
NATURAL RESOURCES JOURNAL

Volume 17
Issue 1 *Winter 1977*

Winter 1977

Clean Air Act Amendments of 1970 - Technological and Economic Infeasibility

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CLEAN AIR ACT AMENDMENTS OF 1970—TECHNOLOGICAL AND ECONOMIC INFEASIBILITY

Clean Air Act Amendments of 1970—Held not to give Environmental Protection Agency Administrator or Federal Courts discretion in disapproving state implementation plans on grounds of technological or economic infeasibility. *Union Electric Co. v. Environmental Protection Agency*, ____U.S.____, 96 S.Ct. 2518 (1976).

In response to the primary and secondary air quality standards promulgated by the Administrator of the Environmental Protection Agency,[1] Missouri formulated an implementation plan as required by the Clean Air Act Amendments of 1970.[2] Because only the St. Louis area exceeded sulfur dioxide levels[3] as established by the Administrator,[4] the Missouri implementation plan focused on control and regulation of emissions in the St. Louis area. The State's plan was effective immediately and allowed variances for sources that could not comply.[5]

Petitioner, Union Electric Co., was a public utility supplying electricity to the St. Louis area and parts of Missouri, Illinois, and Iowa. The coal fired plants in the St. Louis area were subject to sulfur dioxide emission standards established by the Missouri implementation plan.

Under the provisions of the federal statute a petition for review of the Administrator's action in approving a state implementation plan may be filed with the Circuit Court of Appeals for the appropriate district if made within thirty days from the date of such promulgation.[6] Union Electric did not file a petition for review of the Administrator's approval. Instead, Union Electric applied for and received one year variances from the State agency for its generating plants. In May of 1974, while Union Electric was applying for an extension of variances for two of its three plants, the Administrator of the Environmental Protection Agency notified Union Electric that

1. 40 C.F.R. § 50 (1975).
2. 42 U.S.C. § § 1857a-18571 (1970).
3. 40 C.F.R. § 52.1321 (1975).
4. 40 C.F.R. § § 50.4-50.5 (1975).
5. *See* Rev. Mo. Stat. § 203.110 (1969).
6. 42 U.S.C. § 1857h-5(b)(1) (1970).

its emissions violated the standards of the state implementation plan.

After receiving this notice from the Administrator, Union Electric filed a petition with the 8th Circuit Court of Appeals[7] for review of the Administrator's 1972 approval of the Missouri implementation plan. Union Electric argued that because of various economic and technological difficulties that arose after the thirty day review period[8] it was entitled to a judicial review of the validity of the Administrator's approval of the plan. The Court of Appeals held that "only matters which, if known to the Administrator at the time of his action, would justify setting aside that action are properly reviewable after the initial 30 day review period."[9] The court then concluded "that economic and technological considerations do not afford a basis for review under § 307b . . ."[10] and that it was therefore "without jurisdiction to consider the claims raised by [Union Electric] . . ."[11]

Because of the conflict among the circuits on the issue of jurisdiction under 42 U.S.C. § 1857h-5(b)(1) (1970), the Supreme Court granted certiorari.[12]

The jurisdictional question before the Court was whether review of the Administrator's action in approving the state implementation plan could be based on a failure to consider economic or technological infeasibility. The Court found that, because the Administrator could not consider economic or technological infeasibility in evaluating or approving a state implementation plan, it had no authority to review that which the Administrator could not have considered. By framing the issue in this manner, the Court concerned itself with determining the power of the Administrator.

The Administrator took the position that he had no authority to reject a state implementation plan because it might have been economically or technologically infeasible. Union Electric, on the other hand, argued that considerations of claims of technological and eco-

7. 515 F.2d 206 (8th Cir. 1975).

8. 42 U.S.C. § 1857h-5(b)(1) (1970) provides:

> Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

9. 515 F.2d 206, 216 (8th Cir. 1975).

10. *Id.* at 219.

11. *Id.* at 221.

12. For holdings contrary to the holdings of the 8th Circuit *see Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 168-169 (6th Cir. 1973), *Appalacian Power Co. v. EPA*, 477 F.2d 495, 505-507 (4th Cir. 1973), *Duquesne Light Co. v. EPA*, 481 F.2d 1 (3d Cir. 1973), *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). For cases supporting the 8th Circuit holding *see South Terminal Corp. v. EPA*, 504 F.2d 646, 675-676 (1st Cir. 1974), *Texas v. EPA*, 499 F.2d 289, 317 (5th Cir. 1974), *Natural Resources Defense Council, Inc. v. EPA*, 507 F.2d 905, 914 (9th Cir. 1974).

nomic infeasibility were within the Administrator's authority. In making this argument, Union Electric pointed out that one of the eight criteria[13] that a state implementation plan must meet to justify the Administrator's approval required attainment of the "national primary ambient air quality standard . . . as expeditiously as practicable but in no case later than three years from the date of approval of such plan . . ."[14] and attainment of a "national secondary ambient air quality standard" within "a reasonable time . . ."[15] Union Electric asserted that these time requirements necessarily required the Administrator to consider economic and technologic infeasibility.

