3-1-2012

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Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38RC31

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NRDC v. EPA: Another Battle over Ozone NAAQS

INTRODUCTION

In Natural Resources Defense Council v. Environmental Protection Agency,1 the D.C. Circuit ruled against the Environmental Protection Agency (EPA) and a “guidance document” (“Fee Program Guidance,” hereinafter “FPG”) the agency had promulgated.2 The court held the FPG’s issuance in violation of the Administrative Procedure Act (APA) and rejected part of its content as in violation of the Clean Air Act (CAA). The FPG sought to expand state discretion in relation to section 185 of the CAA by giving states the option, subject to EPA approval, to implement “program alternatives” to CAA section 185’s fee program. The fee program mandates fees for nonattainment of National Ambient Air Quality Standards (NAAQS).3 The court vacated the FPG because it would have changed the law without undergoing the notice-and-comment process mandated by the APA. It further rejected a specific alternative program suggested in the FPG, an “attainment alternative.” The attainment alternative would have allowed regions that met either the previous one-hour NAAQS or the new eight-hour NAAQS to avoid section 185 fees for nonattainment of the one-hour NAAQS. This In Brief first discusses the statutes, administrative rules, and litigation that gave rise to this case. It then summarizes the facts of the case and the court’s holdings. The In Brief concludes by evaluating the court’s reasoning and anticipating how it will affect future cases.

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I. BACKGROUND

A. Statutory Genesis

This case stems from the CAA requirements that the EPA promulgate a NAAQS for ozone and that those regions which do not attain it “be subject to additional restrictions over and above the [Act’s] implementation requirements.” The restriction at issue mandates fees on major source of ozone emissions in an area that remains in severe or extreme nonattainment of a NAAQS after its attainment deadline.

EPA established the first ozone NAAQS in 1971, then updated it in 1979 to a one-hour standard that prohibited average ozone concentrations over 0.12 parts per million (ppm). In 1997, after finding the one-hour standard “insufficient to protect public health,” EPA issued a new rule that changed both the standard and its measure by updating the NAAQS to an eight-hour standard of 0.08ppm. This eight-hour standard is more stringent than the previous one-hour standard and is overall “more protective of public health.” In order to “ease the transition to the new standard,” EPA determined that subpart 2 of the CAA, which includes section 185, would apply only to nonattainment under the one-hour standard. In other words, under the 1997 rule, section 185 fees would have applied only to nonattainment under a standard that EPA had already found insufficient to protect public health.

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4. Id. § 7409(a).
7. The initial ozone NAAQS prohibited one-hour concentrations over 0.08 ppm. See Table of Historical Ozone NAAQS, EPA, http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_history.html (last visited Apr. 16, 2012) [hereinafter Table of Historical Ozone NAAQS]. The method used for measuring adherence to this standard is fairly complicated; for a detailed explanation, see EPA, GUIDELINE ON DATA HANDLING CONVENTIONS FOR THE 8-HOUR OZONE NAAQS 4–7 (1998), available at http://epa.gov/ttn/naaqs/ozone/ozonetech/o3guide.htm.
9. Id. This standard was revised to 0.075 ppm in 2008, a reduction smaller than what the Clean Air Scientific Advisory Committee (CASAC) recommended. In January 2010, EPA proposed a rule that would bring the standard generally in line with CASAC’s recommendations by lowering it to between 0.06 ppm and 0.07 ppm. Efforts to enact the rule are ongoing. See Table of Historical Ozone NAAQS, supra note 7; National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938 (proposed Jan. 19, 2010) (to be codified at 40 C.F.R. pts. 50, 58).
10. The 0.12 ppm one-hour standard correlated to a 0.09 ppm eight-hour standard. S. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 892 (D.C. Cir. 2006).
B. Litigation Following the 1997 Rule and Its Fallout

The Supreme Court reviewed the 1997 rule four years later in *Whitman v. American Trucking Ass'ns*. Although the Court recognized that the CAA left several “gaps” for EPA to fill in implementing the revised NAAQS, it held that EPA did not have discretion to implement the new standard under only subpart 1. EPA responded to the Court’s decision by promulgating another formal rule in 2004. The 2004 rule contained two points pertinent to this case.

