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On February 27, 2001, the U.S. Supreme Court ruled on two cases relating to a May 1999 decision of the U.S. Court of Appeals for the District of Columbia Circuit. The appellate court had remanded to the U.S. Environmental Protection Agency (EPA) its National Ambient Air Quality Standards (NAAQS), ruling that in establishing the standards, the agency had violated the constitutional nondelegation doctrine. In response to a petition filed by EPA, the Supreme Court heard the question of whether the Clean Air Act (CAA) prohibits EPA from considering all consequences associated with compliance, or whether it requires EPA to focus solely on the beneficial health effects of reducing pollutants in the air.

The Supreme Court affirmed in part and reversed in part the judgment of the DC Circuit, and remanded the cases for further proceedings. Specifically, the Supreme Court ruled that

1. EPA may not consider implementation costs in setting primary and secondary NAAQS under Section 109(b) of the CAA;
2. Section 109(b)(1) does not delegate legislative power to EPA in contravention of Article I, Section 1, of the Constitution;

3. The Court of Appeals had jurisdiction to review EPA's interpretation of Part D of Title I of the CAA, relating to the implementation of the revised ozone NAAQS; and
4. EPA's interpretation of Part D is unreasonable.

The Supreme Court's decision spurred mixed reactions throughout the environmental community. To better understand the differing interpretations of the court's ruling, *EM* invited several professionals who have been closely following the case to share their opinions and reactions.

# A Supremely Sweet Victory for Clean Air and Public Health

by Howard Fox, Earthjustice

The Supreme Court's decision, which addressed strengthened air quality standards for PM and ozone, represents a major victory for public health and for the rule of law. The court did not rule on the scientific basis for the new standards, because the issue was not before the court; however, the decision does remove important legal hurdles that industry had thrown into the path of the new standards, and therefore, it is a major step forward in the battle against air pollution.

## PUBLIC HEALTH IMPLICATIONS

What are the public health implications of the new NAAQS? Among air pollutants, PM and ozone enjoy the dubious distinction of being the preeminent public health threat. No other pollutant comes close to these two in terms of the number of deaths, illnesses, and other adverse effects they cause. With respect to PM, EPA has estimated that 3000–15,000 deaths, 6000–10,000 hospital admissions for respiratory and cardiopulmonary diseases, tens of thousands of cases of respiratory illness, and millions of days of missed work and restricted activity will be prevented each year just by *partial* attainment of the new NAAQS.<sup>1</sup> With respect to ozone, EPA has estimated that its new standards will each year prevent tens of thousands of occurrences of health effects, including respiratory symptoms, reductions in lung function, and asthma attacks.<sup>2</sup>

EPA's public health conclusions weren't simply pulled out of a hat. To the contrary, the rulemaking that produced the 1997 standards reflected the most extraordinarily thorough scientific review in the history of the CAA, considering thousands of peer-reviewed studies addressing the effects of particulates and ozone. In addition to the peer review to which each of these published studies had previously been subjected, a special advisory committee, the Clean Air Scientific Advisory Committee (CASAC), conducted further scrutiny.

For each pollutant, EPA prepared a detailed "criteria document" presenting and analyzing the most recent scientific information, and a "staff paper," in which agency staff further discussed the information and its regulatory implications. Before being finalized, the criteria documents and staff papers were released for comment by CASAC and the public. For each document, CASAC reached "closure," meaning that the committee was satisfied the document provided an adequate basis for agency decision-making. EPA then published detailed notices of proposed rulemaking in the *Federal Register*, and

received comments in writing and at several public hearings, before publishing the final standards in the *Federal Register* in July 1997.<sup>3</sup>

What did the science show? The findings were most dramatic for particulates. Recent epidemiological studies documented a consistent association between short-term exposures to particulates and various health impairments, including premature death, as well as exacerbation of cardiopulmonary diseases such as emphysema and chronic bronchitis. Most vulnerable are the elderly, young, and those suffering from pre-existing heart and lung disease. Of key importance, EPA found that these effects were occurring even at levels meeting the pre-existing particulate standards set in 1987. Indeed, though most of the areas violating the 1987 standards were located in the western United States, the vast majority of findings showing health impacts came from studies conducted in the eastern United States. EPA found that fine particles—those emitted by motor vehicles, power plants, and other combustion sources—were the best indicator of these health effects. And so, EPA proceeded in 1997 to set the first-ever NAAQS for fine particles.

