

Judicial Consideration of Feasibility in Enforcement of The Clean Air Act

by

Jim Racobs and Christine Winn

I. THE CLEAN AIR ACT AND THE PROBLEM OF FEASIBILITY

Due to the increasing industrialization of human society, clean air is becoming an ever scarcer resource. The dangers presented by mounting "greenhouse" gases and depletion of ozone in the stratosphere now make the problem of air pollution of critical global importance. The first Congressional attempt to confront the problem was the Clean Air Act ("CAA") of 1955. The CAA has since been amended several times, most recently in 1990.

Under the CAA the regulation of stationary sources of air pollution, such as power and manufacturing plants, is shared by the federal and state governments. The Environmental Protection Agency ("EPA") sets air quality standards, based on health, for various pollutants. To attain these standards, the states must create implementation plans, which include emissions limits for certain statutory sources.

The CAA provides for judicial review by federal courts of appeals of EPA approval of state implementation plans ("SIPs"). For enforcement of SIP regulations, the federal government, EPA, or citizens may bring an action in federal district court. Some sources found in violation of emissions standards have claimed as a defense that they are economically and/or technologically unable to comply with the standards. This article addresses the question whether district courts have the discretion to deny injunctive relief in enforcement actions on such grounds. The statutory language does not expressly resolve this question, and the circuits have split in answering it.

This article considers the text of the CAA, its legislative history, an important United States Supreme Court case, the issue of due process, and the doctrine of equitable discretion as they relate to the problem of judicial consideration of feasibility. It concludes that ordinarily feasibility is not a relevant basis for declining to enjoin violations. However, in extraordinary circumstances, such as potential extreme social or economic disruption from a plant closing, judicial consideration of feasibility may be appropriate.

II. SHOULD COURTS CONSIDER INFEASIBILITY DEFENSES IN ENFORCEMENT OF THE CLEAN AIR ACT?

Although the CAA does not expressly preclude or permit courts to consider feasibility when an injunction is sought, feasibility is a relevant factor under several of its provisions. Some courts have cited these provisions to support their consideration of feasibility. Others have justified it by a need for due process or as an exercise of judicial equitable discretion. However, the CAA bases its air quality standards on factors of health and welfare, not economic or technological feasibility; due process may be satisfied by consideration of feasibility under the statutory scheme prior to enforcement; and traditional equitable discretion may not apply to enforcement of statutory laws.

A. The CAA Text and Statutory Scheme

1. Section 113 - Enforcement Actions

Section 113 of the CAA provides for EPA compliance orders and judicial enforcement. If it finds a violation of a SIP requirement, the EPA can either issue a compliance order on its own, setting forth the nature of the violation and specifying a time for compliance, or it may immediately seek judicial enforcement.⁷ The EPA may also seek judicial enforcement if a violator ignores a compliance order.⁸

The EPA has apparent discretion to consider feasibility in setting a compliance date since the section requires the EPA to specify a date it finds "reasonable, taking into account the seriousness of the violation and any good faith efforts to comply . . ."⁹ It might be argued that courts have analogous discretion in delaying injunctive relief. However, the provision for judicial enforcement does not call for the court to set a "reasonable" date.¹⁰ If the EPA seeks judicial enforcement, it can seek an injunction, a civil penalty, or both.¹¹ Thus section 113 expressly recognizes the EPA's discretion to seek an injunction or not. Section 113 calls for courts to consider several factors in determining civil penalties, including feasibility, but no language directs them to consider such factors in fashioning injunctive relief.¹²

These provisions indicate that Congress granted the EPA, but not the courts, the discretion to decide whether or not to seek injunctive relief against violators and to fashion the nature of that relief. The discussion of equitable discretion below addresses the question whether broader judicial discretion can be based on the courts' traditional equitable powers.¹³

2. Section 307 - Review of EPA Actions

Section 307 of the CAA provides that EPA actions, such as compliance orders or approval of a SIP, are reviewable by a federal court of appeals.¹⁴ That section also precludes review by district courts in enforcement proceedings of any EPA action which could have been reviewed by a

