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Pennsylvania's Technologically Impossible Air Pollution Standards Upheld

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NOTES

PENNSYLVANIA'S TECHNOLOGICALLY IMPOSSIBLE AIR POLLUTION STANDARDS UPHELD

ENVIRONMENTAL LAW–CLEAN AIR ACT: The Pennsylvania Supreme Court upholds the imposition of fines for noncompliance with technologically impossible standards of pollution control under Pennsylvania's implementation plan of the federal Clean Air Act. *Pennsylvania Dep't of Env'tl Resources v. Pennsylvania Power Co.*, 490 Pa. 399, 416 A.2d 995 (1980).

INTRODUCTION

Imposition of technologically impossible and economically infeasible air pollution control standards under the federal Clean Air Act (CAA)[1] has long been an issue in both federal and state enforcement proceedings.[2] Federal case law has clearly proscribed federal agency consideration of impossibility in the formulation and implementation of national pollution control standards.[3] The doctrine of technology forcing is the basis for that proscription. The assumption underlying that doctrine is that imposing technologically impossible air pollution control standards and penalties for violations upon American industry will force rapid technological development.[4] Technological innovation is expedited by placing the burden of compliance with pollution standards on the polluter. Although federal agencies are bound to technology-forcing standards, case law has also indicated that state courts and agencies may consider the defenses of impossibility and infeasibility when enforcing those standards.[5] The question remained whether state courts and agencies were obligated to consider those defenses in enforcement proceedings. A recent Pennsylvania case, *Pennsylvania Dep't of Environmental Resources v. Pennsylvania Power Co.*,[6] held that the Pennsylvania Department of

1. 42 U.S.C. §§ 7401-7642 (Supp. II 1978) (amending 42 U.S.C. §§ 1857-1858 (1976)).
2. *See, e.g.*, Union Electric v. EPA, 427 U.S. 246 (1976); Train v. Natural Resources Defense Council, 421 U.S. 60 (1975); Union Electric v. EPA, 593 F.2d 299 (8th Cir. 1979); Friends of the Earth v. Potomac Electric Power Co., 419 F. Supp. 528 (D.D.C. 1976); Pennsylvania Dep't of Env'tl Resources v. Pennsylvania Power Co., 490 Pa. 399, 416 A.2d 995 (1980).
3. Union Electric v. EPA, 427 U.S. 246 (1976).
4. *Id.* at 256-57.
5. *Id.* at 266-67; Union Electric v. EPA, 593 F.2d 299, 306-07 (8th Cir. 1979).
6. 490 Pa. 399, 416 A.2d 995 (1980).

Environmental Resources had the authority to reject those defenses and impose fines for violations of technologically impossible standards. The Pennsylvania court further found it desirable and constitutional to force technological innovation by the imposition of civil penalties under the Pennsylvania implementation plan of the CAA.

CLEAN AIR ACT–REGULATORY SCHEME

The federal CAA and its amendments[7] represent a drastic attempt to remedy the problem of air pollution. They act as a "comprehensive programmatic and regulatory system on the subject of air pollution"[8] and are the only major federal legislation on the subject.

The 1970 amendments to the CAA established three regulatory programs to address three different pollution problems: "(1) pollution from existing sources; (2) emissions of hazardous pollutants; and (3) emissions from future stationary and mobile sources."[9] The amendments expand the federal role in pollution control by providing that the Environmental Protection Agency (EPA) declare air quality criteria and national ambient air quality standards.[10] They further direct the EPA administrator to publish and maintain a current list enumerating certain pollutants that may adversely affect public health or welfare.[11] The amendments then require the EPA administrator to issue national ambient air quality standards for all the specified pollutants within 12 months after publication of that list.[12]

Section 110 of the CAA holds the states responsible "for implementation, maintenance, and enforcement" of the national ambient air quality standards.[13] These responsibilities are carried out through

7. 42 U.S.C. §§ 7401-7642 (Supp. II 1978) (amending 42 U.S.C. §§ 1857-1858 (1976)).

8. W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 214 (1977).

9. Parish, *Enforcement and Litigation under the Clean Air Act Amendments of 1977*, 12 NAT. RESOURCES LAW. 435, 436 (1979).

10. 42 U.S.C. §§ 1857c-3, -4 (1976) (amended 1977).