First, it announced that subpart 2 would apply only to regions in nonattainment of the one-hour and the eight-hour standards, and that EPA would cease implementation of the one-hour standard a year after the eight-hour standard went into effect. The immediate effect was a drastic reduction in the number of regions facing sanctions under subpart 2. This provision of the 2004 rule met with mixed results in *South Coast Air Quality Management District v. EPA*, where the D.C. Circuit upheld the withdrawal of the one-hour standard but struck down the attempt to limit subpart 2’s application to regions in nonattainment of both standards.

The second key point of the 2004 ozone rule was EPA’s interpretation of section 172(e), an anti-backsliding provision. Section 172(e) stipulates that “if the administrator relaxes a [NAAQS],” EPA must maintain controls that are “not less stringent than” those applicable to areas in nonattainment prior to the relaxation. The 2004 rule interpreted this provision to apply also when NAAQS were made more stringent, as in the 1997 change in ozone NAAQS. However, EPA’s further assertion that not all “applicable controls” from subpart 2 would apply under section 172(e) greatly tempered the apparent rigidity of this point. Among the controls that EPA asserted would not apply was section 185’s fee program. The *South Coast* court approved EPA’s interpretation of section 172(e)—that it applies where standards are relaxed and where they are made more stringent—but rejected the exclusion of section 185 fees from “applicable controls” of subpart 2.

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15. *Id.* at 484–86.
18. *Id.* (explaining that 76 of the 122 areas then in nonattainment would become exempt from subpart 2). The provision would result in the effective nullification of subpart 2 upon the one-year anniversary of the eight-hour standard. *Id.*
22. *S. Coast*, 472 F.3d at 890.
23. *See id.*
24. *See id.* at 900–03.
After *South Coast*, the imminence of section 185 fees motivated industry groups to approach EPA in the hopes of finding a way to avoid sizable penalties. Those efforts led to the creation of a special section 185 work group under the Clean Air Act Advisory Committee (CAAAC). The group’s membership drew from private, public, and government sectors, and was tasked with developing ways to implement alternative programs.

Although dissent arose over some issues, the group compiled a list of potential alternative programs that states might choose to adopt. The work group also unanimously posed to EPA the question at issue in NRDC: “Is it legally permissible under either section 185 or section 172(e) for a State to exercise the discretion identified in [the proposed alternatives]?" 

EPA, believing that such discretion was in fact legally permissible, issued the FPG that gave rise to this case. In the FPG, EPA asserted that states could meet the requirements of section 185 via either the program it prescribes or an equivalent alternative program. According to the FPG, EPA had discretion to allow either option. The FPG further provided several examples of alternative programs that would be acceptable, most notably an

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26. These penalties amount to $5000 per ton of emissions that exceed 80 percent of baseline emissions, adjusted to account for inflation since 1990. See 42 U.S.C. § 7511d(b) (2006).
28. Private sector participants included Baker Botts and ExxonMobil; public interest entities included NRDC, Earthjustice, and Sierra Club. Government agencies from relevant nonattainment areas were also involved, including San Joaquin Valley Air Pollution Control District and Texas Commission on Environmental Quality. For a full list, see Robert Wyman, Clean Air Act Advisory Comm., Clean Air Act Section 185: Nonattainment Fees (May 14, 2009), available at http://www.epa.gov/air/caaac/185wg/yttaentment_areas.pdf [hereinafter Nonattainment Fees].
30. For example, the notion that the only way for some sources to reduce emissions was to cut production caused some consternation. See Nonattainment Fees, supra note 28. Disagreements basically split along predictable lines between nonprofit and industry groups, with only some government agencies “changing sides” on various proposals. See Section 185 TASK FORCE, CLEAN AIR ACT ADVISORY COMM., SCOPE OF STATE DISCRETION IN IMPLEMENTING CLEAN AIR ACT SECTION 185, MAY 12, 2009 DRAFT (2009), available at http://www.epa.gov/oar/caaac/185wg/all_responses_05_12_09_final.pdf [hereinafter SCOPE OF STATE DISCRETION].
33. The guidance document does not mention all of the alternative programs from the work group, presumably because EPA believed some of the alternatives to be untenable under the CAA. Compare Section 185 ISSUES, supra note 31, with Fee Program Guidance, supra note 2.
34. Fee Program Guidance, supra note 2.
35. Recall that 172(e) requires changes be “not less stringent than” the old programs. Thus, “equivalent” means not less stringent than section 185. See 42 U.S.C. § 7502(e) (2006).
36. Fee Program Guidance, supra note 2, at 2–3.
37. *Id.*
38. *Id.* at 4–6.
attainment alternative. The attainment alternative would permit regions already in attainment under either the one-hour standard or the eight-hour standard to count their current emissions controls as an “alternative program” that would suffice as a substitute for subpart 2. Under this alternative, regions could avoid section 185 fees for nonattainment of the one-hour NAAQS without actually improving performance. EPA’s approval of alternative programs in general and the attainment alternative in particular gave rise to NRDC’s suit.

