of a statute could not constitute an unconstitutional delegation of legislative power. See id. at 912. The Court stated, “[I]n a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.” Id.; see also A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (addressing issue of whether Code of Fair Com-
American Trucking court considered whether EPA's Final Rule modifying NAAQS for ozone and particulate matter was based on a construction that amounted to an unconstitutional delegation of legislative power. In setting NAAQS, EPA examined the severity of health effects, the size of the population affected, and the certainty of effect. While the D.C. Circuit acknowledged that these factors alone posed no intrinsic nondelegation issue, EPA failed to articulate any intelligible standard for establishing its ozone and particulate matter limits. Noting that EPA's construction of CAA allowed it to set NAAQS between zero and any point that would yield "killer fog," the D.C. Circuit held that EPA's construction effected an unconstitutional delegation of legislative power.

IV. NARRATIVE ANALYSIS

In Michigan v. EPA, the D.C. Circuit addressed whether EPA's construction of significant contribution under CAA section 7410(a)(2)(D)(i)(I) was proper. In making its determination, the Michigan court addressed several issues pertaining to whether the use of cost-effectiveness as a determination for significance violated section 7410(a)(2)(D)(i)(I).

A. Determining Significant Contribution

In concluding EPA was within its statutory authority, the Michigan court addressed the four arguments advanced by State Petition-

petition for Live Poultry Industry of New York City Metropolitan Area had been adopted pursuant to unconstitutional delegation of legislative power; Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (considering whether National Industrial Recovery Act was "an unconstitutional delegation to the President of legislative power... transcending the authority of Congress... ").

71. See American Trucking, 175 F.3d at 1034 (discussing EPA's Final Rule which revised primary and secondary NAAQS for particulate matter and ozone).

72. See id. at 1035 (discussing National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 88,883 (1997)).

73. See id. at 1034 (stating that EPA lacks "any determinate criterion" for establishing its limits).

74. See id. at 1034-35, 1037 (holding EPA's determination of policy judgment unconstitutional); see also Schecter Poultry Corp., 295 U.S. at 495 (holding code-making authority was unconstitutional delegation of legislative power because it was immensely broad); Panama Refining Co., 293 U.S. at 388 (holding "the wide range of administrative authority... cannot be allowed to obscure the limitations of the authority to delegate.").

75. See Michigan v. EPA, 213 F.3d 663, 674-81 (D.C. Cir. 2000) (looking to past precedent, consideration of costs, uniform controls, and nondelegation to determine whether EPA's evaluation of "contribute significantly" was proper).

76. See id. at 671-81 (addressing whether EPA's cost-effectiveness analysis violated CAA § 7410(a)(2)(D)(i)(I)).
ers: (1) EPA did not act in accordance with precedent; (2) EPA impermissibly considered cost-effectiveness; (3) EPA irrationally required uniform NO\textsubscript{x} controls on the states; and (4) EPA’s determination violated the nondelegation doctrine.\footnote{See id. at 674 (discussing Petitioners’ challenges to EPA’s construction of “contribute significantly.”).}

1. Past Precedent

In their argument concerning past precedent, State Petitioners asserted that cases such as Jefferson County and Connecticut, hinging on the statutory standard in place prior to the 1990 CAA Amendments, barred EPA from considering emissions in the instant case as “significant” within the meaning of section 7410(a)(2)(D)(i)(I).\footnote{See id. at 674 (discussing Petitioners’ argument against EPA’s Final Rule regarding past precedent).} The previous standard, on which Jefferson County and Connecticut were based, contained the phrase “prevent attainment.”\footnote{See id. at 674 (discussing Petitioners’ arguments regarding prior provisions of CAA); see also 42 U.S.C. § 7410(a)(2)(E) (1982) (setting forth regulations prescribing primary and secondary NAAQS).} In these cases, the Second and Sixth Circuits upheld EPA’s conclusion that emissions from upwind states, which impacted downwind states more than the impacts involved in the instant case, were not substantial enough to prevent attainment.\footnote{Michigan, 213 F.3d at 674 (distinguishing Michigan from both Jefferson County and Connecticut).} Essentially, Petitioners’ argument equated the previous standard, “prevent attainment,” with the new standard, “contribute significantly to nonattainment.”\footnote{See Michigan, 213 F.3d at 674 (discussing previous EPA decisions based on CAA prior to 1990 Amendments). For a complete discussion of cases involving previous EPA decisions based on CAA prior to the 1990 Amendments, see supra notes 36-45 and accompanying text.}

