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## Supreme Court Issues Decision in Case Challenging EPA's Revised National Ambient Air Quality Standards

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On February 27, 2001, the United States Supreme Court issued its long awaited decision in the case that challenged the U.S. Environmental Protection Agency's ("EPA") revised National Ambient Air Quality Standards for ozone and particulate matter. *Whitman, Administrator of Environmental Protection Agency, et al. v. American Trucking Associations, Inc., et al.*, 531 U.S. \_\_\_\_\_ (No. 99-1257 (February 27, 2001)). The Supreme Court, in a unanimous decision, held:

1. Section 109(b) of the Clean Air Act (42 U.S.C. §7409(b)) prohibits the Agency from considering implementation costs when EPA sets National Ambient Air Quality Standards (NAAQS);
2. Section 109(b)(1) of the Act does not delegate legislative powers to EPA; therefore, EPA did not violate the nondelegation doctrine in issuing its revised ozone and particulate matter standards pursuant to this section;
3. EPA's "Implementation Strategy" for the revised ozone NAAQS was final agency action subject to judicial review; and
4. EPA's implementation strategy was an unreasonable agency interpretation of an ambiguous statutory scheme, and is therefore unlawful; the issue is sent back to EPA to develop a reasonable implementation strategy.

This decision has significant ramifications, not only for the NAAQS that were the principal issues, but for broader issues as well.

### **Consideration of Cost**

The Court declined to depart from the United States Court of Appeals for

the District of Columbia Circuit's ("Court of Appeals") 1980 decision in *Lead Industries Assn., Inc. v. EPA*, 647 F.2d 1130 (CA DC 1980), finding that Section 109(b)(1), which instructs EPA to set NAAQS in order to protect the public health with an adequate margin of safety, "unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA." Slip. op. at 11. The Court also makes it clear that the appropriate forum for considering the costs of implementation is "before the state agency formulating the implementation plan." *Id.*, citing *Union Electric Co., EPA*, 427 U.S. 246 (1976).

### **Nondelegation Doctrine**

In remanding the NAAQS to EPA in 1999, the Court of Appeals held that Section 109(b)(1) of the Act delegated legislative power to the Agency to set the NAAQS, and that EPA in setting the NAAQS had provided no intelligible principle to guide the Agency's exercise of that authority, in contravention of the nondelegation doctrine under the Constitution. *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027 (CA DC 1999). In analyzing this doctrine and EPA's NAAQS rulemaking, the Court focused on the language of Section 109(b)(1), which requires that EPA set the standard(s) at a level requisite to protect human health. The Court viewed this language as setting limits on EPA's discretion - the standards must be "sufficient, but not more than necessary." *Whitman v. A.T.A.*, *supra*, at 13. Examining the manner in which it has historically analyzed non-delegation challenges, the Court found that the scope of discretion allowed by Section 109(b)(1) is "well within the outer limits of our nondelegation precedents." *Id.* Even in cases where the statutory language calls for broad, "sweeping" regulatory programs, the Court stated that "...we have never demanded, as the Court of Appeals did here, that statutes provide a 'determinative criterion' for saying 'how much of [the regulated harm] is too much.'" *Id.*, at 15.

Where, as here, the Court finds that the statutory language sets boundaries on the discretion delegated to the agency with which it is comfortable, it will not treat such a grant of power as "legislative power" that runs afoul of the nondelegation doctrine under the Constitution.

While three of the Justices would have undertaken different analyses (Justice Thomas issued a concurring opinion on this specific issue, as did Justices Stevens and Souter), ultimately each agreed that the delegation of authority to the Agency to promulgate NAAQS under Section 109 of the Act did not run afoul of the nondelegation doctrine, and the judgment of the Court of Appeals, which remanded the rules to EPA, was reversed.

### **EPA's Implementation of the Ozone NAAQS**

The final two issues addressed by the Court involved the EPA's implementation strategy for the revised ozone NAAQS. Specifically, the Court analyzed whether the "Implementation Strategy" devised by the Agency was "final agency action" that could be challenged in the Court of Appeals, and, if the answer is yes, was EPA's implementation strategy a reasonable interpretation" of the statutory provisions.

