Policy Study No. 269

No Intelligible Principles:
The EPA's Record in Federal Court

BY JONATHAN H. ADLER

Executive Summary

All federal agencies have some share of their policy decisions challenged in court. But most federal agencies win most of the time. Federal courts generally defer to legislative agencies' policy decisions. As a general rule, courts will only strike down a federal regulation for one of three reasons: 1) the regulation is unlawful; 2) the regulation is arbitrary and capricious or an abuse of discretion, or 3) the regulation was not issued in accordance with procedural requirements.

The Environmental Protection Agency appears to be an exception to the general rule that courts defer to agency decisions. Over the past seven years, the EPA suffered losses in the majority of cases filed in the primary court of jurisdiction for challenges to environmental regulations. During Carol Browner's tenure as EPA Administrator, federal courts struck down EPA rules requiring the sale of electric cars in eastern states, mandating minimum ethanol content in reformulated gasoline, and requiring state regulators to consult with federal wildlife agencies before approving Clean Water Act permits, among many others. The EPA lost many different types of cases, involving allegations of both excessive and insufficient regulation.

Most challenges to EPA regulations are heard in the U.S. Court of Appeals for the D.C. Circuit. This court has primary or exclusive jurisdiction over the regulatory activities of most federal agencies. Several environmental statutes contain jurisdictional provisions that grant the D.C. Circuit exclusive venue over *all* challenges to regulatory actions promulgated under those laws. An analysis of challenges to EPA regulations and final agency actions in the D.C. Circuit during the Clinton Administration finds that the EPA wins fewer than half of its cases before the D.C. Circuit.

- Of the 69 cases analyzed, the EPA won only 23, or one-third (33.33 percent) of those in which the court considered the merits of the challenge.
- In over half of the cases (53.62 percent), the D.C. Circuit struck down all or a substantial portion of the challenged rule.

- In the remaining cases (13.04 percent) the court dismissed the challenges on ripeness or standing grounds, or otherwise held the challenged EPA action to be unreviewable in federal court. In these latter cases, the court never considered the substance of the challenge to the EPA's rule.

EPA's record in the D.C. Circuit is substantially worse than one would expect given the judicial doctrines of deference to agency fact-finding and policy preferences. Indeed, it is substantially worse than that of federal agencies as a whole as found in prior analyses.

Several of the EPA's losses are quite significant in the context of environmental policy, raising question about the rigorousness of the agency's policy evaluation and development, as well as the propriety of the current administration's priorities and policies. In case after case, the court has found the Browner-administered EPA acting with little regard for the limits or obligations of its statutory authority, and with little regard for the need to explain the basis for its decisions.

Some of these problems may not be solely a function of the agency's internal structure or staff competence as much as they are a result of the agency's statutory mandates and the over-zealousness of the politically appointed EPA leadership. In addition, the complex nature of EPA's policymaking responsibilities, the combination of intricate technical and scientific issues, and the controversial nature of EPA's regulatory efforts combine to make the EPA's job particularly difficult. However, a comparison of the EPA's record with that of the Occupational Safety and Health Administration (OSHA), a controversial federal agency that also regulates highly complex matters, suggests otherwise. OSHA has not had the same difficulties as the EPA in defending its regulatory determinations in court. One possible reason for OSHA's favorable court record is that 1980 the Supreme Court set very clear standards for OSHA rulemakings. This court decision has forced OSHA to engage in a more rigorous assessment of the risks posed by substances it wishes to regulate. OSHA's experience shows that more searching and consistent judicial review of EPA actions are not a threat to the protection of public health. Quite the contrary, more demanding judicial review could improve priority setting within the agency.

It is difficult to review EPA's record in federal court and not conclude that the agency has a problem. Yet there is no silver bullet to the problem of the EPA's approach to regulation. All three branches of government can take steps to improve EPA regulatory decisionmaking and accountability. Whatever the nature and extent of its statutory mandate, it is important that the EPA administer its responsibility in a faithful and accountable manner.

Part 1

Introduction

On May 14, 1999, the U.S. Court of Appeals for the District of Columbia Circuit struck down the Environmental Protection Agency's new air quality standards.[1] Codified just 22 months earlier, the EPA rules would have significantly tightened the national ambient air quality standards (NAAQS) for ozone and fine particulate matter. The new NAAQS were extremely controversial. Critics charged the EPA with ignoring scientific findings that undermined the standards, a view echoed within the Administration. Independent analysts estimated the new rules could cost as much as $90 to $150 billion per year to implement.[2] By the EPA's own estimates, costs of the new ozone standard would exceed the benefits.[3]

Shortly after the EPA's new NAAQS became final, various industry and small business groups took the EPA to court challenging the rules. A three-judge panel of the D.C. Circuit held unanimously that the EPA ignored reliable scientific evidence suggesting that tightening the ozone standard could have *negative* impacts on public health, and that the EPA's approach to implementing the ozone standard violated the Clean Air Act.[4] Two of the judges went even farther, holding that the EPA overstepped its bounds in issuing the NAAQS, as the rules were not based upon a Constitutional interpretation of the Clean Air Act. The EPA, according to the court, interpreted its authority under the act to set new NAAQS in such a way that the agency could justify nearly any level of air quality from completely polluted to pristine. What the EPA failed to do, according to the court, is identify an "intelligible principle" within the Clean Air Act to guide its policy determination. The lack of such a principle, the court ruled, rendered the EPA's interpretation of the act unconstitutional. Consequently, the court told the EPA to try again.

Reaction from the EPA and its defenders was swift and fierce. EPA Administrator Carol Browner labeled the court's ruling "illogical," calling it "one of the most bizarre and extreme decisions ever rendered in the annals

---

1 *American Trucking Associations, Inc. v. U.S.E.P.A.*, 175 F.3d 1027 (D.C. Cir. 1999) *rehearing granted in part, denied in part* No. 97-1440 (Oct. 29, 1999).

2 Anne E. Smith, et al., *Costs, Economic Impacts, and Benefits of EPA's Ozone and Particulate Standards*, Reason Public Policy Institute Policy Study 226, (Los Angeles: Reason Public Policy Institute, June 1997).

3 *Regulatory Impact Analysis for Proposed Ozone National Ambient Air Quality Standard* (Research Triangle Park, North Carolina: U.S. EPA Office of Air Quality Planning and Standards Innovative Strategies and Economics Group, December 1996). See also Susan E. Dudley and Wendy L. Gramm, "EPA's Ozone Standard May Harm Public Health and Welfare," *Risk Analysis*, vol. 17, No. 4 (August 1997), pp. 403-06.

4 Upon rehearing, the latter ruling of the court was slightly modified so as to allow the EPA to enforce its new standard provided it complies with the relevant statutory provisions of the Clean Air Act.

of environmental jurisprudence."[5] The Sierra Club's Kathryn Hohmann called the decision "ludicrous."[6] "It's an extreme interpretation of the Constitution that's aimed at preventing the federal government from doing its job," added Natural Resources Defense Council attorney David Hawkins, himself a former EPA official.[7]

Critics of the D.C. Circuit's opinion characterized the ruling as an aberration. University of Chicago professor Cass Sunstein identified the case as evidence of a "perilous" upsurge in "conservative judicial activism" by "Reagan and Bush appointees" on the federal courts.[8] While the *American Trucking* panel's reliance upon the non-delegation doctrine might be unusual, there is nothing exceptional about a federal court striking down EPA regulations. Indeed, it seems to happen all the time. Under EPA Administrator Carol Browner, judges of all political stripes and ideological leanings have issued rulings repudiating EPA decisions. Over the past seven years, federal courts struck down EPA rules requiring the sale of electric cars in eastern states, mandating minimum ethanol content in reformulated gasoline, and requiring state regulators to consult with federal wildlife agencies before approving Clean Water Act permits, among many others.[9] Courts have also remanded EPA decisions not to impose more stringent air pollution regulations, rejected EPA's study linking cancer to secondhand smoke, and invalidated some of the EPA's more aggressive enforcement policies.[10]

All federal agencies have some share of their policy decisions challenged in court. But most federal agencies win most of the time. Studies of court review of federal agency action have found that federal regulatory agencies win the vast majority of cases. For instance, one study of over 1,800 court decisions in the mid-1980s found that federal appellate courts upheld challenged agency actions between 70 and 80 percent of the time.[11] This stands in stark contrast to the EPA's record during the Clinton Administration, during which the EPA lost a far greater proportion of cases. Indeed, in the primary court of jurisdiction for challenges to environmental regulations, the EPA suffered losses in a majority of cases brought during Carol Browner's tenure as EPA Administrator.[12]

It is to be expected that even the most diligent and responsible regulatory agency will occasionally lose a battle in federal court. Both agency officials and federal judges are fallible. What is remarkable in the case of the EPA, however, is the sheer volume of litigation sparked by its rules and, of late, its poor record defending these rules in court. That EPA suffers so many court losses, at the hands of so many judges with

---

5 Quoted in Carol Cole, "Court Hints at Striking Clean Air Act," *Octane Week*, May 24, 1999, Statement of EPA Administrator Carol M. Browner on Appeal of Recent Panel Decision on Air Quality Decisions, June 28, 1999.

