

[\[Table of Contents\]](#)[\[Next Story\]](#)

CLEAN AIR ACT DEALT MAJOR BLOW

Appeals court says EPA went beyond scope of law with ozone, particulate matter rules

Julie Grisham

In a [decision](#) many called surprising, an appeals court on May 14 struck down the Environmental Protection Agency's plans to tighten standards for particulate matter and ozone under the Clean Air Act. The court said sections of the act were based on "an unconstitutional delegation of legislative power."



[AP Photo/Elaine Thompson]

The U.S. Court of Appeals for the District of Columbia said EPA had failed to explain how it reached the standards it set for particulate matter and had not formulated adequate criteria for setting ozone limits. In 1997, EPA issued a new standard of 0.08 ppm measured over eight hours for ozone and set standards for fine particles as small as 2.5 μm in diameter. The court remanded all standards related to its decision back to EPA for further consideration.

According to Jayne Mardock, director of the [Clean Air Network](#), an alliance of local, state, and national organizations, people are still struggling to figure out what the ruling means.

David Friedland, an environmental attorney with Washington, D.C.-based law firm Beveridge & Diamond, says it's one of the most complicated decisions he's seen.

EPA relied on two sections of the Clean Air Act in setting its revised [National Ambient Air Quality Standards](#) (NAAQS) for ozone and particulates. Section 108 directs EPA to list pollutants that endanger public health and to issue air quality criteria for them that reflect the latest scientific information. Section 109 directs EPA to periodically revise NAAQS to protect against adverse health effects with an adequate margin of safety. But the court said EPA had construed the sections so loosely as to render them unconstitutional.

Citing the "nondelegation doctrine" and drawing on cases from the New Deal era, the court said Congress can't tell agencies to write standards because it amounts to delegating legislative authority to the executive branch.

The court's ruling was "an implicit criticism of Congress and a bold criticism of EPA," says Marci A. Hamilton, a professor at Benjamin N. Cardozo School of Law, New York City, and an expert on constitutional law. She believes the court came to the right decision in ruling that the air standards are invalid until EPA can show that they follow from an "intelligible principle."

The court noted that the only concentration of ozone and particulate matter in the air that is risk-free in terms of health impacts is zero. And it said that for EPA to pick any cutoff other than zero, it must explain the basis of the decision. "What EPA lacks is any determinate criterion for drawing lines," the judges wrote. "It has failed to state intelligibly how much is too much."

The court also ruled that EPA could not ignore the potential health benefits of ground-level ozone when establishing the ozone standard. Many groups presented the court with evidence that tropospheric ozone shields the skin and eyes from harmful ultraviolet light.

The court split 2-to-1 on the decision. The majority opinion was written by U.S. Circuit Judges Stephen F. Williams and Douglas H. Ginsburg. The dissenting judge, David S. Tatel, wrote that, in making its decision, "the court ignores the last half-century of Supreme Court nondelegation jurisprudence." He noted that the Clean Air Act has been amended by Congress several times and has been subject to numerous oversight hearings. He believes EPA offered "reasonable explanation" for the air standards.

EPA plans to appeal the decision, which likely will go to the Supreme Court. The agency says it stands by the health protections in the clean air standards and the science behind them.

At a hearing last week on another contentious air issue--EPA's plan to drastically cut sulfur levels in gasoline--EPA Administrator Carol M. Browner called the ruling "extreme, illogical, and bizarre." She said she had reviewed transcripts from congressional hearings on the 1990 Clean Air Act Amendments and that, in those debates, no one ever denied EPA's ability to set standards.

Many industry groups praised the court's decision. A spokesman for the [Chemical Manufacturers Association](#) called the decision a "significant victory" that will have "direct benefits for CMA members."

The [American Trucking Association](#), which brought the lawsuit against EPA together with many other industry and state groups, said, "The court reinforced the fact that EPA must follow the law as written by Congress and cannot just implement its own open-ended policy preferences."

Environmental groups, however, called the decision an attack on the environment. Philip E. Clapp, president of the [National Environmental Trust](#), said in a statement: "The decision jeopardizes the lives of 15,000 people a year, who EPA estimates die prematurely because of smog and soot pollution these regulations are intended to prevent." He said the decision "amounts to an activist court attempting to rewrite the Clean Air Act."

Although environmental groups were upset by the decision, they did see a few bright spots. For one thing, the court did not dispute the science supporting EPA's conclusion that particulate matter and smog are dangerous pollutants. It also rejected the argument from small-business interests that EPA should consider costs to industry as well as health when setting standards.

Some legal experts say the decision could have wide-ranging effects on the ability of EPA and other agencies to put forth regulations. But many opposed to the ruling still are optimistic. The case is not the death of the Clean Air Act, Mardock says.

[\[Next Story\]](#)[\[Table of Contents\]](#)