II. ANALYSIS

NRDC brought suit in March 2010 with three claims: (1) EPA violated the APA by failing to submit the FPG to the notice and comment process; (2) EPA violated the CAA by allowing states discretion to implement program alternatives; and (3) EPA’s attainment alternative violated the CAA.

EPA responded with “nearly every arrow in its jurisdictional quiver,” raising a number of procedural defenses. In quickly dispatching those defenses, the court stated that “section 172(e)’s application in this context requires interpretation”—an important point to which I will return. On the merits, EPA contended that, because the FPG was either a policy statement or interpretive rule, it was exempt from the APA’s notice and comment requirement. It further argued that both alternatives were permissible exercises of statutory gap-filling.

A. On the Merits: Did EPA Have Discretion?

The court found for NRDC on its first claim, holding that the FPG was a legislative rule and therefore subject to notice and comment requirements. It declined to judge the merits of the second claim against program alternatives in general, but ruled against the attainment alternative that would have allowed attainment under either the one-hour or eight-hour standard to preclude section 185 fees.

In holding for NRDC on the first issue, the court noted EPA had eliminated regional directors’ ability to reject alternative programs proposed by states on the sole basis that they would conflict with the CAA. The court noted this was not a theoretical option, but one that they had previously been exercised. Thus, by restricting directors’ range of choices, the FPG...
impermissibly changed the law by answering affirmatively the question posed by the CAAAC’s workgroup: it concluded states did have the discretion identified by the CAAAC.  

The court’s judgment on this issue presented it with a fork in the road: either end the inquiry after vacating the FPG or continue on and address the rule’s substantive merits, as NRDC urged. The court noted the lack of controlling precedent for the choice, citing cases in favor of each option. In a move perhaps instructive for the future parties, it chose to proceed by balancing two interests: avoiding preemption of the APA’s notice-and-comment process, and potentially exacerbating the injury sued over by delaying judgment. Balancing these factors, the court passed on the acceptability of program alternatives at large, stating, “Because neither the statute nor our case law obviously precludes [alternative programs], we believe that by weighing in now we would unfairly prejudge any future notice and comment process.” By contrast, the court acted decisively against the attainment alternative, noting that its inevitable rejection alleviated any concerns about deference.

The attainment alternative’s conflict with the CAA stems from section 172(e), which requires that an alternative be “not less stringent than applicable controls.” Rather than claiming that controls for the eight-hour standard were actually equivalent to controls for the one-hour standard, EPA equated “the purpose of section 185 as an anti-backsliding measure . . . with the purpose of 8-hour attainment controls.” However, section 172(e) does not merely require that controls have the same purpose, but that newer controls in fact be “no[] less stringent” than controls required to attain the superseded standard.

The court further held that the attainment alternative was inconsistent with precedent because, in direct contradiction of the South Coast holding that applicable controls “must be enforced under the one-hour NAAQS,” it would allow violations of the one-hour standard to continue. As in South Coast, the court rejected EPA’s defense that it could no longer reclassify areas under the

50. Id. at 320.
51. Id. at 321.
52. Id. This move by the court deserves further discussion, but it is beyond the scope of this In Brief. The cases the court cited provided no mechanism or guide for choosing whether to proceed or to end an inquiry after vacating an administrative rule because it violates the APA; thus, the instant case’s test for proceeding, weighing the integrity of the notice-and-comment process against the injury that delaying judgment will cause, may be instructive for future administrative law cases. See id. (citing Sprint Corp. v. FCC, 315 F.3d 369, 377 (D.C. Cir. 2003); Air Transp. Ass’n of Am. v. FAA, 169 F.3d 1, 4–6, 8 (D.C. Cir. 1999); Owner-Operator Indep. Drivers Ass’n v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 206 (D.C. Cir. 2007); Ala. Power Co. v. Fed. Energy Regulatory Comm’n, 160 F.3d 7, 11 (D.C. Cir. 1998)).
54. Id. at 322.
55. See id.
56. Id. (emphasis added).
57. Id.
58. Id. at 322–23.
The court reiterated a point it had previously made in *Sierra Club v. EPA:*

"[i]f the Environmental Protection Agency disagrees with the Clean Air Act’s requirements . . ., it should take its concerns to Congress . . . In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court."