Noting that Jefferson County and Connecticut were based on SO\textsubscript{2} emissions rather than NO\textsubscript{x} emissions, the D.C. Circuit determined that EPA did not bind itself to any particular criterion under the old standard and that nothing in the language of the 1990 Amendments to the statute provided any criteria for classifying emissions as “significant.”\footnote{See Michigan, 213 F.3d at 674 (discussing state Petitioners’ arguments regarding prior provisions of CAA); see also 42 U.S.C. § 7410(a)(2)(E) (1982) (setting forth regulations prescribing primary and secondary NAAQS).} The Michigan court held that Petitioners’ claim

\footnote{Michigan, 213 F.3d at 674 (discussing previous EPA decisions based on CAA prior to 1990 Amendments). For a complete discussion of cases involving previous EPA decisions based on CAA prior to the 1990 Amendments, see supra notes 36-45 and accompanying text.}
fell short since it failed to identify any previous adoption of a binding standard by EPA. 83

2. Consideration of Costs

In consideration of Petitioners' argument that EPA impermissibly considered cost-effectiveness in its determination, the D.C. Circuit first looked to the statutory language of section 7410(a)(2)(D)(i)(I). 84 The D.C. Circuit noted that the term "significant" does not convey "unidimensionality" and, therefore, does not convey an exclusive consideration of health effects. 85 The Michigan court then stated that Petitioners failed to provide an alternative analysis whereby EPA could determine "significance" considering only health factors. 86

Relying on NRDC, Petitioners argued that EPA was precluded from considering cost-effectiveness as a primary factor for determining significant contribution under section 7410(a)(2)(D)(i)(I). 87 The D.C. Circuit concluded that while its decision in NRDC acknowledged that the statutory language and legislative history provided little support for the consideration of costs absent a "clear congressional intent to preclude consideration of cost," EPA was not barred from applying costs. 88 The Michigan court upheld EPA's decision pursuant to the notion that there must be a clear congressional intent to preclude the consideration of costs. 89

3. Uniform Controls

With respect to the issue of uniform controls, the Michigan court considered two principal arguments set forth by Petitioners. 90

83. See id. (concluding Petitioners' claim inadequate since EPA never adopted binding concept of how much emissions activity was too much under CAA § 7410(a)(2)(D)(i)(I)).
84. See id. at 674 (discussing Petitioners' claim that CAA § 7410(a)(2)(D)(i)(I) does not authorize EPA to consider cost of ozone reduction).
85. See id. at 677 (discussing Petitioners' claim that "significant" connotes "unidimensionality" in measuring factors deemed "significant").
86. See id. at 678. Petitioners stressed that EPA is required to "establish a definition of significance that is dominated by air quality factors, as air quality is the sole factor mentioned in the statute." Id. at 776 (quoting Reply Brief of Petitioning States, page 4).
87. See Michigan, 213 F.3d at 674 (discussing Petitioners' claim with respect to EPA's cost considerations).
88. Id. at 678 (citing NRDC, 824 F.2d 1146, 1163 (D.C. Cir. 1987)).
89. See id. (stating preclusion of costs requires "express congressional direction.").
90. See id. at 679 (discussing Petitioners' claim that EPA's uniform control strategy is irrational in two respects).
Petitioners first contended that, under the EPA Final Rule, regardless of the amount of contribution from a particular state, EPA irrationally required all twenty-three regions to employ uniform controls by mandating that they “reduce their NOx by an amount achievable with ‘highly cost-effective controls.’” 91 The Michigan court maintained that its decision to uphold EPA’s cost-effectiveness analysis necessitated allowing such a consequence.92

Petitioners next asserted that EPA should have imposed more costly reductions for emissions originating from sources located closer to nonattainment areas than sources located further away.93 Relying on EPA methodology, the Michigan court concluded that, by comparison, EPA’s non-uniform regional approaches did not “provide either a significant improvement in air quality or a substantial reduction in cost.” 94 Noting that Petitioners failed to provide a critical analysis of EPA’s methodology, which independent investigators corroborated, the D.C. Circuit held it had no basis to disturb EPA’s findings.95

4. Nondelegation

Relying primarily on the D.C. Circuit’s holding in American Trucking, Petitioners argued that EPA’s Final Rule violated the nondelegation doctrine.96 Because nothing in EPA’s analysis clarified how much NOx contribution was substantial enough to qualify for a SIP call, Petitioners averred that EPA’s construction of “contribute significantly” was not “based on any intelligible principles.” 97 While the D.C. Circuit acknowledged that EPA’s cost-

91. Id. Petitioners claimed that despite considerable differences in contributions to downwind nonattainment, even small contributors must reduce emissions “equivalent to those achievable by highly cost-effective measures.” Id.

