

**SUPREME COURT ISSUES OPINION
IN EPA v. AMERICAN TRUCKING ASSOCIATIONS**

Yesterday, the Supreme Court issued its opinion in two companion cases addressing the lawfulness of the Environmental Protection Agency's ("EPA's") July 1997 revised standards for ozone and particulate matter. American Trucking Assn's v. United States Environmental Protection Agency, 175 F.3d 1027 (D.C. Cir. 1999). The Court first affirmed the U.S. Court of Appeals for the D.C. Circuit's ("D.C. Circuit") holding that the Clean Air Act bars consideration of costs in setting air quality standards. Next, the Court reversed the D.C. Circuit's holding that the Clean Air Act's standard setting provision, as interpreted by EPA, was an unconstitutional delegation of legislative power to EPA because it did not provide an "intelligible principle" to guide EPA's exercise of its discretion in setting the standard. Finally, the Court held that EPA's implementation policy for the new ozone standard was unlawful. The Court remanded the cases to the D.C. Circuit for further proceedings consistent with the opinion.

The Costs Issue. In an early case challenging one of EPA's air quality standards, the D.C. Circuit held that Section 109(b)(1) of the Clean Air Act ("CAA"), which requires EPA to set air quality standards "the attainment and maintenance of which ... are requisite to protect the public health" with "an adequate margin of safety," barred the consideration of costs. Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1148 (D.C. Cir. 1980). In its challenge to the ozone and particulate standards in both the D.C. Circuit and the Supreme Court, industry argued that Lead Industries and its progeny were wrongly decided. The Supreme Court rejected this argument, holding that the text of Section 109(b)(1), "interpreted in its statutory and historical context, and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations" from the standard setting process. Slip Op. At 11.

The Delegation Issue. The D.C. Circuit held that the language of Section 109(b)(1) set forth above, as interpreted by EPA, did not provide an "intelligible principle" to guide EPA in setting the air quality standards, and therefore the standards were an unconstitutional delegation of power from the legislative to the executive branch, in violation of Article I, § 1 of the Constitution. The Court reversed, accepting the Solicitor General's argument that Section 109(b)(1) at a minimum requires that "[f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." Slip Op. at 13. The term "requisite," in turn, means "sufficient, but not more than necessary," *id.*, or "not lower or higher than is necessary." Slip Op. at 15. Reading the key terms of the Clean Air Act in this manner, the Court found that the limits on EPA's discretion were similar to limits upheld in Touby v. United States, 500 U.S. 160, 163 (1991)(Attorney General to designate a drug as a controlled substance if doing so was "necessary to avoid an imminent hazard to the public safety"), and in Industrial Union Dept. AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 646 (1980)(OSHA provision requiring agency to set

a standard “which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health”).

The Court noted the two Depression era cases in which an “intelligible principle” was found lacking (Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and A.L.A. Schechter Poultry Corp v. United States, 295 U.S. 495 (1935)), but then set forth a series of cases in which relatively broad statutory delegations under the Public Utility Holding Company Act, the Federal Communications Act, the Interstate Commerce Act, and other statutes were upheld. Slip Op. at 14. Section 109(b)(1), the Court held, “fits comfortably” within the scope of discretion permitted by this precedent.

The Subpart 2 Issue. The final issue involved EPA’s implementation of the revised ozone standard. Part D, Subpart 1 of the CAA contains general provisions that apply to nonattainment areas for all pollutants for which EPA has issued standards. For ozone, in particular, however, Part D, Subpart 2 of the CAA amendments of 1990 provides specific requirements and timetables for compliance. EPA took the position that the provisions of Subpart 1, and not the provisions of Subpart 2, applied to implementation of the new ozone standard.

The Court framed the issue as whether Subpart 1 or Subpart 2 or some combination of the two applied to implementation of the new ozone standard. After rejecting EPA’s arguments that the issue was not final agency action ripe for review, the Court analyzed the question under the traditional Chevron test. First, the Court disagreed with the D.C. Circuit’s conclusion that Subpart 2 clearly controlled implementation of the revised standard, because the Court found the CAA ambiguous. Slip Op. at 21. But the Court went on to hold that EPA’s interpretation was unreasonable and therefore unlawful. The Court found that Congress had carefully restricted EPA’s discretion to regulate ozone under Subpart 2 by prescribing, among other things, five categories of ozone nonattainment, each with its own deadline for attainment, and its own compliance requirements. EPA’s complete ignorance of these provisions in implementing the new ozone standard solely under Subpart 1 was unlawful. Slip Op at 26.

Next Steps. As noted earlier, the Supreme Court remanded the cases to the D.C. Circuit. What that Court will do is not precisely clear. The Court could simply issue another opinion, based not on the delegation doctrine, but based rather on a Chevron standard and guided by the principles of the Supreme Court opinion (for example, that requisite means not lower or higher than is necessary). More likely, the Court will order briefing by industry, EPA, states and other parties to the case on how to proceed in light of the remand.

Finally, there is the question of the practical impact of the revised standards today. Clearly, EPA cannot implement the revised ozone standard under its existing approach. EPA may have to undergo rulemaking to devise a mechanism to implement the revised ozone standard that is consistent with Subpart 2. In the meantime, EPA may argue that it can at least designate areas

as nonattainment for the new ozone standard, as a prelude to ultimate enforcement of that standard. Industry and many states are likely to oppose any such designations or further regulatory activity until such time as an implementation strategy is upheld in court.

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