Wall v. United States Environmental Protection Agency: The Sixth Circuit Overturns a Hazardous Ozone Area Redesignation

I. OVERVIEW OF THE CASE

In 1978, the United States Environmental Protection Agency (EPA) designated the Cincinnati metropolitan area as an ozone nonattainment region pursuant to the 1977 Amendments to the Clean Air Act (CAA).[1] The Cincinnati metropolitan area encompasses counties in Kentucky and Ohio, formally referred to as a "multi-State ozone non-attainment area."[2] After Congress passed the 1990 Amendments of the CAA, the EPA reaffirmed the Cincinnati metropolitan area's moderate ozone nonattainment designation.[3] The EPA required Kentucky and Ohio to submit revisions to their respective state implementation plans (SIPs) in accordance with the regulations for their current designation, including measures to achieve attainment by the November 15, 1996, deadline assigned by the EPA.[4] In 1994, after timely submission of the SIP revisions, Kentucky and Ohio submitted requests for the EPA to redesignate the Cincinnati metropolitan area to ozone attainment.[5] The EPA denied both states' redesignation requests because the area violated the national ambient air quality standards (NAAQS) for ozone during the summer of 1995.[6] Kentucky, and Ohio as an intervenor, filed suit against the EPA for denying Kentucky's redesignation request.[7] Kentucky argued that the decision was unreasonable because the EPA did not limit the ozone level review to the years presented by the request, but instead based their denial on data recorded after the state requested redesignation.[8] The court affirmed the EPA's decision as a reasonable

1. Wall v. EPA, 265 F.3d 426, 432 (6th Cir. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Kentucky v. EPA, No. 96-4274, 1998 WL 661138, at *1 (6th Cir. 1998).
8. *Id.* at *2.

interpretation of the relevant statutory language absent explicit guidance from Congress.[9] In 1999, Kentucky and Ohio again submitted requests for the EPA to redesignate the Cincinnati metropolitan area to attainment status.[10] The supporting data included records showing the area did not exceed the ozone NAAQS between 1996 and 1998 and continued to comply with the NAAQS throughout 1999.[11] On January 24, 2000, the EPA published a notice of proposed approval for Kentucky's and Ohio's SIP submissions and redesignation requests.[12] Wall and Fremont, Ohio residents, and the Sierra Club challenged the EPA's decision on several grounds in an official comment to J. Elmer Bortzer, Chief of the Regulation Development Section of the EPA.[13] The EPA eventually entered a final decision to redesignate the Cincinnati metropolitan area from nonattainment to attainment for ground-level ozone and to approve the area's clean air maintenance plan.[14]

Wall and Fremont (with the Sierra Club intervening) filed suit against the EPA in the United States Court of Appeals for the Sixth Circuit to overrule the EPA's final decision.[15] The Sixth Circuit vacated the EPA's decision to redesignate the Cincinnati metropolitan area to attainment status and remanded the case for further proceedings.[16] The plaintiffs argued that neither Kentucky nor Ohio evinced adequate maintenance plans and that the EPA failed to apply the procedural requirements of the CAA properly to the Kentucky and Ohio redesignation requests.[17] The Sixth Circuit upheld the EPA's attainment-emissions approach used to demonstrate the adequacy of Kentucky's and Ohio's maintenance plans.[18] The court also affirmed the EPA's decision to consider the redesignation requests for the Cincinnati metropolitan area without Kentucky submitting revised transportation-conformity requirements for their SIP.[19] However, the Sixth Circuit found that the EPA impermissibly redesignated the area to attainment status because EPA

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9. *Id.* at *2-*4.
10. *Wall*, 265 F.3d at 433.
11. *Id.*
12. *Id.* (citing Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Ohio and Kentucky, 65 Fed. Reg. 3630 (Jan. 26, 2000)).
13. *Wall*, 265 F.3d at 433-34.
14. *Id.* at 434 (citing Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Ohio and Kentucky, 65 Fed. Reg. 37,879 (June 19, 2000)).
15. *Wall*, 265 F.3d at 427.
16. *Id.* at 442.
17. *Id.* at 435.
18. *Id.* at 435-38.
19. *Id.* at 440.

granted redesignation before Ohio adopted reasonably available control technology (RACT) rules into its SIP. *Wall v. United States Environmental Protection Agency*, 265 F.3d 426 (6th Cir. 2001).