6 Quoted in Robert L. Jackson & James Gerstenzang, "Air Quality Standards Rejected by Appeals Court," *Los Angeles Times*, May 15, 1999.

7 Quoted in Margaret Kriz, "Why the EPA's Wheezing a Bit," *National Journal*, July 24, 1999, p. 2166.

8 Cass R. Sunstein, "The Courts' Perilous Right Turn," *New York Times*, June 2, 1999.

9 *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997), *modified on rehearing* 116 F.3d 499; *American. Petroleum Inst. v. U.S. EPA*, 52 F.3d 1113 (D.C. Cir. 1995); *American Forest & Paper Ass'n v. U.S. EPA*, 137 F.3d 291 (5th Cir. 1998); .

10 *American Lung Ass'n v. EPA*, 134 F.3d 388 (Jan. 30, 1998); *Flue-Cured Tobacco Cooperative Stabilization Corp. v. U.S. EPA*, 4 F. Supp. 2d 435, 465-66 (M.D.N.C. 1998); *Harmon Industries v. Browner*, 191 F.3d 894 (8th Cir. 1999).

11 Peter Schuck and E. Donald Elliott, "To the Chevron Station: An Empirical Study of Federal Administrative Law," *Duke Law Journal*, vol. 40, no. 2 (November 1990), pp. 984-1060. The study examined cases from 1984-85 and 1988 in order to determine whether the Supreme Court's *Chevron* decision made it easier of more difficult for agencies to defend their rules. In the six months prior to *Chevron*, agencies won 71 percent of their cases. In the six months following the decision, agencies won 81 percent of the time. Three years later, in 1988, agencies won 76 percent of the time.

12 As noted below, some court rulings were based on procedural grounds, such as whether a given regulation or EPA action was ripe for review, or even judicially reviewable at all.

differing political viewpoints, suggests that the agency itself—not a few aberrant or "activist" judges—has problems.

Part 2

Judicial Review of Agency Actions

Federal courts generally defer to legislative agencies' policy decisions, particularly when they are administering a congressionally enacted program. Federal regulatory agencies, the reasoning goes, have greater expertise in resolving complex matters than courts. Indeed, the reason most federal regulatory agencies are created in the first place is to administer complex programs. Agencies are presumed to have the requisite expertise to handle matters within their area of specialization. Therefore, federal courts do not intrude upon the prerogatives of federal agencies lightly. As Martin Shapiro noted 30 years ago, "courts typically let the agency do what it pleases."[13]

As a general rule, courts will only strike down a federal regulation for one of three reasons. First, courts will invalidate regulations that are unlawful. This includes regulations that violate constitutional protections and those that are not authorized by federal statutes. Second, courts will invalidate rules that are arbitrary and capricious or otherwise represent an abuse of the agency's discretion. This is a fairly minimal threshold requirement that agencies must document and explain the rationale and evidentiary basis for their decisions. It does not, however, require that agencies make the most sensible policy choices or factual findings. Third, courts will also invalidate agency rules when agencies fail to follow the relevant procedures for issuing rules. None of these three standards is particularly difficult for federal agencies to meet.

A. The Chevron Doctrine

Assuming that there are no clear constitutional defects with an agency's regulations, the first question for a court when reviewing a challenge to an agency action is whether the agency's action is within the agency's legal authority. Typically, the question before the court is whether the regulatory agency properly interpreted the law it is applying. In other words, courts first consider whether the regulation in question is authorized by an act of Congress. This examination, like the review of questions of fact and policy (discussed below), is quite deferential to agency assessments of their own legal authority.

Under what is known as the *Chevron* doctrine, courts evaluate agency interpretations of authorizing statutes through a two-step process.[14] First, courts consider the statute itself. In the Supreme Court's words,

---

[13] Martin M. Shapiro, *The Supreme Court and Administrative Agencies* (New York: Free Press, 1968), p. 265.

[14] The doctrine is named for *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

> *First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.*[15]

If, however, the intent of Congress is not clear, and the statutory language is ambiguous, courts are required to defer to the agency's interpretation of the statute, even if other statutory interpretations seem more plausible. As the Supreme Court held in *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[16] More specifically, the interpretation of the administering agency is given "controlling weight" unless it is found to be "arbitrary, capricious, or manifestly contrary to the statute."[17] The agency is not required to follow the statutory interpretation that the court would adopt if it were construing the statute on its own. As the Court explained in a subsequent case, "the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program."[18]

The *Chevron* doctrine is not without substantial justification. For one, administrative agencies are more familiar with the subject matter with which they are entrusted than federal courts of general jurisdiction. As the *Chevron* court noted, "Judges are not experts in the field, and are not part of either political branch of government."[19] As broad as the EPA's jurisdiction is, it is far less broad than that of a federal appellate court, which in any given year will hear cases involving dozens of different statutes and common-law-based causes of action covering a wide range of subjects. Therefore, one can assume that the EPA, as compared with a court, has a greater appreciation for how a given principle or legislative command can or should apply in a given environmental context.

Another argument for deference to agency constructions of the statutes they administer is that interpreting statutes requires agencies to make policy judgments, and that such decisions are best made by officials of administrative agencies that are overseen by the executive branch.[20] If, for example, a statute requires that an agency set a permissible exposure level for a hazardous substance with an "adequate margin of safety," it is more appropriate for the "adequate margin" to be set by an executive agency than a federal court.[21] Courts are not to evaluate the relative merits of competing policy proposals when an agency action is challenged in court. "Such policy arguments are more properly addressed to legislators or administrators, not to judges."[22] For these reasons, the Supreme Court held that "deference to regulatory agencies is a reasonable policy for

---

15 *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

16 *Chevron*, 467 U.S., p. 843.

17 *Chevron*, 467 U.S., p. 844.

18 *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)

19 *Chevron*, 467 U.S., p. 865.

20 *See, e.g.*, Antonin Scalia, "Judicial Deference to Agency Interpretations of Law," *Duke Law Journal*, vol. 39, no. 1 (June, 1989) pp. 511-15 (such policy determinations are "not for the courts but for the political branches"); Kenneth W. Starr, "Judicial Review in the Post-Chevron Era," *Yale Journal on Regulation*, vol. 3 (Spring 1986), p. 283.

21 Of course, there is a strong argument that most such decisions should actually be made by the people's elected representatives in the legislature. See generally, David Schoenbrod, *Power without Responsibility: How Congress Abuses the People Through Delegation* (New Haven: Yale University Press, 1993).

22 *Chevron*, 467 U.S., p. 864.

the courts to adopt. Micromanaging regulatory agencies is not a task for which courts are well suited. Nonetheless, it is important to recognize that deference is not abdication."[23]

1. "Arbitrary and Capricious"

In some cases, whether a regulatory agency such as the EPA has the legal authority to act in a given area is not in dispute. However, this does not mean that the agency action is legally valid. Agency regulations that are "arbitrary, capricious, [or] an abuse of discretion" can be invalidated by federal courts just the same as those regulations that are in excess of an agency's delegated power.[24] In making this determination, courts are to "consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[25] This examination is to be "searching and careful''—what is often referred to as a "hard look''—but the reviewing court "is not empowered to substitute its judgment for that of the agency."[26] In other words, like the *Chevron* doctrine, this standard of review for agency determinations give agencies a substantial amount of leeway.

