

ETHYL CORPORATION

Summary of Court Opinion in Lead Case

In December, 1973, Ethyl Corporation (Ethyl), other lead antiknock manufacturers and the National Petroleum Refiners Association brought suits against the Environmental Protection Agency (EPA) seeking judicial review and reversal of regulations phasing out lead antiknocks in gasoline over a four year period until they were virtually eliminated.

The principal objections raised by the suits with regard to the EPA regulations were (i) that the EPA had exceeded the authority granted to it by the Clean Air Act by failing to demonstrate on the basis of the record that the use of lead antiknocks in gasoline "will endanger the public health and welfare" and (ii) that the EPA's evaluation of the medical and scientific evidence as to the alleged health effects of lead antiknocks revealed such serious inconsistencies and errors as to constitute "arbitrary and capricious action."

The Circuit Court of Appeals for the District of Columbia, which has exclusive jurisdiction for review of EPA regulations under Section 211 of the Clean Air Act, issued on December 20, 1974 an order setting aside the EPA lead regulations by a two to one vote and stating that an opinion explaining the decision would be issued shortly. On January

28, 1975, the D. C. Circuit Court of Appeals issued a 169 page opinion, with Judge Wilkey writing for the majority (joined by Judge Tamm) and Judge Wright filing a lengthy, vigorous dissent.

On the question of EPA's statutory authority to issue the lead regulations, the majority held that Section 211 of the Clean Air Act requires the EPA to conclude "after consideration of all relevant medical and scientific evidence" that "the lead from auto emissions by itself or alone contributes a measurable increment of lead to the human body, and that this measurable increment causes a significant health hazard." (p. 13 of majority opinion).

In reaching this conclusion, the Court reviewed the legislative history of Section 211 of the Clean Air Act and concluded that it requires a threshold determination of endangerment to the public health turning crucially on factual issues and not on choices of policy, thus setting up a rigorous standard which requires a substantial amount of proof. The majority contrasted the language of Section 211 of the Clean Air Act with Sections 202 and 108 of that Act, which obviously grant the EPA Administrator much greater authority in making policy choices rather than limiting him to a factual determination as does Section 211.

The majority then went on to review the evidence in

the record, analyzing and commenting in detail on the various medical and scientific studies contained in EPA's health document issued with its lead reduction regulations. The majority ended its review with this conclusion (pp. 48-49):

"In the case at hand, we have concluded that at certain points in assessing the scientific and medical data the Administrator made 'clear error[s] of judgment.' This conclusion is based upon a 'searching and careful' inquiry into the facts underlying the determination that airborne lead will endanger the public health. At several points in the Administrator's reasoning we have found little or no evidence to support his conclusions, and at several points we have noted clear errors of a substantial nature in the Administrator's analytical and evaluative methodology and the EPA's decision-making process. Several vital links in the chain are unsupported; for the Administrator to leap to the conclusion he did can only be termed arbitrary and capricious. We conclude that 'a clear error of judgment' has occurred."

The majority then ended its opinion by emphasizing that it was finding the lead regulations invalid on two separate and alternative grounds, as indicated above, and stated in conclusion (pp. 71-74):

"We appreciate the quandry in which the Administrator found himself after three years of pondering this question. Beset on all sides by those urging the Administrator to take action, to ban or limit drastically the use of lead in gasoline, confronted by the arguments of those who asserted that such action was completely unjustified, attempting in the First Health Document and in the Second Health Document to

postulate a scientific basis for the action he had tentatively decided to take, only to have the scientific bases of his action riddled by the analysis of scientists in all departments of the same government commenting thereon, and confronted finally by an order of this Court that he act one way or another in a period of 30 days, the Administrator found himself with the question 'whether . . . to take arms against a sea of troubles, and by opposing end them.' So the Administrator acted, in reliance primarily on data only partially analyzed by his own staff and not commented on by any outside party. The result was, Hamlet-like, a blind stab through a curtain of ignorance, inflicting anguish, but in our judgment not rationally solving any problem." (Footnotes omitted).

Judge Wright's 96 page dissent disagrees in forceful and sometimes bitter language with the majority opinion. First, the dissent examines in detail the statutory standard of Section 211 of the Clean Air Act and concludes, on the basis of Judge Wright's view of the legislative history and the comparable provisions of the Act, that Section 211 requires only a determination of endangerment to the public health as a policy question to be decided on the basis of an assessment of risks rather than a factual determination from medical and scientific evidence.

Judge Wright next turns his attention to the standard for reviewing the evidence and rejects the majority view that a clear error of judgment by the EPA is equivalent to "arbitrary and capricious action". The dissenting opinion

also contains a review of the medical and scientific evidence in the record, from the point of view of one who believes strongly that the reviewing court must rely upon the "expertise" of the administrative agency and should not interfere with its conclusions except in the rarest and most flagrant case where there is no rational basis whatever for the Administrator's conclusions.

Judge Wright then concludes his dissent with this peroration (pp. 95-96):

"I must suspect that the rigor of the majority's review, and its hostility to these regulations, are related to the energy crisis and a reluctance to 'waste' a single gallon of gasoline for reasons of health when extra gallons might prove to be in short supply. I sympathize with the majority's impulse, but it is not for the courts to respond to this crisis by emasculating health-related legislation fully considered and enacted into law by the Congress. . . . That, needless to say, is a chore for the Congress, if indeed the crisis demands it. For the time being, however, the legislation must be applied as written, and this, I believe, the majority has failed to do.

The majority tells us that the Administrator, the environmental expert installed and staffed by Congress, has, Hamlet-like, stabbed blindly 'through a curtain of ignorance, inflicting anguish, but in our judgment not rationally solving any problem.' (Majority opinion at 73). I suggest, to the contrary, that it is the majority that, without scientific background or access to expertise, is stabbing blindly through the curtain of ignorance. And, with due deference to the

'anguish' the Administrator has inflicted on the suppliers of lead for the petroleum industry, it is the anguish of the children and urban adults who must continue to breathe our lead-polluted air that moves me."

It is interesting to note that on the day the opinion was issued, Judge Wilkey and Judge Wright each amended their respective opinions to refer to news stories of an EPA study indicating that the catalytic converter may cause sulfate emissions at a dangerously high level. The majority cited the "newly discovered dangers" as an additional reason for EPA to reassess its priorities and take steps to control dangerous PNA and sulfate emissions. Judge Wright complained bitterly that the last minute amendment was simply "an indication of the majority's desperation in grasping for theories to support its conclusion"

At the moment, EPA has options either to accept the majority's decision, to petition the Circuit Court for a rehearing (either by the same three judges or the entire Court) or to petition the United States Supreme Court for an appeal. The importance of the issues involved in this case, the long and forceful opinions of the Court, and the obvious bitterness between the majority and dissenting judges may be taken as indications that the Supreme Court is likely to grant an appeal in this case if the EPA chooses to seek one.