II. BACKGROUND

Ground-level ozone forms when its precursors, nitrogen oxides and volatile organic compounds (VOC), are emitted into the atmosphere and exposed to sunlight.[20] Ozone inhalation can cause health problems, such as respiratory infections, chest pains, and nausea, in the healthiest adults.[21] Ozone's high chemical reactivity corrodes metals and paints.[22] Pollution sources do not directly release ozone, thus contributing to urban smog; instead, sources such as motor vehicles, factories, and power plants emit the ozone precursors necessary for ozone formation.[23] The EPA and state governments use air quality models to predict ozone levels resulting from selected precursor source combinations.[24]

The CAA mandates the EPA to set forth a NAAQS for recognized airborne pollutants, including ozone, to protect the public health and welfare.[25] The agency categorizes geographic areas as "attainment," "nonattainment," or "unclassifiable," depending on whether the areas satisfy the statutory NAAQS.[26] The degree of federally regulated pollution control heightens according to an area's designation, nonattainment requiring the most stringent regulation scheme.[27] The CAA holds states responsible for complying with the NAAQS.[28] States must submit to the EPA a SIP that enumerates the state's proposed actions for attaining the EPA's air quality standards by a given date for each known pollutant.[29] The CAA requires a SIP to "include enforceable emission limitations and other control measures, means, or techniques," provide for the "establishment and operation of appropriate devices" needed to gather air quality data, and include enforcement programs.[30]

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20. *Id.* at 427-28 (citing H.R. REP. NO. 101-490 (1990)).
21. *Id.* at 428.
22. *Id.*
23. *Id.*
24. *Id.* (citing Ohio v. EPA, 784 F.2d 224, 228-29 (6th Cir. 1986)).
25. *Id.* (citing 42 U.S.C. § 7409 (1994)).
26. *Id.* (citing 42 U.S.C. § 7407(d)).
27. *Id.* (citing 42 U.S.C. §§ 7505-7515); *see also id.* (citing 42 U.S.C. § 7511(a) (breaking nonattainment down into categories of "marginal," "moderate," "serious," "severe," and "extreme")).
28. *Wall*, 265 F.3d at 428.
29. *Id.* (citing 42 U.S.C. § 7410(k)).
30. *Id.* at 430 (citing 42 U.S.C. § 7410(a)(2)(A)-(C)).

The CAA allows states to request that the EPA redesignate an area with improved air quality from nonattainment to attainment status.[31] Redesignation consequentially alleviates the state's duty to adhere to the pollution control measures exclusive to nonattainment areas.[32] The state's obligation shifts from effectuating the SIP to implementing the maintenance plan through the enforcement measures.[33] To fulfill the criteria for redesignation, (1) a state must attain the NAAQS for ozone levels, (2) the EPA must fully approve the state's SIP, (3) the EPA must determine air quality improvement is due to permanent and enforceable reductions resulting from the SIP and federal control regulations, (4) the EPA must approve a state maintenance plan ensuring compliance with the NAAQS for ten years after redesignation, and (5) the state must demonstrate compliance with the SIP requirements.[34] The EPA provides interpretative guidance for the redesignation requirements in the general preamble to the 1990 CAA Amendments.[35]

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court adjudicated whether the EPA reasonably constructed the CAA term "stationary source."[36] The 1977 CAA Amendments required nonattainment states to enact a permit program that regulated "new or modified major stationary sources" of air pollution.[37] The EPA's interpretation allowed states to use a plant-wide definition for stationary source, which eliminated the need for existing plants to satisfy permit requirements with each equipment installation or modification.[38] The EPA instead mandated that states must demonstrate that the alteration does not increase the plant's total emission.[39] The Supreme Court established a two-part analysis to determine the reasonableness of the EPA's construction.[40] First, if Congress explicitly addresses the issue, then the court and the agency must yield to Congress's unambiguous intent.[41] Second, if the court finds that Congress does not directly address the issue, then the court determines "whether the agency's answer is based on a permissible construction of the statute."[42] The Court

