Legal Backgrounder

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EPA ENFORCEMENT ORDERS FOUND LACKING IN DUE PROCESS PROTECTIONS

by

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In *Tennessee Valley Authority v. Whitman*, ___ F.3d ___, 2003 U.S. App. LEXIS 12830 (June 24, 2003), the United States Court of Appeals for the Eleventh Circuit held that the statutory scheme for the issuance of Administrative Compliance Orders ("ACOs") under the Clean Air Act ("CAA")[1] is inconsistent with due process and separation of powers principles. *See id.* at *2.[2] This conclusion was based on an enforcement process resulting in the issuance of an ACO by the Environmental Protection Agency ("EPA") in which the EPA Administrator: (a) determined the procedure that will be used to challenge the ACO; (b) acted as the prosecutor, judge and fact finder; and (c) determined the facts that will be considered by her and by a reviewing court. This paper discusses the implications of this ruling for administrative enforcement mechanisms used by the EPA under other authorities, including the Federal Water Pollution Control Act ("CWA"), 33 U.S.C. § 1319, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6908, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, and the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136d, § 136n.[3] The ruling's impact may extend to administrative enforcement mechanisms under other statutes as well.

Background. In 1999, the EPA concluded that the Tennessee Valley Authority's ("TVA")

[1] ACOs are orders that essentially require an entity to undertake certain actions to bring it into compliance with the CAA. These actions can range from filing reports to undertaking major capital improvement projects.

[2] The court held that it lacked jurisdiction to review the ACO because such an order did not constitute "final" agency action. The premise for this conclusion was the nature of the ACO process, which the court found to be unconstitutional.

[3] This paper does not discuss whether the court's constitutional holding is dicta in light of the threshold conclusion that the court lacked jurisdiction over the controversy as there was no "final agency action." Instead, the focus is on whether the reasoning might apply in other contexts.

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replacement of various boiler components at its power plants did not constitute "routine maintenance" and therefore were "modifications" triggering New Source Review ("NSR") obligations under the CAA. *See TVA v. Whitman* at *15-23. EPA issued an ACO to compel TVA to follow NSR requirements, and asserted that the failure to follow those requirements constituted violations of the CAA. Although several amendments to the ACO were executed following negotiations, ultimately TVA continued to object to a finding that the CAA had been violated. EPA ordered TVA to follow the ACO, but also said it would 'reconsider' the ACO by "adjudicating" the issue of whether TVA had violated the CAA. An ad hoc procedure was followed by the Environmental Appeals Board for this 'adjudication.' The ACO was affirmed by the Appeals Board and styled a "Final Order," from which TVA appealed.

The Eleventh Circuit Holding. At the heart of the case is the enforcement scheme created by the CAA. The court noted four enforcement mechanisms under the CAA to address violations of the Act: (**1**) criminal prosecution, 42 U.S.C. § 7413(a)(3)(D), (c); (**2**) injunctive relief and imposition of civil fines, 42 U.S.C. § 7413(a)(1)(C), (a)(2)(C), (a)(3)(C), (b); (**3**) administrative assessment of fines following a formal adjudication of liability consistent with the Administrative Procedures Act ("APA") and 40 C.F.R. § 22, 42 U.S.C. § 7413(d); and (**4**) issuance of an ACO directing the regulated party to comply with various requirements, 42 U.S.C. § 7413(a)(1)(A), (a)(2)(A), (a)(3)(B), (a)(4). *See TVA v. Whitman* at *6-8.

The court recognized that there was a marked difference between the first three enforcement options and the issuance of an ACO. "Whenever any of these [first] three enforcement methods is used, the following fact remains true: if the defendant believes that the EPA has based its conclusions upon erroneous facts or an incorrect understanding of the law, the defendant may make legal and factual arguments in an independent forum — one that enables the defendant to utilize a panoply of pre-established procedural rights." *Id.* at *6. However, the court explained that ACOs are issued with the "status of law," but are meant to be issued and usually are issued by the EPA without an adjudication. *See id.* at *8-10. Further, section 7413 makes a violation of the terms of an ACO itself a "basis for the imposition of extensive civil fines or imprisonment." *Id.* at *10. *See also* 42 U.S.C. § 7413(b) (the Administrator may commence a civil action when a "person has violated … any … order … issued, or approved under this chapter"); 42 U.S.C. § 7413(c)(1) ("[a]ny person who knowingly violates … any order under subsection (a) of this section … shall upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment not to exceed 5 years, or both").

