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Clean Air Standards: The Supreme Court Agrees to Review *American Trucking Associations v. EPA*

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Summary

In 1999, in *American Trucking Ass'ns, Inc. v. U.S. EPA*, a U.S. Court of Appeals ruled that deficiencies in EPA's promulgation of revised national ambient air quality standards for ozone and particulate matter required that they be remanded to the agency for further consideration. The decision was controversial, in part because it relied on a long-moribund legal principle known as the nondelegation doctrine. The court's use of this doctrine, if upheld, has implications for many delegations of congressional authority to agencies. In addition, its holding that the revised ozone ambient standard cannot be enforced has sparked debate. By itself, however, the decision is unlikely to have major short-term effects on the ozone and particulate matter control programs.

In May, 2000, the Supreme Court agreed to review this decision, raising the prospect of a major pronouncement on the nondelegation doctrine, the enforceability of the revised ozone standard, and the role of compliance costs in setting nationwide air quality standards.

In1999, the U.S. Court of Appeals for the D.C. Circuit ruled that deficiencies in EPA's promulgation of revised primary and secondary national ambient air quality standards (NAAQSs) for ozone and particulate matter required that they be sent back to the agency for further consideration. *American Trucking Ass'ns, Inc. v. U.S. EPA*, 175 F.3d 1027 (D.C. Cir.), *modified on rehearing*, 195 F.3d 4 (D.C. Cir. 1999), *petition for cert. granted*, 120 S. Ct. 2003 (May 22, 2000), 120 S. Ct. 2193 (May 30, 2000). Given the perceived impact of these clean-air standards on the economy, it was unsurprising that the judicial challenges were brought in roughly 50 separate actions — with two Members of Congress (Rep. Bliley and Sen. Hatch) filing as amici on the side of the challengers.

The controversy surrounding the court decision's key rationale, resurrecting a long-moribund legal doctrine, echoed that surrounding the revised ozone and particulate matter NAAQSs when they were promulgated in 1997.[1]

In May 2000, the Supreme Court agreed to decide certain issues raised in the D.C. Circuit's opinion.

By way of background, NAAQSs lie at the very heart of the Clean Air Act (CAA). These standards prescribe maximum pollutant concentrations for ground-level, outdoor air, and have been promulgated by EPA for six pollutants.[2] The NAAQSs determine the stringency of emission limits that each state must impose on stationary air pollution sources to achieve the NAAQSs within its borders. NAAQSs come in two forms: "primary NAAQSs" protect the public health, while "secondary NAAQSs" protect the public welfare (non-public health effects).[3]

What the D.C. Court of Appeals Said

The two-judge majority opinion. The most controversial portion of the majority opinion is Part I, on unconstitutional delegation. This doctrine derives from Article I of the Constitution, which vests "[a]ll legislative Powers" in Congress. Not surprisingly, the Supreme Court eschews a literal reading of "[a]ll," recognizing that Congress routinely delegates quasi-legislative powers to non-Article I bodies. In particular, Congress frequently commits to the specialized expertise of executive-branch agencies the task of rulemaking in technical areas — such as air pollution control. The nondelegation doctrine says that such delegations pass constitutional muster if Congress gives the agency an *intelligible principle* to guide its exercise of that authority.

The majority found that EPA had construed CAA section 109 — requiring that primary NAAQSs be set so as to "protect the public health" "allowing an adequate margin of safety" — so loosely as to render it an unconstitutional delegation. The court agreed with the *factors* used by the agency to assess the public health threat posed by air pollutants. But, it said, EPA had articulated no intelligible principle for translating the factors into a particular NAAQS, nor is one apparent from the statute.

