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

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On June 24th, in a lengthy and often strongly-worded opinion, the Eleventh Circuit Court of Appeals declared key provisions of the Clean Air Act (CAA) unconstitutional, and stripped the Environmental Protection Agency of one of its most powerful administrative enforcement weapons – the Administrative Compliance Order (ACO). *Tennessee Valley Authority v. EPA*, No. 00-15936 (11th Cir. June 24, 2003). The broad sweep of the opinion could potentially deprive not only EPA, but other federal and state agencies, of similar enforcement authority under other statutes as well.

The case arose when TVA challenged an ACO issued by EPA under the CAA, in which the Agency claimed that numerous changes made at TVA's facilities were "modifications" that violated New Source Performance Standard (NSPS) and New Source Review (NSR) requirements under the Clean Air Act. Both EPA and industry anticipated that this decision would clarify the scope of the CAA's "routine maintenance, repair, and replacement" exemption.

The court, however, dismissed TVA's challenge without addressing the merits, based on constitutional concerns – a surprising conclusion, as neither EPA nor TVA had raised any such claims. The court held that the CAA provisions which made ACOs independently enforceable violated due process, because they allowed EPA to obtain significant penalties for violations of an ACO, without providing the defendant any opportunity to contest the underlying violation in court. Having removed any threat of penalties for violations of an ACO, the court then found that ACOs are not final agency action, and 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.

In Part I of this article, we briefly summarize the history of the case, its holding, the court's rationale, and the conflict it sets up with other circuit courts. In Part II, which will appear next month, we will discuss the implications of the decision for regulated parties, EPA's administrative enforcement program under the Clean Air Act, as well as potential ramifications for other regulatory programs.

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I. The Decision

History of the Litigation. Several years ago, EPA began a major enforcement initiative against the utility industry, filing several federal district court lawsuits alleging NSR and NSPS violations. EPA, believing it could not file a civil judicial action against TVA because it was a fellow federal agency, chose instead to pursue TVA using administrative enforcement tools.

EPA issued and amended several ACOs, claiming that various past TVA "rehabilitation" projects were "modifications" triggering NSPS and/or NSR. After much negotiation, the Administrator decided to "reconsider" the ACOs, and in a novel process, delegated to EPA's Environmental Appeals Board (EAB) the authority to perform the review. The EAB ultimately affirmed portions of the ACOs and issued its own Order. TVA, in turn, sought review of the ACO in the 11th Circuit under CAA Section 307(b), which authorizes appellate review of any "final agency action."

Holding and Rationale. The opinion focused on what the court saw as the central problem presented by the statutory scheme: ACOs have an "injunction-like legal status[,]" yet are "issued without an adjudication or meaningful judicial review." Opinion at 8. An ACO may be issued upon "any information available to the Administrator," CAA § 113(a), including "a staff report, newspaper clipping, anonymous phone tip" (Opinion at 8) – a much less rigorous standard than the "probable cause" that is required for search warrants. Yet the Clean Air Act authorizes both civil and criminal enforcement for the failure to comply with such an order. CAA § 113(b), (c)(1). Thus, a company or individuals can face $27,500 per day in penalties, and even years in jail, for violating an ACO, without EPA ever having to prove that the underlying violation actually occurred. Opinion at 9-12. This the court found to be unconstitutional. *Id.* at 12.

The court noted that this statutory injustice could be avoided if the ACO did not have the "status of law," and thus could not support the imposition of penalties. Indeed, the court appeared convinced that Congress did not intend to attach such significant penalties to ACOs, pointing to other statutory provisions, agency practice, legislative history, and various practical difficulties with such an interpretation. Opinion at 24-40. Nevertheless, in the end, the court concluded that the plain language of the Act compelled the contrary conclusion: because the Act authorizes the imposition of independent civil and criminal penalties for any violation of an ACO, the ACO has the "status of law." Opinion at 4-42.

The court then set forth the well-accepted principle that the Due Process Clause entitles a defendant to "a full and fair hearing before an impartial tribunal" – *before* the defendant is subject to civil or criminal penalties. *See, e.g., Ex Parte Young*, 209 U.S. 123, 147 (1908) ("when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.") Because the CAA allowed penalties to be imposed for violating an ACO without providing the right to any hearing on the underlying violation, the court declared the provisions authorizing such penalties unconstitutional. Opinion at 47.

The court further rejected the argument that a voluntary hearing, such as the EAB hearing EPA provided here, could "save" the statute. In the court's view, the EAB review came nowhere near satisfying due process requirements; the court characterized these proceedings as "entirely ignoring the concept of the rule of law." Opinion at 18. More importantly, the court found that such a voluntary hearing was not authorized by the statute and would therefore be an unconstitutional delegation of judicial authority to EPA. Opinion at 48-49.