For ozone, the science showed that adverse health effects were occurring, even at ozone levels meeting the preexisting standards set in 1979. These effects include asthma attacks, hospitalization for respiratory illness, painful breathing, and significant reductions in lung function. The evidence documenting these effects includes actual laboratory studies on human volunteers, as well as epidemiological and animal data. Most vulnerable are those exercising outdoors in summertime for substantial periods, including children, and those who work or recreate outdoors, especially asthmatics.

Industry, joined by three states, filed suit against these new standards. In 1999, the U.S. Court of Appeals for the DC Circuit unanimously rejected their attacks on the science underlying the fine particle standard:

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“The numerous epidemiological studies appearing in this record, some of which EPA also used to support the 1987 NAAQS, easily satisfy the standard articulated in the statute and emphasized repeatedly in decisions of this court. Covering diverse geographic locations with widely varying mixes of air pollution, the studies found statistically significant relationships between airborne particulates signified by a variety of indicators and adverse health effects. Given EPA’s statutory mandate to establish standards based on ‘the latest scientific knowledge,’ the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards.”<sup>4</sup>

The Supreme Court in no way questioned this DC Circuit ruling, which was not even appealed by industry, nor did the court question the science underlying the ozone standard; that issue was not before the court.

In short, the rigorous scientific review underlying the 1997 standards remains valid, and is a strong basis for urging expeditious action to implement those standards. Indeed, recent evidence and analyses confirm the validity of the link between PM and serious health effects. To help protect Americans from exposure to pollution that can kill them or make them seriously ill, it is high time that the 1997 standards—which have been on the books for nearly four years and were the products of years of careful analysis—are finally implemented. The court’s decision, by removing important roadblocks thrown in the path of these standards, represents an important step toward that goal.

## THE RULE OF LAW

The court’s decision also represents an important victory for the rule of law. The Supreme Court considered and rejected two invitations to judicial activism. Instead of asking the court to apply the law as courts are supposed to do, industry had urged the court to *make* law by substituting industry’s view of wise public policy for the law enacted by Congress.

More than 30 years ago, Congress passed the CAA of 1970, which mandated that EPA set national air quality standards that “protect the public health” with “an adequate margin of safety.” A mere four months after the statute was passed, EPA enunciated an interpretation of this mandate from which the agency has not wavered: that the CAA “does not permit any factors other than health to be taken into account in setting the primary standards.”<sup>5</sup>

The 1970 CAA’s clear public health mandate was an understandable reaction by Congress, which for years had heard industry use cost and feasibility arguments to defeat public health protection. As Justice Breyer recognized in his concurring opinion, Congress intended to set public health requirements and then prod industry to develop the technologies needed to meet them, an approach known as “technology-forcing.” Justice Breyer explained that “the statute’s

technology-forcing objective makes regulatory efforts to determine the costs of implementation both less important and more difficult. It means that the relevant economic costs are speculative, for they include the cost of unknown future technologies. It also means that efforts to take costs into account can breed time-consuming and potentially unresolvable arguments about the accuracy and significance of cost estimates.”<sup>6</sup>

More than 20 years ago, the DC Circuit issued a seminal decision in *Lead Industries Association vs. EPA*,<sup>7</sup> affirming EPA’s interpretation that the CAA requires standards to be based on health rather than costs. The next year, industry mounted a massive legislative attack on *Lead Industries*, urging Congress to allow cost-benefit analysis in setting air quality standards. After holding detailed hearings on the issue, Congress decided not to enact such legislation, and in the intervening years has rejected additional industry requests that it do so.