The Implementation Strategy issue centers around the interplay between Sections 171-179B (42 U.S.C. §§7501-7515 ("Subpart 1")), which sets forth requirements applicable to nonattainment areas in general, and Sections 181-185B (42 U.S.C. §§7511-7511f ("Subpart 2")), which contains specific requirements for ozone nonattainment areas.

The basic conflict at issue is that both Subpart 1 and Subpart 2 arguably can apply to the new ozone standard; Subpart 1 gives EPA wide latitude in setting requirements and deadlines for nonattainment areas, whereas Subpart 2 (which was enacted as part of the 1990 Amendments to the Clean Air Act) restricts Agency discretion and sets specific requirements and deadlines for areas not meeting the "old" ozone standard.

With respect to the threshold question of whether the Agency's Implementation Strategy was reviewable, the Court had "little trouble concluding" that the Strategy constituted final agency action subject to judicial review pursuant to Section 307 of the Clean Air Act. The focus of the analysis was on the "finality" of the action; where the Agency "has rendered its final word on the matter" in question, the Court finds the action to be final agency action subject to Section 307 judicial review. The Court held that the Implementation Strategy, as announced in the "Memorandum for the Administrator of the Environmental Protection Agency" that was published in the Federal Register (62 Fed.Reg. 38421 (1997)), marked the consummation of the decisionmaking process on the issue of implementing the revised ozone NAAQS, and was therefore appropriately subject to judicial review.

On the merits of the challenge to the Implementation Strategy, the Court found some ambiguity in the relevant sections of the Clean Air Act (i.e., Subpart 1 and Subpart 2). Thus, the analysis focused on whether the Agency's Implementation Strategy was a "reasonable interpretation" of the statutory provisions. The Court held that it was not a reasonable interpretation because the Strategy would effectively "read out" Subpart 2 requirements once a nonattainment area met the "old" 0.12 ppm ozone NAAQS. While the Court acknowledged that at least portions of Subpart 2 may be "ill-fitted" to the revised standard, it found that the Agency could not reasonably construe the Clean Air Act in such a way as to nullify these provisions (especially where those provisions served to limit the Agency's discretion), and it remanded the issue of implementation of the revised ozone standard to EPA to develop a reasonable interpretation reconciling Subparts 1 and 2.

### **Next Steps**

While the Court reversed the Court of Appeals judgment on the nondelegation doctrine, it also left the door open for the Court of Appeals to

"dispose of" other challenges to the NAAQS that were not addressed in the Court of Appeals' decision. As a procedural matter, the Supreme Court remanded the case to the Court of Appeals for proceedings "consistent with [its] opinion." Slip op., at 26.

Many of the parties that challenged the NAAQS did so on grounds other than (or in addition to) the nondelegation theory (i.e., that the rule was arbitrary, capricious, an abuse of discretion, outside the scope of EPA's statutory authority). Because the Court of Appeals originally remanded the case to EPA to "develop a construction of the act" that passes constitutional muster, it did not address these other challenges. In its opinion the Court of Appeals referred explicitly to those other challenges: "The remaining issues cannot be resolved until such time as EPA may develop a constitutional construction of the act." 175 F.3d 1027, 1034 (emphasis added). The Court of Appeals was in effect waiting for EPA to remedy constitutional deficiencies before it addressed the other challenges that were based on Section 307(d)(9) of the Clean Air Act. Now that the Supreme Court has reversed the Court of Appeals' finding that there was a constitutional defect, the Court of Appeals can proceed with its analysis of the "remaining issues," and it is possible that it could strike down the regulations on other grounds.

Even if the regulations are ultimately upheld, it is clear that EPA must devise an implementation scheme that meets the concerns enunciated by the Supreme Court. Reconciling Subparts 1 and 2 in a manner that would satisfy the Court's "reasonable interpretation" standard may prove to be very difficult, in light the Court's analysis of the parameters within which EPA must act.

- [Kenneth R. Meade](#)