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CASE SUMMARIES

Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001).

The Clean Air Act (“CAA”) requires the EPA to promulgate and periodically review National Ambient Air Quality Standards (“NAAQS”) for air pollutants identified by the EPA as meeting certain statutory criteria. For each pollutant, the EPA sets two standards. The first is the “primary standard,” which is a concentration level requisite to protect the public health with an adequate margin of safety. The “secondary standard” is the level “requisite to protect the public welfare.”

The Administrator for the EPA revised the NAAQS for Particulate Matter and ozone on July 18, 1997. American Trucking Associations, Inc. challenged the newly promulgated standards in the United States Court of Appeals for the District of Columbia.

American Trucking claimed that § 109(b)(1) of the CAA delegated legislative power to the Administrator of the EPA in violation of the United States Constitution. The Court of Appeals held that the EPA had interpreted the statute to provide no “intelligible principle” to guide the agency in decision-making. The Court of Appeals did suggest, however, that the EPA could possibly avoid the unconstitutional delegation by adopting a much more restrictive construction of the CAA. The court then remanded the NAAQS to the EPA for revision.

The Court of Appeals unanimously rejected American Trucking’s next argument, that the Court should depart from the rule set forth *Lead Industries Assn., Inc. v. EPA*. In that case, the same court nineteen years earlier had held that the EPA may not consider the cost of implementing a NAAQS in setting the initial standard. The Court of Appeals also rejected American Trucking’s argument that the implementation provisions for ozone were so tied to the existing ozone standard that the EPA lacked the power to revise the standard.

The EPA filed for rehearing, asserting that the Court lacked jurisdiction. The EPA argued that because it had taken no final action implementing the revised NAAQS, the Court could not review the standard. The CAA limited the Court of Appeals for the District of Columbia to jurisdiction in order to review “nationally applicable regulations promulgated, or final agency action taken, by the Administrator.” However, the Court found that the revised NAAQS were not tentative, and that they were “unambiguous and devoid of any suggestion that it might be subject to subsequent revision.” The court also noted that the revised NAAQS imposed a number of requirements on the states, which indicated a finality to the NAAQS that made them ripe for review. The Court thus held that it had jurisdiction to hear the case, and denied the EPA’s claim.

The EPA petitioned the Supreme Court for review. The EPA challenged the holding of the Court of Appeals that the CAA delegated legislative power to the Administrator of the EPA, and that the EPA’s interpretation of the CAA pertaining to the power to promulgate NAAQS was improper. The EPA also challenged the jurisdiction of the Court of Appeals. American Trucking conditionally cross-petitioned for review on whether the Administrator may consider the costs of implementation in setting NAAQS. The Supreme Court granted certiorari both petitions, and consolidated the cases for its decision.

The Supreme Court held that the costs of implementation may not be used as a factor in setting NAAQS. The CAA instructs the EPA to set primary ambient air quality standards “the attainment and maintenance of which... are requisite to protect the public health” with “an adequate margin of safety. The Court found that it was “fairly clear that this text does not permit the EPA to consider costs in setting the standards.” The language was noted as “absolute.”

The EPA, based on the information about health effects contained in the technical criteria documents compiled under the CAA is to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an “adequate” margin of safety, and set the standard at that level. The Court found that “[n]owhere are the costs of achieving such a standard made part of the initial calculation.”

The Supreme Court rejected American Trucking’s argument that the meaning of the term “public health” did not mean the standard definition of “the health of the community,” but rather “the ways and means of conserving the health of the members of a community.” The Court followed the standard rule that “words that can have more than one meaning are given content, however, by their surroundings.” In the context of the CAA, the definition espoused by American Trucking did not make sense, according to the Court. “Congress could not have meant to instruct the Administrator to set NAAQS at a level ‘requisite to protect’ ‘the art and science dealing with the protection and improvement of public health.’”