11. (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant–
    (A) which in his judgment has an adverse affect on public health or welfare;
    (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
    (C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

42 U.S.C. § 1857c-3(a)(1) (1976) (amended 1977).

12. *Id.* § 1857c-3(a)(2) (amended 1977).

13. *Id.* § 1857c-5(a)(1) (amended 1977).

state implementation plans, which must be approved by the EPA administrator.[14] Eight general subjects must be addressed in those plans: "(1) attaining the standards within the time period prescribed; (2) inclusion of emission limitations and other controls; (3) monitoring; (4) preconstruction review of new sources; (5) intergovernmental cooperation; (6) administrative requirements for state agencies; (7) inspection and testing of motor vehicles; (8) a revision authority."[15] Although the federal government retains broad powers and preemptive rights in certain areas, responsibility for enforcement of the CAA lies mainly at the state level, and a liberal attitude towards state authority to grant variances of requirements has been encouraged.[16]

LEGISLATIVE AND JUDICIAL CONSIDERATION OF IMPOSSIBILITY

Consideration of technological impossibility and economic feasibility in setting and maintaining air pollution standards is an issue frequently raised in CAA litigation. The language, legislative history, and amendments of the act indicate that federal standards of air quality control must be formulated without concession to infeasibility or impossibility:

> Relaxing air quality standards to the detriment of public health and safety misplaces our national priorities. . . . Certainly Congress has at its command . . . other economic tools far more powerful to deal with national economic problems than relaxing air and water quality standards.
>
> Relaxation of standards may increase the profitability of some individual companies or industries. However, an accurate accounting of the economic gains and losses to society will show a net loss. The social costs of pollution are real. They are not reflected in industry balance sheets, but citizens pay them nontheless.[17]

Federal intent to ignore technological feasibility in formulation of pollution standards was set forth in congressional reports preceding the enactment of the 1970 amendments: "Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time."[18] A senate committee determination stated,

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14. *Id.* § § 1857c-5(a) (amended 1977).
15. W. RODGERS, *supra* note 8, at 248.
16. *See* Train v. Natural Resources Defense Council, 421 U.S. 60 (1975).
17. *Clean Air Act Amendments of 1977–Part 4: Hearing on S.251, S.252, and S.253 Before the Subcomm. on Environmental Pollution of the Sen. Comm. on Environment and Public Works,* 95th Cong., 1st Sess. 2-3 (1977) (opening statement of Sen. Gary W. Hart).
18. 116 CONG. REC. 32902 (1970) (remarks of Sen. Muskie), *quoting* S. Rep. No. 403, 90th Cong., 1st Sess. (1967).

> 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.[19]

Individual states, however, may consider technological capabilities and economic impact on industry when implementing their own plans, as long as national control levels for the entire region are met.[20] Impossible standards must be incorporated into the state implementation plan if necessary to comply with national pollution control levels. The EPA Administrator apparently may not otherwise consider impossibility when evaluating a proposed state implementation plan.

This was the position taken by the U.S. Supreme Court in *Union Electric v. EPA.*[21] In that case, an electric utility company filed a petition for review of the Missouri implementation plan establishing sulfur dioxide emission levels to which it was subject. The petitioner argued that technological and economic difficulties made compliance impossible. The Court refused to consider the claims of technological and economic feasibility, holding that a reviewing court may only consider " 'grounds' . . . such that, had they been known at the time the plan was presented to the Administrator for approval, it would have been an abuse of discretion for the Administrator to approve the plan."[22] The Court held that the eight criteria in Section 110 of the CAA are the exclusive factors in the EPA administrator's evaluation, absent other express provisions.[23] Because technological and economic factors are not among the criteria listed, the Court concluded that they may not be considered in EPA evaluation of state implementation plans and are not grounds for challenging a state-initiated implementation plan at the promulgation stage.

Two issues left unanswered by *Union Electric* were whether and to what extent infeasibility constitutes a defense at the state enforcement level. Dictum in the opinion indicates that impossibility might be at least a partial defense to enforcement proceedings under the CAA:

> [T]he Amendments do allow claims of technological and economic infeasibility to be raised in situations where consideration of such claims will not substantially interfere with the primary congres-

19. S. REP. NO. 1196, 91st Cong., 2d Sess. 2-3 (1970).
20. W. RODGERS, *supra* note 8, at 260.
21. 427 U.S. 246 (1976).
22. *Id.* at 256.
23. *Id.* at 264-65.

