

February 28, 2001

COURT UPHOLDS EPA'S CLEAN AIR STANDARDS BUT REJECTS OZONE IMPLEMENTATION PLAN

(American Trucking Associations, Inc. v. Whitman (formerly Browner))

The United States Supreme Court unanimously upheld the Environmental Protection Agency's (EPA) method of revising standards for the permissible levels of ground-level ozone and particulate matter. In doing so, the High Court rejected arguments by the Washington Legal Foundation (WLF) and the regulated industry that the EPA, in setting the standards, had to factor in the costs of their implementation, and that the failure to do so would result in an unconstitutional delegation of legislative power from the Congress to the EPA. At the same time, however, the Court struck down EPA's ozone implementation plan as violative of the Clean Air Act (CAA), and sent it back to the U.S. Court of Appeals for the District of Columbia Circuit for further consideration.

WLF had filed a brief in the case on behalf of itself and the Allied Educational Foundation urging the Court to strike down EPA's controversial ozone and particulate matter regulations. In its brief, WLF had argued that the EPA was not precluded by the CAA from considering the costs of its proposed air quality standards. WLF further argued that by failing to consider such costs, the EPA rules became an unconstitutional delegation of legislative power because the agency could arbitrarily set the standard at any level.

In 1997, former EPA Administrator Carol Browner promulgated the National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter. The overly strict standards would cost industry and consumers an estimated \$420 billion. At the same time, EPA's evidence that the rules were needed to protect the public's health was scientifically suspect. In short, the rules could not be justified on a cost-benefit basis.

On review in the U.S. Court of Appeals for the District of Columbia Circuit, the court agreed with the EPA that the agency was precluded by Section 109 of the Clean Air Act from considering costs in setting the air quality standards, relying on its 1980 decision in *Lead Industries Ass'n v. EPA*. Thus, the EPA need only concern itself with the health effects of any revised rule or standard. However, the court of appeals further held that without any intelligible principle to guide the agency in setting the standards, the EPA could arbitrarily set the standard at a "zero" level of emissions. Accordingly, the court of appeals ruled that the CAA violated the rarely invoked nondelegation doctrine

under the Constitution.

The EPA had sought review in the Supreme Court on the nondelegation issue and industry cross-petitioned on the cost-benefit issue. In its brief, WLF urged the Court to avoid reaching the nondelegation issue by interpreting the Clean Air Act in a way that authorizes the agency to conduct a cost-benefit analysis.

Justice Antonin Scalia, writing for the Court, noted that the CAA instructs the EPA to set NAAQS "the attainment and maintenance of which . . . are requisite to protect the public health" allowing for "an adequate margin of safety." Justice Scalia noted that this provision, when viewed in the context of the CAA as a whole, "unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA." Accordingly, the Supreme Court upheld the court of appeals on that point, reaffirming the D.C. Circuit's *Lead Industries* decision. Justice Stephen Breyer wrote a concurring opinion, stating that while the EPA may not be required by the CAA to consider costs, nothing in the law precludes the agency from considering costs on its own if it so desired.

With respect to the nondelegation doctrine, the Court rejected the decision of the court of appeals on that issue. Surveying its prior jurisprudence in the area, the Court noted that the direction given by Congress to the EPA in setting the air standards fits well within the acceptable practice of allowing the agency to regulate within broad but lawful parameters. In a separate concurring opinion, Justice Clarence Thomas indicated that he would consider the nondelegation doctrine as an issue in an appropriate case in the future.

Finally, the Court struck down the ozone implementation policy. The Court noted that the EPA unlawfully disregarded a relevant section of the CAA, Subpart 2, which the EPA claimed only applied to areas that were in nonattainment in 1989, and not to areas subject to the new standards. The Court thus declined to give the EPA any deference on this point under its *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* decision because the agency's interpretation of Subpart 2 was not a "reasonable" one.

While the Court rejected the cost and nondelegation doctrine arguments, the standards themselves are still subject to attack on other grounds on remand to the court of appeals. It remains to be seen whether and how these two air standards ultimately will be implemented.

WLF's brief was drafted with the *pro bono* assistance of Paul D. Clement and Jeffrey S. Bucholtz of the Washington, D.C. office of King & Spalding.

* * *

For further information, contact Paul Kamenar, WLF Senior Executive Counsel, at 202-588-0302.