31. *Id.* at 429 (citing 42 U.S.C. § 7407 (d)(3)(D)).
32. *Id.* (citing 42 U.S.C. § 7410(a)(2)(I)).
33. *Id.* (citing 42 U.S.C. § 7505a(d)).
34. *Id.* (quoting 42 U.S.C. § 7410(d)(3)(E)).
35. *Id.* at 432.
36. 467 U.S. 837, 840 (1984).
37. *Id.* (citing 42 U.S.C. § 7502(b)(6)).
38. *Chevron*, 467 U.S. at 840.
39. *Id.*
40. *Id.* at 842-43.
41. *Id.* at 842.
42. *Id.* at 843.

explained that agencies hold an express delegation of authority to fill in the gaps of statutory provisions with regulations.[43] Further, the "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[44] Accordingly, the Court decided not to substitute its own construction for the EPA's interpretation.[45] The Court reasoned that the EPA's interpretation proved consistent with congressional intent, not expressly stated in the statute: to reduce air pollution while simultaneously promoting economic growth.[46]

In *Chemical Manufacturers Ass'n v. Natural Resources Defense Council*, the Supreme Court further expounded the court's role in reviewing an EPA final ruling.[47] The plaintiffs, Chemical Manufacturers Association, challenged an EPA decision to issue variances from toxic pollutant effluent limitations imposed by the Clean Water Act (CWA).[48] Applying the two-part *Chevron* test, the Court evaluated the EPA's ruling in light of the statutory language, legislative history, and the goals of the CWA to determine whether the EPA's interpretation was "a sufficiently rational one to preclude a court from substituting its judgment for that of EPA."[49] The Court held the EPA's construction did not prove inconsistent with any of the relevant comparative factors.[50] Therefore, the court refused to "judge the relative wisdom of competing statutory interpretations."[51]

The Sixth Circuit in *Ohio v. EPA* specifically addressed the court's position in reviewing EPA modeling and testing procedures.[52] In an earlier decision, the court held that the EPA's use of a computerized atmospheric model was arbitrary and capricious without corroborating scientific data.[53] The court ordered the EPA to propose a program that validated the legitimacy of the computerized atmospheric model.[54] When reviewing the revised plan, the court noted that, "[i]nstead of simply deferring to EPA's decisions regarding scientific and computer models

43. *Id.* at 843-44.
44. *Id.* at 844.
45. *Id.* at 866.
46. *Id.*
47. 470 U.S. 116 (1985).
48. *Id.* at 118.
49. *Id.* at 125.
50. *Id.* at 134.
51. *Id.*
52. 798 F.2d 880, 881 (6th Cir. 1986).
53. *Id.* (citing Ohio v. EPA, 784 F.2d 224 (6th Cir. 1986)).
54. Ohio v. EPA, 784 F.2d 224, 231-32 (6th Cir. 1986).

. . . the legislative history of the 1977 [CAA] indicates that the Courts are to conduct a 'searching review' of the basis of EPA . . . procedures."[55]

The second and fifth redesignation criteria require the EPA to approve fully the SIP according to § 7410 of the CAA.[56] A SIP for nonattainment areas must provide for the timely attainment and maintenance of the NAAQS, SIP enforcement, and the allocation of adequate resources and authority to execute the enforcement provisions.[57] More specifically, a moderate nonattainment area must include pollution limits in accordance with the RACT rules for existing VOC emission sources and procedures ensuring continuity between state or local transportation and clean air plans.[58] The EPA must either approve or disapprove each SIP within one year of its submission.[59] The SIP's approved provisions become federally enforceable, and the nonapproved provisions must be revised within a defined time period.[60] However, if the EPA disapproves the SIP, then the state risks sanctions and federally imposed clean air measures.[61]

