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TVA v. EPA: The Eleventh Circuit Invalidates A Key EPA Administrative Enforcement Mechanism – Part II

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In Part 1 of this article, we discussed the Eleventh Circuit Court of Appeals decision declaring key provisions of the Clean Air Act (CAA) unconstitutional, and stripping the Environmental Protection Agency of a powerful administrative enforcement weapon – the Administrative Compliance Order (ACO). Tennessee Valley Authority *v.* EPA, *No. 00-15936 (11th Cir. June 24, 2003).*

The court dismissed TVA's challenge to an EPA ACO without addressing the merits, based on due process constitutional concerns even though neither EPA nor TVA had raised such claims. The court also found that ACOs are not final agency action, and thus are not subject to judicial review – indeed, the court characterized ACOs as "legally inconsequential," and stated that until EPA proves the existence of a CAA violation in court, "TVA is free to ignore the ACO without risking the imposition of penalties for noncompliance with its terms." Opinion at 4. The court's opinion is in conflict with decisions in at least two other circuits. Below, we discuss the potentially significant implications of the *TVA* decision for regulated parties, EPA's administrative enforcement program, and other regulatory programs.

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Specific Impacts Of The TVA Decision

The one area where the *TVA* decision will have little or no impact is EPA's ongoing utility enforcement initiative, or other comparable initiatives, because TVA is the only defendant against whom EPA acted administratively. Ironically, TVA may have lost more than it won: had EPA been allowed to proceed with its administrative enforcement process, and had TVA refused to accept EPA's findings, the Agency would have had to pursue a Byzantine path, including negotiation, review, and approval of legal questions and substantive decisions by the Office of Management and Budget (OMB) and the Department of Justice Office of Legal Counsel (OLC). See Exec. Order No. 12,088, 3 C.F.R. 243 (1978), as amended by Exec. Order No. 12,580, 3 C.F.R. 193 (1987); Exec. Order No. 12,146, 3 C.F.R. 409 (1979), as amended by Exec. Order No. 12,608, 3 C.F.R. 245 (1987), and Exec. Order 13,286, 68 Fed. Reg. 10,619 (Mar. 5, 2003). As a result of the 11th Circuit's holding, however, EPA may now pursue TVA directly in court – a venue that may prove less favorable to TVA than either OMB or

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OLC, especially in the present political climate. The only question is whether the Department of Justice will bring the case.

For others, however, the opinion may well have a far-reaching impact, because it clearly prohibits EPA from enforcing violations of ACOs under the Clean Air Act. A facility in the 11th Circuit that disagrees with a violation alleged in an ACO may now simply choose not to comply with the order, without risking additional liability (although liability for any underlying substantive violation would still continue to accrue).

Other Circuits may or may not follow suit. The Sixth and Ninth Circuits most likely will not, as they have already expressed conflicting interpretations in *Allsteel* and *Alaska*; the *Wagner Seed* decision may indicate that the Second Circuit would also disagree. Thus, facilities in the Sixth and Ninth Circuits may not simply ignore an ACO, but must instead seek immediate review under Section 307(b); facilities in other Circuits (including the Second Circuit) are constitutionally entitled to some sort of judicial review, but at the moment, the timing or form of review is unclear. Facilities in these other Circuits may therefore want to seek immediate judicial review of any ACO, until the finality of the ACO and the validity of the ACO enforcement provisions of Section 113 is conclusively established.

A more definitive answer may be upcoming: The Supreme Court has agreed to review the 9th Circuit's decision on the merits in the *Alaska* case. While the primary question presented to the Court will be EPA's authority to override State "best available control technology" determinations, the constitutional questions raised by the *TVA* case, and the apparent split in the circuits that it caused, may lead the Supreme Court to address this issue as well. In fact, while EPA has in the past consistently argued that ACOs are not "final agency action" subject to judicial review under Section 307(b), the Agency, in its brief filed on July 18, decided in light of TVA to reverse course and concede that ACOs are final orders subject to judicial review.

Potential For Extension To Other Statutory Schemes

The due process concerns addressed in *TVA* are not limited to the Clean Air Act, but apply to any regulatory scheme in which an administrative compliance order may be independently enforced without a guarantee of judicial review of the underlying violation. The broad language of the court's holding suggests that other statutory schemes may be subject to similar challenges. The court itself pointed out the many similarities between the enforcement provisions of the Clean Air Act and those of the Clean Water Act – clearly implying that orders issued under the latter statute are similarly questionable. Opinion at 40 n.32. Administrative orders issued under other environmental statutes may also be subject to challenge – as may similar orders issued under other regulatory schemes in fields as diverse as communications, interstate trade, labor, and food and drug law.

