EPA LOSES ON CLEAN AIR ACT REGULATION ENFORCEMENT/FEDERAL COURT DETERMINES THAT EPA CANNOT MAKE UP REGULATIONS BEYOND THE SCOPE ALLOWED BY CONGRESS.

On May 14, 1999, the U.S. District Court of Appeal for the D.C. Circuit held that the Environmental Protection Agency has been acting in an unconstitutional manner, with a holding of broad implications for property owners fighting federal agencies who impose their internal interpretations of wetlands and endangered species statutes. In a case brought by the American Trucking Association against the EPA, joined in an important amicus curie brief by C. Boyden Gray, Chairman of the Washington-based Citizens for a Sound Economy [formerly with President Bush's Justice Dept.], the Court suspended EPA's 1997 air quality regulations. Part of EPA's 1997 edict required states like California to regulate microscopic particles, or soot, down to 2.5 microns. That's 28 times smaller than the width of a human hair.

The Court has held that the EPA is required to articulate the "intelligible principle" that shapes its definition of unacceptable levels of smog and soot when writing new rules. However, the Court said in mandating its 1997 air quality standards, the EPA arbitrarily was "picking numbers out of thin air" and that its standards were "arbitrary and capricious". EPA's new rules would have cost Americans at least $46 billion, destroyed business, and not saved a single life.

Repudiation of EPA's wacko science was important, but more important was the Court's finding that the section of the 1990 Clean Air Act upon which the EPA relied in issuing its controversial regulations amounted to "an unconstitutional delegation of legislative power." The court held that the EPA's actions violated the "non-delegation" doctrine that prohibits Congress from entrusting legislative power to government agencies without legal standards to guide the use of the delegated power. In other words, the EPA was making laws rather than enforcing them; sound familiar, anyone? Every day, those of us with property interests are faced with interpretations of Section 401 and 404 of the Clean Water Act, requiring the property owner to submit to in-house rule making which has never been reviewed by Congress. We are hopeful that the Court's decision's far-reaching implications will be regularly applied to the full gamut of federal agency actions. The decision also sends a message to Congress that it should do its job of legislating, rather than passing it off to politically unaccountable agencies and courts.

The Appeals Court decision is really a victory for Americans who expect environmental regulations to be based on non-bogus science, and who expect Congress and federal agencies to behave constitutionally. Of course, the EPA immediately appealed the decision, and whether the Supreme Court will hear the case has not yet been determined. Given their recent rulings restricting regulation under the Commerce Clause, I believe EPA may have blown it in appealing the decision.

1999 hasn't been a good year for the EPA -- they've faced another stunning rebuke. Last July, U.S. District Court Judge William L. Osteen found reason to nullify the EPA's 1992 report that claimed second-hand smoke to be a Class A human carcinogen and cause of lung cancer. He found that the EPA *knowingly, willfully and aggressively put out false and misleading*

information. Keep Judge Osteen's finding in mind the next time an environmental scientist tells you that the relationship between the regulations and the environmental goal is "well documented."

Let us pray that the Supreme Court takes the case, and hands EPA their lunch.