Translating the impact factors into a numerical NAAQS requires more, insisted the court, than asserting that a higher NAAQS would allow greater public health harm, and a lower NAAQS less harm. This is *always* true for a nonthreshold pollutant,[4] but does not fix the *maximum acceptable* degree of harm. EPA also argued that at pollution levels

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[1] 62 Fed. Reg. 38,652 (1997) (particulate matter NAAQS); 62 Fed. Reg. 38,856 (ozone NAAQS). *See generally* John E. Blodgett, Larry B. Parker, and James E. McCarthy, *Air Quality: Background Analysis of EPA's 1997 Ozone and Particulate Matter Standards* (CRS Report 97-8 ENR).

[2] 40 C.F.R. §§ 50.4-50.12.

[3] CAA § 109(b); 42 U.S.C. § 7409(b).

[4] According to the court, "EPA regards ozone definitely, and [particulate matter] likely, as nonthreshold pollutants, i.e., ones that have a possibility of adverse health impact (however slight) at any exposure level above zero." 175 F.3d at 1034.

below the promulgated standard, health effects are less certain. The court rejected this argument as well. "[T]he increasing uncertainty argument," said the court, "is helpful only if some principle reveals how much uncertainty is too much."[5]

The court did not void the relevant CAA provision, but rather gave EPA an opportunity to develop the constitutionally required intelligible principle. Such principle, it opined, could not bring in compliance costs, since it has been judicially held that EPA may not consider costs in setting primary NAAQSs. If EPA finds that no principle is available, it would have to seek ratification of its NAAQSs by Congress.

Moving beyond the delegation issue, the court in Part II rejected petitioner arguments that EPA had failed to consider various assertedly required factors in revising the NAAQSs. For example, the court held that cost may not be considered in revising a NAAQS, just as it may not be considered in setting the initial NAAQS.

In Parts III and IV, the court turned to arguments specific to particular NAAQSs. Part III addressed the ozone NAAQS, holding that 1990 CAA amendments defining "marginal" to "extreme" ozone nonattainment by resort to statutorily specified atmospheric concentrations,[6] did not by that fact bar EPA from revising the ozone NAAQS. On the other hand, EPA is precluded from *enforcing* a revised primary ozone NAAQS other than in accordance with the classifications, attainment dates, and control measures set out in "subpart 2": the act's provisions dealing specifically with ozone nonattainment.[7] For this reason, the court declined to vacate the new ozone standards while the agency, per the delegation-doctrine discussion above, seeks to divine an "intelligible principle."

The court also concluded that EPA must, in setting or revising a NAAQS, consider the *benefits* as well as harmful effects of the pollutant. Thus, in addressing ozone, the agency must weigh any protection from ultraviolet radiation by ground-level ozone. This, said the court, the EPA may do on remand, assessing any such positive effects under the "intelligible principle" that it may develop.

Part IV addresses the particulate matter (PM) NAAQSs. It opens by sustaining EPA's decision to regulate coarse particulate pollution (2.5 to 10 micrometers in diameter) above the 1987 levels. Such coarse pollution, the court found, had documented health effects apart from those of fine particulate matter (below 2.5 micrometers in diameter). Still, the court held, EPA cannot deal with coarse particulate matter through a "PM_{10}" NAAQS that covers *both* coarse and fine particulates, since PM_{10} is an arbitrary indicator for coarse particulate pollution. The PM_{10} NAAQS was therefore vacated.

Part IV also rejected an argument against the new $PM_{2.5}$ NAAQS made by several Midwestern (coal producing) states. They argued that because EPA is regulating fine particulates separately for the first time, $PM_{2.5}$ should be considered a *new* pollutant, with all the CAA procedures that entails. The court saw it differently, viewing the $PM_{2.5}$

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[5] *Id.* at 1036.

[6] CAA § 181(a); 42 U.S.C. § 7511(a).

[7] CAA §§ 181-185B; 42 U.S.C. §§ 7511- 7511f.

standard as merely a continuation of EPA's trend, dictated by evolving science, toward focusing PM controls on the most injurious part of the particle-size spectrum. Nonetheless, because of its delegation doctrine holding, the court invited briefing on the question of remedy.