92. Michigan, 213 F.3d at 679. The D.C. Circuit concluded that its decision to uphold EPA’s determination to base “significant contribution” on cost differentials logically entailed upholding the consequence of uniform controls. See id.

93. See id. (clarifying Petitioners’ second argument against uniform controls).

94. Id. (quoting Final Rule, 63 Fed. Reg. at 57,423) (evaluating EPA’s methodology and regional approaches to air quality and cost reduction).

95. See id. at 679-80. The D.C. Circuit looked to an independent investigator which confirmed EPA’s methodology, stating “there was no clear benefit to an exposure-based trading system, compared with simple ton-for-ton NOx trading.” Id. at 679-80 (quoting Krupnick & Anderson, A Dilemma Downwind, 137 Resources For The Future 5, 6 (1999)).

96. See id. at 680 (discussing Petitioners’ nondelegation argument); see generally American Trucking, 175 F.3d 1027 (D.C. Cir. 1999). For a further discussion of American Trucking facts, see supra notes 70-74 and accompanying text.

97. Michigan, 213 F.3d at 680. The D.C. Circuit explained that Petitioners’ argument for nondelegation centered on the fact that EPA’s analysis did not explain where the line to establish significant contribution would be drawn. See id.
effectiveness analysis was a "radically incomplete line-drawing device," the Michigan court asserted that the statute contained certain threshold limitations which confined the reach of the statute to "a modest role." The D.C. Circuit maintained that a number of cases, including American Trucking, have upheld delegations of standardless discretion on the premise that such discretion could only be narrowly deployed by agencies. The Michigan court consequently determined that because the threshold criteria required under the statute effectively limited EPA’s authority, American Trucking was distinguishable from the instant case. Resting on these principles, the Michigan court held that EPA’s decision did not violate the nondelegation doctrine.

B. The Dissent

In accordance with Petitioners’ argument, Circuit Judge Sentelle offered the sole dissenting opinion in Michigan. Judge Sentelle contended that EPA did not have the statutory authority to consider costs under section 7410(a)(2)(D)(i)(I). The dissent stated that because EPA lacked the statutory authority to consider costs, the majority’s analysis should not have addressed the other considerations set forth in the controversy.

98. Id. The D.C. Circuit listed three threshold considerations that EPA must make before assessing “significance” according to CAA § 7410(a)(2)(D)(i)(I). See id. First, EPA must find that emissions activity exists within a particular state. See id. Second, EPA must demonstrate that such emissions are migrating into other areas. See id. Finally, EPA must show that such emissions contribute to nonattainment. See id.

99. See id. at 680 (citing American Trucking, 175 F.3d at 1037) (holding EPA’s Final Rule modifying NAAQS for ozone and particulate matter created unconstitutional delegation of legislative power); see also International Union, UAW v. OSHA (“Lockout/Tagout I”), 938 F.2d 1310 (D.C. Cir. 1991) (noting scope of agency’s “claimed power to roam was immense, encompassing all American enterprise.”); Synar v. United States, 626 F.Supp. 1374, 1383 (D.D.C. 1986) (three-judge panel), aff’d sub nom. Bowsher v. Synar, 478 U.S. 714 (1986) (stating “[w]hen the scope increases to immense proportions . . . the standards must be correspondingly more precise.”).

100. See Michigan, 213 F.3d at 680-81 (discussing threshold determinations EPA must make before assessing significance).

101. See id. at 681 (holding EPA’s decision was not based on intelligible principles).

102. See id. at 695-97 (agreeing with Petitioners that EPA undeniably exceeded its statutory authority).

103. See id. at 696 (Sentelle, J., dissenting) (stating that statutory language does not confer upon EPA authority to consider costs).