In rejecting Union Electric's argument the Court looked to the legislative history of the Clean Air Act Amendments of 1970 and found that the time requirements for the national primary ambient air quality standard represented a well formulated congressional policy in favor of technology forcing. The Court noted the Senate Committee's report.

> The Committee determined that . . . the health of the people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible . . .[16]

The Court found the congressionally determined time requirement removed considerations of technological and economic infeasibility from the scope of the Administrator's authority.

Because there was no specific time requirement for national secondary air quality standards and because there was no actual debate on the time limit, Union Electric argued that the federal standards were to be met precisely by the States and could not be exceeded by them. Union Electric also contended that if economic and technological infeasibility were present, then the Administrator would be forced to reject the implementation plan, at least in regard to secondary standards involving public welfare rather than public health.

The Court admitted technology forcing was not expressly a part of the federal standards relating to secondary air quality standards but instead found the individual States had the power to adopt a technology forcing policy in connection with secondary standards. The Court again looked at the legislative history of the specific provision

13. *See* 42 U.S.C. § 1857c-5(a)(2) (1970).
14. *Id.* at § 1857c-5(a)(2)(A)(i).
15. *Id.* at § 1857c-5(a)(2)(A)(ii).
16. S. Rep. No. 1196, 91st Cong., 2d Sess., 2-3 (1970).

and noted that both the Senate and House bills allowed States to submit plans stricter than the federal standards demanded. Because the individual States had the power to enact stricter standards, the Administrator had no authority to reject state plans for that reason.

The Court therefore held that "the language of § 110(a)(2)(A)[17] provides no basis for the Administrator ever to reject a state implementation plan on the ground that it is economically or technologically infeasible."[18]

To provide further support for its holding the Court pointed to two procedures whereby Union Electric could have obtained relief from difficulties created by economic or technological infeasibility. First, if the Governor of the particular State requests at the time of the implementation, the statute allows a polluter a two year extension of the three year deadline if, among other things, it is technologically or economically infeasible for the state polluter to comply with the State plan.[19] Second, the State, after the approval of the State implementation plan, may obtain, through application of the Governor of the particular State, a one year postponement of compliance where such postponement is based on technological or economic grounds.[20]

The Court concluded its analysis by pointing out that Congress' determination, viz., that technology forcing, despite its risks, was required in order to move forward in protecting the environment and that States should have the power to implement stricter standards than those set down on a national level, required the Court to refrain from reviewing the Administrator's action when such review would force the Court to nullify the clear intent of Congress.

The concurring opinion of Justice Powell, though admitting that the majority's reasoning was accurate, emphasized the possible negative effects the Court's decision might have on Union Electric's customers. Because it was clear to Justice Powell that Union Electric could not have continued operating if forced to comply with the restrictions contained in the implementation plan, he felt that "the shutdown of an urban area's electrical services could have an even more serious impact on the health of the public than that created by a decline in ambient air quality."[21] Justice Powell, when he stated "that Congress, if fully aware of this draconian possibility, would strike a different balance,"[22] implied that the Court might have been

17. *See* 42 U.S.C. § 1857c-5(a) (1970).
18. ___U.S. ___, 96 S.Ct. 2518, 2529 (1976).
19. *See* 42 U.S.C. § 1857c-5(e) (1970).
20. *See id.* § 1857c-5(f).
21. ___U.S. ___, 96 S.Ct. at 2532.
22. *Id.*

justified in inferring a different congressional intent. Justice Powell's implied suggestion, however, would have required the Court to ignore what it had determined was the clear intent of Congress.

Union Electric Co. v. Environmental Protection Agency has three important implications. First, it firmly establishes that the Administrator of the Environmental Protection Agency, because of the underlying congressional policy of technology forcing in the area of air pollution, has absolutely no authority to consider technological or economic infeasibility when he evaluates and promulgates a state implementation plan. This lack of authority on the part of the Administrator effectively takes away from the courts any power to review technological or economic infeasibility as it relates to cases arising under the Clean Air Act Amendments of 1970. In the area of environmental pollution, technological and economic infeasibility has been the strongest argument industrial polluters have had against enforcement of state and federal air quality standards. The end result of the Court's decision is to put some teeth into the enforcement of air quality standards.

Second, the decision implies that, if the Administrator has considered economic or technological infeasibility in his approval of a state implementation plan, such action would be an abuse of the Administrator's discretion. If this conclusion is accurate, any action on the part of the Administrator on his approval of state implementation plans that considered technological or economic infeasibility would be subjec to review by the courts.

Third, the Court's holding gives the individual States considerable autonomy in establishing secondary air quality standards, as long as those standards meet federal minimum requirements. This allows the States the same technology forcing tool Congress sought to employ in enforcing primary air quality standards.

Although the holding of the Court, if limited to its narrowest interpretation, means only that the Court will not review the promulgation of state implementation plans as long as they meet the necessary statutory requirements, the language of the Court indicates that it strongly supports Congress' policy of technology forcing. The end result is that the Environmental Protection Agency can apply more certain sanctions against polluters that do not comply with state air quality emission controls. The sanctions will be more certain because polluters no longer will be able to postpone compliance with emission standards by seeking review by the courts. According to the Court's holding, neither the courts nor the Administrator have the authority to invalidate or modify state implementation plans on grounds of economic or technological infeasibility.

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