

# CLEAN AIR ACT

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## Supreme Court Bars Consideration of Costs in Setting Ambient Standards, Overturns D.C. Circuit's Nondelegation Ruling, and Strikes Down EPA's Ozone NAAQS Implementation Policy

In a major decision addressing EPA's legal authority to establish and implement National Ambient Air Quality Standards (NAAQSs), the U.S. Supreme Court unanimously rejected industry petitioners' arguments that EPA must consider implementation costs in setting NAAQSs. *Whitman v. American Trucking Ass'ns*, No. 99-1257 (Feb. 27, 2001). The Court also reversed the decision of the D.C. Circuit holding that EPA's revised ozone and particulate matter (PM) standards are unlawful because they violate the constitutional doctrine of nondelegation. The Court ruled, however, that EPA's announced policy for implementing the revised ozone standard is unlawful.

Although the Supreme Court's decision definitively resolves the questions of whether costs can be considered in setting NAAQSs under the current law and whether the revised standards violate the nondelegation doctrine, key issues remain to be addressed before the D.C. Circuit on remand. As explained below, the question of whether the revised ozone and PM standards are "arbitrary and capricious" was not addressed by either the D.C. Circuit or the Supreme Court. Accordingly, on remand, the D.C. Circuit will be called upon to address that issue. Similarly, while the Supreme Court ruled that EPA's implementation policy for the revised ozone standard was unlawful, the Supreme Court did not explain what interpretation would be permissible. Thus, EPA must now develop a new implementation approach that will withstand judicial review.

We summarize the Court's rulings below.

### Consideration of Costs

The Court's opinion, authored by Justice Scalia, explains that industry's arguments that the costs of implementing a NAAQS must be considered in setting that standard are "made against the natural reading" of the Act and a long line of contrary D.C. Circuit precedents. The Court's opinion states that, since the decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), the D.C. Circuit has consistently ruled that "economic considerations [may] play no part in the promulgation of ambient air quality standards under Section 109" of the Act. The opinion explains that section 109(b)(1) directs EPA to set primary standards "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety." According to the Court, nowhere in section 109(b)(1) are the costs of achieving a standard expressly made part of the process of setting the health-based standard. Thus, industry "must show a textual commitment of authority to the EPA to consider costs in setting NAAQS . . . ."

The Supreme Court rejected industry's argument that the term "public health" can be read in this context to include factors such as economic conditions that "might produce health losses sufficient to offset health gains achieved in cleaning the air - for example, by closing down whole industries and thereby impoverishing the workers and consumers dependent on those industries." Instead, the Court concluded that the term must be given its ordinary meaning: "the health of the public." The Court further finds that the terms "adequate margin"

and “requisite” do not leave room to include cost concerns. In addition, the fact that costs are mentioned in certain places in sections 108 and 109 does not mean that they are to be considered in setting standards. Those other provisions are merely intended to enable EPA to assist the states in carrying out their role of implementing the NAAQSs promulgated by EPA.

### **Nondelegation Doctrine**

The “nondelegation doctrine” establishes the constitutional principle that Congress cannot delegate its legislative powers to an administrative agency. The Court’s opinion states that the D.C. Circuit had been confused in its approach to applying the doctrine. According to the D.C. Circuit, the revised standards violate the doctrine because EPA had not articulated any “intelligible principles” that would limit its authority in setting standards under section 109(b)(1). However, the Supreme Court’s opinion states that the question is instead whether the statute itself sets forth “intelligible principles.” According to the Court, EPA’s construction of the statute has no bearing on whether it is constitutional – the Agency cannot save an otherwise unconstitutional provision.

The Court then states that the “limits on the EPA’s discretion are strikingly similar to” ones that the Court has upheld in many other situations. According to the Court, “[s]ection 109(b)(1) of the CAA, which to repeat we interpret as requiring the EPA to set air quality standards at the level that is ‘requisite’ – that is, not lower or higher than necessary – to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent.” The Supreme Court reverses the D.C. Circuit’s ruling on the nondelegation doctrine issue and remands the case to that court to dispose of any other “preserved challenge.”