104. See id. (discussing majority’s complex and extensive opinion and declining to address any subsidiary issues).
Judge Sentelle asserted that while Congress provided one criterion for determining whether emissions "contribute significantly to nonattainment" in downwind states, EPA impermissibly adopted a separate criterion.\(^{105}\) Looking to the *Ethyl Corp.* decision barring EPA's consideration of other criterion where the plain language of a statutory provision clearly identifies the criterion to be used, Judge Sentelle questioned why the instant controversy did not "fall squarely within the four corners of . . . Ethyl Corp."\(^{106}\)

Referring to the statutory language, the dissent argued that Congress clearly authorized EPA to base its findings on amounts of pollutants "measured in terms of significance of contribution to downwind nonattainment," rather than costs of alleviation.\(^{107}\) The dissent further contended that the majority incorrectly separated "significantly" from "contribute," resulting in the majority's disregard for the statutory language of section 7410(a)(2)(D)(i)(I) discussing "amounts" of "air pollutants" that "contribute significantly" to nonattainment.\(^{108}\) Finally, looking to *Chevron*, the dissent asserted that the majority failed to properly reach the second prong of the *Chevron* analysis since neither EPA nor the majority offered any sensible interpretation of the statute relating cost-effectiveness to its language.\(^{109}\)

V. CRITICAL ANALYSIS

The *Michigan* court's holding that EPA properly interpreted "contribute significantly" under CAA section 7410(a)(2)(D)(i)(I) is erroneous in several respects.\(^{110}\) First, the *Michigan* court incorrectly held that EPA acted in accordance with past precedent.\(^{111}\) Next, the *Michigan* court wrongly found EPA's consideration of

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105. See *Michigan*, 213 F.3d at 696 (Sentelle, J., dissenting) (stating that while Congress set forth one criterion, EPA impermissibly adopted another criterion).

106. *Id.* (noting similarities between *Michigan* and *Ethyl Corp.*). For a further discussion on the *Ethyl Corp.* holding, see supra notes 63-69 and accompanying text.


108. *Id.* Examining the statutory language of CAA § 7410(a)(2)(D)(i)(I), the dissent asserted that "no reasonable reading of the statutory provision in its entirety allows the term significantly to springboard costs of alleviation into EPA's statutorily defined authority." *Id.*

109. *Id.* at 697. For a complete discussion on the *Chevron* court's analysis, see supra notes 53-62 and accompanying text.

110. For a further discussion of the *Michigan* court's holding regarding EPA's determination of "contribute significantly" under CAA § 7410(a)(2)(D)(i)(I), see infra notes 115-61 and accompanying text.

111. For a further discussion of the *Michigan* court's holding on past precedent, see infra notes 115-27 and accompanying text.
costs was permissible under section 7410(a)(2)(D)(i)(I). Additiona-
ecessarily, the Michigan court improperly found that EPA’s uniform
controls imposed on the states were not irrational. Finally, the Michigan court erroneously held that EPA’s determination was based on intelligible principles.

A. Past Precedent

The D.C. Circuit inappropriately held that EPA’s interpretation of “contribute significantly” was correct with respect to past precedent. The two main principles on which the court distinguished Jefferson County and Connecticut were erroneous under the statutory language of section 7410(a)(2)(D)(i)(I). First, the Michigan court inappropriately contended that past precedent was never established because EPA did not bind itself to any particular criterion. Secondly, the court inappropriately concluded that the amended provision provided no criterion.

While the Michigan court stated that EPA did not bind itself to a particular criterion under the previous statutory language, the court overlooked the fact that EPA based its decisions in Jefferson County and Connecticut on amounts of pollutants. Both Jefferson County and Connecticut established that EPA understood that its de-

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112. For a further discussion of the Michigan court’s decision that EPA’s cost considerations are permissible under CAA § 7410(a)(2)(D)(i)(I), see infra notes 128-46 and accompanying text.
113. For a further discussion of the Michigan court’s decision that uniform NOx controls imposed upon states were not irrational, see infra notes 147-52 and accompanying text.
114. For a further discussion of the Michigan court’s finding that EPA’s determination was based upon intelligible principles, see infra notes 153-61 and accompanying text.
115. See Michigan, 213 F.3d at 674. For a complete discussion on the Michigan court’s analysis of the Jefferson County and Connecticut decisions, see supra notes 116-27 and accompanying text.
116. See Michigan, 213 F.3d at 674 (discussing whether EPA bound itself to any criteria).
117. See id.
118. See Jefferson County, 739 F.2d at 1071, 1078 (6th Cir. 1984). EPA examined emissions from Gallagher by performing modeling studies in order to determine whether the percentage of SO2 emissions was significant enough to have caused or substantially contributed to NAAQS violations in Kentucky. See id.; see also Connecticut v. EPA, 696 F.2d 147, 153 (2d Cir. 1982). EPA used statistical modeling to determine whether the percentage of SO2 emitted from power plants in New York were substantial enough to prevent attainment of NAAQS in Connecticut. See id.
termination of whether emissions from one state prevent attainment in other states must be based on amounts of pollutants.\textsuperscript{119}

