In an unsigned opinion released today, the D.C. Circuit largely upheld the Bush Administration's revision of the air quality standard for ozone. The opinion can safely be described as dull reading, but it provides some guidance to EPA about the current round of standards revision that is now underway.

The law requires EPA to set air quality standards for major air pollutants "which in the judgment of the Administrator, . . . allowing an adequate margin of safety, are requisite to protect the public health." The Clinton Administration set the primary ozone standard at .08 ppm. EPA's clean air advisory committee told the Bush Administration there was "no scientific justification" for retaining the Clinton standard. It also said that "overwhelming scientific evidence" supported its recommendation "that the level of the current primary ozone standard should be lowered from 0.080 to no greater than 0.070 ppm." Nevertheless, EPA decided that the lowest level where there was clear evidence of health effects was .080, although admittedly there was some plausible but uncertain evidence for lower levels. All things considered, EPA decided that it could provide the margin of safety required by the statute by lowering the standard "an appreciable amount" from .08 to .075.

In upholding the Bush standards, the court stressed the great deference due to EPA as the expert agency in charge of implementing the standard. The court disclaimed any role in refereeing disputes among experts, and it also stressed that EPA had broad leeway in deciding how much of a margin of safety was enough. Thus, the court was not inclined to delve deeply into the technical arguments or to second-guess EPA in its policy determination. The court also made it clear that EPA did not have show that old standards were wrong due to errors or new evidence; it was free to reassess the evidence based on its own policy and scientific judgment.

These aspects of the opinion give the Obama EPA lot of room to maneuver in revising the Bush standards. But its leeway could be narrower if the clean air advisory board heeds the court's opinion. The court said, "Had CASAC [the advisory board] reached a scientific conclusion that adverse health effects were likely to occur at the 0.070 ppm level, EPA's failure to justify its uncertainty regarding adverse health effects at this level would be acceptable." Furthermore, if EPA disagrees with the advisory committee, it "must give a sound scientific reason for its disagreement."

In this case, however, EPA got away with its rejection of the committee's recommendations because the committee was careless in expressing its views. The

court said it was unsure whether the advisory committee was making a scientific judgement or making a policy judgment about margins of safety when it said that a level of .07 would be unacceptable.  So next time the advisory committee will know to use the phrase: "in our scientific judgment" and to speak about the probability of harm rather than the unacceptability of the risk.

On the other hand, if EPA does go along with the advisory committee in a future ruleamking, the court made it clear that  EPA is within its rights to "rely on an explicit recommendation by the unanimous CASAC panel." Thus, EPA's decision gains strength when it agrees with the advisory committee. Putting all this together, there are clear incentives for the advisory board to phrase its recommendations with an explicit focus on science rather than policy and for EPA then to follow its lead in order to strengthen its case in court.

I should mention one final aspect of the opinion.  The discussion so far has been about the primary standards, which are designed to protect human health.  EPA also issued a secondary standard (designed to protect public welfare), which was the same as the primary standard.  The court said that EPA had failed to give a clear enough explanation for making the standards equal, in particular, it had failed to state explicitly "what level of protection was 'requisite to protect the public welfare.'" This part of the opinion seems very nit-picky and the prose seems especially muddy. But this holding doesn't make much difference: the court left the old provision in place while EPA reconsidered, and the whole issue will become moot when the Obama Administration issues a new set of standards anyway.