One reason courts strike down agency actions as "arbitrary and capricious" is because the agency in question failed to explain its decision sufficiently. As the D.C. Circuit noted in one case:

> *The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts.*[27]

An agency's regulatory determination must also be supported by "substantial evidence."[28] This requirement is not so demanding as it sounds, however. All that is required is for the agency to be able to identify "more than mere scintilla" of evidence supporting its conclusion, just enough so that a reasonable person *could* conclude that the agency's assessment is correct.[29] Even if the preponderance of evidence suggests that the agency should have made a different decision, its decisions will be upheld so long as the agency can point to some amount of credible evidence that supports its conclusion. In a sense, the "substantial evidence" standard can be seen as the regulatory analog to the "clearly erroneous" standard that is applied to lower court findings of fact in appeals.

Above all else, arbitrary and capricious review serves to ensure that agencies only promulgate regulations after careful review and consideration of the relevant facts. It does not ensure that agencies make good decisions. But, by requiring agencies to put forth the bases for their decisions, it enables the regulated

---

[23] *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment).

[24] The "arbitrary, capricious, [or] an abuse of discretion" standard derives from § 706(2)(A) of the Administrative Procedure Act. An equivalent standard is used in most reviews of agency determinations, even under environmental statutes that contain their own judicial review provisions.

[25] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

[26] Ibid, p. 416.

[27] *Greater Boston Television Corp. v. FCC*, 444, F.2d 841, 851-52 (D.C. Cir. 1970).

[28] While this requirement technically applies only to rules promulgated after formal rulemakings, it is equivalent to the evidentiary showing required under arbitrary and capricious review. *Association of Data Processing Service Organizations v Board of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984).

[29] *See, e.g., Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

community and the broader public to see why the agency made the choices that it did, and what evidence the agency used in the process, and this helps to ensure accountability.

2. Procedural Requirements

Finally, courts consider whether agencies have complied with the relevant administrative procedures when developing new regulations.[30] General standards for agency rulemakings are provided in the Administrative Procedure Act (APA), though some environmental statutes have their own "mini-APAs" that provide their own particularized standards for rulemakings and judicial review. As a general rule, a proposed regulation must be published in the *Federal Register*, and the public must have an opportunity to submit comments on the proposed rule before it can take effect. Failure to follow the mandated procedures is sufficient grounds for a court to invalidate a rule, or at least to require the agency to remedy the procedural deficiency.

---

[30] *See, e.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

Part 3

The EPA's Record in Court

Because federal courts show substantial deference to the findings and regulatory determinations of federal regulatory agencies, few federal regulations are struck down in federal court. As noted above, at least one study evaluated the success rate for federal agencies as a whole during the 1980s.[31] This study, conducted by Peter Schuck and E. Donald Elliott, sought to determine whether the Supreme Court's *Chevron* decision had a significant effect on judicial deference to federal agencies. It found that between 70 and 80 percent of federal regulations are upheld when challenged in federal court. While federal agencies had a tougher time in the U.S. Court of Appeals for the D.C. Circuit, they still won in this court between 53 and 62 percent of the time.[32] As detailed below, this is far greater than the percentage of challenges in which the EPA prevailed in the U.S. Court of Appeals for the D.C. Circuit, the federal appellate court in which most challenges to EPA rules are heard.[33] While a cursory review of the EPA's record in other courts suggests that its record is somewhat better in the remaining circuits, few of these cases involve challenges to broad regulatory decisions by the EPA. That said, the EPA has suffered several significant losses with broad implications for existing environmental policies in other federal circuit courts as well.

A. The D.C. Circuit

The U.S. Court of Appeals for the District of Columbia Circuit is, for all practical purposes, the second-highest court in the land when it comes to regulatory and administrative matters. The D.C. Circuit has primary or exclusive jurisdiction over the regulatory activities of most federal agencies. In recent years, the D.C. Circuit has disposed of over one-fifth of all agency appeals in the nation; agency appeals represent approximately half of the court's caseload.[34] As a result, the D.C. Circuit has special expertise in evaluating regulatory decisions.

---

31 Schuck & Elliott, "To the Chevron Station," p. 984.

32 Ibid., p. 1042.

33 Admittedly, different studies have used differing methodologies to tabulate wins and losses in federal court. Some studies, for example, separate independent claims in cases, or separate out those parties to a case with differing interests in the litigation. Nonetheless, the disparity is larger than one would expect to arise from such differences in methodology.

34 *See, e.g.* Patricia M. Wald, "Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On," *Tulsa Law Journal*, vol. 32, no. 4 (Winter 1996), p. 232.

Environmental policy is no exception. Indeed, some have claimed that the D.C. Circuit "played a central role in the development of environmental law."[35] This is the case in no small part because several environmental statutes contain jurisdictional provisions that grant the D.C. Circuit exclusive venue over *all* challenges to regulatory actions promulgated under those laws.[36] Others, such as the Clean Air Act and Safe Drinking Water Act, give the D.C. Circuit exclusive jurisdiction over challenges to rules of national application and scope.[37]

The accompanying table analyzes challenges to EPA regulations and final agency actions in the D.C. Circuit during the Clinton Administration.[38] As Figure 1 illustrates, of the 69 cases analyzed, the EPA won 23, or one-third (33.33 percent) of those in which the court considered the merits of the challenge. In over half of the cases (53.62 percent), the D.C. Circuit struck down all, or a substantial portion of, the challenged rule. In the remaining cases (13.04 percent) the court dismissed the challenges on ripeness or standing grounds, or otherwise held the challenged EPA action to be unreviewable in federal court.[39] In these latter cases, the court never considered the substance of the challenge to the EPA's rule, as there is "a checklist of hoops that every potential appellant must go through to get to the merits."[40] Approximately one in four challenges to agency actions, across the board, will fail to get through each hoop.[41]

---

35 Richard L. Revesz, "Environmental Regulation, Ideology, and the D.C. Circuit," *Virginia Law Review*, vol. 83, no. 8 (November 1997), pp. 1717-67.

36 These laws include the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, aka "Superfund"), the Oil Pollution Act of 1990, and the Solid Waster Disposal Act.

37 One reason for not giving the D.C. Circuit exclusive jurisdiction over all Clean Air Act-related litigation is that much litigation involves challenges to local air pollution plans or individual permitting decisions.

38 This study looked at cases argued after start of the Clinton Administration (January 20, 1993) and decided within the subsequent seven years (prior to January 20, 2000). Only cases resulting in published decisions were consulted.

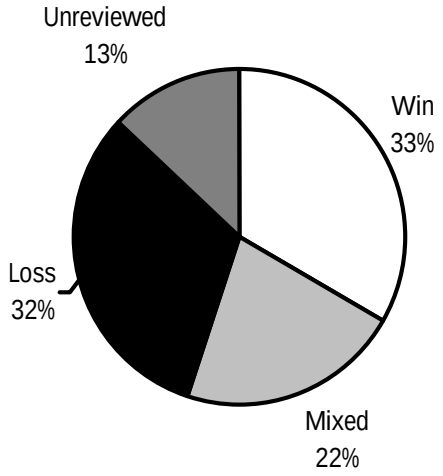
39 For example, some agency actions that are non-binding on the public, such as policy statements, are not reviewable in court.