The plain language of the amended provision of section 7410(a)(2)(D)(i)(I) likewise provides that EPA must base its determination on amounts of pollutants.\textsuperscript{120} As the dissent correctly demonstrated, the amended section provides that EPA shall prevent states from emitting "pollutant[s] in amounts which will . . . contribute significantly to non attainment."\textsuperscript{121} Accordingly, the D.C. Circuit incorrectly concluded that the amended provision provided no criterion.\textsuperscript{122}

In distinguishing Jefferson County and Connecticut from the instant case, the D.C. Circuit implied that Petitioners incorrectly equated the former statutory standard of "prevent attainment" with the present standard of "contribute significantly to non attainment."\textsuperscript{123} Although Jefferson County based its decision on the language of the previous statutory provision, the Sixth Circuit adopted a test similar to that dictated by the current language of section 7410(a)(2)(D)(i)(I).\textsuperscript{124} Examining CAA statutory language, the Jefferson County court based its holding on whether emissions from one state "significantly contributed" to NAAQS violations in differ-


\textsuperscript{120} See Michigan, 213 F.3d at 695-97 (Sentelle, J. dissenting) (stating CAA § 7410(a)(2)(D)(i)(I) empowers EPA to base its decision on amounts of pollutants); see also 42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994) (stating EPA must police SIPs to ensure that they contain adequate provisions that will prohibit sources within States from emitting "pollutants in amounts which will . . . contribute significantly to non attainment.").

\textsuperscript{121} See Michigan, 213 F.3d at 695 (Sentelle, J. dissenting) (quoting 42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994)).

\textsuperscript{122} See id. at 695-97. The dissenting opinion in Michigan concluded the majority incorrectly held that CAA § 7410(a)(2)(D)(i)(I) provides no criteria for determining whether a state's contribution to another state's non attainment is significant. See id. at 696. For a further discussion of the dissenting opinion, see supra notes 103-09 and accompanying text.

\textsuperscript{123} Michigan, 213 F.3d at 674. The Michigan court also noted that "given EPA's finding as to the cumulative effects of the pollutants that generate ozone, EPA might well be able to distinguish this case from the sulfur dioxide cases that states have cited." Id.

\textsuperscript{124} See Jefferson County, 739 F.2d at 1093 (determining proper test Congress intended under CAA § 7426(a) was "whether one state 'significantly contributes' to NAAQS violations in another state."); see also 42 U.S.C. § 7426(a) (Supp. V 1981) (requiring written notice of any new source of pollution to closely situated states).
ent states.125 Similarly, in Connecticut, the Second Circuit rejected a literal reading of the word “prevent” under the previous statutory language, implying that the burden of proof on Petitioners would be too great.126 Based on the interpretation of the previous statutory language set forth by the Second and Sixth Circuits, Petitioners in Michigan were in fact correct in equating the two provisions.127

B. Consideration of Costs

The D.C. Circuit applied an inadequate analysis to the statutory language of section 7410(a)(2)(D)(i)(I) and to prior holdings in its decision that EPA’s consideration of costs was permissible.128 The Michigan court reasoned that because the term “significant” does not convey a unidimensional measure, EPA was not bound to any particular type of assessment.129 This conclusion is flawed because it effectively dissociates the adverb “significantly” from the verb it modifies, “contributes.”130 Consequently, the D.C. Circuit failed to acknowledge that the statute permits EPA to look for that which is being contributed, namely “an amount of an air pollutant.”131 By isolating the term “significantly” and failing to consider other terms provided for in the statute, the court grants EPA au-

125. See Jefferson County, 739 F.2d at 1093 (holding power plant contributing three percent of pollutants violating Jefferson County’s NAAQS did not significantly contribute under CAA § 7426). For a further discussion on Jefferson County, see supra notes 36-41 and accompanying text.


127. For a complete discussion of Petitioners’ Jefferson County and Connecticut arguments, see supra notes 36-45 and accompanying text.

128. See Michigan, 213 F.3d at 696 (Sentelle, J., dissenting). The Michigan dissent concluded that both the majority and EPA clearly contorted the language of CAA § 7410(a)(2)(D)(i)(I) in order to justify cost considerations under the statute. See id.; see also NRDC v. EPA, 824 F.2d 1146, 1166 (D.C. Cir. 1987) (holding cost considerations impermissible when determining what is safe); Ethyl Corp. v. EPA, 51 F.3d 1053, 1058 (D.C. Cir. 1995) (holding courts must give effect to “the unambiguously expressed intent of Congress.”).