The fourth criterion for redesignation requires a "fully approved maintenance plan for the area."[62] The maintenance plan ensures NAAQS compliance for ten years following redesignation.[63] The state fulfills the maintenance requirement by showing that the ozone concentration will not exceed 0.12 parts per million after redesignation.[64] The plan's adequacy depends on an EPA determination considering "the particular circumstances facing the area proposed for redesignation and based on all relevant information available at the time."[65] In addition to the maintenance plan, the state must include enforcement provisions to rectify violations occurring after redesignation, also referred to as a contingency plan.[66] The contingency plan reverts states back to compliance with the ozone control measures found in the SIP, enacted to rectify their prior nonattainment status.[67]

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55. *Ohio*, 798 F.2d at 882.
56. Wall v. EPA, 265 F.3d 426, 430 (6th Cir. 2001).
57. 42 U.S.C. § 7410(a)(2) (1994).
58. *Wall*, 265 F.3d at 431 (citing 42 U.S.C. § 7511a(b)(2)).
59. *Id.* at 428 (citing 42 U.S.C. § 7410(k)(2)).
60. *Id.* (citing 42 U.S.C. §§ 7413, 7604); 42 U.S.C. § 7501(d)(1).
61. *Wall*, 265 F.3d at 428 (citing 42 U.S.C. §§ 7509, 7110(c)).
62. *Id.* at 430 (quoting 42 U.S.C. § 7407(d)(3)(E)).
63. *Id.* (quoting 42 U.S.C. § 7505a(a)).
64. *Id.* (citing 40 C.F.R. 50.9(a) (1999)).
65. *Id.* at 430-31.
66. *Id.* at 431 (quoting 42 U.S.C. § 7505a(d)).
67. *Id.*

Subpart 1 of Part D of the CAA specifies requirements exclusively for nonattainment areas to regulate air pollution emanating from transportation sources in order to satisfy the fifth redesignation criterion.[68] The 1990 CAA Amendments prohibit a federal agency's ability to "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to [a SIP] after it has been approved or promulgated under section 7410 of this title."[69] Federal activities conform to a SIP if the expected emissions from the activity do not conflict with the SIP's goal to reduce state NAAQS violations and achieve timely attainment.[70] Subpart 2 of Part D requires a SIP for a nonattainment area to adopt RACT rules corresponding with the area's classification.[71] The RACT rules address all other air pollution sources except transportation.[72] A SIP for a moderate nonattainment area includes general RACT rules for existing VOC sources and specific RACT rules for particularized VOC emissions.[73]

In *Southwestern Pennsylvania Growth Alliance v. Browner*, the Sixth Circuit determined whether the EPA's decision to redesignate the Cleveland-Akron-Lorain, Ohio, area from nonattainment to attainment for ozone was arbitrary and capricious.[74] The court applied the two-step analysis set forth by the Supreme Court in *Chevron* and conceded that the court must uphold the EPA ruling "unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[75] The issue arose whether a state must submit a revised SIP to comply with rules promulgated subsequent to its submission, but before requesting redesignation.[76] The plaintiffs pointed to § 7407(d)(3)(E), which requires the EPA to approve a state's SIP prior to redesignating an area.[77] The court agreed with EPA's interpretation of § 7407(d)(3)(E) that the EPA may rely on previously approved SIPs when reviewing redesignation requests.[78]

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68. *Id.*
69. *Id.* (quoting 42 U.S.C. § 7506(c)(1)).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* (citing 42 U.S.C. § 7511a(b)(2)).
74. 144 F.3d 984, 985 (6th Cir. 1998).
75. *Id.* at 988 (citing 5 U.S.C. § 706(2)(a) (1994)).
76. *Id.* at 989.
77. *Id.*
78. *Id.*

