The Legal Planet team has been so busy fretting over the Gulf oil spill (not to mention getting our grading done) that we've skipped over some important environmental law developments. Here's one. In May, the US Court of Appeals for the DC Circuit, upheld EPA's National Ambient Air Quality Standards (NAAQS) for lead against an industry challenge. Although the decision doesn't break any new legal ground, its important as an affirmation that the DC Circuit understands the difficulty of setting these standards and is not inclined to fly-speck them.

The Clean Air Act requires that EPA set NAAQS for so-called "criteria pollutants," which contribute to pollution which may reasonably be anticipated to endanger public health or welfare and which come from numerous or diverse mobile or secondary sources. Once a substance is identified as a criteria pollutant, EPA must set primary NAAQS at a level "requisite to protect the public health" with "an adequate margin of safety," and secondary NAAQS to protect public welfare. The states are then charged with achieving the NAAQS through State Implementation Plans. The Supreme Court said in Whitman v. American Trucking Associations, 531 U.S. 457, 475-76 (2001) that the primary NAAQS must be "not lower or higher than is necessary . . . to protect the public health with an adequate margin of safety."

In the past, EPA has been reluctant to regulate lead through the NAAQS. It did not identify lead as a criteria pollutant until forced to do so by court order (NRDC v. Train, 545 F.2d 320 (2d Cir. 1976)). The first lead NAAQS were issued in 1978, setting both primary and secondary standards at 1.5μg/m^3 averaged over a calendar quarter. Those standards remained in place for three decades, as evidence accumulated that lead is harmful at considerably lower levels. The Clean Air Act requires that EPA review and if necessary revise its standards every five years. Despite some staff studies in the late 1980s EPA did not either revise or formally state that it had completed review of the lead NAAQS, and it did nothing about the lead standard after 1991. Finally, in 2005, a court ordered the agency to undertake a formal review and to finalize any revisions to the lead NAAQS by September 2008.

Industry vigorously opposed any tightening of the lead standard, even going so far as to argue at one point that the 1970s phase-out of lead from gasoline meant that lead no longer qualified as a criteria pollutant. Nonetheless, EPA proceeded, following the advice of its scientific advisors, to adopt new standards in November 2008, reducing the allowable concentration of lead by an order of magnitude, to 0.15μg/m^3 on a three-month rolling average basis. (The fact that the Bush EPA was able to get the new rule through OMB review suggests just how clear it was that the old one was inadequate.)

The Coalition of Battery Recyclers Association sued, contending that the new standards were unlawfully overprotective. The DC Circuit has now roundly rejected that claim. The court reiterated its earlier holding (Am. Lung Ass'n v. EPA, 134 F.3d 388 (D.C. Cir. 1998)) that the NAAQS must protect sensitive populations, in this case children living near sources of lead emissions. It agreed with EPA that a population-level decrease of 2 IQ points is a significant public health problem, and endorsed EPA's use of population level analysis, refusing to demand that EPA conclusively demonstrate that any particular individual child's IQ score would decrease. It rejected the claim that EPA must obtain and release the raw data underlying any scientific study on which its standard relies. Interestingly, Battery Recyclers argued that EPA had erred in giving more weight to published epidemiological studies than to its risk assessment modeling (just the opposite of the claim that opponents of climate change regulation make about models), but the court found EPA's explanation of the uncertainties of its risk assessment effort adequately explained that choice.

Overall, this opinion, read together with EPA's lead rule, gives a great sense of how difficult the task of setting the NAAQS standards is, and confirms that the DC Circuit will uphold those standards if the record shows that EPA seriously grappled with the uncertainties and limitations of the evidence and with the knotty question of what constitutes a significant public health impairment. Clearly, although the NAAQS must be "requisite" to protect the public health, EPA still needs to err, if at all, on the side of caution, identifying the most at-risk populations and providing that adequate margin of safety.