40 Wald, "Judicial Review at Midpassage," p. 256.

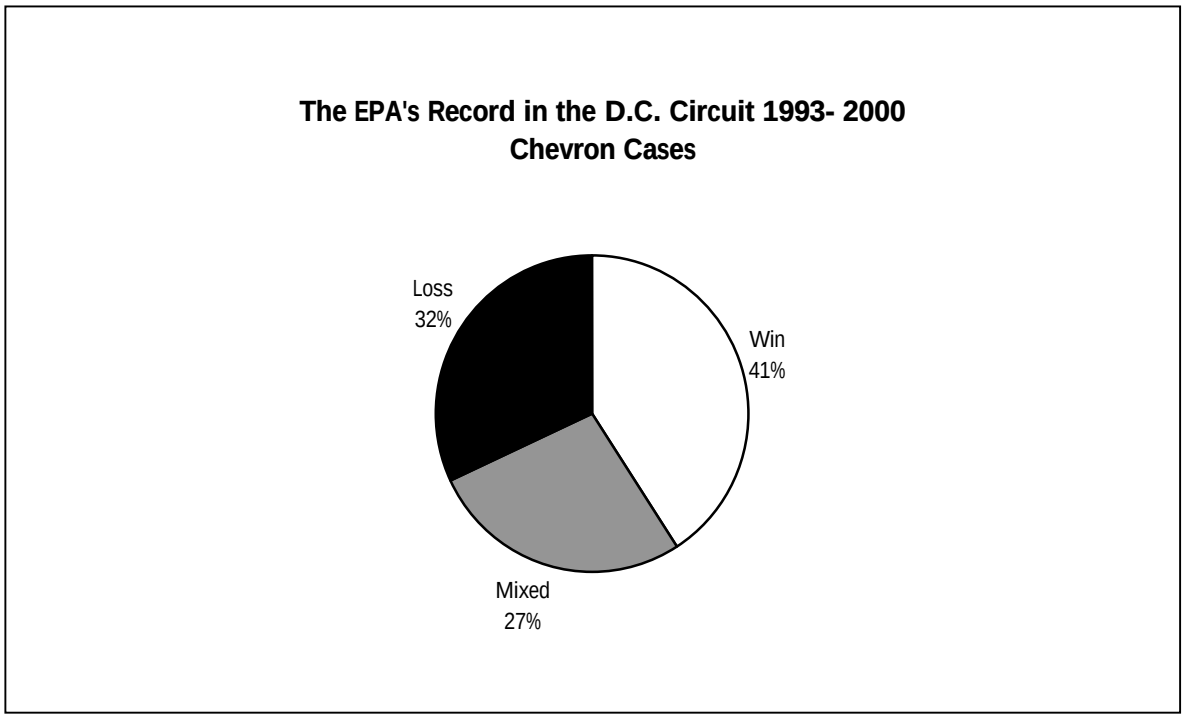
41 Ibid.

As Figure 2 shows, even excluding the 25 cases in which the court did not explicitly consider the *Chevron* doctrine, the EPA's record is still less than 50 percent. Of the 44 cases in which *Chevron* was considered, the EPA won 18 (40.91 percent) of the cases. The court invalidated the agency action in question, or a substantial portion thereof, in 27 (59.09 percent) of these cases. Thus, even when only *Chevron*-related cases are considered, the EPA's win-loss record remains substantially below that which one would anticipate given the deferential nature of court review. The EPA's record in *Chevron* cases is below that reported in the Shuck-Elliott study, as well as that found by others.[42]

The EPA's Record in the D.C. Circuit 1993-2000



[42] Wald, "Judicial Review at Midpassage," p. 241. Judge Patricia Wald, a Carter appointee on the D.C. Circuit, found an overall affirmance rate of 66 percent for 1995 in cases in which *Chevron* challenges to agency decisions were raised.



Several of the EPA's losses are quite significant in the context of environmental policy, raising questions about the rigorousness of the agency's policy evaluation and development, as well as the propriety of the Clinton Administration's priorities and policies.

- One of the Clinton EPA's first actions after Carol Browner was confirmed as EPA Administrator was to promulgate new rules governing reformulated gasoline. In particular, the EPA mandated that a minimum percentage of oxygenates—fuel additives that increase the oxygen content of fuels—come from renewable sources. The explicit purpose of the rule was to "create additional markets for ethanol." The EPA claimed authority to impose this requirement under the Clean Air Act, even though independent analyses suggested that, if anything, the mandate would *reduce* air quality, not improve it. As the court noted in striking down the rule, "The sole purpose of the RFG program is to reduce air pollution, which it does through specific performance standards for reducing Volatile Organic Compounds (VOCs) and toxics emissions. EPA admits that the [ethanol rule] will not give additional emission reductions for VOCs or toxics . . . and has even conceded that the use of ethanol might possibly make air quality worse."[43]
- In 1993, and twice in 1995, the D.C. Circuit overturned EPA decisions to deny a waiver for MMT, a manganese-based fuel additive.[44] In the first challenge, the waiver denial was remanded to the EPA at the agency's own request for consideration of the additive's impact on emission-control systems. According to the court, "once the EPA found MMT innocent of any adverse effect on those systems, it was legally required to grant the waiver, and we ordered it to do so."[45] Yet this decision did not remove the EPA's obstruction to the sale of MMT, since the agency then refused to register the additive. EPA claimed that MMT was not registered for sale under the Clean Air Act, because the EPA had never

---

[43] *American. Petroleum Inst. v. U.S. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

[44] *Ethyl Corp. v. Browner*, 989 F.2d 522 (D.C. Cir. 1993); *Ethyl Corp. v. EPA (Ethyl II)*, 51 F.3d 1208 (D.C. Cir. 1995); *Ethyl Corp. v. Browner (Ethyl III)*, 67 F.3d 941 (D.C. Cir. 1995).

[45] *Ethyl III*, 67 F.3d, p. 942.

granted the waiver that it had been legally obligated to issue. The D.C. Circuit rejected this argument as well in October 1995 and ordered MMT's registration—only after MMT's manufacturer, the Ethyl Corp., took the EPA to court three times.

- In 1994, the D.C. Circuit voided the EPA's decision to list methylene diphenyl diisocynate (MDI) as a hazardous air pollutant.[46] "Not many rules fail the arbitrary and capricious standard," the unanimous court declared, "but . . . the rule now under review fails twice. . . ."[47] Despite the agency's "broad discretion" in designing a model to approximate MDI emissions, the court struck down the EPA's listing because under the agency's approach, there was "simply no rational relationship between the model and the known behavior of the hazardous air pollutant to which it is applied." In particular, the EPA insisted upon treating MDI as a gas at ambient temperatures at which MDI is a solid, and therefore cannot be released as an air emission. The court noted that EPA's approach "bespeaks a 'let them eat cake' attitude that ill-becomes an administrative agency whose obligation to the public it serves is discharged if only it avoids being arbitrary and capricious."[48]

- For nearly a decade, the Environmental Defense Fund and American Lung Association sought to induce the EPA to issue a new National Ambient Air Quality Standard (NAAQS) for sulfur dioxide under the Clean Air Act to protect sensitive populations, such as asthmatics. In 1996, after two federal lawsuits and two rounds of notice and comment in the *Federal Register*, the EPA concluded that no new NAAQS was necessary. When challenged, this decision was set aside as the EPA failed "adequately to explain" its conclusion.[49] "Judicial deference to decisions of administrative agencies like EPA rests on the fundamental premise that agencies engage in reasoned decision-making," the court noted.[50] Because the EPA's explanation of its decision was too cursory to enable the court to assess whether it was a reasonable exercise of the agency's discretion, the decision was remanded.

- Under the Clean Air Act, primary responsibility for developing emission-reduction plans lies with the individual states. As the Supreme Court held in 1977, "so long as the ultimate effect of a State's choice of emission limitations is compliance with national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."[51] Nonetheless, in 1995, the EPA sought to require 13 northeastern states to adopt California's low-emission vehicle (LEV) standards under the Clean Air Act (CAA). The state of Virginia objected to the EPA's usurpation of its authority and challenged the rules. The EPA, the D.C. circuit ruled, had sought to "circumvent" the CAA's statutory provisions and exceeded its authority.[52] States could choose to adopt the California LEV standards, as some have, but that decision could not be forced upon them by the EPA.

- The Clean Air Act provides that the EPA may mandate the use of reformulated gasoline in metropolitan areas classified as "Marginal, Moderate, Serious, or Severe" ozone nonattainment areas. The EPA

---

46 *Chemical Manufacturers Ass'n v. EPA*, 28 F.3d 1259 (D.C. Cir. 1994).

47 Ibid, p. 1261.

48 Ibid, p. 1266.

49 *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998). It is worth noting that the opinion in this case was written by Clinton Administration Judge David Tatel, the judge who dissented in part in *American Trucking*.

50 *American Lung Ass'n*, 134 F.3d at 392.

51 *Natural Resources Defense Council v. Train*, 421 U.S. 60, 79 (1975). The 1990 Clean Air Act Amendments left this structure intact, although certain emission control measures are statutorily mandated in certain nonattainment areas.

52 *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997).