Additionally, because the Administrator may issue an ACO on the basis of "any information available," an ACO may be based on a newspaper article or an anonymous tip, without any opportunity for the regulated party to meaningfully argue the law and facts before a neutral tribunal. This situation is compounded by the fact that the ACO can be an independent basis for imposing civil and criminal liabilities. As a result, the court reasoned that this enforcement scheme for ACOs establishes a system where the "EPA is the ultimate arbiter of guilt or innocence, and the courts are relegated to a forum that conducts a proceeding, akin to a show-cause hearing, on the issue of whether an EPA order has been flouted." *TVA v. Whitman* at *15. The court ultimately held that "this scheme violates the Due Process Clause and the separation-of-powers principle." *Id.*

Due Process and Separation of Powers. While other courts have addressed whether there is pre-enforcement review of an ACO, the 11th Circuit panel concluded that "[n]o court has discussed the constitutional issues inherent in a scheme in which an executive branch agency can (a) make a finding, on the basis of 'any information available,' that the law has been violated and (b) issue a compliance order which, if ignored, leads automatically to the imposition of severe civil penalties and perhaps imprisonment." *Id.* at *55. The court found this enforcement scheme to be "repugnant to the Due Process Clause of the Fifth Amendment." *Id.* at *62.

The 11th Circuit panel declared, "Before the Government can impose severe civil and criminal penalties, the defendant is entitled to a full and fair hearing before an impartial tribunal 'at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). It held that the "scheme enacted by Congress deprives the regulated party of 'a reasonable opportunity to be heard and present evidence' on the two most crucial issues: (a) whether the conduct underlying the issuance of the ACO actually took place and (b) whether the alleged conduct amounts to a CAA violation." *Id.* (quoting *Yakus v. United*

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States, 321 U.S. 414, 433 (1944)).[4]

The court further reasoned that the EPA Administrator cannot "amend the statute" by creating a hearing process before it issues an ACO in which it is the prosecutor, judge and fact-finder. *See id.* at *63. "Far from rendering the statutory scheme more palatable, a pre-ACO adjudication would only highlight another constitutional problem with the CAA: the statutory scheme unconstitutionally delegates judicial power to a non-Article III tribunal." *Id.* at *63-64 (citing *N. Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982)). "The statutory scheme relegates Article III courts to insignificant tribunals. The district courts serve as forums for the EPA to conduct show-cause hearings. And the courts of appeal are similarly emasculated, reviewing only whether the ACO has been validly issued — i.e., whether the Administrator's decision to issue the ACO was based upon 'any information' as opposed to no information at all." *Id.* at *64. The court explained, "Without meaningful judicial review, the scheme works an unconstitutional delegation of judicial power." *Id.*

The court concluded:

> The Clean Air Act is unconstitutional to the extent that mere noncompliance with the terms of an ACO can be the sole basis for the imposition of severe civil and criminal penalties. Therefore, ACOs lack finality because they do not meet prong two of the *Bennett* test. We thus conclude that courts of appeals lack jurisdiction to review the validity of ACOs. The EPA must do what it believes it has been required to do all along—namely, prove the existence of a CAA violation in district court, including the alleged violation that spurred the EPA to issue the ACO in this case.

Id. at *67.