III. THE COURT'S DECISION

In the noted case, the Sixth Circuit began by stating the network of CAA provisions related to redesignation and the standard of review for agency decisions.[79] The court first analyzed the issue of whether the EPA's method of demonstrating maintenance satisfied CAA requirements.[80] The EPA used an attainment-emissions inventory approach to forecast that Kentucky's and Ohio's maintenance plans would meet the NAAQS for the next ten years following redesignation.[81] The attainment-emissions approach requires a determination that "1) the area is currently in compliance and 2) that future emissions in the area are projected to remain below the current level for the next ten years."[82] The Code of Federal Regulations § 51.112(a) mandates that "[e]ach plan must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements."[83] The plaintiffs argued that 40 CFR § 51.112(a)(1) further required that the EPA test the reliability of maintenance plans using air quality models.[84] The EPA counterargued that the attainment-emissions approach satisfactorily measures the state's maintenance in congruence with their construction that the phrase "timely attainment and maintenance" limits the applicability of § 51.112(a)(1) relied on by the plaintiffs to situations requiring the state to show attainment and maintenance, as opposed to state's needing to show only maintenance.[85] The court concluded that the EPA's interpretation reasonably coincided with the relevant statutory language.[86] The court reasoned that the EPA interpretation deserved deference because neither the CAA nor subsequent EPA interpretative memoranda prescribe a specific methodology to project a maintenance scheme's effectiveness.[87] The plaintiff's alternative attack against the EPA's approval of Kentucky's and Ohio's maintenance plans involved the Tier 2 rulemaking proceeding presented by the EPA.[88] The Tier 2 report classified the Cincinnati metropolitan area as "certain or highly likely to

79. Wall v. EPA, 265 F.3d 426, 427-32, 435 (6th Cir. 2001).
80. *Id.* at 435-37.
81. *Id.* at 435.
82. *Id.*
83. 40 C.F.R. § 51.112(a)(1) (1999).
84. *Wall*, 265 F.3d at 436.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*

require additional emission reductions."[89] The court explained that the Tier 2 proceedings were irrelevant to determining the sufficiency of the attainment-emissions approach because Tier 2 focused on program development to reduce pollution, not redesignation methodology.[90] The court also noted that EPA recently updated the Tier 2 statistics to include the period at issue.[91] Therefore, judicial substitution is not appropriate to reverse the EPA's decision to give the Tier 2 findings no weight for redesignation purposes.[92]

The court next discussed whether the redesignation plan for the Cincinnati metropolitan area failed because the maintenance plan did not allocate sufficient resources and authority to implement enforcement measures.[93] Although the court commented that ideally contemporary resource allocation accompanies each redesignation request, it still deferred to the EPA's interpretation not requiring new enforcement commitments.[94] The court again observed that neither the CAA nor the EPA regulations explicitly require a separate enforcement commitment for maintenance plans.[95] With no legislative history or congressional guidance for clarification on the matter, the court relied on the CAA Calcagni Memorandum, which states, "[A]n EPA action on a redesignation request does not mean that earlier issues with regard to the SIP will be reopened."[96] Therefore, the court upheld the EPA's approval of the Cincinnati metropolitan area's maintenance plans.[97]

The court then addressed the significance on redesignation, if any, of Kentucky's failure to submit a revised SIP that included procedures for transportation-conformity requirements.[98] The court accepted the EPA's latest interpretation, which overruled a prior rulemaking proceeding that applied transportation-conformity requirements to redesignation requests.[99] The court legitimated the EPA's reversal by quoting *Rust v. Sullivan*: "A revised interpretation deserves deference because an initial agency interpretation is not instantly carved in stone and the agency, to engage in informed rulemaking, must consider varying interpretations

89. *Id.* at 437.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 438.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*

and the wisdom of its policy on a continuing basis."[100] The court deemed the EPA's decision that Kentucky's failure to submit a revision for transportation-conformity requirements did not apply to a state's redesignation request proved "sufficiently rational . . . to preclude a court from substituting its judgment for that of EPA."[101]