> sional purpose of prompt attainment of the national air quality standards. . . . Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires . . . and industries with particular economic or technological problems may seek special treatment in the plan itself. [T]he industry . . . may obtain a variance . . . [or it] may be able to take its claims of economic or technological infeasibility to the state courts.[24]

Nevertheless, in *Friends of the Earth v. Potomac Electric Power Co.*,[25] a federal district court held that infeasibility does not constitute a defense at the enforcement level.[26] It cited *Union Electric* in denying the impossibility defense, acknowledging the technology forcing nature of the CAA. The court did mention, however, that equitable discretion could be used in fashioning relief for violations under the act, thereby permitting some flexibility in considering individual or unique circumstances.

In a different case also entitled *Union Electric v. EPA*,[27] the Eighth Circuit Court of Appeals indicated that the impossibility defense must be raised at the state level, if at all.[28] The court held that the judiciary cannot enjoin the EPA from instituting enforcement procedures against a company in violation of infeasible standards while it is in good faith pursuing a revision of those standards in state court.[29] The court also held that technological and economic impossibility could be raised as a defense to an enforcement proceeding in state court,[30] but it did not determine the scope of the defense or guarantee its effectiveness. The opinion left unclear whether the state is obligated to consider claims of impossibility when dealing with a particular industry, or if such consideration is purely discretionary. Assuming that states have such discretion, the court expressly left the determination of the constitutionality of penalties for noncompliance to be decided at a future enforcement proceeding.[31]

The Pennsylvania Supreme Court, in *Pennsylvania Power Co.*,[32] appears to be the first state court to hold that the state does have the

24. *Id.* at 266-67 (citations omitted).
25. 419 F. Supp. 528 (D.D.C. 1976).
26. *Id.* at 535.
27. 593 F.2d 299 (8th Cir. 1979).
28. *Id.* at 306-07.
29. *Id.* at 300.
30. *Id.* at 307.
31. *Id.*
32. Pennsylvania Dep't of Env'tl Resources v. Pennsylvania Power Co., 490 Pa. 399, 416 A.2d 995 (1980).

authority to reject the impossibility defense and that its imposition of fines for violations of those standards is constitutional.

THE PENNSYLVANIA CASE

The Pennsylvania implementation plan of the federal CAA at issue in *Pennsylvania Power Co.* reflects mounting concern with pollution in Pennsylvania. Pennsylvania's first air pollution control legislation, the Pennsylvania Air Pollution Control Act,[33] was enacted prior to the CAA in 1960. The act implied "a cautious and conciliatory legislative attitude toward air pollution control"[34] and stated that its purposes and implementation should "not unreasonably obstruct the attraction, development and expansion of business . . . but [should] be technically feasible and economically reasonable."[35] Due to growing concern over the environment and ever-worsening pollution, the Air Pollution Control Act was amended in 1968 to declare protection of the public welfare as its primary goal and to delete references to economic and technological feasibility.[36]

The Air Pollution Control Act and the CAA were both used in developing Pennsylvania's implementation plan, which was approved by the EPA administrator on May 31, 1972.[37]

The actual controversy in the case arose when the Pennsylvania Power Company was ordered by the Pennsylvania Department of Health, now the Department of Environmental Resources, to limit its particulate matter emission from five coal-fired boilers in compliance with standards under Regulation V of the Air Pollution Commission. That regulation is now part of the Pennsylvania implementation plan. The standards were technologically impossible to meet, so the Pennsylvania Power Company attempted to effect a compromise by proposing construction of taller emission stacks to disperse the pollution higher into the atmosphere and decrease ground level concentrations. The proposal was ignored by the Department of Environmental Resources, which subsequently filed a complaint for civil penalties of $195,400 for pollution control violations. After lengthy judicial proceedings,[38] the Pennsylvania Commonwealth Court held that the

33. PA. STAT. ANN. tit. 35, § § 4001-4015 (Purdon 1977).

34. Picadio, *An Introduction to the Law of Air Pollution Control in Pennsylvania,* 44 PA. B.A.Q. 203, 209 (1973).

35. 1960 PA. LAWS P.L. (1959) 2119, § 2.