129. See Michigan, 213 F.3d at 677. The D.C. Circuit acknowledged that the term “significant” would be an odd term for Congress to choose in order to express unidimensionality. See id. The Court referred to the phrase “significant other” to support its reasoning. See id.

130. See id. at 696 (Sentelle, J., dissenting). Dissenting Judge Sentelle stated, “I marvel at an interpretation that permits cost effectiveness to find a place in a statutory provision addressing amounts of air pollutant contribution.” Id. The dissent then explained that Congress clearly intended EPA to look for an “‘amount’ of an ‘air pollutant,’” as being contributed significantly. Id.

131. See id. (Sentelle, J., dissenting). The dissenting opinion noted that the majority disregarded the fact that the statute authorizes EPA to address that which is being “contributed significantly.” Id.
authority that was not expressly provided for in section 7410(a)(2)(D)(i)(I).\textsuperscript{132}

Accordingly, \textit{Michigan} is inconsistent with the D.C. Circuit's reasoning set forth in \textit{NRDC}.\textsuperscript{133} Although the holding in \textit{NRDC} did not preclude EPA from considering costs, it clearly prohibited EPA from making its determination based on costs when the statutory language identifies a principal criterion.\textsuperscript{134} As the dissenting opinion in \textit{Michigan} demonstrated, the solitary criterion Congress set forth in section 7410(a)(2)(D)(i)(I) was "amounts of pollutants."\textsuperscript{135} Because the provision contains no requisite "clear congressional intent to preclude consideration of cost . . . ," EPA is barred from employing cost-effectiveness as its chief consideration under \textit{NRDC}.\textsuperscript{136}

Moreover, in light of the D.C. Circuit's holding in \textit{Ethyl Corp.}, its holding in \textit{Michigan} was improper.\textsuperscript{137} The crux of the D.C. Circuit's decision in \textit{Ethyl Corp.} rested on the notion that when plain statutory language clearly indicates that "‘decisions are to be based on one criterion, [ ] EPA cannot base its decision on other criteria.'"\textsuperscript{138} In section 7410(a)(2)(D)(i)(I), Congress provided a criterion based on amounts of air pollutants.\textsuperscript{139} Nonetheless, EPA disregarded this standard and applied a "cost-effectiveness of alleviation" criterion.\textsuperscript{140} By allowing EPA to apply a criterion that does

\begin{itemize}
  \item \textsuperscript{132}. See \textit{id.} at 695 (Sentelle, J., dissenting) (agreeing with Petitioners that EPA has undeniably "exceeded its statutory authority.").
  \item \textsuperscript{133}. See \textit{id.} at 678-79. For a discussion of the \textit{Michigan} court's holding with respect to \textit{NRDC}, see \textit{supra} notes 87-89 and accompanying text.
  \item \textsuperscript{134}. See \textit{NRDC v. EPA}, 824 F.2d 1146, 1165 (D.C. Cir. 1987) (stating cost considerations are relevant in determining what is safe).
  \item \textsuperscript{135}. See \textit{Michigan}, 213 F.3d at 696 (Sentelle, J., dissenting) (stating that Congress has set forth one criterion in form of amounts of pollutants that contribute significantly to nonattainment in downwind states).
  \item \textsuperscript{136}. \textit{NRDC}, 824 F.2d at 1163. While the \textit{NRDC} court allowed EPA to consider costs, it recognized that when Congress provides a principal criterion, EPA is flatly barred from basing its analysis on cost considerations. See \textit{id.} at 1164-65.
  \item \textsuperscript{137}. See \textit{Michigan}, 213 F.3d at 696 (Sentelle, J., dissenting). The dissent concluded, "I would remind the agency once more of the lessons of . . . \textit{Ethyl Corp.}, allow the petitions for review, and end the case." \textit{id.}
  \item \textsuperscript{138}. See \textit{id.} at 696 (Sentelle, J., dissenting) (quoting \textit{Ethyl Corp. v. EPA}, 51 F.3d 1053, 1058 (D.C. Cir. 1995)) (holding EPA must not base its decision regarding air pollutants on criteria other than that provided in statutory provision).
  \item \textsuperscript{139}. See \textit{id.} (stating Congress clearly provided that EPA decisions under CAA § 7410(a)(2)(D)(i)(I) are to be based on amounts of air pollutants); see also 42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994) (setting forth regulations prescribing primary and secondary NAAQS).
  \item \textsuperscript{140}. See \textit{Michigan}, 213 F.3d at 674-79. For a further discussion of EPA's cost-effectiveness analysis, see \textit{supra} notes 12-20 and accompanying text.
\end{itemize}
not exist in the statutory language, the D.C. Circuit incorrectly applied its own rule.141

