

*American Trucking Associations, Inc. v. USEPA,*  
Nos. 97-1440 and 97-1441 (D.C.Cir. October 29, 1999)  
**Summary of Opinions Re EPA's Request for Rehearing of May 14, 1999 Decision**

**General Summary**

- ❑ In July 1997, EPA issued health-based air quality standards for ozone and particulate matter. In response to challenges filed by industry and others, a three-judge panel of the United States Court of Appeals for the District of Columbia issued a split opinion on May 14. The relevant portions of this opinion are summarized below.
  
- ❑ On June 28, 1999, EPA filed a petition for rehearing on three aspects of the May 14 decision.
  - The petition gave the original three-judge panel the opportunity to reconsider and modify portions of its May 14 decision.
  - The petition also asked the entire D.C. Circuit to rehear three issues and reverse the decision of the original panel.
  - The three aspects at issue were whether the panel erred:
    - in determining that the Act, as applied and without further clarification, represents an unconstitutional delegation of legislative authority;
    - in concluding that EPA lacks authority to implement the revised, more stringent ozone NAAQS;
    - in determining that EPA must consider alleged benefits of ozone pollution to address health risks posed by the sun's natural rays when setting an ozone NAAQS.
  
- ❑ On October 29, 1999, the Court responded to EPA's petition.
  - The original three-judge panel kept most of its original decision as issued on May 14, but it partially modified one aspect of its decision (see the "Ability to Enforce Ozone Standard" section below).
  - Rehearing before the entire court was denied, although the majority of voting judges voted in favor of rehearing.

- On the key constitutional issue, of the nine judges who voted, five voted **in favor** of granting the petition for rehearing in front of the entire Court. (Two judges did not participate in the decision for unspecified reasons.)
    - The petition for rehearing was denied, however, because the court rules require a majority of the 11 active judges to vote for rehearing (rather than a majority of the voting judges).
    - A vigorous opinion in favor of rehearing, stated that the panel's decision on the constitutional issue was "fundamentally unsound" and went on to conclude that "the panel implicitly asserts a greater role for a reviewing court than is justified."
- The industry challengers to the July 1997 health-based air quality standards did not seek rehearing on any of the issues they lost in the May 14 decision -- including those portions of the panel's decision that upheld key aspects of the science EPA relied on and the process EPA followed in setting the standards.

### Summary of Specific Issues

#### □ **NONDELEGATION DOCTRINE:**

- May 14 Panel Decision: In the May 14 decision, the Court held (2 to 1) that the Clean Air Act, as applied and absent further clarification, is unconstitutional because it "effects an unconstitutional delegation of legislative power."
  - The Court stated that "the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable."
  - However, the Court said that when EPA considers these factors for non-threshold pollutants, "what EPA lacks is any determinate criterion for drawing lines" to determine where the standard should be set.
  - The vigorous dissent on this issue stated that the relevant Clean Air Act provision's "delegation of authority is narrower and more principled than delegations the Supreme Court and this court have upheld since [a 1935 case relied on by the majority]."
- October 29 Panel Decision on Rehearing Request: In a split opinion reiterating its earlier views, the panel denied rehearing on this issue.

- Request for Rehearing Before the Entire Court: Of the nine judges voting, five voted to have the entire Court rehear the case -- six votes were needed to grant rehearing. Four of these five clearly said that the panel's decision on the nondelegation doctrine should be reversed.
  - In a strongly worded opinion, three judges concluded that, "Not only did the panel depart from a half century of Supreme Court separation-of-powers jurisprudence, but in doing so, it stripped the Environmental Protection Agency of much of its ability to implement the Clean Air Act, this nation's primary means of protecting the safety of the air breathed by hundreds of millions of people."

□ **ABILITY TO ENFORCE THE REVISED OZONE STANDARD**

- May 14 Panel Decision: In the May 14 decision, the Court held paradoxically that the Clean Air Act allows EPA to revise the primary ozone standard, but stated that the revised ozone standard "cannot be enforced."
- October 29 Panel Decision on Rehearing Request: In response to EPA's petition for rehearing, the panel modified this portion of the opinion.
  - The panel replaced language in the May 14 decision stating that the revised ozone standard "cannot be enforced" with language saying that it could be enforced "only in conformity with Subpart 2."
    - The majority did not explain what it meant to enforce a revised ozone standard "in conformity with Subpart 2," which sets out specific requirements for enforcing the pre-existing 1-hour ozone standard.
    - The concurring opinion states that this "leaves open the possibility that the new ozone standard can be implemented in areas that have attained the old standard."
- The panel also changed the May 14 decision to say that Subpart 2 does not bar EPA from enforcing a revised secondary air quality standard. This replaced language that would have precluded EPA from enforcing a revised secondary standard before an area had attained the pre-existing 1-hour standard.
- The panel also modified its rationale for not vacating the 8-hour ozone standard. It continues to allow the 8-hour standard to remain in effect because "the parties have not shown that the standard is likely to

engender costly compliance activities in light of our determination that it can be enforced only in conformity with Subpart 2.”

- Request for Rehearing Before the Entire Court: The petition for rehearing this issue before the entire court was denied.

#### □ **CONSIDERATION OF UVb RADIATION**

- May 14 Panel Decision: In addressing whether EPA should have considered alleged benefits of ground-level ozone as a shield in blocking ultraviolet (UVb) radiation, the May 14 decision held that EPA must consider whether ground-level ozone has a beneficial effect, and if so, consider such effects in assessing ozone's net effects on health.
- October 29 Panel Decision on Rehearing Request: The petition for rehearing on this issue was denied.
- Request for Rehearing Before the Entire Court: The petition for rehearing on this issue was denied.

The October 29, 1999 opinions can be found at:

<http://www.cadc.uscourts.gov/common/opinions/199910/97-1440b.txt>

The May 14, 1999 decision can be found at:

<http://www.cadc.uscourts.gov/common/opinions/199905/97-1440a.txt>