### **Finality of EPA’s Ozone Standard Implementation Policy**

EPA argued that the D.C. Circuit had erred in reviewing its implementation policy for the revised ozone standard because it was not a final agency action and was otherwise not ripe for review. The Court’s opinion rejects EPA’s position and states that “[w]e have little trouble concluding that this

constitutes final agency action subject to review under § 307” of the Act. The Court states that EPA’s published interpretation of Subparts 1 and 2 of Part D of the Act marks the consummation of a decisionmaking process and therefore constitutes a final agency action. The opinion explains that the Agency had proposed an implementation policy for the revised ozone standard, received public comments on it, and published its final policy and the statutory interpretation supporting it in the preamble to the final rule. The White House also issued a directive which set forth the same policy. According to the Court, EPA’s “own behavior thus belies the claim that its interpretation is not final.”

The Court similarly rejects EPA’s ripeness argument. The opinion states that the issue is “fit” for review in that the issue is merely one of statutory interpretation and that hardships are being imposed on states subject to the policy.

### **Lawfulness of EPA’s Ozone Standard Implementation Policy**

The opinion concludes that Part D of the Act is ambiguous as to how EPA is to implement a revised ozone standard. At the same time, the Court concludes that EPA’s interpretation of the relevant provisions of Part D is not a permissible reading. Subpart 1 of Part D contains general language authorizing EPA to address nonattainment problems for any NAAQS. Subpart 2, which was added by the 1990 Amendments, sets forth a detailed scheme for addressing ozone nonattainment, including a classification system, specific deadlines, and prescribed sanctions. EPA’s implementation policy is based on its interpretation that Subpart 2 applies to ozone nonattainment areas only until they achieve attainment with the “old” 1-hour ozone standard. EPA asserted that, at that point, Subpart 1 authorizes it to prescribe different measures for implementing the “revised” 8-hour standard.

The Court concludes, among other things, that Congress did not intend that Subpart 2 be completely superseded upon the revision of the 1-hour ozone standard – particularly since Congress knew at the time that it was passing the 1990 Amendments that a revision of the 1-hour standard was being considered. Although the court acknowledged that some elements of Subpart 2 are

“ill-fitted” for implementing a revised standard, e.g., classifications are based on the 1-hour standard and attainment dates are tied to 1990 rather than the date of promulgation of the revised standard, “[t]he EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.”

After concluding that EPA’s interpretation of the relationship between Subparts 1 and 2 is unlawful, the Court does not indicate what a permissible interpretation would be. Instead, the Court states that “it is left to the EPA to develop a reasonable interpretation of the nonattainment implementation provisions insofar as they apply to revised ozone NAAQS.”

### **Remaining Issues**

In the wake of the Supreme Court’s decision, a number of issues involving the revised standards remain to be resolved. In particular, upon remand to the D.C. Circuit, that Court is to address any “preserved issue,” which would include the question of whether the revised standards are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Because the D.C. Circuit disposed of the case primarily on nondelegation grounds, that court did not address the “arbitrary and capricious” challenges, including the question of whether the standards satisfy the statutory criterion of being “requisite to protect the public health.” EPA’s position before the Supreme Court was that “requisite” should be read to mean “sufficient, but not more than necessary.” Industry petitioners can be expected to argue on remand that the record fails to demonstrate that the limits chosen were not more stringent than necessary.

In accordance with the Supreme Court’s decision on the ozone standard implementation issue, EPA must develop an interpretation of Subparts 1 and 2 that harmonizes them to the extent possible. If EPA utilizes notice and comment rulemaking procedures to develop its new implementation policy – which the Supreme Court concluded was what EPA had done before – that process will likely take several months. In addition, EPA is still obligated to address issues remanded to it by the D.C. Circuit after its decision such as consideration of the beneficial effects of ground level ozone. Thus, it will be some

time before the remaining issues involving the revised standards are finally resolved.

The D.C. Circuit will likely call for the submission of supplemental briefs by the parties to address the remaining issues. The court might also schedule an additional oral argument. ‘

## **Supreme Court Denies Review in NOx SIP Call Case**

On March 5, the U.S. Supreme Court denied petitions filed by industry parties and certain states seeking review of the D.C. Circuit’s decision largely upholding EPA’s NOx SIP call rule. *Appalachian Power Co. v. EPA*, S.Ct. No. 00-445; *Michigan v. EPA*, S.Ct. No. 00-632; *Ohio v. EPA*, No. 00-633. The D.C. Circuit’s decision, among other things, had rejected arguments that EPA had not sufficiently analyzed each state’s emissions to determine which states “contribute significantly” to ozone nonattainment and that EPA had unlawfully based its “significant contribution” determinations on the cost-effectiveness of emissions controls. *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000). The D.C. Circuit had also concluded that the record did not support including three states – Wisconsin, Missouri, and Georgia – within the SIP call and remanded minor aspects of the rule to the Agency.<sup>1/</sup> As is frequently the case, the Supreme Court’s order did not include an explanation for denying the petitions seeking review of the D.C. Circuit’s decision.