The court's final-issue analysis concerned the necessity for states to adopt RACT rules.[102] The EPA granted both Kentucky's and Ohio's requests for redesignation without Ohio adopting the requisite RACT rules.[103] The court found the EPA's redesignation absent RACT rules a blatant contradiction to the federal regulations and CAA statutory language.[104] In the Federal Register, the EPA clarified that its policy "would require full adoption, submission and approval of [certain RACT rules] prior to approval of the redesignation request."[105] The relevant statutory language reads, "The State shall submit a revision to the applicable implementation plan to include provisions to require the implementation of reasonably available control technology."[106] The court rejected the EPA's argument that RACT rules drafted within a contingency plan satisfy the requirements for redesignation.[107] The court explained that the CAA unambiguously prohibited redesignation approval for RACT rules contained within a contingency plan because this would effectively relegate the rules to an "optional contingency measure."[108] The court concluded that the clear intent of Congress requires a state to adopt actual RACT rules before the EPA grants redesignation; thus, the EPA abused its discretion in redesignating the Cincinnati metropolitan area without Ohio's adopting RACT rules.[109] In light of the EPA's abuse of discretion, the court vacated the EPA's final decision to redesignate Cincinnati from nonattainment to attainment status for ground-level ozone.[110]

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100. *Id.* at 439-40 (quoting Rust v. Sullivan, 500 U.S. 173, 186-87 (1991)).

101. *Id.* at 440 (quoting Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125 (1985)).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* (citing Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Ohio and Kentucky, 65 Fed. Reg. 3636, (Jan. 24, 2000)).

106. *Id.* at 440 (citing 42 U.S.C. § 7511a(b)(2) (1994)).

107. *Id.* at 440-41.

108. *Id.* at 441 (citing 42 U.S.C. § 7505a(d)).

109. *Id.* at 441-42.

110. *Id.* at 442.

IV. ANALYSIS

The legitimacy of the EPA's decision to redesignate the Cincinnati metropolitan area from nonattainment to attainment hinged on the court's accepting the EPA's interpretation of the second, fourth, and fifth criteria for redesignation under the CAA. The Sixth Circuit engaged in a meticulous examination of the basis for the EPA's decision through adherence to prior judicial opinions, developing the review process for agency interpretations. The court's methodical approach to analyzing the reasonableness of the EPA's decision in light of related CAA provisions, prior EPA interpretations, and direct congressional intent parallels the Supreme Court's analytical approach in *Chevron*. In *Chevron*, the Court extensively explored the legislative history, prior EPA interpretations, the statutory language, and policy pertaining to "stationary sources."[111] The Supreme Court combined each of these interpretative angles to validate the EPA's final decision to implement a "bubble concept" for "stationary source" emission regulations.[112] The court summarily concluded that the EPA bubble concept achieved the purpose of nonattainment programs: to improve air quality.[113]

The Sixth Circuit's analysis primarily concentrated on the adequacy of Kentucky's and Ohio's respective SIP and maintenance plans. Case law addressing redesignation creates an analytical structure for reviewing EPA final decisions without providing precedent for the specific issues brought forth by the plaintiffs. The court strictly followed the two-part test established in *Chevron* to determine whether the EPA possessed the authority, absent explicit congressional guidance from the statute, to formulate a reasonable agency interpretation. Then the court traced the redesignation provision's legislative intent and congressional history to evaluate the EPA's consistency with the purpose of the CAA. The court also deciphered the plausible interpretations that flow from the sentence structure of the statutory language to determine whether the EPA's decision was a reasonable construction, carefully resisting the temptation to replace the EPA's decisions with alternative interpretations, just as equally reasonable, based solely on judicial preference.

The determinative issue in the case involved the EPA decision to grant Kentucky's and Ohio's redesignation requests without Ohio

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111. *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

112. *Id.* at 866. The "bubble concept" allows companies to offset the emissions of new installments within the same source using a plant wide standard, instead of mandating that each plant modification conform to NAAQS Standards as an individual unit. *Id.* at 855.