Once the court declared the statutory scheme unconstitutional, it determined that it did not have jurisdiction to hear TVA's challenge to the ACO, and hence the competing arguments on the substantive NSR questions. Section 307(b) allows the court to review only "final agency action." As the court pointed out, an action is "final" only if it "affects the legal rights and obligations of the parties[.]" Opinion at 22. By rejecting EPA's right to hold TVA liable for violating an ACO, the court removed any threat to TVA's "legal rights and obligations," thereby making the ACO not "final agency action." The court accordingly dismissed TVA's petition, and instructed EPA to pursue any further enforcement through a formal action in district court. *Id*. at 50.

II. The Question Of "Finality" Of Agency Administrative Actions

The *TVA* opinion tackles head-on the many prior cases that addressed the finality of agency administrative orders, the vast majority of which either finessed or ignored the tension between the summary nature of ACOs and constitutional due process requirements. Most prior decisions have held that ACOs are not "final agency action," and so are not subject to immediate judicial review under Section 307(b) of the CAA. These courts, however, did not address the due process concerns such holdings raise – they presume that the defendant will have an opportunity in a subsequent enforcement action to dispute the underlying violation, or that violation of an ACO will not, in and of itself, subject the defendant to additional penalties. As the *TVA* court points out, however, on its face, Section 113 allows EPA to enforce violations of ACOs, and obtain penalties for any such violations, without ever having to prove the underlying violation – something most prior cases have simply failed to consider. Opinion at 43-46.

The Sixth and Ninth Circuits, on the other hand, reached the opposite conclusion, holding that EPA administrative orders could be final agency action, and that the recipient of such an order may seek immediate review under Section 307(b) (although the Ninth Circuit remanded the case for development of a record). *See Allsteel v. EPA*, 25 F.3d 312 (6th Cir. 1994); *Alaska v. EPA*, 244 F.3d 748 (9th Cir. 2001). The Eleventh Circuit, however, dismissed this approach as well, noting that these cases "fail[ed] to grapple with the constitutional problems that arise from this legal status." Opinion at 43.

The court's rejection of the Sixth and Ninth Circuits' approach is noteworthy in light of the standard rule of construction that requires courts to interpret a statute so as to avoid constitutional concerns wherever possible. Because the "constitutional problems" identified by the TVA court arise from the statute's failure to provide judicial review of the underlying violation, those problems could be remedied by providing immediate, pre-enforcement review under Section 307(b). This immediate review is precisely what the *Allsteel* and *Alaska* courts authorized. And yet, the Eleventh Circuit dismissed this approach without even discussing it.

The court's unwillingness to follow *Allsteel* and *Alaska* may reflect a significant degree of frustration with EPA's desire to "have its cake and eat it too[.]" Opinion at 29 n. 26. As the court pointed out, EPA consistently takes the position in litigation that an ACO is not "final agency action" and therefore cannot be reviewed under Section 307(b). *Id.* at 29. Yet when issuing ACOs, the Agency invariably threatens the recipient with civil and criminal liability if it does not comply. *Id.* at 29 n. 26. The court was clearly troubled by this approach, and so may have decided to resolve the matter in a way that places the burden of pursuing enforcement on EPA, instead of forcing the defendant to file suit to protect its rights. Under *Allsteel* and *Alaska*, the recipient of an ACO bears the responsibility to seek immediate judicial review in order to dispute its terms; if the party does not do so, it may not be able to challenge the substance of the order in a subsequent enforcement action. The *TVA* court, on the other hand, placed the responsibility of going forward squarely on EPA: by holding that an ACO cannot support an enforcement action, the opinion will force EPA to initiate formal enforcement proceedings before it can compel a defendant to install new equipment or pay penalties.

Finally, the decision is interesting for its failure to address at least one apparently contradictory holding under another statute. *See Wagner Seed v. Daggett*, 800 F.2d 310 (2d Cir. 1986) (refusing a constitutional challenge to a cleanup order under CERCLA § 106, finding that the threat of penalties for violating the order did not violate due process). While the *Wagner Seed* decision is distinguishable on its facts – it involved an emergency cleanup order, which the *TVA* court intimated may be constitutional (Opinion at 25-26), and the CERCLA statutory scheme authorizes a "good faith" defense not available under the CAA – it is somewhat surprising that the *TVA* court did not at least mention *Wagner Seed*, given the significant similarity between the facts and the legal issues raised in both cases.

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