The one-judge dissent. The dissenting judge dealt exclusively with the delegation issue, accusing the majority of "ignor[ing] the last half century of Supreme Court nondelegation jurisprudence." The NAAQS-setting section of the CAA, he believed, does not give EPA unbridled discretion.

A later clarification. On petition for rehearing, the D.C. Circuit clarified some minor aspects of its Part III ozone nonattainment discussion.[8] It declined, however, to reconsider its ruling on nondelegation.

The Supreme Court Takes the Case

On May 22, 2000, the Supreme Court granted EPA's petition for certiorari. This was unsurprising, since EPA challenged the D.C. Circuit's controversial invocation of the nondelegation doctrine. That use of the doctrine seemed vulnerable, based as it was on the majority opinion's assertion that EPA discretion to set primary NAAQSs under CAA section 109 is without bounds. On the contrary, section 109 appears to impose at least a partial, if not complete, constraint on EPA -- that primary NAAQSs be based on "air quality criteria" published by the agency, and be set so as to "protect the public health" allowing an "adequate margin of safety."[9] As the dissent noted, the Supreme Court has sustained against nondelegation-doctrine challenge statutes instructing the FCC to regulate broadcast licensing "in the public interest,"[10] authorizing the Price Administrator to set "fair and equitable" prices,[11] and empowering the Attorney General to regulate drugs that pose an "imminent hazard to public safety."[12] If these vague standards are constitutionally adequate constraints on agency discretion, then arguably the CAA's bounds on the setting of primary NAAQSs are as well.

Indeed, except for two Depression-era cases in which standards were found to be absent, the Court has never found constitutional fault with a congressional delegation.[13] All that the Court seems to insist on (sometimes) is that Congress employ a delegation which "sufficiently marks the field within which the Administrator is to act so that it may

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[8] 195 F.3d 4, 10 (D.C. Cir. 1999).

[9] CAA § 109(b)(1); 42 U.S.C. § 7409(b)(1).

[10] National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[11] Yakus v. United States, 321 U.S. 414, 426-427 (1944).

[12] Touby v. United States, 500 U.S. 160 (1991).

[13] *See* Mistretta v. United States, 488 U.S. 361, 371-379 (1989) (reviewing case law). It should be noted that *American Trucking Associations* does not target the congressional delegation itself, as did previous delegation decisions. Rather, it implicitly recognizes that agencies can cure delegation deficiencies in statutes, thus transforming the delegation doctrine into a requirement that agencies constrain their own discretion.

be known whether he has kept within it in compliance with the legislative will."[14] Where the congressional standard is combined with requirements of notice and hearing and agency statements of findings and considerations, so that judicial review under due process standards is possible, the constitutional requirements of delegation have been fulfilled.[15] The judicial review provisions of the CAA arguably satisfy this lax standard.[16]

The D.C. Circuit decision on nondelegation, if left intact by the Supreme Court, means that all future new and revised NAAQSs are presumably subject to challenge on nondelegation grounds — unless, of course, the agency follows some judicially approved "intelligible principle" developed in the current litigation.[17] Beyond this, any Supreme Court endorsement of a reborn nondelegation doctrine could have implications for federal environmental regulation generally — indeed, for many non-environmental delegations of congressional authority to agencies.

A second important issue raised in EPA's petition related to the "subpart 2" discussion above. EPA's petition asks whether provisions of the 1990 CAA amendments specifically aimed at achieving ozone attainment, such as subpart 2, restrict EPA's general authority under other CAA provisions to implement new and more protective NAAQSs.

While the Supreme Court's grant of EPA's petition was expected, its grant of the industry's, on May 30, 2000, was not. The industry petition asked whether the CAA requires EPA, when setting primary NAAQSs, to ignore factors other than health effects – such as costs of compliance. The petition proposed that a negative answer to this question might allow EPA to supply an "intelligible principle" satisfying the nondelegation doctrine. That compliance costs *cannot* be considered in the setting of primary NAAQSs had long been considered a settled matter, ever since a 1980 decision of the D.C. Circuit.