Under the NOx SIP call rule, each state that is subject to the rule is to determine what emission reduction requirements it will impose on sources within its boundaries to meet the NOx emission “budget” specifically established for it in the rule. It is expected that the affected states will impose most of the additional requirements on electric utility sources and certain non-utility industrial sources with large boilers.

Following its decision in March 2000, the D.C. Circuit extended the deadline by which states

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1/ The D.C. Circuit’s decision is discussed in more detail in the March 2000 *Washington Report* at WR-291.

must submit their SIP revisions to EPA from September 1, 1999, to October 30, 2000 to reflect the fact that the Court had earlier stayed the rule for approximately 13 months. In August 2000, the Court similarly extended the deadline by which sources must reduce their NOx emissions pursuant to the SIP call from May 1, 2003 to March 31, 2004.

Although the Supreme Court's denial of the petitions marks the end of the original challenges to the NOx SIP call rule, litigation concerning particular aspects of the SIP call will continue. As a result, it is presently unclear when all legal issues will be resolved and whether EPA will be able to implement the SIP call as it currently intends. Two additional cases involving challenges to the NOx SIP call rule are presently pending before the D.C. Circuit. In one case, industry and state petitioners contend that various "technical amendments" made by EPA in 1999 and 2000 to revise state NOx budgets in the original rule are unlawful. *Appalachian Power Co. v. EPA*, No. 99-1268 (D.C. Cir.). That case was argued before the Court on March 23, 2001. In a second case, industry petitioners are challenging EPA's decision to adopt a two-phase approach to the SIP call and to amend state NOx budgets for a third time without following notice and comment rulemaking procedures. *Appalachian Power Co. v. EPA*, No. 00-1243 (D.C. Cir.). Oral argument in this case is scheduled for May 7.

In addition, on January 5, 2001, former Administrator Browner signed a *Federal Register* notice containing a rulemaking package responding to the D.C. Circuit's decision remanding certain issues to EPA. However, that proposal has not been published because it is still being reviewed by the Bush Administration

pursuant to the "Card Memorandum."<sup>2/</sup> The proposed rule would set forth specific geographic emissions boundaries and further revise the budgets for certain states. It is unclear when the proposed rule will be published. '

## EPA Upholds Challenges to Title V Permit for Insufficient Periodic Monitoring

EPA has granted in part a petition for an objection to a Title V permit on the grounds that certain periodic monitoring requirements were either not specified at all or were inadequate. *In the Matter of Fort James Camas Mill*, Petition No. X-1999-1 (Dec. 22, 2000).<sup>3/</sup> The decision is noteworthy because in it EPA interprets its Part 70 regulations in a manner that is inconsistent with the D.C. Circuit's ruling in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

EPA's decision responded to a petition filed by an individual pursuant to section 502(b) of the Act requesting that EPA object to a permit issued to a pulp and paper mill by the Washington Department of Ecology. The petition for an objection alleged that more than 30 specific terms in the mill's Title V permit failed to contain necessary periodic monitoring requirements. Former Administrator Browner granted approximately one-half of the claims raised in the petition and denied the remainder.

In explaining the rationale for its decision, EPA expressly relied on its recent decision in *In the Matter of PacifiCorp's Jim Bridger and Naughton Utility Steam Generating Plants*, Petition No. VIII-00-1 (Nov.

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2/ The "Card Memorandum" is discussed in more detail in the January 2001 *Washington Report* at WR-344.

3/ EPA's decision can be found on the website of the Clean Air Act Information Network under Title V Operating Permits – Policy and Guidance Documents – Decisions on Petitions for Objections.