The Supreme Court also rejected American Trucking's argument that other factors besides air pollution affect public health, and that the economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains achieved in cleaning the air. The Court noted that while American Trucking's argument was unquestionably true, Congress was aware of the problem and provided for that precise exigency. The CAA permitted the Administrator to waive the compliance deadline for stationary sources if sufficient control measures were unavailable and the continued operation of such sources was essential to the public health or welfare. In addition, the CAA permitted or required that economic costs be taken into account in implementing the air quality standards. The Court therefore "refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted."

In order for American Trucking to prevail, the Court held that there must be "a textual commitment of authority to the EPA to consider costs in setting NAAQS." Since the provision of the CAA providing for NAAQS is "the engine that drives nearly all of Title I of the CAA," the "textual commitment must be a clear one." Congress, the Court noted, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."

American Trucking argued that the terms "adequate margin" and "requisite" in the CAA leave room to pad health effects with cost concerns. The Court, however, held that "it was implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards." American Trucking also argued that while the Administrator's judgment about what is requisite to protect the public health must be based on the criteria documents developed under the CAA, it need not be based solely on those criteria, and that while the criteria must include "effects of public health or welfare which may be expected from the presence of such pollutant in the ambient air," they are not necessarily limited to those effects. The Court held that even if the arguments were conceded as true, they would not conclude that one of the unenumerated factors that the agency could consider would be the cost of implementation. The cost was considered a factor "both so indirectly related to public health and so full of potential for canceling the conclusion drawn from the direct health effects that it surely would have been expressly mentioned in [the CAA] had Congress meant it to be considered."

American Trucking's final argument was that a number of provisions of the CAA do require attainment cost data to be generated, and that these provisions make no sense unless costs are to be considered in setting the NAAQS. The court rejected that argument, noting that "these provisions enable the Administrator to assist the States in carrying out their role as primary implementers of the NAAQS." The States are primarily responsible for deciding what emissions reductions will be required from which sources. Federal Clean Air legislation directs federal agencies to develop and transmit implementation information data, including cost data to the States, in order to assist states in choosing the means by which to implement the standards. The Court held that the collection of implementation data for this purpose "is perfectly sensible, and has no bearing upon whether cost considerations are to be taken into account in formulating the standards."

After considering all the arguments, the Court held that the text, as "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 NAAQS- setting process, and thus ends the matter for us as well as the EPA."

The Supreme Court also held that section 109(b)(1) of the CAA did not violate the nondelegation doctrine. The CAA requires the EPA to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on criteria and allowing an adequate margin of safety, are requisite to protect the public health." The Court of Appeals, when deciding this issue, had held that this section did not provide an "intelligible principle" to guide the EPA's exercise of authority in setting NAAQS. The Court of Appeals thus held that the EPA's interpretation of the statute violated the nondelegation doctrine.

The Supreme Court disagreed, instead finding that the constitutional question at hand was whether the statute had delegated legislative power to the agency. The Constitution vests all legislative powers to Congress, and provides no delegation of those powers. Thus, when Congress confers decision-making authority upon agencies, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." However, the suggestion of the Court of Appeals that the EPA could cure an unlawful delegation of legislative power by adopting, within its discretion, a limiting construction of the statute was flatly rejected by the Supreme Court. The question of whether a statute delegates legislative power was instead to be a question for the courts, and "an agency's voluntary self-denial has no bearing on the answer."

The Supreme Court also held that the scope of discretion the CAA allows was in fact well within the outer limits of the Court's nondelegation precedents. The degree of agency discretion that is acceptable varies according to the scope

of the power congressionally conferred. In the instant case, the Court decided that Congress is required to provide substantial guidance on setting air standards that affect the entire economy. However, the Court did not require that the CAA provide a determinate criterion for saying how much of the regulated harm is too much. The requirement that the EPA set air quality standards at the level that is not higher or lower than necessary to protect the public health was within the scope of discretion allowed, and did not violate the nondelegation principle.

The EPA argued also that the judgment of the Court of Appeals should be vacated because it lacked jurisdiction to review the EPA's implementation policy. Section 307(b)(1) of the CAA gives the Court of Appeals of the District of Washington jurisdiction over any "nationally applicable regulations promulgated, or final action taken, by the Administrator [of the EPA]." The EPA argued that its implementation policy did not constitute agency "action," was not a "final action," and was not ripe for review. The Court rejected all of the arguments.