> decided that it should also be able to require the use of reformulated gasoline in nonattainment areas that are not given one of the four specified classifications under the CAA. Industry groups challenged the rule, alleging that the EPA violated the specific statutory language of the act. The court agreed, holding that "Congress provided for [the use of RFG] only for areas classified as Marginal, Moderate, Serious or Severe. It meant what it said." [53] Indeed, the court declared, "It is hard to imagine how Congress could have done so more clearly" and struck down the EPA's rule.[54]

As the above examples and accompanying table indicates, the EPA lost many sorts of cases, involving allegations of both excessive and insufficient regulation. One year before the invalidation of the ozone and particulate NAAQS standards, the D.C. Circuit held that EPA failed to explain adequately its decision *not* to revise the NAAQS for sulfur oxide emissions. Thus, it would be wrong to characterize the string of high-profile court losses as evidence of "anti-regulatory" or "anti-environmental" sentiment among the judiciary. In addition, these decisions have been written by judges from a broad political spectrum, including appointees of Presidents Carter, Reagan, Bush, and Clinton.

There is a unifying theme among these cases, however. In case after case, the court has found the EPA acting with little regard for the limits or obligations of its statutory authority, and with little regard for the need to explain the basis for its decisions. The result is an agency with minimal accountability to the legislature and, more importantly, to the people. If an agency does not explain the bases for its decisions and does not faithfully implement the laws under which it operates, it is acting in violation of the public trust. Based upon the EPA's record in court, it seems it crosses this line more often than most.

EPA's record in the D.C. Circuit is substantially worse than one would expect given the judicial doctrines of deference to agency fact-finding and policy preferences. Indeed, it is substantially worse than that of federal agencies as a whole as found in prior analyses. Even were the cases in which the court dismissed challenges considered to be substantive wins for the agency, EPA would still have won fewer than half of all the cases considered by the D.C. Circuit since the Clinton Administration took charge.

B. Other Federal Courts

While the D.C. Circuit considers the lion's share of judicial challenges to EPA rules, other federal circuit courts are, from time to time, called upon to assess the EPA's adherence to the law. Most of the time, these cases are appeals from lower-court judgments or administrative rulings concerning the application of EPA regulations to a specific matter, such as an individual permit application, enforcement action, Superfund cleanup decision, or review of a State Implementation Plan (SIP) under the Clean Air Act. These cases, unlike those before the D.C. Circuit, rarely involve questions of national import. Nonetheless, there have been several cases in the past few years when other circuit courts have ruled against significant EPA policies or programs.

- Under the Clean Water Act (CWA), the EPA typically delegates responsibility for administering the National Pollution Discharge Elimination System (NPDES), including the issuing and enforcement of

---

[53] *American Petroleum Inst. v. U.S. EPA*, 2000 U.S. App. LEXIS 14, *17 (D.C. Cir. 2000).

[54] *American Petroleum Inst.*, 2000 U.S. App. LEXIS at *9.

permits, to state agencies. The conditions for this delegation are spelled out in the CWA. When the EPA delegated this authority to Louisiana, however, it decided that the statutory requirements were not enough. The EPA unilaterally decided to require that the state consult with federal wildlife agencies before issuing permits to ensure compliance with the Endangered Species Act—a law that the EPA does not administer.[55] The EPA threatened to veto permits that were not so approved. When asked to review this new permit condition by regulated firms, the U.S. Court of Appeals for the Fifth Circuit determined that EPA created it without any statutory basis whatsoever and set it aside.[56]

- In 1995 the federal government indicted James Wilson for violating the Clean Water Act (CWA) for filling wetlands without a federal permit. According to the EPA and U.S. Army Corps of Engineers, the CWA requires that landowners obtain a permit before discharging dredge or fill material onto any property classified as a wetland the "degradation . . . of which could affect" interstate commerce.[57] In his defense, Wilson maintained that the EPA and Army Corps' interpretation of the CWA extended their regulatory authority beyond its constitutionally permissible scope under the commerce clause. The U.S. Court of Appeals agreed, overturned Wilson's conviction, and invalidated the rule.[58] Interestingly, the EPA and Army Corps maintain that the invalidated regulation remains applicable throughout the rest of the nation outside of the Fourth Circuit's jurisdiction. They further maintain that the court's decision does not even alter the "substantive requirements of existing Corps or EPA regulations, except to the extent necessary to comply" with the ruling.[59]

---

55 The ESA is administered by the Fish and Wildlife Service and the National Marine Fisheries Service.

56 *American Forest & Paper Ass'n v. U.S. EPA*, 137 F.3d 291 (5th Cir. 1998).

57 33 C.F.R. §328.3(a)(3).

58 *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

59 U.S. Environmental Protection Agency and U.S. Department of the Army, Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction over Isolated Wetlands in Light of *United States v. James J. Wilson* (May 29, 1998).

Part 4

Is the EPA the Problem?

The EPA is arguably one of the most controversial federal agencies. Regulatory analysts frequently single out the EPA for criticism. Analysts note that the EPA regulates more risks and at higher cost than its brethren agencies. Among the criticisms of the EPA are the following: for approximately 10 percent of all of the federal government's regulatory activity and approximately one-third of those regulations expected to cost over $100 million to implement.[60]

- The EPA does a poor job of establishing priorities in accordance with independent evaluations of public health risks or environmental needs.[61]
- EPA regulations are substantially less cost-effective, in terms of dollars expended per life saved, than those of other regulations, in some cases by orders of magnitude.[62]
- Only a small percentage of EPA rulemakings comply with the requirements of existing Executive Orders that mandate "need" evaluations, cost and benefit assessments, and consideration of alternatives.[63]
- The EPA's enforcement efforts bear little relation to the actual environmental impacts of regulatory violations.[64]

Some of these problems may not be a function of the agency's internal structure as much as they are a result of the agency's statutory mandates. As one former EPA administrator commented, the EPA suffers from "battered agency syndrome" in that it is "not sufficiently empowered by Congress to set and pursue meaningful priorities, deluged in paper and lawsuits, and pulled on a dozen different vectors by an ill-assorted

---

[60] In October 1998, there were 4,560 entries in the *Unified Agenda of Federal Regulations*. Of these, 462 were for the EPA. Of those rule-makings listed in the October 1998 *Unified Agenda*, 117 were expected to cost more than $100 million per year. 38 of these were EPA rulemakings, more than double the number of the next highest agency or department. Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Policymaker's Snapshot of the Federal Regulatory State*, 1999 Edition, Competitive Enterprise Institute, March 1999, pp. 17, 19.

[61] *See, e.g.*, Marc K. Landy, Marc J. Roberts and Stephen R. Thomas, *The Environmental Protection Agency: Asking the Wrong Questions – From Nixon to Clinton*, 2nd ed. (New York: Oxford University Press, 1994).

[62] *See, e.g.*, Robert W. Hahn, "Regulatory Reform: What to the Government's Numbers Tell Us?" in *Risks, Costs, and Lives Saved: Getting Better Results from Regulation*, R. Hahn, ed. (Washington, D.C.: AEI Press, 1996), pp. 228-235.

[63] *Ensuring Accountability for Developing Well-Founded Federal Regulations: An Initial "Report Card" on Compliance with Key Directives of the Regulatory Executive Order (E.O. 12866)*, Institute for Regulatory Policy/Federal Focus, Inc., April 1995.

[64] Jonathan H. Adler, "Bean Counting for a Better Earth: Environmental Enforcement at the EPA," *Regulation*, vol. 21, No. 2 (Spring 1998).

and antiquated set of statutes."[65] But this is a separate question from whether the EPA is diligent and responsible in pursuing the mandates and priorities that Congress bestows upon it.