The Supreme Court heard oral argument on both petitions on November 7, 2000.

Policy Implications

Congress has functioned primarily as an interested observer while the appeals process runs its course, but it has taken two steps, in legislation enacted October 27, 2000, to ensure that EPA would not implement any aspect of the new standards prior to a final court decision. The first of these steps[18] prohibits EPA from designating nonattainment areas under the new ozone standard (and possibly imposing new permit requirements on major sources of air pollution in such areas) until June 15, 2001 or until the Supreme Court's decision, whichever occurs first. In a separate amendment, the bill delayed for a

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[14] *Yakus*, 321 U.S. at 425.

[15] *Id.* at 426.

[16] CAA § 307(d); 42 U.S.C. § 7607(d).

[17] Nondelegation challenges to *existing* NAAQSs would seemingly be time barred. CAA section 307(b)(1) instructs that petitions for review of primary and secondary NAAQSs must be filed within 60 days after notice of promulgation appears in the Federal Register. 42 U.S.C. § 7607(b)(1).

[18] H. Amdt 859 to H.R. 4635, the VA-HUD-Independent Agencies Appropriation for FY 2001.

year the imposition of requirements that transportation projects in new nonattainment areas conform to an area's plan to attain clean air standards.[19]

Because the schedule for implementation of new NAAQS standards is lengthy, and because other provisions of the Act are unrelated to the setting of a NAAQS, the delays caused by congressional action and court challenges have had little effect to date. Without court intervention, EPA would have had until July 2000 to promulgate a list of ozone nonattainment areas under the 8-hour standard and until December 2005 to designate $PM_{2.5}$ areas. State implementation plans for those nonattainment areas would not have been due until 2003 and 2008, respectively. The ozone deadlines have clearly been delayed by the appeal process, but the monitoring to identify nonattainment areas has gone forward; if EPA prevails, it will be ready to proceed with designation of ozone nonattainment areas upon the resolution of court challenges. The $PM_{2.5}$ deadlines are so far in the future that they may not be affected, unless the standards are overturned by the court.

Meanwhile, other sections of the Act that are unaffected by decisions regarding the NAAQSs are driving continued improvements in air quality, and will force major sectors of the economy to implement more stringent emission controls. These include Phase II of the Acid Rain program under Title IV of the CAA, Tier 2 auto emission standards under section 202, the hazardous air pollutant program under section 112, new standards for diesel engines under Title 2, and the regional haze program under section 169.

Ultimately, no matter what the outcome of *American Trucking Associations*, Congress may choose to address the issue of congressional delegation of authority to set NAAQSs. The language of section 109, requiring protection of public health with an adequate margin of safety but providing no further "intelligible principle" by which EPA should make such a determination, is reminiscent of the original language of section 112 of the CAA governing hazardous air pollutants (HAPs). Between 1970 and 1990, EPA had great difficulty setting standards under that section, since it seemed to imply that emissions of nonthreshold pollutants should not be allowed at all. After years of court challenges to EPA attempts at regulation, Congress, in the 1990 CAA amendments, enacted a completely different approach to regulating HAPs: a list of pollutants was identified in the statute, and EPA was directed to promulgate emission standards for sources of these pollutants that embodied the Maximum Achievable Control Technology (MACT), a term defined with great specificity in the Act. Later, the Agency is to examine residual risks remaining after the imposition of MACT; here, too, Congress was specific in establishing a standard by which to judge the need for regulation (a 1-in-a-million cancer risk). Section 109 presents similar issues and might be susceptible to a similar solution. Whether Congress will address this issue is likely to depend on the outcome of EPA's and industry's appeals in *American Trucking Associations*, however.

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[19] Conference Report on H.R. 4635 (H.Rept. 106-988), Title III, Environmental Protection Agency, Administrative Provisions, p. 46.