Similarly, the Michigan court’s holding inappropriately implicated an analysis under the second prong of the Chevron test.142 The Michigan court’s conclusion implied that EPA is free to base its decision on cost-effectiveness insofar as Congress has not explicitly prohibited such an analysis.143 Congress’ intent in section 7410(a)(2)(D)(i)(I) is apparent; EPA must base its decision on amounts of pollutants that “contribute significantly to nonattainment” in downwind states.144 Although Congress did not define significant contribution or amount, neither EPA nor the Michigan court provided a reasonable interpretation that justified EPA’s use of cost-effectiveness.145 To compel application of the second prong of the Chevron test whenever a statutory provision does not explicitly prohibit an asserted legislative power is inconsistent with established precedent recognized by the D.C. Circuit.146

C. Uniform Controls

Because EPA’s regulatory scheme was erroneously based on cost considerations, it should have been overruled at the outset and the Michigan court’s analysis should not have reached such subsidiary issues as uniform controls.147 Upholding EPA’s uniform controls decision, the D.C. Circuit determined that its decision to allow EPA to consider cost-effectiveness necessitated the requirement

141. Id. at 696 (Sentelle, J., dissenting). The dissenting opinion stated that “the present controversy falls squarely within the four corners of . . . Ethyl Corp.” Id. Therefore, according to the D.C. Circuit’s opinion in Ethyl Corp., EPA should not have been permitted to consider costs. See id. For a complete discussion of the Ethyl Corp. holding, see supra notes 63-69 and accompanying text.

142. See Michigan, 213 F.3d at 697 (Sentelle, J., dissenting) (stating nothing in Chevron supports Michigan result). For a complete discussion of the Chevron holding, see supra notes 53-62 and accompanying text.

143. See Michigan, 213 F.3d at 697 (Sentelle, J., dissenting) (stating EPA’s position essentially implies that EPA may use any criteria not expressly forbidden by Congress).

144. See id. at 696 (Sentelle, J., dissenting) (stating both EPA and Michigan majority failed to offer any reasonable interpretation of statutory language which enabled them to depend upon or even relate to cost-effectiveness of alleviation).

145. See id. at 696 (Sentelle, J., dissenting) (stating, “I marvel at an interpretation that permits cost-effectiveness to find a place in a statutory provision addressing amounts of air pollutant contribution.”).

146. See id. at 697 (Sentelle, J., dissenting) (stating that when statutory language is unambiguous “EPA cannot base its decision on other criteria, even on a criterion as laudable as the health of the public.”).

147. See id. at 697 (Sentelle, J., dissenting). In his dissenting opinion, Judge Sentelle refused to address subsidiary issues discussed in the majority opinion in light of EPA’s unfounded regulatory scheme. See id.
that all twenty-three jurisdictions uniformly reduce their NOx emissions utilizing "highly cost-effective controls." Because the Michigan court reached its conclusion based on principles that run contrary to the clear language of section 7410(a)(2)(D)(i)(I), as well as the established principles set forth in NRDC, Ethyl Corp., and Chevron, the issue of uniform controls is consequently obsolete. Petitioners provided no critical analysis of EPA's methodology with respect to EPA's construction of the statutory provision on which EPA based its methodology. Nevertheless, the established case law of NRDC, Ethyl Corp., and Chevron clearly prohibits EPA from basing its consideration on costs. Consequently, because EPA based its findings on impermissible criteria, the issue of uniform controls should be nullified.

D. Nondelegation

While the Michigan court was correct in its determination that EPA did not violate the nondelegation doctrine, it inappropriately concluded that EPA's cost-effectiveness analysis was based on intelligible principles. Indeed, Congress expressly provided an intelligible principle in section 7410(a)(2)(D)(i)(I), amounts of pollu-

148. See Michigan, 213 F.3d at 679 (stating uniform controls "flow[ ] ineluctably from EPA's decision to draw 'significant contribution' line on basis of cost differentials.").

149. See id. at 695 (Sentelle, J., dissenting) (emphasizing EPA, as federal agency, "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress."). For a complete discussion of the Michigan court's analysis of NRDC, Ethyl Corp., and Chevron, see supra notes 128-46 and accompanying text.

150. See Michigan, 213 F.3d at 679 (noting that state petitioners provided "no material critique of EPA's methodology.").