That the EPA has a particularly poor record in federal appellate courts does not necessarily mean, in and of itself, that there is anything wrong with the EPA's decisionmaking. For instance, one could argue that the complex nature of EPA's policymaking responsibilities, the combination of intricate technical and scientific issues, and the controversial nature of EPA's regulatory efforts combine to make the EPA's job particularly difficult. Yet the EPA is hardly the only federal agency forced to defend complex and costly regulations of highly technical matters in federal court. The Occupational Safety and Health Administration (OSHA), for one, regulates workplace exposures to chemicals and other substances that pose a potential health threat to workers. Much like the EPA, OSHA's statutory mandate requires it to consider highly complex matters about which there is substantial scientific uncertainty. Indeed, some of the substances OSHA regulates, such as lead, benzene, and asbestos, are subject to EPA regulation as well. OSHA regulation can also be tremendously expensive—and controversial. OSHA, like EPA, has its fair share of critics.[66]

Despite OSHA's similar mandate and political opposition, OSHA has not had the same difficulties as the EPA in defending its regulatory determinations in court. While OSHA promulgates far fewer regulations than the EPA—and has a correspondingly smaller staff and budget—a smaller percentage of its substantive rules are successfully challenged in court. Indeed, since 1980, OSHA has lost only a handful of cases in which a substantive OSHA rulemaking was challenged. In particular, OSHA has a near-perfect record in setting workplace standards covering "toxic materials" and "hazardous physical agents" under Section 6(b)(5) of the Occupational Health and Safety Act ("OSH Act"), though these regulations are comparably as complex and controversial as EPA standards set under the Clean Air Act. Indeed, OSHA has withstood challenges to workplace standards for lead, arsenic, ethylene oxide, and formaldehyde, among others.[67] Since 1980, the cases in which OSHA has been unable to defend its workplace safety regulations in court have been few and far between and tend to involve exceptional circumstances, such as an effort by OSHA to regulate 420 unrelated substances in one sweeping rule.[68]

One possible reason for OSHA's favorable court record is that the Supreme Court set very clear standards for OSHA rulemakings pursuant to the Occupational Safety and Health Act in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* ("*Benzene*").[69] In *Benzene*, the American Petroleum Institute and other industry groups challenged OSHA's decision to lower the "permissible exposure limit" (PEL) for benzene from 10 parts per million (ppm) to 1 ppm, based on the agency's conclusion that there was no safe level of exposure to benzene. The Supreme Court held that OSHA was required to demonstrate, with

---

65 William Ruckleshaus, quoted in Richard D. Morgenstern, "Introduction to Economic Analyses at EPA," in *Economic Analyses at EPA: Assessing Regulatory Impact*, R. Morgenstern, ed. (Washington, D.C.: Resources for the Future, 1997).

66 *See, e.g.*, Thomas J. Kniesner and John D. Leeth, "Abolishing OSHA," *Regulation*, vol. 18, No.4 (1995).

67 *United Steelworkers of America v. Marshall*, 647 F.2d 1180 (D.C. Cir. 1980); *American Iron & Steel Inst. v. OSHA*, 939 F.2d 975 (D.C. Cir. 1991); *ASARCO, Inc. v. OSHA*, 746 F.2d 483 (9th Cir. 1984); *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479 (D.C. Cir. 1986);*United Auto Workers v. OSHA*, 878 F.2d 389 (D.C. Cir. 1989).

68 In 1992, OSHA unsuccessfully defended its attempt to set permissible exposure limits (PELs) for 428 substances simultaneously. *AFL-CIO v. OSHA*, 955 F.2d 962 (11th Cir. 1992). According to the 11th Circuit, this rule unreasonably sought to regulate over 400 "unrelated" substances that had "little in common . . . except the fact that OSHA considers them toxic and in need of regulation." *AFL-CIO*, 965 F.2d at 972. In the process, OSHA failed to make independent risk determinations for the individual substances in question.

69 448 U.S. 607 (1980).

"substantial evidence" that a given substance poses a "significant risk of harm" before setting a new PEL. Because OSHA failed to make this showing, the rule was overturned. Despite the constraints *Benzene* imposed on OSHA, its rulemaking has continued. Since *Benzene*, OSHA has promulgated numerous standards for "toxic and hazardous substances" covering a range of potentially hazardous substances, including asbestos, cadmium, 1,3-butadiene, methylene chloride, and bloodborne pathogens. These standards have survived court challenges time and again.

One reason for OSHA's string of successes in court is that the *Benzene* decision forced the agency to engage in a more rigorous assessment of the risks posed by substances it wishes to regulate. In a sense, the Supreme Court's *Benzene* ruling put OSHA on notice how it would have to conduct its rulemakings in order to survive judicial scrutiny, and that is a burden OSHA has been able to bear. As Frank Cross of the University of Texas notes,

> *[p]rior to the Benzene decision, OSHA was reluctant to attempt to quantify the risk presented by substances, and generally devoted little attention to the significance of the risks presented by these various substances. Since the Supreme Court has compelled the agency to change these policies, however, OSHA's determinations of significant risk have been among the most coherent of all such federal regulatory decisions.*[70]

The quality and thoroughness of OSHA's risk assessments (at least compared with the EPA and OSHA's pre-*Benzene* conduct) discourage courts from overturning its standards. According to Cross,

> *Although OSHA initially was resistant to quantitative risk assessment and de minimis thresholds for regulatable risk, the agency now applies these regulatory principles on a regular basis and has perhaps the most coherent practice of any federal agency on this issue. . . . By comparing the hazard from a given substance or condition to the overall average risk, and especially the average cancer risk, faced by workers, OSHA appears to have a standard that both conforms to the Benzene decision and enables it to maximize worker protection by devoting its finite resources to the most hazardous workplace conditions.*[71]

OSHA's experience suggests that the regulatory behavior of an agency is a greater determinant of whether it will succeed or fail in court than the substance or scope of its regulatory efforts. Indeed, *Benzene*'s impact on OSHA's regulatory activities and regulatory challenges to the agency's authority are a clear indication that an agency can be held to high standards of disclosure and accountability without inhibiting its ability to regulate pursuant to its statutory authority. It also suggests that more searching and consistent judicial review of EPA actions is not a threat to the protection of public health. Quite the contrary, if more demanding judicial review were to force the EPA to engage in more rigorous regulation-setting, it could actually improve priority setting within the agency. This is true irrespective of the policy course the agency opts to follow.

---

[70] Frank Cross, "Beyond Benzene: Establishing Principles for a Significance Threshold on Regulatable Risks of Cancer," *Emory Law Journal*, vol. 35, no. 1 (Winter, 1986), pp. 12-13.

[71] Ibid, pp. 16-17.

Part 5

Conclusion

It is difficult to review EPA's record in federal court and not conclude that the agency has a problem. Too often it seems to place political goals and policy expediency ahead of its responsibility to administer and enforce the laws enacted by Congress—irrespective of whether those laws "make sense" or adopt the best approach to environmental policy. Regrettably, there is no silver bullet to the problem of the EPA's approach to regulation. One cannot change an agency's culture overnight. Nonetheless, greater oversight within all three branches of government can help restore accountability to the agency.

- The judiciary can, and should, continued to exercise stern oversight of the EPA, just as it does with all federal regulatory agencies. If anything, EPA has shown that is due less deference than agencies typically receive. Much as *Benzene* helped improve the decision-making and priority setting, continued judicial scrutiny of EPA's activities could improve its approach to regulation.
- The EPA's poor record in court also suggests the need for greater legislative oversight and more attention to the drafting of legislative language. Whether one believes in the wholesale revision of America's major environmental laws or not, one should recognize that clear directives from Congress minimize the opportunity for agency mischief.[72] Thorough and thoughtful congressional oversight serves a similarly salutary role by helping keep the agency on track and discouraging the placement of politics over sound policy.
- Finally, the EPA needs reform from within the executive branch. Executive orders requiring risk assessments and evaluations of regulatory alternatives can help in the decision-making process, but only if they are followed. Existing review requirements appear to be honored primarily in the breach. Additionally, whether an agency is going to follow the law or seeks every advantage to expand its regulatory reach is, in large part, a result of the agenda set by its leadership. Unless the EPA has an administrator that is willing to impose some restraint, it is unlikely that much will change.

Whatever the nature and extent of its statutory mandate, it is important that the EPA administer its responsibilities in a faithful and accountable manner. This means adhering to the priorities, and limits, established by the Congress, and making clear to the public the bases upon which it acts. It has been the EPA's consistent failure to do these things over the past several years, if not longer, that has led to its disappointing record in the courts. If there is to be change, it must begin from within. Ultimately, if the EPA is unhappy with the way in which the courts handle its rules, it has no one to blame but itself.

---

[72] In addition, clear directives from Congress enhance political accountability for regulatory decisions, as legislators must stand for reelection, whereas agency officials do not. *See generally*, Schoenbrod, *Power without Responsibility*.

Appendix

EPA's Record in the D.C. Circuit – 1993 to the Present

The following chart evaluates all challenges to Environmental Protection Agency (EPA) regulations in the U.S. Court of Appeals for the District of Columbia Circuit argued after January 20, 1993 and decided before January 20, 2000 for which a published opinion was issued. Cases raising procedural or nonenvironmental matters (employment discrimination, FACA compliance, etc.) were excluded from the sample, as were unpublished opinions. Each case resulting in a single published opinion is treated as a single case for the purpose of this analysis, irrespective of the number of parties to the proceeding or the number of issues raised.

