

Lead can cause neurological damage to young children and developing fetuses. The only really safe level is zero. Because poor children are the most likely to be exposed to this hazard, this is also a major environmental justice issue.

The Trump EPA took the position that it could set a hazard level higher than zero because of the cost of reaching a lower threshold. In a split [decision](#), the Ninth Circuit reversed. The statutory issues are complicated, and the dissent made some reasonable arguments. Ultimately, though, it's hard to believe Congress wanted EPA to misrepresent that a certain level of lead is safe for children when it really isn't.

The case involved several types of regulations, but the most important dealt with levels of lead dust. The main way children are exposed to lead is by contacting dust from lead paint in older buildings. The key language that the majority relies on requires EPA to set the hazard level to include "any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, lead contaminated paint... that would result in adverse human health effects as established by the Administrator under this chapter."

That language certainly seems to support the majority's view, which is that "lead-based paint hazard" means a level that's unsafe, not one that can't be feasibly reduced. The fact that it's not feasible to eliminate a hazard doesn't mean that the hazard itself has vanished. There was no feasible way of making it safe for British pilots to fight in the Battle of Britain, where their death rate was horrific. Still, it would be weird to say that they were engaged in a nonhazardous activity simply because there was no escaping the risk.

The dissent relied primarily on the final clause ("established by the Administrator. . ."). In the dissenter's view, "adverse health effects" only count if EPA decides those effects can be addressed feasibly. The dissent then invokes other language in the statute to show that EPA is generally supposed to act on the basis of feasibility. That's not an absurd argument.

Both views of the statute have problems. The dissenter's view requires assuming that Congress meant EPA to call low levels of lead as nonhazardous even knowing that they were in fact unsafe for children. If it wants to, Congress can define *hazardous* as "any level that EPA thinks should be reduced." Still, you would think that Congress would have made it clearer if it meant to adopt such a peculiar definition of the word *hazardous*.

Behind this disagreement about the definition, there was a deeper dispute about the function that setting hazardous levels plays in the statute. Under the dissenter's view, the hazard level and the remedial regulations aren't separable. EPA issues the safe level based on what remedial regulations are going to be feasible to reduce risk. Then it issues those

regulations. Under the majority's view, there's a two-step process: first EPA sets the safe level based on science, and *then* it considers feasibility in issuing remedial regulations.

It seems to me that here, too, the majority has the better of the argument. If the dissenter is right about the way the statute is supposed to operate, it would have been much simpler for Congress to have skipped the process of setting a hazard level. Instead, it could simply have said, "EPA shall issue regulations reducing lead risk, taking into account the risk of harm and the cost of reducing lead levels." Or Congress could have said EPA should determine the "acceptable" level of exposure rather than the hazardous level.

This was another Ninth Circuit case where the government had dragged its feet for years about taking action, and had taken the minimum action possible only after a court said the delay was unacceptable. That history may well have influenced the majority. I can understand the government's reluctance to admit that it was going to leave lead at an unsafe level for cost reasons. Still, to my mind, if achieving safety isn't feasible, it's better for the government to say so, rather than issuing a decision that purports to determine safety but actually does something much different.