B. Looking Ahead—Are Alternative Programs Acceptable?

The court’s holdings were unsurprising, given the results in *Whitman* and *South Coast.* Yet, despite the sharpness in the latter part of the opinion, this episode of *NRDC v. EPA* is unlikely to end the battle over section 185 fees. The question initially posed by the CAAAC to EPA over state program alternatives still remains: is it permissible under either section 185 or section 172(e) for a state to implement program alternatives? If EPA remains convinced such discretion is allowable and pursues an official rule stating as much, some environmental protection group will almost certainly challenge it in court.

The *NRDC* court purported to defer judgment on this issue, but a close reading of the case hints at the outcome of future litigation on the issue. Given the court’s decision to strike down the attainment alternative, its past willingness to strike down other attempts to circumvent section 185’s fee program, and its statement that “neither the statute . . . nor case law obviously precludes” program alternatives, it seems that the court intended to leave a door open for program alternatives. Delaying categorical judgment would otherwise be a puzzling waste of time and resources, particularly where the court specifically noted the injury imparted by such delay.

Moreover, the court seemed to read some ambiguity into the statute when it stated that “172(e)’s application in [the context of alternative programs] requires interpretation,” but it does not “obviously preclude[]” program alternatives. Such ambiguity, in conjunction with Congress’ delegation of power to EPA to enforce the CAA, indicates that an official rule interpreting 172(e) to allow program alternatives would likely be entitled to *Chevron* deference after undergoing the notice-and-comment process.

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59. *See id.* (citing S. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 902 (D.C. Cir. 2006)).
60. *Sierra Club v. EPA,* 479 F.3d 876 (D.C. Cir. 2007).
61. *Natural Res. Def. Council,* 643 F.3d at 323 (quoting *Sierra Club,* 479 F.3d at 884) (internal quotation marks omitted).
63. The uniform opposition to such a rule among environmental protection groups seems to assure that one group or another would bring suit. Every environmental nonprofit on the Section 185 Work Group formed by the CAAAC stated its opposition not only to the broad notion of alternative programs, but to the insufficiency of each specific proposed alternative. The proposed alternative programs ranged from proposed exemptions for equipment already meeting LAER/BARCT/BACT standards to aggregating sources. *See SCOPE OF STATE DISCRETION,* supra note 30.
65. *Id.* at 319, 321.
66. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837 (1984). This case established *Chevron* deference, which is accorded to the interpretations of executive agencies in relation to statutes that the agency has been specifically tasked to enforce. *Chevron* deference attaches when
deference would require nothing more than showing that EPA’s interpretation of section 172(e) is not arbitrary or capricious. This is a low standard and likely would not bar EPA’s interpretation.

Permitting an interpretation that allows for alternative programs would be a troubling and potentially incorrect result. In stating that “case law [does not] obviously preclude[]” alternative programs, the court seemed to hold Whitman inapplicable to the concept of program alternatives. Yet, only a decade prior to the instant case, the Supreme Court noted in Whitman that subpart 2, which includes section 185 and its fee program, was intended to “govern implementation for some time.”67 If that is the case, it seems that Congress has already spoken directly to the issue of allowing program alternatives and has precluded them. That direct action would preclude not only the statutory ambiguity necessary for future Chevron deference regarding section 172(e), but also the viability of program alternatives in the near future.

Additionally, the gaps identified in Whitman pertained only to the Court’s recognition that subpart 2 was not intended “to be the exclusive, permanent means of enforcing a revised ozone standard in nonattainment areas.”68 The Court did not identify any discretion that EPA could exercise in modifying enforcement of subpart 2 under the existing one-hour standard. However, if alternatives for nonattainment under the one-hour standard are allowed, regardless of their stringency or equivalency, subpart 2 would seemingly be moot regarding the original one-hour standard, as an alternative program would not truly be “alternative” if it did not displace subpart 2. Such a result seems squarely at odds with Whitman.

The implementation of alternative programs is also worrisome for the fact that those who sought their implementation in the first place—industry groups—might exploit them to their advantage. Although the programs might theoretically facilitate NAAQS attainment, they may also impede such progress. Since the pendulum swings both ways, and the statute is intended specifically to protect public health, it seems unwise to open the door to greater possibility of harm without strong need and the potential for great success.

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68. Id. at 484 (emphasis added).

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