



Supreme Court Hears Challenge to Clean Air Rules

By Brian Hansen

WASHINGTON, DC, November 9, 2000 (ENS) - The U.S. Supreme Court heard oral arguments this week on two companion cases that could greatly alter the U.S. Environmental Protection Agency's ability to protect the public from polluted air. The cases could even set a precedent for restricting the regulatory abilities of all federal agencies.

Both cases revolve around the federal Clean Air Act, which authorizes the Environmental Protection Agency (EPA) to establish air quality standards that are "requisite to protect" public health with "an adequate margin of safety."



The EPA's 1997 rules reduced the amount of pollution that trucks and other vehicles were allowed to emit (Two photos courtesy EPA)

The cases argued on Tuesday originate in the EPA's 1997 decision to strengthen the standards for ground level ozone - a major component of smog - and particulate matter or soot. The agency claimed that earlier standards for these pollutants were not adequate to protect the public from respiratory illness or premature death.

The 1997 standards - which the EPA claims were based on solid scientific evidence - lowered the acceptable size of airborne particles of soot and other particulate pollutants from 10 micrometers to 2.5 micrometers.

The rigorous 1997 standards also reduced allowable smog levels from 0.12 parts per million of ozone over a one hour period to 0.08 parts per million over eight hours.

The EPA estimated that the revised 1997 standards would protect an estimated 130 million Americans, including 35 million children who suffer from asthma and other respiratory illnesses due to poor air quality.

That argument was not good enough to a host of industry groups, trade organizations and three states, which challenged the revised standards in federal court. Those parties, led by the American Trucking Association, argued that the EPA should have to consider the costs of achieving cleaner air when setting standards.



Vehicle exhaust is among the prime sources of the pollution that leads to smog

The Washington, DC circuit court rejected that argument last year, ruling that the EPA only had to take costs into account when it initially adopted standards - not when it revised them, as the agency had done in 1997.

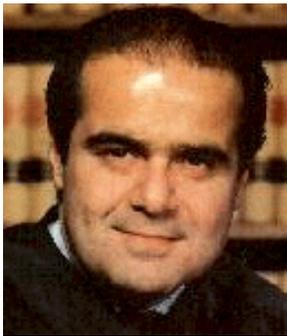
But the EPA's victory was rendered meaningless by a

second aspect of the court's 1999 decision. The court held that the standard setting process that the agency had followed in 1997 represented an unconstitutional delegation of Congress's legislative authority - meaning that the EPA had overstepped its own authority and tried to borrow powers normally held only by Congress.

When EPA Administrator Carol Browner petitioned for the Supreme Court to review the lower court's finding, the industries - once again led by the American Trucking Association - filed a counter petition asking the high court to review its argument that the agency should review the costs associated with its regulations.

Both cases argued Tuesday - *Browner v. American Trucking Association*, and *American Trucking Association v. Browner* - prompted a barrage of probing questions from all but one of the Supreme Court Justices.

Justice Antonin Scalia wasted no time in inquiring about the EPA's claim that the 1997 smog and soot standards were based on "tangible and quantifiable" public health end points. An end point is a term used to describe the problem that medical researchers are examining in a research study, such as lung cancer, asthma or death. An end point of cancer, for example, might be studied as one possible outcome of exposure to air pollution.



Justice Antonin Scalia (Two photos courtesy The Supreme Court)

Scalia reminded U.S. Solicitor General Seth Waxman, who represented the EPA in both cases, that the lower court had ruled that the EPA lacked an "intelligible standard," such as a avoiding certain number of lung cancer cases, to identify why it selected the air pollution standards that it chose.

"You could have drawn the line anywhere," said Scalia of the 1997 smog standard promulgated by the EPA. "I want a criterion for why (EPA) drew the line at .08."

Waxman explained that the EPA chose to set the smog standard at .08 because the epidemiological data that the agency consulted indicated that there were no "demonstrable, long term" health effects below that level. At a level of .07 for example, the adverse health effects from breathing smog would be "transient and reversible," Waxman said.

That was not good enough for Scalia.

"Why aren't transient health effects health effects?" Scalia shot back. "Why do you say that they should be ignored? It's less coughing, but it's still coughing."



Justice Sandra Day O'Connor

Justice Sandra Day O'Connor asked if the Clean Air Act compels the EPA to conduct cost benefit analyses before issuing regulations.

Waxman maintained that Congress has "made it clear" that standards are to be based on their ability to protect public health only, and that costs may only be taken into account during the implementation process.

That principle, which has survived a host of challenges that have been brought against it, was once again attacked on Tuesday by Edward Warren, who argued both cases on behalf of the American Trucking Association.

Warren told the Court that by enacting soot and smog standards that were based on no discernible health end points, the EPA could cost the transportation industry some \$50 billion per year. According to Warren, attempting to follow those standards would bring about the "deindustrialization" of the nation's economy.

Warren said that there "has to be some common sense brought to bear" on the EPA's practice of establishing pollution standards, and that the agency must consider the costs of complying with its regulations before it enacts them.

Justice Scalia seemed to acknowledge Warren's point, declaring that the EPA would "bring us back to the Stone Age" if it never took costs into consideration when promulgating new regulations.

Warren later elaborated on Scalia's point, arguing that even though the U.S. is a rich nation, it would be foolish to "squander" a massive amount of resources attempting to combat one problem, such as air pollution brought about by soot and smog.

"You don't protect public health without taking into account how everything is affected," Warren told reporters outside the court.



EPA Administrator Carol Browner (Photo courtesy EPA)

EPA Administrator Carol Browner also addressed reporters outside the court. Browner, who shook hands with the attorney who is suing her and her agency, called the Clean Air Act the "single greatest public health and environmental statute in the history of the United States."

"These [soot and smog] standards are about cleaner air for every person in the country," said Browner, who noted that the regulations would prevent "thousands of premature deaths every year."

"We're very proud of the work that we did in setting these standards," Browner said.

Browner's point was echoed by Howard Fox, an attorney with the Earthjustice Legal Defense Fund. Earthjustice, an environmental watchdog group, filed a friend of the court brief on behalf of the EPA.

"Congress didn't violate the Constitution when it set air quality standards that protect the public health, and EPA didn't violate it by setting standards that better protect Americans from death, hospitalization and illness," Fox said.

A host of environmental and public health groups have come to the aid of the EPA in this case, including the American Lung Association.

"The stakes in this case couldn't be higher," said American Lung Association CEO John Garrison. "No other environmental contaminant has public health impacts anywhere near those of particles (soot) and ozone (smog)."

But Browner warned that if the EPA loses this case, the repercussions could go much further.



The Supreme Court's decision could affect the regulatory powers of all federal agencies (Photo courtesy The Supreme Court)

"This case goes far beyond the EPA," Browner said. "It could call into question the work of other regulatory agencies."

The Supreme Court could invoke the little used Constitutional rule of "nondelegation," which means that federal agencies may not adopt powers normally reserved for Congress. If the Court decides that the EPA usurped Congressional powers, the decision could restrict not only the EPA's ability to regulate pollution, but also the authority of others federal agencies to regulate everything from transportation to consumer pricing.

A transcript of Tuesday's oral arguments will be posted on the Supreme Court's Web site within two weeks. The site is located at <http://www.supremecourtus.gov> .

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