151. See id. at 696 (Sentelle, J., dissenting). Evaluating relevant case law, such as Ethyl Corp., the dissent averred that the Michigan court's analysis contradicted past precedent. See id. The dissenting opinion also concluded that, in light of the lessons of cases like Ethyl Corp., the Michigan court should not have permitted EPA's cost-effectiveness analysis and, therefore, should have ended its analysis without addressing any subsidiary issues. See id. at 697.

152. See id. at 697 (Sentelle, J., dissenting) (refusing to address subsidiary issues).

153. See Whitman v. American Trucking Ass'ns, 121 S. Ct. 903, 912 (2001) (stating "[i]n a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.").
However, EPA based its determination on a principle not provided for in the statute, cost-effectiveness. The Michigan court acknowledged that EPA "neither rest[ed] [its] benchmark on anything in the language or function of [section 7410(a)(2)(D)(i)(I)], nor otherwise explains why the resulting cut-off point represents the right degree of 'cost-effectiveness.'" Moreover, the Michigan court appropriately recognized that EPA's cost-effectiveness analysis was "a radically incomplete line-drawing device," yet, the court concluded that such lack of discretion was distinguishable from cases such as American Trucking. The D.C. Circuit based this distinction on the flawed premise that EPA's discretion under section 7410(a)(2)(D)(i)(I) could only be deployed in a "narrower scope." Nonetheless, the court admitted that the provision nominally "encompasses 'all American enterprise.'" The Michigan court determined that the "threshold determinations" that EPA must make before assessing "significance," tended to confine EPA's activity under the statute. Although these threshold criteria establish which states contribute to nonattainment, as the Michigan court recognized, EPA's cost-effectiveness analysis for determining significance remains radically incomplete.

VI. IMPACT

The implications of the Michigan court's decision to allow EPA to consider costs in promulgating CAA section 7410(a)(2)(D)(i)(I)

154. See 42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994) (requiring SIPs to include provisions prohibiting "any source . . . of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, . . . any other State . . . ").

155. See Final Rule, 63 Fed. Reg. at 57,356 (requiring twenty-three jurisdictions to reduce NOx emissions by amount that can be achieved for less than $2,000 dollars per ton).

156. Michigan, 213 F.3d at 680 (questioning relationship between designated cut-off point and level of cost-effectiveness).

157. Id. (stating EPA's determination of cut-off point was "essentially unbounded.").

158. See id. While the Michigan court emphasized the narrow scope to which EPA is limited when employing CAA § 7410(a)(2)(D)(i)(I), it noted that "[n]early half the nation is affected and control costs will be substantial." Id.

159. Id. (recognizing broad reach of CAA § 7410(a)(2)(D)(i)(I)).

160. See id. at 680-81. The Michigan court referred to threshold criteria requiring EPA to determine emissions activity exists within a state, such emissions migrate into downwind states and the emissions contribute to nonattainment. See id. at 680.

161. See Michigan, 213 F.3d at 680-81 (stating EPA's cost-effectiveness analysis is radically incomplete in establishing how much NOx is worthy of SIP call).
are multifaceted. While the ultimate effects of the decision with respect to the problem of ozone transport remain to be seen, the immediate impact is that EPA's authority under section 7410(a)(2)(D)(i)(I) has been greatly expanded beyond the scope intended by Congress.162

While EPA has reached its determination in pursuit of a goal as commendable as clean air, it is fundamental that the agency's power to enforce legislative regulation is restricted to the authority expressly delegated by Congress.163 As the D.C. Circuit previously recognized in Ethyl Corp., "[w]ere courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron and quite likely with the Constitution as well."164 Indeed, with the holding of the Michigan court, the D.C. Circuit has consequently realized its own fears.165 Because the Michigan court's decision to allow EPA to consider costs under section 7410(a)(2)(D)(i)(I) expands EPA's authority under the provision, so long as the scope of EPA's discretion under the statute remains unchecked, "the dam constituted by these criteria will burst."166

Erika Jean Doyle

162. See id. at 696 (Sentelle, J., dissenting) (concluding Michigan court's analysis contorted statutory language in order to justify applying cost considerations).
163. See id. at 695-96 (Sentelle, J., dissenting) (discussing American Petroleum's warning to EPA that its power is limited to what Congress has delegated to it).
165. For a complete discussion of the propriety of the Michigan court's holding, see supra notes 115-61 and accompanying text.
166. See Michigan, 213 F.3d at 680-81 (observing substantial costs of pollution controls and far reaching effects of EPA's decision).