

Court Tells E.P.A. to Change the Way It Sets Pollution Rules

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WASHINGTON, July 28 — In a decision written by Judge Robert H. Bork, a Federal appellate court here ruled today that the Environmental Protection Agency could consider only health, and not cost or technological feasibility, when determining what are safe levels of exposure to toxic air pollutants.

But the court also ruled that once that safe level was set, the agency could consider costs and other factors in determining how far the polluter must go in reduce the offending emissions.

The unanimous decision by the 11-member United States Court of Appeals for the District of Columbia ordered the E.P.A. to review its standard for emissions of vinyl chloride, a gas emitted in the manufacture of some plastics, because the standard was based on cost and technological feasibility. The gas has been shown to cause liver cancer in humans.

The decision emphasized that the environmental agency's determination of a safe level of air pollution that can cause cancer "must be based solely on the risk to health."

The court granted a petition by the Natural Resources Defense Council, a private environmental group, asking that the E.P.A. be required to review

Judge Bork writes a decision holding that 'safe' air levels must be based on health considerations.

its decision that it would not issue new standards that would place more stringent restrictions on emissions of vinyl chloride. On this issue Judge Bork's decision was a reversal of the way he voted last year when the case was considered by a three-judge panel of the court.

But the decision would presumably apply to all toxic air pollution the agency is responsible for regulating under the Clean Air Act and would therefore put some limitations on its applying cost and benefit tests when deciding on anti-pollution regulations.

The decision today is based on a section of the Clean Air Act that requires the agency to protect the public from hazardous air pollutants, which are defined as those that may cause "an increase in mortality or an increase in serious irreversible or incapacitating reversible illness." The environmental agency is required to adopt a standard that first determines the maximum amount of a pollutant beyond

which these adverse health effects may take place and is then required to set an "ample margin of safety" below that level.

The agency has adopted the policy that the standards required by this section of the law can be met through the use of the "best available technology" that would reduce emissions to a point beyond which the costs would be "grossly disproportionate" to the benefits of lowering the risk to health.

Considerations of Health

Today the appeals court found that the Congressional mandate requires the Administrator of the E.P.A. to make an initial determination of what is "safe." It said this determination must be based exclusively "on the risk to health."

"Under this opinion, the E.P.A. has to be able to look people in the eye and tell them they are safe from a cancer-causing air pollutant," said David D. Doniger, a lawyer for the Natural Resources

Defense Council. He said the decision would require the agency to change the way it has been setting standards, particularly under the Reagan Administration.

However, the court also ruled that, once the environmental agency has determined on health grounds alone what constitutes a safe level of exposure to a pollutant, it may use considerations of cost and technological feasibility to determine what is an "ample margin of safety" to establish beyond the safety level required by the law.

The court rejected the contention by the Natural Resources Defense Council that the environmental agency is required to bar any emissions of a cancer-causing chemical when there is scientific uncertainty about what constitutes a safe level of exposure.

The decision stated that the court was requiring a review of the vinyl chloride standard because the E.P.A. had not determined the health risks involved. But it added that the agency did not have to find that "safe" means "risk free." It also said that the finding of the court was "limited" in that it was not intended to bind the agency "to any specific method of determining what is safe" or what constitutes an "ample margin."

Lawyers for the E.P.A. and for the vinyl chloride institute, as well as Mr.

Doniger of the natural resources group, said they were happy with the court decision.

The decision reverses, in part, a 2-to-1 decision reached by a three-member panel of the appeals court last November, which rejected the petition to have the environmental agency review its decision not to issue a more stringent standard on vinyl chloride. Judge Bork was one of the two judges to rule against the petition at the time.

Judge Bork's role in this case provides some support for two themes that he and his supporters in the looming confirmation battle over his nomination to the Supreme Court have stressed in seeking to rebut charges that he is a rigid conservative ideologue far from the mainstream of legal thought.

The fact that he changed his position in the case after it was reheard by the entire 11-man court supports the view that he does not invariably prejudge issues on the basis of his overall philosophy and can keep an open mind.

The fact that his opinion on an ideologically charged issue of great complexity and some importance was signed by all 10 other members of a court that is deeply divided between liberals and conservatives supports the view that he is capable of consensus-building, at least when he wants to be.