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court of appeals.¹⁵ As discussed in more detail below, the Supreme Court held that a court of appeals could not consider issues of feasibility in reviewing an EPA approval of a SIP, but declined to decide whether infeasibility could be a defense in an enforcement action.¹⁶

B. Legislative History of the CAA

The legislative history of the CAA does not provide much support for judicial consideration of feasibility. Federal clean air legislation before 1970 required courts to consider economic and technical feasibility in enforcement proceedings.¹⁷ The House version of the 1970 amendments had similar requirements. The Senate version, however, which eventually became law, dropped them.¹⁸ The Senate Report makes clear that this omission was intended to preclude courts from placing economic considerations over health concerns: "[t]he Committee determined that . . . the health of people is more important than the question of whether the early achievement of ambient air quality standards is technically feasible Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down"¹⁹ The Supreme Court in *Union Electric Co. v. EPA*, 427 U.S. 246, reviewed the legislative history of the 1970 Clean Air Amendments and found that the new requirements were "expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible."²⁰

In 1977 Congress, faced with the threat of extensive shutdowns of industrial sources due to widespread nonattainment of air quality standards, enacted amendments to the CAA.²¹ These amendments to some degree compromised the technology-forcing effect of the CAA by expanding the availability of extensions, revisions, and variances.²² It is clear that Congress is not oblivious to the need to consider issues of feasibility. However, the national air quality standards are still based exclusively on health considerations, and Congress has reinstated no provision for judicial consideration of feasibility in enforcement actions.

C. The Supreme Court

The Supreme Court has not decided whether infeasibility is a relevant defense in an enforcement action, but analysis of one of its decisions is nevertheless helpful on this issue. Finding that Congress intended the CAA to be technology-forcing in its effect, the Supreme Court in *Union Electric* concluded that the EPA was not to consider infeasibility claims in evaluating SIPs.²³ It therefore held that a court of appeals was also precluded from considering them in reviewing EPA approval of a SIP.²⁴

The Court noted several specific ways the issue of feasibility could properly be raised: before the state agency formulating the SIP, in requesting a variance from a state agency, in the state courts, through the state

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governor's application to the EPA for an extension of deadline or postponement of compliance, and in requesting a delayed compliance order from the EPA.²⁵ But the Court expressly declined to decide whether infeasibility could be a defense in an enforcement action since the question was not before it.²⁶

Since the Court affirmed the relevancy of feasibility in several other circumstances which were not before it, the Court's silence in regard to enforcement actions appears to indicate disapproval of a district court's entertainment of infeasibility claims. The policy concern which the Court cited in disallowing challenge to a SIP on infeasibility grounds would apply equally to such a challenge in an enforcement action: it "would permit . . . a federal court to reject a State's legislative choices in regulating air pollution, even though Congress plainly left" that determination with the States.²⁷

Moreover, it would be inconsistent and counterproductive to find that, even though Congress did not intend the EPA to consider feasibility issues in evaluating implementation plans, it did intend courts to consider such issues in limiting enforcement of those plans. If so, states might expend time, money, and effort in developing SIPs only to have federal courts overturn them in piecemeal fashion years later.²⁸ Both before and since *Union Electric*, however, lower courts have ruled in conflicting ways on this issue.

D. Due Process

Some violators have claimed and some courts have found that due process might require that infeasibility be raisable as a defense in an enforcement action. A source forced to shut down without ever having opportunity to raise the issue of unattainable emissions standards might argue its rights to due process under the Fifth Amendment have been violated.

Assuming the validity of this argument, it does not follow that an enforcement action is the proper or only forum in which to raise feasibility issues. As discussed above, the Supreme Court in *Union Electric* pointed out various ways in which feasibility is properly considered under the CAA other than in enforcement actions.²⁹ A Sixth Circuit court found that these opportunities satisfied due process and that infeasibility was not a relevant defense in an enforcement action.³⁰ Sixth and Fourth Circuit courts have also found that consideration of feasibility during the penalty stage of enforcement actions provide due process.³¹

E. Equitable Discretion

To justify considering feasibility in CAA enforcement actions, some courts have invoked traditional equitable discretion.³² Under common law, although a plaintiff seeking an injunction might establish a violation of law, the court weighed factors of fairness independent of strict legal liability in deciding whether to grant, deny, or modify injunctive relief. This doctrine of

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equitable discretion, however, developed as a means to give courts flexibility in vindicating judge-made common law rights, not legislated statutory rights.³³ The question is whether courts retain equitable authority to deny injunctions under a statute like the CAA, where Congress expressly provides injunctive relief.