36. PA. STAT. ANN. tit. 35, § § 4001-4015 (Purdon 1977).

37. Pennsylvania Dep't of Env'tl Resources v. Pennsylvania Power Co., 490 Pa. 399, 416 A.2d 995, 996 n.4 (1980).

38. The Pennsylvania Power Company was ordered by the Pennsylvania Department of Health (now the Department of Environmental Resources) to comply with Regulation V emission limitations and it appealed the order to the Pennsylvania Air Pollution Commis-

United States Constitution prohibits imposition of civil penalties for noncompliance with technologically impossible standards of air pollution control.[39] The Pennsylvania Supreme Court subsequently reversed the decision and remanded it for consideration of the Pennsylvania Power Company's non-constitutional claims.[40]

The opinion first addressed the issue of whether the state Department of Environmental Resources was vested with authority under the Pennsylvania statute to set technologically infeasible air pollution standards. The court held that the department had no such authority.[41] In reaching this conclusion, the Pennsylvania Supreme Court appears to have adopted many of the federal policies behind the 1970 and 1977 amendments to the CAA. It stated that the "federal-state regulatory partnership makes the federal point of view as to the permissibility of setting 'technologically impossible standards,' extremely important to our discussion."[42]

In addressing the question of whether impossibility should be a defense to state enforcement proceedings as a matter of public policy, the Pennsylvania Supreme Court also assimilated federal policies behind the CAA. Section 110 of the CAA requires that the state impose technologically impossible standards through state implementation plans, if such standards are necessary to achieve national ambient air quality standards. The policy premise of the section is that, if forced, American industrial ingenuity and economic incentive will respond by stimulating development of the controls necessary to meet new standards.[43] Although standards may be technologically or econom-

sion. The Commission affirmed the Department's order, but the power company never attempted to comply with or to appeal the ruling. The Commonwealth of Pennsylvania then filed a civil complaint in the Court of Common Pleas of Lawrence County. That court ordered the power company to submit a plan for compliance and it set a deadline for operational compliance. A supplemental order was also issued setting forth specific actions to be taken by the power company in regulating emissions and penalties for failures to perform them. The power company did not appeal the orders and submitted a plan for compliance to the Department of Environmental Resources, proposing a compromise on certain pollution controls it considered to be technologically impossible to meet. The Department treated that proposal as contemptuous of the lower court's order and filed two additional legal actions against the power company: 1) a petition for civil contempt in the Court of Common Pleas of Lawrence County, and 2) a civil penalty action before the Environmental Hearing Board for pollution control violations. The contempt petition was denied, but the Environmental Hearing Board assessed penalties against the power company in the amount of $195,400. The latter decision was appealed to the Pennsylvania Commonwealth Court. Pennsylvania Dep't of Env'tl Resources v. Pennsylvania Power Co., 34 Pa. Commw. Ct. 546, 384 A.2d 273, 275-78 (1978).

39. *Id.*, 384 A.2d at 286.
40. 416 A.2d at 1003.
41. *Id.* at 1000.
42. *Id.* at 998.
43. *Id.* at 999.

ically infeasible at the time of their promulgation, the underlying assumption is that the imposition of sanctions will expedite technological development in areas that would otherwise lay dormant. Congress apparently concluded that this is a desirable and efficient way to compel industrial compliance with pollution regulations designed to protect the general public. The Pennsylvania Supreme Court cited the first *Union Electric* case as support for this proposition:

> These requirements are of a "technology-forcing character," . . . and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible. . . . Technology forcing is a concept somewhat new to our national experience and it necessarily entails certain risks. But Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking.[44]

Infeasibility and industrial "state of the art" may be taken into account when formulating state implementation plans and granting variances only where national pollution goals will not be affected, but the state is not required to do so. Pennsylvania's acceptance of the doctrine of technology forcing would preclude consideration of those factors in most instances.

The opinion cited the exclusion of consideration of technological and economic impossibility in the amendment of the Pennsylvania Air Pollution Control Act's declaration of policy as further demonstrating state legislative approval of technology forcing in Pennsylvania.[45] Pennsylvania case law was also described as evidencing a "very limited acceptance of the impossibility defense."[46] Federal and state policies convinced the court that the state had the authority to reject impossibility and infeasibility as a defense to state enforcement proceedings. The fulfillment of those policy goals often requires such rejection.

