

Hypotheticals for Notice and Comment Rulemaking Procedures - Part II

I. Hypothetical I -

- A. EPA has statutory authority to set ozone emission limits on consumer products at levels that are necessary to protect the environment.
- B. EPA determined that certain consumer-grade air purifiers containing ionizing coils designed to trap pollens, odors and other pollutants may emit dangerously high levels of ozone. Consequently, it issued a Notice of Proposed Rulemaking inviting comments on a proposed rule restricting emissions from such ionizing air purifiers. When EPA proposed the rule, it was relying on several studies that indicated that air purifiers emitted high levels of ozone, but EPA did not identify or discuss those studies in the notice of proposed rulemaking.
- C. In response to the notice of proposed rulemaking, four medical, consumer and air quality associations filed comments insisting that the state of the applicable technology, and uncontrollable variables having to do with ventilation conditions in individual home environments, would make it impossible for manufacturers of air purifiers to calibrate their ionizing equipment in such a way as to ensure that ozone emissions would be within any limits prescribed by EPA.
- D. In its final rule, EPA set the level of “acceptable ozone emission” at an imperceptible level, even in the smallest of rooms, and about 95% lower than the average emission rate of the leading models on the market today. The new limit nullifies any of the air purifying qualities of the ionizing feature in the household air cleaners. When EPA issued the final rule, the agency did not discuss the comments raised by the medical, consumer and air quality associations in the notice accompanying the rule.
- D. What challenges would the manufacturers raise to EPA’s final rule - procedural or otherwise - and how would EPA respond?

II. Hypothetical II - In addition to the facts outlined above for Hypothetical I, assume that when EPA finalized the rule that set ozone limits for air purifiers, it did not discuss the studies regarding the level of ozone emissions from air purifiers or the dangers created by those emissions. What additional challenges could the manufacturers raise regarding the final rule?

III. Hypothetical III: Look at the hypothetical on page 360. If you are representing the

commenters who are challenging DOT's rule requiring safety belts on trains, on what basis would you argue that the rule should be invalidated?