Key:

W – Win; main body of regulation upheld in face of regulatory challenge – 33.33%
L – Loss; agency regulation reversed or remanded to agency – 31.88%
M – Mixed; substantial portion of regulation reversed or remanded, while remainder upheld – 21.74%
U – Unreviewed; case dismissed for lack of standing or ripeness, or otherwise deemed unreviewable – 13.04%

CASE	ISSUE(S)	RESULT	
American Petroleum Institute v. U.S. EPA, 2000 U.S. App. LEXIS 14 (Jan. 4, 2000)	Challenge to EPA interpretation of Clean Air Act provisions governing the imposition of reformulated gasoline in nonattainment areas	Petition for review granted	L
Lignite Energy Council v. EPA (Lignite II)*, 1999 U.S. App. LEXIS 33131 (Dec. 21, 1999)*	Challenge to New Source Performance Standards (NSPS) for emissions of nitrogen oxides from utility and industrial boilers.	Standards upheld	W
Molycorp, Inc. v. U.S. EPA, 197 F.3d 543 (Dec. 17, 1999)	Petition for review of Technical Background Document issued under Resource Conservation and Recovery Act (RCRA)	Document unreviewable	U
Natural Resources Defense Council v. EPA, 1999 U.S. App. LEXIS 27978 (Oct. 29, 1999)	Challenge to enhanced emission source monitoring rule under 1990 Clean Air Act (CAA)	Majority of rule upheld	W
Lignite Energy Council v. EPA (Lignite I), 1999 U.S. App. LEXIS 26263 (Sept. 21, 1999)	Challenge to New Source Performance Standards (NSPS) for modified boilers; EPA moved for partial voluntary remand	Rule vacated and remanded	L

CASE	ISSUE(S)	RESULT	
Amer. Trucking Ass'ns v. EPA, 175 F.3d 1027 (May 14, 1999) *reh'g granted in part, denied in part, reh'g en banc denied*, 195 F.3d 4 (Oct. 29, 1999)	Challenge to promulgation of revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter.	Ozone and fine PM rules remanded; coarse PM vacated	L
Louisiana Envtl. Action Network v. U.S. EPA, 172 F.3d 65 (Mar. 26, 1999)	Petition for review of Resource Conservation and Recovery Act (RCRA) rule allowing variances for treatment of hazardous waste in landfills	Petition denied	W
General Motors v. EPA, 168 F.3d 1377 (Mar. 23, 1999)	Petition for review of federal penalty for violating state Clean Water Act permit	Petition denied	W
Envtl. Defense Fund v. EPA, 167 F.3d 641 (Mar. 2, 1999)	Challenge to rule "grandfathering" previously conforming transportation projects under Clean Air Act	Rule Remanded	L
Sierra Club v. U.S. EPA, 167 F.3d 658 (Mar. 2, 1999)	Challenge to medical waste incinerator emission standards under the Clean Air Act	Rule remanded in part	M
Harbor Gateway Commercial Property Owners Ass'n v. U.S.EPA, 167 F.3d 602 (Feb. 19, 1999)	Challenge to listing of petitioner's land on National Priorities List under CERCLA	Listing invalid	L
George E. Warren Corp. v. U.S. EPA, 159 F.3d 616 (Nov. 3, 1998)	Challenge to EPA's application of Clean Air Act reformulated gasoline rule to foreign refiners	Petition Denied	W
Clean Air Implementation Project v. EPA, 150 F.3d 1200 (Aug. 14, 1998)	Challenge use of "credible evidence" in Clean Air Act enforcement	Dismissed for lack of ripeness	U
Military Toxics Project v. EPA, 146 F.3d 948 (June 30, 1998)	Challenge to RCRA military munitions rule	Petition denied	W
Fla. Power & Light Co. v. EPA, 145 F.3d 1414 (June 26, 1998)	Challenge to RCRA preamble statements	Dismissed for lack of ripeness/final agency action	U
Motor & Equipment Mfrs. Ass'n v. Nichols, 142 F.3d 449 (April 24, 1998)	Challenge to waiver of preemption for Califorinia on-board emissions diagnostic device regulations under Clean Air Act	Partially dismissed, partially denied	W
Columbia Falls Aluminum Co. v. EPA, 139 F.3d 914 (June 17, 1998)	Challenge to "spent potliner" rule governing byproduct of aluminum production under RCRA	Rule vacated and remanded	L
Appalachian Power Co. v. EPA, 135 F.3d 791 (Feb. 13, 1998)	Challenge to utility boiler NOx emission limits under Clean Air Act	Petition granted in part/denied in part	M
American Lung Ass'n v. EPA, 134 F.3d 388 (Jan. 30, 1998), rehearing en banc denied	Challenge to EPA's refusal to promulgate more stringent sulfur dioxide NAAQS under Clean Air Act.	Decision remanded for failure to explain decision	L
Montrose Chemical Corp. v. EPA, 132 F.3d 90 (Jan. 13, 1998)	Challenge to alleged decision to expand scope of National Priorities List listing	Dismissed b/c internal memo not reviewable	U
Oz Technology Inc. v. EPA, 129 F.3d 631 (Nov. 21, 1997)	Challenge to listing of refrigerant as "unacceptable" CFC substitute under Clean Air Act	Listing upheld	W

CASE	ISSUE(S)	RESULT	
Natl. Wildlife Fed'n v. Browner, 127 F.3d 1126 (Nov. 4, 1997)	Citizen suit to force review of state water quality standards under Clean Water Act	Dismissal affirmed	W
Sierra Club v. EPA, 129 F.3d 137 (Nov. 4, 1997)	Challenge to grace period for transportation conformity requirements under Clean Air Act	Regulation unlawful	L
Troy Corp. v. Browner, 120 F.3d 277 (Aug. 1, 1997)	Challenge to listing of 286 chemicals on toxic release inventory (TRI).	Listing of 284 of 286 chemicals upheld	W
Amer. Iron & Steel Inst. v. EPA, 115 F.3d 979 (June 6, 1997)	Challenge to Great Lakes Final Water Quality Guidance under Clean Water Act	Petition granted in part, denied in part	M
New Mexico v. EPA, 114 F.3d 290 (June 6, 1997)	Challenge to radioactive waste disposal regulations as applied to Department of Energy facilities	Rule upheld	W
Virginia v. EPA, 108 F.3d 1397 (Mar. 11, 1997), *modified on reh'g* 116 F.3d 499.	Challenge to imposition of California low-emission vehicle (LEV) standards in eastern states under the Clean Air Act	Rule vacated	L
American Portland Cement Alliance, 101 F.3d 772 (Dec. 13, 1996).	Challenge to EPA ruling that cement kiln dust to receive special regulatory classification under RCRA	Determination unreviewable	U
RSR Corp. v. EPA, 102 F.3d 1266 (Jan. 3, 1997)	Challenge to National Priorities List listing	Listing upheld, challenge untimely	U
Davis County Solid Waste Mgmt. v. U.S. EPA, 101 F.3d 1395 (Dec. 6, 1996), *amended on reh'g* 108 F.3d 1454.	Challenge to municipal solid waste facility "MACT" standards under Clean Air Act	Rule vacated	L
Mead Corp. v. Browner, 100 F.3d 152 (Nov. 12, 1996)	Challenge to aggregated National Priorities List listings	Listing invalidated	L
Natl. Electrical Mfrs. Ass'n v. EPA, 99 F.3d 1170 (Nov. 8, 1996), rehearing denied	Challenge to final land disposal restrictions on hazardous soils alleging EPA's failure to provide adequate notice	Petition denied	W
Dithiocarbamate Task Force v. EPA, 98 F.3d 1394 (Nov. 1, 1996)	Challenge to listing of carbamate-based products and waste streams as hazardous under RCRA	Rule vacated in part	M
American Municipal Power-Ohio v. EPA, 98 F.3d 1372 (Oct. 29, 1996)	Challenge to EPA definition of "thermal energy" under the Clean Air Act	Petition denied	W
Backcountry Against Dumps v. EPA, 100 F.3d 147 (Oct. 29, 1996)	Challenge to approval of Indian reservation's solid waste management permitting program under RCRA	Approval vacated	L
Texas Mun. Power Agency v. EPA, 89 F.3d 858 (July 23, 1996)	Challenge to emission marketable emission permit regulations under Clean Air Act	Rules upheld	W
Engine Mfrs. Ass'n. v. U..S. EPA, 88 F.3d 1075 (July 12, 1996)	Consolidated challenges to emission standards for non-road vehicles under the Clean Air Act	Consolidated petition denied on most grounds	W
Louisiana Envtl. Action Network v. Browner, 87 F.3d 1379 (July 9, 1996)	Challenge to Clean Air Act "delegation" rules governing approval of state regulatory programs	Review dismissed on ripeness grounds	U
Board of Regents, Univ. of Washington v. EPA, 86 F.3d 1214 (June 25, 1996)	Challenge to National Priorities List listing	Listing upheld	W