Supreme Court decisions on the exercise of equitable discretion in enforcement of federal statutes are open to conflicting interpretation. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153,³⁴ ("*TVA*"), the Court held that a lower court had no discretion to deny an injunction under the Endangered Species Act, an injunction which barred construction of a dam that threatened the endangered snail-darter. The cost-benefit analysis necessary to decide between saving the fish or building the dam was too difficult for the courts and would require them to question Congressional decisions.³⁵

However, four years later in *Weinberger v. Romero-Barcelo*, 456 U.S. 305,³⁶ the Court held that issuance of an injunction was discretionary under provisions of the Federal Water Pollution Control Act ("*FWPCA*") similar to those of the CAA. The district court declined to enjoin Navy practice bombing, which sometimes landed in offshore waters. The Supreme Court remanded, but agreed that an injunction was not mandatory. It distinguished *TVA* as an exceptional situation where only an injunction could meet the objectives of the federal act, whereas the *FWPCA* provided for penalties as well as injunctions³⁷ and its standards were based partly on practicality.³⁸ Consequently, the statute did not clearly require immediate termination of the Navy violation.

Based on a broad reading of *Romero-Barcelo*, one could argue that since the CAA provides both remedies, courts have the discretion to deny injunctions as long as they impose penalties. A narrower reading is possible: these cases taken together require district courts to enforce compliance with federal statutes, and injunctions are discretionary only if compliance is assured by other remedies.³⁹

III. SUGGESTED JUDICIAL GUIDELINES

Based on the foregoing analysis, these authors conclude that any discretion that federal district courts may have to consider feasibility in enforcing the CAA is at best narrow. As long as Congress bases national air quality standards on public health concerns, a source found in violation of SIP standards should be able to raise infeasibility as a defense against injunctive relief only in exceptional cases and only if certain criteria are met.

These authors recommend that before reaching feasibility issues a court make the following findings:

- (1) that delaying compliance will not substantially interfere with prompt attainment of air quality standards;⁴⁰
- (2) that there is clear evidence of economic or technical infeasibility;
- (3) that the source has made good faith efforts to comply;⁴¹ and

(4) that exceptional circumstances exist to justify delay or denial of injunctive enforcement of the law (e.g., extreme economic or social disruption in the form of massive local unemployment or loss of electrical power). The court should find that circumstances are pressing enough to justify the court's granting a variance from SIP requirements rather than waiting for administrative or legislative action.

IV. CONCLUSION

Congress provides for injunctive relief to remedy violations of SIP requirements promulgated under the CAA, but it has not expressly prohibited federal courts from exercising equitable discretion in deciding whether to grant that relief. The circuits are currently split on whether courts may properly do so. However, the CAA is intended first and foremost to protect the health of the public, and one of its goals is the forcing of technological development in the control of air pollution.⁴²

Consequently, this article proposes that a court should entertain an infeasibility defense to an injunction only under narrowly defined circumstances. A court should refrain from enjoining a violation only if it finds that tolerating its continuance would not substantially interfere with prompt attainment of national air quality standards. In addition, the court should find clear evidence of economic or technical infeasibility and of good faith effort by the source to comply with SIP requirements. Finally, the court should find that exceptional circumstances, such as extreme social or economic disruption, would result from an injunction. Judicial adherence to such guidelines will promote predictability in enforcement of the law and, more importantly, further the CAA's goal of cleaner, healthier air.

(For notes, see p. 53)

Jim Racobs is a third year student at UC Davis Law School. He worked last summer for the Sierra Club Legal Defense Fund in Denver, Colorado. Christine Winn is a second year law student at UC Davis Law School.