16, 2000).<sup>4/</sup> In that decision, EPA interpreted its Part 70 regulations as allowing it to determine that the periodic monitoring provided in an applicable requirement is not adequate for Title V purposes. EPA reached this conclusion notwithstanding the *Appalachian Power* decision, where the Court concluded that section 70.6(a)(3), which specifically addresses periodic monitoring, does not allow the permitting authority or EPA to require additional periodic monitoring where the applicable requirement in question already provides for periodic monitoring. In *PacifiCorp*, EPA said that section 70.6(c)(1), which contains general language indicating that monitoring or testing must be sufficient to assure compliance, authorizes it to do what the D.C. Circuit said it cannot do – require additional or different periodic monitoring where the applicable requirement already prescribes periodic monitoring requirements. EPA explained its reasoning as follows:

EPA pointed out [in the *PacifiCorp* decision] that where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, the court of appeals has ruled that the periodic monitoring rule in section 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such circumstances, EPA found, the separate regulatory standard at section 70.6(c)(1) applies instead. The factual circumstances of *PacifiCorp* are analogous to this case. Accordingly, the reasoning of *PacifiCorp* is being followed in this case as well.

The *Fort James* decision appears to confirm that EPA will continue to rely on the interpretation of its Part 70 regulations revealed in the *PacifiCorp* decision – an interpretation that conflicts with the D.C. Circuit’s holding in *Appalachian Power*. In addition, the Agency has informally indicated that it might issue guidance which states that section 70.6(c)(1) grants permitting agencies and EPA authority to require more stringent periodic

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4/ That decision is discussed in the November 2000 *Washington Report* at WR-334.

monitoring even where the applicable requirement specifies periodic monitoring requirements. ‘

## “Federally Permitted Releases” Guidance Issued by Clinton Administration, Postponed by Bush Administration

On January 17, 2001, EPA officials signed revised guidance addressing the question of which air emissions qualify as “federally permitted releases” under section 101(10)(H) of CERCLA and therefore are not subject to hazardous substance reporting requirements under section 103 of CERCLA or section 304 of EPCRA. However, as explained below, that guidance has subsequently been withdrawn by the Bush administration for further review. It is uncertain whether the revised guidance will be re-issued and, if so, whether it will be substantially changed.

The revised guidance is intended to supersede EPA’s interim guidance on “federally permitted releases” involving air emissions, which was issued on December 21, 1999. 64 Fed. Reg. 71,613. EPA subsequently suspended the interim guidance in response to judicial challenges brought by several industry parties in the D.C. Circuit. *National Ass’n of Manufacturers v. EPA*, No. 00-1111 (D.C. Cir.). In connection with that litigation, the D.C. Circuit ordered EPA to take further action with regard to the interim guidance by January 26, 2001. EPA’s signing of the revised guidance on January 17 was intended to respond to the court’s directive.

On January 22, the Bush Administration sent a letter to the Office of the Federal Register withdrawing the revised guidance before it could be published. The withdrawal followed a January 20 memorandum from the White House Chief of Staff directing all department and agency heads, among other things, to withdraw any proposed or final regulations that had been sent to the Office of the Federal Register but not yet published. 66 Fed. Reg. 7702 (Jan. 24, 2001). The Bush Administration intends to review all such regulatory actions to determine whether they should go forward, be revised, or be permanently withdrawn.

Although the revised guidance contains certain substantive changes from the December 1999 interim guidance, there is apparently no consensus among industry representatives at this time regarding whether the changes adequately address industry concerns that EPA's guidance will unlawfully narrow the scope of the section 101(10)(H) exclusion from reporting requirements. The principal changes in the guidance involve emissions of VOCs, PM, and NOx as well as emissions from minor sources.

Under the interim guidance, facilities were required to report on VOC or PM emissions that are subject to permits or control regulations unless the permit terms or regulations specifically targeted the particular hazardous substance constituent in question. The revised guidance provides that, where facilities are in compliance with permit limits or control regulations for VOCs or PM and "those limits or controls include conditions that, when viewed together, control the release of a constituent hazardous substance, such a release would likely qualify as a federally permitted release." However, the revised guidance also states that "[w]hether the hazardous substance . . . is a criteria pollutant or a hazardous pollutant, the permit limit or control should be designed to limit or eliminate the specific hazardous substance that is subject to reporting under CERCLA or EPCRA." While the revised guidance appears to broaden the reporting exemption for VOCs and PM, it is unclear just how far the exemption is intended to extend.

NOx emissions were not specifically addressed in the interim guidance. The revised guidance appears to exempt all NOx emissions that are expressly subject to permit limits for NOx. According to the revised guidance, "NOx permit limits are sufficient to meet the CERCLA federally permitted release definition for releases of NO and NO<sub>2</sub>."

The revised guidance provides that emissions from a minor source with a federally enforceable threshold would generally qualify as federally permitted releases. "Releases of hazardous substances . . . from the normal operations of such minor sources qualify for the CERCLA section 101(10)(H) federally permitted release definition when the emissions of specific hazardous substances . . . are subject to the threshold limit imposed by law or regulation."