CASE	ISSUE(S)	RESULT	
Huls America v. Browner, 83 F.3d 445 (May 10, 1996), rehearing denied	Challenge to denial of petition to remove IPDI from "extremely hazardous substances" list under Emergency Planning and Community Right-to-Know Act.	Denial upheld	W
Envtl. Defense Fund v. EPA, 82 F.3d 451 (April 19, 1996), *amended on reh'g* 92 F.3d 1209.	Challenge to transportation conformity regulations under Clean Air Act	Petition denied	W
Ethyl Corp. v. Browner, 67 F.3d 941 (Oct. 20, 1995)	Challenge to EPA denial of registration of manganese-based fuel additive under Clean Air Act	Registration ordered	L
Natl. Mining Ass'n v. U.S., EPA, 59 F.3d 1351 (July 21, 1995), rehearing en banc denied	Challenge to definition of "major sources" of hazardous air pollutant (HAP) emissions	Partially upheld, partially rejected	M
NRDC v. Browner, 57 F.3d 1122 (June 27, 1995)	Challenge to rule on mandatory sanctions for SIP inadequacy	Petition denied	W
Indianapolis Power & Light Co. v. U.S. EPA, 58 F.3d 643 (June 23, 1995)	Challenge to rules governing SO2 emission extension allowances under acid rain program	Petition denied	W
Chemical Waste Mgmt. v. U.S. EPA, 56 F.3d 1434 (June 16, 1995)	Due process challenge to off-site rule on disposal of hazardous wastes from Superfund sites	Petition dismissed	U
General Electric Co. v. U.S. EPA, 53 F.3d 1324 (May 12, 1995)	Appeal of $25K fine for violation of PCB disposal rules under TSCA	Rule upheld, but fine voided because EPA did not give proper notice	M
Amer. Petroleum Inst. v. U.S. EPA, 52 F.3d 1113 (April 28, 1995)	Challenge to renewable oxygenate requirement in reformulated gasoline program	Rule vacated	L
Ethyl Corp. v. EPA, 51 F.3d 1053 (April 14, 1995)	Challenge to denial of waiver for manganese-based fuel additive under Clean Aid Act	Waiver ordered	L
Ciba-Geigy Corp. v. EPA, 46 F.3d 1208 (Feb. 21, 1995)	Challenge to maximum contamination level (MCL) and maximum contaminant level goal for atrazine under Safe Drinking Water Act	Petition dismissed; rule remanded	M
Greenpeace, Inc. v. EPA, 43 F.3d 701 (Jan 13, 1995)	Challenge to EPA determination that WTI incinerator met permit conditions under RCRA	Determination unreviewable	U
Amer. Water Works Ass'n v. EPA, 40 F.3d 1266 (Dec. 6, 1994)	Challenge to national primary drinking water regulation for lead under Safe Drinking Water Act	Partially upheld, partially remanded for fuller explanation and notice	M
Alabama Power Co. v. U.S. EPA, 40 F.3d 450 (Nov. 29, 1994)	Challenge to NOx particle emission limit for coal-burning utilities, based on interpretation of "low NOx burner technology" under Clean Air Act	Rule vacated and remanded	L
Leather Indus. of America, Inc. v. EPA, 40 F.3d 392 (Nov. 15, 1994)	Challenge to standards for disposal of sewage sludge containing chromium and selenium under Clean Water Act	Rule overturned	L

CASE	ISSUE(S)	RESULT	
Mobil Oil Corp. v. U.S. EPA, 35 F.3d 579 (Sept. 23, 1994)	Challenge to RCRA "mixed with or derived from" rule for definition of hazardous waste	Some arguments mooted by Congressional action; remaining portions invalidated	L
Santa Barbara County Air Pollution Control Dist. v. U.S. EPA, 31 F.3d 1179 (Aug. 12, 1994)	Challenge to regulation of emissions from sources on outer continental shelf	Regulation vacated in part	M
Chemical Mfrs. Ass'n v. EPA, 28 F.3d 1259 (July 19, 1994)	Challenge to listing of methylene diphenyl diisocyanate as high risk pollutant under Clean Air Act	Designation vacated	L
Steel Mfrs. Ass'n v. EPA, 27 F.3d 642 (July 8, 1994)	Challenge to treatment standards for metals contained in residual slag under RCRA	Rule upheld	W
NRDC v. U.S. EPA, 25 F.3d 1063 (May 27, 1994)	Challenge to failure to designate used oil as hazardous waste under RCRA	Decision upheld	W
NRDC v. EPA, 22 F.3d 1125 (May 6, 1994), rehearing en banc denied	Challenge to EPA evaluation of automobile emission control requirements in State Implementation Plans (SIPs) under Clean Air Act	Substance of actions upheld; use of committal SIPS to postpone SIP deadlines invalidated	M
Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177 (April 15, 1994)	Challenge to imposition of fees to cover cost of Motor Vehicle and Engine Compliance Program under Clean Air Act.	Imposition of fees upheld; rule remanded for fuller explanation of fee schedule	M
3M Co. v. Browner, 17 F.3d 1453 (Mar. 4, 1994)	Challenge to imposition of civil penalties under TSCA beyond the statute of limitations	Case remanded b/c statute of limitations applies to EPA	L
Horsehead Resource Development Co. v. Browner, 16 F.3d 1246 (Feb. 22, 1994)	Challenge to emission limits for boilers and industrial furnaces under RCRA	Rules upheld save for portions governing products of incomplete combustion	M
Kelley v. EPA, 15 F.3d 1100 (Feb. 4, 1994)	Challenge to regulation defining scope of lender liability under CERCLA	Regulation vacated	L
Edison Electric Institute v. U.S. EPA, 2 F.3d 438 (Aug. 6, 1993)	Challenges to toxicity characteristic rule for designation of hazardous wastes under RCRA	Rule upheld save for application to mineral processing waste and manufactured gas plant wastes	M
Ohio v. U.S. EPA, 997 F.2d 1520 (July 20, 1993)	Challenge to CERCLA regulations governing national contingency plans	Petition granted in part, denied in part	M
American Paper Inst. v. U.S. EPA, 996 F.2d 346 (June 22, 1993)	Challenge to regulations governing interpretation of state water quality standards in writing of pollution discharge permits under Clean Water Act	Rule upheld	W
Tex Tin Corp. v. U.S. EPA, 992 F.2d 353 (May 11, 1993)	Challenge to listing of facility on National Priorities List	Listing vacated	L
Ethyl Corp. v. Browner, 989 F.2d 522 (April 5, 1993)	Challenge to EPA denial of waiver for manganese-based fuel additive.	Rule remanded (at EPA's request)	M

About The Author

Jonathan H. Adler (jadler@cei.org) is a senior fellow in environmental policy at the Competitive Enterprise Institute, a nonpartisan, nonprofit research and advocacy organization in Washington, D.C., where he previously served as Director of Environmental Studies. Mr. Adler is the author of over 150 articles on environmental and regulatory policy, appearing in publications from *The Wall Street Journal* and *Washington Post*, to *Regulation* and *Environmental Law*. His books include *Environmentalism at the Crossroads* (1995) *The Costs of Kyoto: Climate Change Policy and Its Implications* (1997), and the forthcoming *Free Market Environmental Reader* (2000).

Acknowledgements

The author would like to thank those individuals who provided useful comments and critiques of earlier drafts of this paper, including Robert Gasaway, Kenneth Green, Sam Kazman, and David Schoenbrod.

Other RPPI Studies

Table of Contents