Potential Impacts On EPA Enforcement

The *TVA* decision may shift somewhat the balance of power for facilities facing negotiations with EPA. In the past, EPA has routinely ordered facilities to take actions and install equipment that facilities believed to be onerous and unjustified, based on alleged violations that facilities believed to be questionable at best – then threatened significant penalties for failure to comply with its terms. While the *TVA* court did not identify any instances where EPA carried out this threat without providing an opportunity to dispute the underlying violation, EPA's apparent right to do so under the plain language of the CAA may have persuaded many companies to comply with the terms of ACOs, even when they disagreed with the substantive allegations or the relief ordered. Now, with the threat of independent enforcement of an ACO removed, companies faced with an ACO will be in a much stronger bargaining position.

The decision may also result in fewer EPA enforcement actions. First, EPA will have to proceed more cautiously before initiating enforcement proceedings. In the absence of an enforceable ACO, EPA may no longer act as prosecutor and judge, but will instead have to prove its case to a judge in a formal administrative or judicial proceeding. The Agency will necessarily have to be more certain of both the violations alleged and the relief sought before it moves against a facility.

Second, the Agency will also have to be more selective in those cases it decides to pursue. Formal proceedings, with their attendant litigation costs, such as discovery, motions, witnesses, and hearings, require more Agency resources – both personnel and cash – than the relatively summary ACO practice. To the extent that EPA's enforcement office continues to face the budget constraints endemic to the federal government – and there is no reason to think it will not – EPA's ability to pursue the same numbers of violations through formal enforcement actions rather than ACOs is doubtful.

On the other hand, EPA still retains powerful pre-enforcement tools. The *TVA* opinion does not affect EPA's authority to issue a Notice of Violation (NOV), coupled with the threat of formal administrative, civil, or criminal enforcement for any further noncompliance. CAA § 113(a)(1). From EPA's perspective, an NOV can serve many of the same purposes of the ACO. It places a defendant on notice of the Agency's interpretation of the law, which sets the groundwork for defeating a "fair notice" defense – which, given the strict liability nature of the CAA, and the complexity of the regulatory scheme, has proven to be one of few viable defenses to allegations of noncompliance. *See U.S. v. Hoechst Celanese*, 128 F.3d 216, 227-229 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2367 (1998) (fair notice defense no longer applies after EPA notifies plant of Agency's regulatory interpretation).

Moreover, the Agency could also argue that any violations that persist after an NOV is issued are "knowing" violations subject to criminal penalties under Section 113(c). While criminal prosecutions have been relatively infrequent in the past, the mere threat of a criminal investigation is a powerful one. Thus, while pursuing formal enforcement may prove more difficult after *TVA*, the NOV process still enables EPA to pressure facilities to conform to the Agency's interpretation of the law.

One final impact of the *TVA* decision may be to decrease somewhat the opportunity to reach a negotiated settlement prior to full litigation – especially after the matter is referred to the Department of Justice. While settlements are invariably difficult, EPA personnel typically comprehend the complicated technical issues involved, and can sometimes be convinced of the specific practical concerns that a particular facility may face. If EPA believes that it cannot obtain the relief it desires through an informal administrative process, it may be more likely to refer matters to DOJ, which has more expertise in enforcement and litigation than in technical matters.[1]

IV. Conclusion

The *TVA* case strongly indicates that courts will no longer allow EPA to "have its cake and eat it too[.]" Opinion at 29 n.26. The court's opinion has cast a spotlight on an apparent inequity in the Clean Air Act that industry has long complained of. If the 11th Circuit's opinion is adopted in other circuits, it will change the balance of power in negotiations with EPA. In any event, however, the decision ensures that the basic notions of administrative fairness and due process will not be overlooked. The issue is out in the open, and any court that decides to follow a different path must fully explain how its decision will adequately protect constitutional rights.

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[1] *The same may hold true for state agencies, which may rely on administrative enforcement mechanisms with the same constitutional infirmities, and which usually split compliance and enforcement responsibilities between the environmental agency and the Attorney General's office.*