In its lawsuits against the 1997 standards, industry tried to obtain from the judiciary what it had been unable to obtain from the elected members of Congress. Moreover, it sought to overturn 20 years of consistent DC Circuit precedent, mocking *Lead Industries* as a “precedential leper—diseased but untouchable.”<sup>8</sup> The Supreme Court rejected this attack. Finding that the industry argument “makes no sense,” the court ruled

that the CAA “unambiguously bars cost considerations from the NAAQS-setting process.”<sup>9</sup> Industry’s position was unable to muster even a single vote from the court.

The court also rejected another industry invitation to judicial activism: the request that a little-known constitutional theory, known as the “nondelegation” doctrine, be used to invalidate the 1997 standards. In the court’s entire history, it had struck down statutes only twice under this doctrine—both times in 1935, in cases addressing New Deal legislation. In *Whitman*, the court found that the CAA provides sufficient guidance to inform EPA’s standard-setting and, therefore, does not constitute an unconstitutional delegation of Congress’s legislative authority.<sup>10</sup> Likewise, the court rejected industry’s counterintuitive argument that EPA could through its interpretation make a constitutional statute unconstitutional. Once again, industry’s position failed to garner a single vote.

#### WHAT’S NEXT?

Though unanimously rejecting industry’s position on the issues addressing the validity of the 1997 standards, the court found fault with EPA’s approach to implementing the 1997 ozone standard. Despite industry’s attempt to spin this aspect

of the court’s decision as a major victory, the ruling was actually quite narrow. Far from accepting industry’s position that EPA could not implement the new standard at all, the court simply held that EPA must develop a “reasonable” implementation approach. EPA needs to move forward promptly with an approach that recognizes the public interest in expeditious control of health-threatening pollution.

EPA also needs to respond promptly to the DC Circuit’s 1999 ruling (not appealed) that the agency must consider the alleged beneficial health effects of ground-level ozone.<sup>11</sup> Industry had argued that ozone shields against ultraviolet radiation, thus preventing skin cancer. Though not expressing a view on the validity of industry’s contentions about the science, the DC Circuit ruled that EPA must at least consider the issue. Toward the end of the Clinton Administration, EPA sent a proposed response to the *Federal Register*, concluding that the evidence on the issue is “too uncertain at this time to warrant any relaxation [of the 1997 standards].”<sup>12</sup> Unfortunately, that notice has not been published. EPA should move forward expeditiously to resolve this issue.

Finally, industry may take a run at presenting additional arguments to the DC Circuit. Though the Supreme Court did remand for the DC Circuit “to dispose of any other preserved challenges” to the 1997 standards, industry should think carefully before prolonging this litigation, which has already stretched out over several years. Industry has had abundant opportunity to make its case: to EPA, during the lengthy proceedings leading up to the 1997 standards; to Congress, which declined requests to veto the standards under the Congressional Review Act; and to the courts, during this four-year litigation. It’s time for industry’s scorched-earth campaign against public health to stop, and for the nation to get on with the important task of implementing more protective air quality standards.

*It’s time for industry’s scorched-earth campaign against public health to stop.*

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5. 36 *Fed. Regist.* 8186 (April 30, 1971).
6. *Whitman vs. American Trucking Associations, Inc.*, 121 S. Ct. 903, 923 (2001).
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8. Brief of American Trucking Associations, Inc. in No. 99-1426, at 27.
9. *Whitman vs. American Trucking Associations, Inc.*, 121 S. Ct. at 911.
10. *Ibid.* at 911-914.
11. *American Trucking Associations, Inc. vs. EPA*, 175 F. 3d at 1051-1053.
12. See [http://www.epa.gov/airlinks/uvb\\_notice.pdf](http://www.epa.gov/airlinks/uvb_notice.pdf), at 2.

#### About the Author

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