

THE US COURT OF APPEALS FOR THE D.C. CIRCUIT DECISION ON EPA'S PUBLIC HEALTH AIR STANDARDS FOR SMOG AND SOOT

Ignoring Supreme Court Law:

- ! On May 14, 1999, in a split decision (2 to 1), a panel of the U.S. Court of Appeals for the D.C. Circuit ignored over a half century of Supreme Court law. It held that the Clean Air Act -- as applied in setting the new public health air quality standards for ozone (smog) and particulate matter (soot) -- is unconstitutional as an improper delegation of legislative authority to the Environmental Protection Agency (EPA).
 - In constructing the programs that provide many of this nation's most important public health and safety standards, Congress, EPA and other federal agencies have relied on a 64-year history of Supreme Court and Court of Appeals jurisprudence sustaining similar Congressional delegations of authority.
 - The panel's split decision -- a radical departure from that well-established case law -- carries with it dangerous implications for not only the new public health air quality standards, but also for many other federal laws or rules enacted to protect the health of the American people.
 - In a vigorous dissent, Judge Tatel declared that "the court ignores the last half-century of Supreme Court nondelegation jurisprudence, apparently viewing these permissive precedents as mere exceptions to the rule laid down 64 years ago [in a 1935 case]."

Upholding EPA's Science and Process:

- ! Despite the constitutional ruling, the Court rejected the central arguments of industry's claims. The Court did not question the science on which EPA relied to develop the health standards or criticize EPA's decision making process. The Court stated that:
 - "the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards."
 - there was "ample support" for EPA's decision to regulate coarse particulate pollution.
 - EPA complied with the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) and Unfunded Mandates Reform Act (UMRA).

Delaying Public Health Protections:

- ! If not overturned, the Court decision will jeopardize or put on hold the new public health air standards for soot and smog which would protect the health of 125 million Americans, including 35 million children. Taken together, these harmful pollutants contribute to acute health effects ranging from premature death to exacerbated asthma and other respiratory problems.

The Decision: Specifically, the Court's decision:

- did not question the need to provide the American public with strong health protections through tightened smog and soot standards.
 - rejected the claim that EPA consider costs when setting national air quality standards.
 - left the 8-hour ozone standard in place, but stated that it “cannot be enforced.”
 - vacated the revised coarse particle (PM10) standards, but the old PM10 standards still apply.
- ! The Court asked for further briefing on several issues. On June 18, 1999, the Court ruled that the PM2.5 standard should remain in place. However, the Court will allow parties to apply for the standard to be vacated if “the presence of this standard threatens a more imminent harm”. Presumably, the “harm” refers to the burden on sources complying with the regulations.
- ! EPA strongly disagrees with the decision. On June 28, 1999 EPA and the Department of Justice filed a petition for rehearing *en banc* asking the entire DC Circuit to reverse the decision of the panel.

Providing Americans with Cleaner Air:

- ! As a result of an initial interpretation of the Court’s ruling, EPA believes it can continue to move forward with other vital clean air programs that will provide the American people with important health protections, including:
- proceeding with its proposal for cleaner vehicles and cleaner gasoline.
 - ensuring the air quality monitoring program continues and the PM 2.5 monitors are put in place.
 - continuing support for voluntary “right-to-know” programs managed by states and coordinated through EPA, such as the Ozone Action Days and the air quality data submitted to EPA’s Internet Ozone Mapping Site.
 - designating areas as attainment or nonattainment for the new 8-hour ozone standards.
- ! EPA is continuing to evaluate the impacts of this decision on, and next steps for, other clean air efforts, including the effect of the decision on areas where the 1-hour ozone standards and the old PM10 standards have been revoked.
- ! On May 25, 1999, in a separate case, a 3-judge panel of the same court (including the two judges who wrote the majority in the air standards case) issued an order partially staying the implementation of the EPA plan to reduce the state-to-state transport of smog (NOx SIP call), which will protect the health of millions of Americans in the eastern U.S. This is not a ruling on the merits of the plan, but a delay to allow all parties to argue their case before the court. EPA is evaluating the order, and, in the fall, will join a number of states in arguing before the court the need to move forward with these important health protections.