The revised guidance, like the interim guidance, provides that releases occurring during an accident or other malfunction "in most circumstances" are not covered by the exemption. According to the guidance, "[p]ermit limits and control regulations usually do not control or limit unanticipated releases such as accidents or malfunctions and for that reason they generally do not qualify for the . . . federally permitted release exemption."

An accompanying guidance on "grandfathered" sources, which was similarly withdrawn, indicates that "[g]enerally, releases from grandfathered sources do not meet the definition of federally permitted releases, because Congress exempted those sources, rather than imposing permits or control regulations on them." However, "[i]f there are federally enforceable permits or control regulations issued under the CAA provisions cited in CERCLA 101(10)(H) that apply to releases of hazardous substances from a grandfathered source, despite the grandfathered source exemption, those releases may qualify as federally permitted releases."

## Virginia Supreme Court Rules That State Enforcement Action is Foreclosed by Prior Federal Action

In a decision under the Clean Water Act that may also have important ramifications for federal and state enforcement of the Clean Air Act, the Virginia Supreme Court has ruled that a state enforcement action may be barred by a prior federal enforcement action involving the same state permit. *State Water Control Board v. Smithfield Foods, Inc.*, No. 000736 (Va. S.Ct., March 2, 2001). The Virginia Supreme Court specifically ruled that EPA and the state agency were "in privity" with regard to enforcement of the state permit. As a result, the Court upheld a lower state court ruling that the State Water Control Board's enforcement action against the company was barred by the doctrine of *res judicata*. Under the doctrine of *res judicata*, a final judgment on the merits of a claim precludes the parties (or other parties "in privity" with them) from subsequently litigating that claim again.

The Virginia Supreme Court's decision apparently marks the first time that any state agency has been barred by a state court from bringing an enforcement action under an environmental statute because EPA had previously obtained a final judgment in a federal enforcement action involving the same claim. Previous cases involving federal versus state enforcement of environmental statutes have raised the "opposite" question of whether EPA is barred from bringing an enforcement action because a state agency has already successfully brought an enforcement action. For example, in *Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999), the Eighth Circuit ruled that EPA's action to enforce RCRA requirements against the company involved was barred by the doctrine of *res judicata* because the state had already obtained a final judgment in its enforcement action.<sup>5/</sup>

The case arose when both EPA and the State Water Control Board filed enforcement actions against the company based on alleged violations of its state permit, which had been issued in accordance with both the Clean Water Act and state law. The federal district court issued its decision in EPA's enforcement action before the state trial court issued its decision in the state's enforcement action. The state trial court ultimately ruled on *res judicata* grounds that the Board could not proceed with its action.

On appeal, the Virginia Supreme Court determined that, based on the lower court decision and the parties' agreement, the only element of *res judicata* at issue before it was whether EPA and the Board were "in privity." According to the Virginia Supreme Court, the "touchstone of privity for purposes of *res judicata* is that a party's interest is so identical with another that representation by one party is representation of the other's legal right." The Court rejected the Board's argument that privity did not exist because each agency's enforcement action was based on separate legal authority:

Although the interests of the Board and the EPA in enforcing clean water requirements may be distinct

in the abstract because the authority to enforce such requirements is grounded in different legislative enactments, the salient fact in this case is that the interests and rights of both the entities are vested in a single permit.

Based on an analysis of the statutes and regulations, the Court concluded that EPA and the Board had mutually agreed that the state permit represented both entities' legal rights so that the Board's legal right was represented by EPA in the federal enforcement action.

The Court also rejected the Board's contentions that the parties had not intended to be in privity as reflected by the fact that they brought separate enforcement actions. According to the Court, "[p]rivacy does not require a shared subjective intent by the parties." Because the Court concluded that there was privity, it upheld the trial court decision, which had dismissed the Board's enforcement action. Although the case involved a permit under the Clean Water Act, the reasoning of the Court could also apply to the enforcement of Clean Air Act permits under the Title V or NSR programs. '

Don't forget to sign up for the **Annual Meeting of the Clean Air Act Information Network, May 10-11, 2001, in Washington, DC.** Send your registration form to Linda Eaton, or phone her at 202.467.7314. You will not want to miss this conference!

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5/ The *res judicata* holding in *Harmon* was an alternative holding. The court also relied upon the express statutory language in RCRA to conclude that EPA lacked enforcement authority.