

The White House decided to [abandon](#) a proposed revision of the air quality standard for ozone in order not to further burden a faltering economy. The story is a bit complicated. The Bush Administration tightened the standard, but not as much as EPA's science board recommended. Environmentalists sued, but desisted when Obama's EPA said it would reconsider the issue. Now the Administration has decided not to do that after all.

There's an interesting question about whether Obama's decision was legal. EPA cannot consider costs when it sets the standard, under clear statutory language confirmed by Supreme Court precedent. The statute also mandates that EPA revisit the standard every five years. I think it's also clear that EPA can't simply leave the old standard intact on the basis of cost. But the next five-year review is not yet due, and EPA seems to have no duty to reconsider the standards off-cycle.

This analysis suggests that EPA (and the President) can decline to take action off-cycle as a matter of discretion, and that a court would not review this failure to act. If this analysis is correct, even though the government can't consider costs in its mandated reviews of the standard, it *can* consider cost (or any other factor) in deciding whether to go forward with an off-cycle review.

On the other hand, you could argue that this is not really an off-cycle action because it is tied to the ongoing dispute over the Bush Administration standard. If you view the proposed revision as just a continuation of the last mandated review by the Bush Administration, cost was not a legitimate consideration. This argument would be stronger if the court had actually remanded the case back to EPA for further consideration, instead of EPA volunteering to take another look at the standard.

The question of when and on what grounds courts will review a failure to act is one of the messiest areas of administrative law. On balance, I tend to think Obama's decision would be non-reviewable, and the environmentalists will have to resume their challenge to the Bush rule rather than attacking Obama's decision in court.

Of course, that doesn't address the question of whether Obama's decision was good policy. I'm doubtful on that score. The scientific evidence before EPA showed that the new standard would have solid public health benefits. The costs wouldn't be felt for at least a couple of years because it takes time to implement new standards, so it is hard to see how issuing new standards would have contributed to the recession. It seems like a bad call in policy terms.

Of course, some of the Republican candidates want to abolish EPA entirely. So the President

might well argue that winning the next election is *really* the highest environmental priority.