113. *Id.*

adopting the RACT rules listed in Subpart 2 of Part D of the CAA for nonattainment areas to include in their SIPs. The court did not rely on case law to support its rejection of the EPA's interpretation of the statutory mandate. Instead, the court applied the first part of the *Chevron* test to determine whether this EPA construction violated the express intent of Congress. The relevant statutory language reads: "The State shall submit a revision to the applicable implementation plan to include provisions to require the implementation of reasonably available control technology."[114] The court questioned the EPA's determination that "provisions" leaves open a window for states to include RACT rules in either the SIP or contingency plan. The court primarily relied on prior EPA interpretations and the statutory language to substitute its judgment for the EPA position.

The court's reliance on prior EPA interpretations contradicts the Supreme Court's holding in *Chevron* that an agency is not bound to its initial interpretation of statutory language.[115] The *Chevron* court encouraged "informed rulemaking" that considers alternate interpretations and progressive policy interests.[116] The Supreme Court's advocacy for continual interpretative constructions of statutes provides a legal basis for the EPA permissibly to disassociate from their previous requirement to include RACT rules in the SIP. A distinction does exist between the two cases, *Wall* and *Chevron*. The plaintiffs in *Chevron* challenged the EPA's interpretation as stated in a regulation. In the noted case, the EPA asserted the new interpretation for implementing RACT rules through contingency plans during the redesignation decision-making process, as opposed to an official interpretative memorandum or regulation. Therefore, the form and timing of the EPA's interpretation in *Wall* does not allow citizens notice of the interpretative change as to permit a challenge to the specific construction prior to its enactment in the redesignation scheme.

The court also overruled the EPA's decision on the premise that the statutory language clearly requires the SIP, not the contingency plan, to establish the requisite RACT rules. The court bolstered its opinion using relevant statutory and agency language for contextual insight. For example, 42 U.S.C. § 7511a(b)(2) mandates that plan provisions "shall be submitted within the period set for by the Administrator in issuing the relevant CTG [Control Technique Guideline] document."[117] The CTG

114. 42 U.S.C. § 7511a(b)(2) (1994).
115. *Chevron*, 467 U.S. at 863-64.
116. *Id.*
117. 42 U.S.C. § 7511a(b)(2).

document creates deadlines for the implementation of state RACT rules, thus implying RACT rules belong in a SIP and not the contingency plan.

Similar to *Chevron*, the Sixth Circuit contemplated the purpose of Congress's requiring the adoption of RACT rules as a part of the SIP as opposed to the contingency plan. The court reasoned that a state must violate the NAAQS to trigger the option to implement a contingency plan, and even then the state chooses which contingency provisions to implement. According to the Sixth Circuit, this array of options included in a contingency plan, the RACT rules being one of many, contradicts Congress's intent for "mandatory" RACT rules. The court contradicted case law by overemphasizing the controlling impact of prior EPA interpretations; however, the comparative analysis between the EPA interpretation, relevant statutory language, and congressional intent reconciles this discrepancy ultimately to justify the court's opinion.

V. CONCLUSION

To determine whether the Sixth Circuit's decision aligned with precedent addressing redesignation issues is a difficult task. The seminal Supreme Court cases, *Chevron* and *Chemical Manufacturers Ass'n*, lay out a blueprint for analyzing the particularized issue, but do not provide bright line rules for every plausible argument presented in a citizen's complaint against the EPA. The court's treatment of prior EPA interpretations is questionable, but the court undoubtedly reached the correct outcome. For the EPA to haphazardly apply "varied" interpretations that conflict with congressional intent is arbitrary and capricious, thus deserving reversal. The EPA should not allow any procedural shortcuts for meeting the requirements for ozone attainment and redesignation. The public's health is at risk from overexposure to ozone, and the EPA is charged to protect our fundamental interest in physical well-being. The court admirably upheld the citizen's right to ensure that the state and the EPA follow the proper redesignation procedures set forth by the CAA.

Tiffani Darden