The court made it clear that although impossibility cannot always be ignored, its acceptance as a defense is very limited. Wide recognition of the defense in enforcement proceedings would subvert those federal statutory policies judicially adopted by the state. Contempt proceedings seeking to proscribe willful disobedience were used by the court as an example of such limited acceptance. Moreover, the court noted that constitutional limitations on enforcement would require its availability in limited circumstances.

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44. *Id.*, *quoting* Union Electric v. EPA, 427 U.S. 246, 266 (1976).
45. PA. STAT. ANN. tit. 35, § 4002 (Purdon 1977).
46. 416 A.2d at 1000.

The constitutional limitations of civil penalties for noncompliance with technologically impossible standards of air pollution control was the second issue addressed in *Pennsylvania Power Co.* Under the due process clause of the United States Constitution, state police power may only be exercised to deprive citizens of their property when a valid public interest requires such deprivation if the means used are reasonably related to the accomplishment of the desired goal and are not unduly burdensome.[47] The lower court held that the imposition of fines for violations of technologically impossible standards would be an unconstitutional deprivation of property without due process. The Pennsylvania Supreme Court disagreed with the lower court's "thesis that the assessment of civil penalties in this case was not reasonably related to the achievement of the public [health] interest and thus an abuse of the state's police power"[48] and held that the penalties imposed were constitutional.[49]

The protection of the health of Pennsylvania's citizenry as regulated through air pollution controls was found to be a legitimate state interest.[50] Technology forcing by the imposition of civil penalties was further found to be a reasonable means of promoting that interest.[51] The exercise of state police power through these penalties was therefore constitutional.

In applying the reasonable relationship aspect of the test, the court stated that utilizing a method of civil fines for violations encourages technological innovation and paves a middle ground between the extremes of rampant pollution and total industrial shutdown.[52] This judicial statement parallels the expressed legislative intentions behind enactment of the 1977 Noncompliance Penalty Provision Amendment to the CAA[53]:

> The intended purposes of this provision are several: (1) to encourage compliance as effectively as possible; (2) to prevent noncomplying sources from gaining an unfair advantage over complying sources with which they compete; and (3) *to permit a middle course of action to be followed in case of noncompliance, rather than requiring*

47. Pennsylvania Dep't of Env'tl Resources v. Pennsylvania Power Co., 34 Pa. Commw. Ct. 546, 384 A.2d 273, 283 (1978), *citing* Lawton v. Steele, 152 U.S. 133, 137 (1894).
48. 416 A.2d at 1002.
49. *Id.* at 1003.
50. *Id.*
51. *Id.*
52. *Id.*
53. This provision establishes a system for the assessment and collection of fines from noncomplying stationary sources while providing a detailed system to assure due process before any penalties become payable. [1977] U.S. CODE CONG. & AD. NEWS 1082-83.

plant shutdowns or permitting noncompliance without penalty.[54] (Emphasis added)

The Pennsylvania Supreme Court thus appears heavily influenced by federal policies in determining that state agencies may constitutionally set and impose penalties for the violation of technologically impossible air pollution control standards.

CONCLUSION

Pennsylvania Power Co. resolves many previously unanswered important questions about the enforcement of technologically infeasible air pollution standards and the appropriateness of the impossibility defense. The decision seems to follow both federal and state trends toward a stronger and more enforcement-oriented approach to air pollution control.[55] Wide acceptance of the impossibility defense would result in de-emphasizing the protection of public health in setting standards at the state level. Judicious acceptance of this defense at the enforcement level will result in equitable decisions in specific cases, without controverting the purpose and intent of the CAA itself or undermining its effectiveness. To allow the defense of impossibility indiscriminately would take the "force" out of technology forcing and would subvert the goals of Congress.

The best resolution of the problem appears to be that expressed in *Pennsylvania Power Co.*—a close coordination of federal goals and policies with enforcement of state implementation plans. In this manner, consistent and uniform guidelines will be developed that allow sufficient flexibility to accommodate unique situations in state implementation.

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54. *Id.*
55. Picadio, *supra* note 34, at 224.