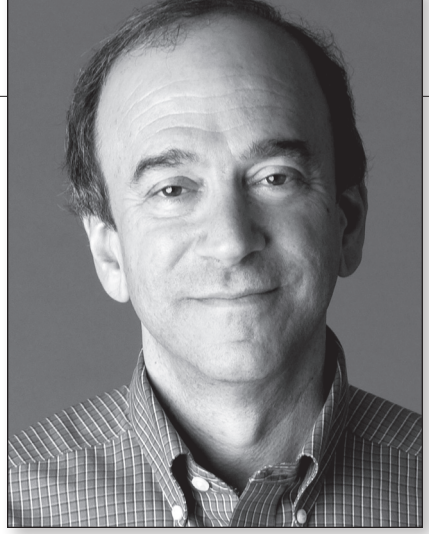

By Richard Lazarus

NAAQS: A Judicial Reality Check

Environmentalists quickly dubbed it the Friday Smog Massacre after President Obama, just before a holiday weekend, instructed EPA to withdraw its decision to reconsider the National Ambient Air Quality Standards for ozone that EPA had promulgated in 2008. Environmentalist outrage was not muted. Obama had "defie[d] the Clean Air Act and a unanimous Supreme Court decision, elevating unlawful considerations above public health, science, and the law."

The president's offense? Although industry contended that the 2008 primary ozone NAAQS of 0.075 parts per million was unduly stringent, environmentalists had countered that it was not stringent enough. And the latter were in good company. EPA Administrator Lisa Jackson had made the same point in originally announcing her decision to reconsider the 2008 standard. And no less than EPA's own Clean Air Science Advisory Committee, established by the Clean Air Act and responsible for providing EPA with scientific expertise in the setting of NAAQS, had unanimously concluded that "overwhelming scientific evidence" supported lowering the primary standard "from 0.08 ppm to no greater than 0.070 ppm."

Yet, this past July, the D.C. Circuit in *Mississippi v. EPA*, unanimously upheld EPA's decision to stick with 0.075 ppm. The judges included David Tatel, Thomas Griffith, and Janice Rogers Brown. Not only do they represent a balanced panel, but Judge Tatel would be on any environmental group's all-star team of judges willing to take on EPA for shirking its responsibilities.

There are three take-away lessons.

First, as the D.C. Circuit put it with an apt literary reference, "unlike Goldilocks, this court cannot demand that EPA get things 'just right.'" The court rejected the environmentalist claims that the 0.075 primary standard was not stringent enough and the claims of industry that it was too stringent. Declining what it characterized as industry petitioner's "invitation to enter that funhouse," the court stressed the limited nature of the judicial role in evaluating the rationality of EPA's decision.

According to the court, the Supreme Court's 2001 admonition in *Whitman v. American Trucking Ass'n* that a NAAQS "neither be higher nor lower than necessary" to be "requisite to protect the public health," within the meaning of the CAA, does not mean there is only one possible lawful standard. The court cannot "referee battles among experts" and the fact that EPA has relied on "statistically insignificant results in the past when setting the primary NAAQS" does not mean it has to now.

It was dubbed the Friday Smog Massacre after EPA withdrew its ozone standard

The second lesson relates to the court's ruling that EPA's analysis in setting NAAQS may properly include "public health policy judgments as well as its analysis of scientifically certain fact." EPA's greatest vulnerability in the litigation was its rejection of the unanimous recommendation of the twenty-three member advisory committee that "overwhelming scientific evidence" supported EPA's promulgating an ozone NAAQS "no greater than 0.070 ppm." The CAA's procedural requirement that EPA must provide "an explanation of reasons" for departing from the panel's recommendations is one of environmental law's signature statutory innovations. It places within the administration record a potentially conflicting source of scientific expertise capable of overcoming a court's normal reluctance to second guess the expert agency.

EPA was able to overcome that hurdle in *Mississippi v. EPA* only by the thinnest of margins. Parsing the words of the committee's recommendation to EPA, the court was persuaded that "because in this case the committee failed to specify whether the 0.070 ppm level it recommended as a maximum rested on a scientific conclusion about the existence of adverse health effects at that level, EPA's invocation of scientific uncertainty and more general public health policy considerations satisfies its obligations under the statute." The committee's apparent shortfall was while it plainly concluded that "overwhelming scientific evidence" *supported* the lower standard, it did not make sufficiently clear that such scientific evidence effectively *compelled* the lower standard and, therefore, that the committee had not also relied on public health policy judgments in support of its ultimate recommendation. For the court, this distinction was dispositive, because when it comes to EPA's exercise of "public health policy judgments when confronted with scientific evidence that does not direct it to a specific outcome, it is to EPA's judgment that we must defer."

The third lesson is be wary of policy hyperbole cast as legal argument. Environmentalists were understandably angry about the president's decision, both on the merits and procedurally. And there is nothing in the D.C. Circuit's ruling to suggest that the court would not have similarly upheld a primary ozone NAAQS of 0.070 ppm. But understandable fury about differing policy judgments is not equivalent to a persuasive legal argument. And, on the latter, the White House plainly prevailed.

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