When the EPA revised the ozone NAAQS in 1996, it also proposed an "interim implementation policy" for the NAAQS that was to govern until the detail of implementation could be put into final form through formal "rulemaking actions." The policy declared that "the interim implementation policy ... represent[s] EPA's preliminary views on these issues and, while it may include various statements that States must take certain actions, these statements are made pursuant to EPA's preliminary interpretations, and thus do not bind the States and public as a matter of law." Later, after the agency had accepted comments on its proposed policy, the White House published the "Memorandum for the Administrator of the Environmental Protection Agency," that prescribed the implementation procedures for the EPA to follow.

The EPA supplemented this Memorandum with an explanation of the procedures for implementation, which was published in the explanatory preamble to the final ozone NAAQS under the heading "Final decision on the primary standard." The preamble stated that the EPA had reconsidered the earlier interpretation proposed in the Interim Implementation Policy, and that a new interpretation had been settled. Parts of the CAA were immediately required to follow the implementation the new 8-hour [ozone] standards.

The Court found "little trouble concluding that [the implementation] constitute[d] final agency action subject to review" under the provisions of the CAA. The Court found that the term "final" in the heading of the NAAQS marked the "consummation of the agency's decisionmaking process." Under the terms of the CAA, only "final" actions are reviewable, and the Court found that the actions of the EPA met this standard. The EPA concluded its "decisionmaking process" when it adopted the interpretation of implementation procedures in the NAAQS. The court also noted that the EPA itself had refused to reconsider the issue in subsequent rulemaking processes to reconsider the issue, and explaining the refusal on grounds that the earlier decision was conclusive.

The Supreme Court also rejected EPA's argument that the issue was not ripe for review. The standard for determining ripeness is the evaluation of both the fitness of the issues for judicial decision and the hardship of the parties if court consideration is withheld. The Court first stated that "the question before us is purely one of statutory interpretation that would not benefit from further factual development." Second, the Court found that review would not "inappropriately interfere with further administrative action." Finally, the Court found that withholding a judicial decision would pose a great hardship to some of the parties. The Court noted that the States, had to immediately undertake the lengthy and expensive job of developing state implementation plans that would follow the EPA's standards within five years. Also, the special judicial review section of the CAA has been characterized by the Court as specifically providing for "preenforcement" review. Thus, the Supreme Court held that the Court of Appeals had proper jurisdiction in this case.

The final issue before the Supreme Court concerned the EPA's authority to implement the revised ozone NAAQS in areas where ozone levels currently exceed the maximum level permitted. Such areas are designated by the CAA as "nonattainment," and are exposed to additional restrictions over and above the implementation requirements imposed generally by the CAA. Subpart 1 of Part D of Title 1 of the CAA contains general nonattainment regulations that apply to every pollutant for which a NAAQS exists. Subparts 2 through 5 contain rules pertaining only to specific pollutants. Subpart 2 applies to ozone. The dispute before the Court centered on whether Subpart 1 alone, or Subpart 2, or some combination of the two, controls the implementation of the revised NAAQS in nonattainment areas.

Two Sections of Subpart 1 contain switching provisions stating that if the classification of ozone nonattainment areas is specifically provided for under other provisions of Part D, then those provisions will control. The EPA argued that the substantive language of Subpart 1 was broad enough to apply to revised ozone standards. The Court felt that this argument was incomplete, determining that in order to decide whether that language did apply, the Court must first decide whether Subpart 2 provided for the classification of ozone nonattainment areas.

After examining the language of Subpart 2, the Court held that it does provide for classification of nonattainment ozone areas. The Court found that a table in Subpart 2 defined five categories of ozone nonattainment areas, and

prescribed attainment deadlines for each. All classifications for areas of ozone nonattainment were to be under the standards set forth in that specific table. After areas were classified, the table set the primary standard attainment date.

The EPA argued that the text of the table was not as clear or comprehensive as it seemed, because the title of the statute containing the table was "Classification and attainment dates for 1989 nonattainment areas." The EPA argued that Subpart 2 only applied to areas that were in nonattainment in 1989, and did not apply to areas later designated nonattainment under the revised ozone standard. The Court rejected this theory, noting that Subpart 2 provided for the classification of areas that have slipped into nonattainment, but were in attainment in 1989. Thus Subpart 2 applied to all areas, and was not limited to 1989 nonattainment areas.

The EPA argued that some provisions of Subpart 2 are ill fitted to the implementation of the revised standard. Using the old 1-hour averages of ozone levels, as Subpart 2 requires, provides an inexact estimate of the new 8-hour averages. The EPA also pointed out that the new ozone standard is stricter than the old standard, and that the classification system of Subpart 2 contains a "gap," since it fails to classify areas whose ozone levels are greater than the new standard, but less than the approximation of the old standard codified at that time, since the technical staff papers had already been completed in late 1989. The Court countered that there was "nothing in the EPA's interpretation [that] would have prevented the agency from aborting Subpart 2 the day after it was enacted." The Court further stated that "[e]ven now, if the EPA's interpretation were correct, some areas of the country could be required to meet the new, more stringent ozone standard in at most the same time that Subpart 2 had allowed them to meet the old standard." As an example, "Los Angeles ... would be required to attain the revised NAAQS under subpart 1 no later than the same year that marks the outer time limit for attaining Subpart 2's one-hour ozone standard." The Court flatly rejected this interpretation, holding that "[a]n interpretation of Subpart 2 so at odds with its structure and manifest purpose cannot be sustained."

Thus, the Court found that "the EPA's implementation policy to be unlawful, though not in the precise respect determined by the Court of Appeals." The Court directed the EPA to develop a reasonable interpretation of the nonattainment implementation provisions applying to the revised standards for ozone.

LORI IMSLAND

Appalachian Power Company v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

A consolidated group of power companies and associations challenged a 'guidance document' promulgated by the EPA. The petitioners asked for review of an Environmental Protection Agency "guidance" document that allegedly imposed unauthorized requirements on states in connection with their operating permit programs under the Clean Air Act. The guidance document was published solely on EPA's website (www.epa.gov) and was not available for notice or comment, in accordance with procedures for formal rulemaking. The guidance document amended the monitoring requirements of certain pollution emitters.

The D.C. Circuit held that: (1) guidance document was final document subject to judicial review; (2) guidance document broadened underlying EPA rule and its promulgation was thus improper absent compliance with formal rulemaking procedures; and (3) proper remedy was to set aside guidance document in its entirety.

Title V of the Clean Air Act altered the manner in which government regulated the private sector to control air pollution. After the 1998 amendments, stationary sources of air pollution must obtain operating permits from the local authorities who administer EPA-approved implementation plans. These permits contain terms and conditions to assure compliance with applicable requirements under the clean air act, which include everything from emission standards to reporting and testing requirements. Standards are also commonly issued by the EPA itself, through formal channels or on its website, as was the case with the standards in question.

The EPA argued that the document was neither final nor binding. The EPA asserted that statements in the preamble to the 1992 rule and response to comments in the final rulemaking alerted interested onlookers to its current position and show that the Guidance issued in 1998 is no broader than the rule itself. However, the court disagreed that the original statute had the broad scope given it by this new guidance. The court reasoned that "[n]othing on the face of the regulation or in EPA's commentary at the time said anything about giving State authorities a roving commission to pore over existing State and federal standards, to decide which are deficient, and to use the permit system to amend, supplement, alter or expand the extent and frequency of testing already provided."

The electric power companies and trade associations representing the chemical and petroleum industry argued that the documents significantly broadened the 1992 rule. The court found that "[i]n directing State permitting authorities to

conduct wide-ranging sufficiency reviews and to enhance the monitoring required in individual permits beyond that contained in State or federal emission standards even when those standards demand some sort of periodic testing, EPA has in effect amended the statute.”

The court concluded that the 1992 rule could not be legally amended without complying with the rule making procedures required by 42 U.S.C. § 7607.

MELANIE KNIES