Application to Other Administrative Enforcement Schemes. The CWA contains an administrative compliance order scheme strikingly similar to the one in the CAA, and is materially identical to the CAA. *See* 33 U.S.C. § 1319(a).[5] Like the CAA, the Administrator may issue a compliance order "on the basis of any information available to him." *Id.* Moreover, the CWA provides for civil penalties for violations of an order. 33 U.S.C. § 1319(d). Unlike the CAA, the CWA may not directly provide that the failure to comply with an order will lead to criminal penalties. *See id.* at § 1319(c).[6] Further, under section 309, the Administrator has the authority to assess administrative penalties. 33 U.S.C. § 1319(g). Although there is an administrative review process in which the Administrator functions as prosecutor, judge and fact- finder,[7] 33 U.S.C. § 1319(g)(4), judicial review is not *de novo,* 33 U.S.C. § 1319(g)(8). This process may raise the unlawful Article III delegation issues addressed in *TVA v. Whitman*.[8]

The RCRA contains a similar enforcement mechanism as well. *See* 42 U.S.C. § 6928. "[W]henever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past

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[4]In a specially concurring opinion joined by Judge Wilson, Judge Barkett noted that even though the Administrator attempted to fill the gap in the statute and provide process to TVA, such an attempt "cannot be deemed sufficient because constitutional due process cannot be provided on an ad hoc basis under the direction and control of the entity whose decision is being challenged." *Id.* at *70.

[5]This similarity was noted by the court in *TVA v. Whitman* at *40, n.32.

[6]Whether the level of civil sanctions can be so severe as to constitute a penal sanction is an open question. *Cf. Hudson v. United States*, 522 U.S. 93 (1997) (analyzing whether a statutory scheme is so punitive either in purpose or effect as to transform civil remedies into criminal penalties).

[7]The same procedure applies to enforcement actions brought by the Secretary of the Army for "dredge and fill" violations under section 404 of the CWA.

[8]It is expected that the *TVA* court's view of the doctrine of delegation/separation of powers will be vigorously contested by the EPA and by other federal administrative agencies.

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or current violation, requiring compliance immediately or within a specified time frame, or both . . . ." *Id.* at § 6928(a)(1). The RCRA further provides that if a recipient of an order "fails to take corrective action within the time specified in a compliance order, the Administrator may assess a civil penalty of not more than $25,000 for each day of continued noncompliance . . ." *Id.* at § 6928(c). Like the CWA, the RCRA does not appear to provide criminal penalties for violation of a compliance order. *See id.* at § 6928(d). However, unlike the CAA and CWA, the RCRA does provide that any compliance order issued by the Administrator be subject to a public hearing, if requested within 30 days after the order is served. *See id.* at § 6928(b). Upon a request for a public hearing, the Administrator must promptly conduct the hearing and "may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may promulgate rules for discovery procedures." *Id.* The procedure for such a public hearing is provided before the Environmental Appeals Board in accordance with the rules established in 40 C.F.R. Part 22. *See* 40 C.F.R. § 22.1(a)(4). This procedure may address certain of the due process issues raised in *TVA v. Whitman*, at *6-7 and n.8. The RCRA scheme, however, still presents an issue as to whether it impermissibly commingles the prosecutorial and adjudicative functions or implicates separation of powers concerns, since the Administrator is again acting as the prosecutor, judge and fact-finder, and determines what facts will be included in the record for purposes of limited judicial review.

Although CERCLA is distinguishable in that the unilateral order mechanism under section 106 does not require the existence of a violation,[9] the process governing section 106 unilateral administrative orders ("UAOs") may suffer from constitutional defects similar to ACOs under the CAA. CERCLA UAOs are issued unilaterally, without a hearing or record. Most UAOs include a provision that appears to make the recipient liable for a civil penalty of up to $27,500 per day, as well as for treble damages, for failing to comply with the order. While a party does have a right to judicial review of the UAO, that review is statutorily limited to situations where the EPA first files an action in district court either to enforce the UAO or for other purposes, or where the party seeking to challenge the UAO has complied with it and only seeks reimbursement. 42 U.S.C. § 9613(h). What is most significant, however, is that under CERCLA, like the process held unconstitutional in *TVA v. Whitman*: (a) the UAO is issued by the EPA which acts as judge, prosecutor and fact-finder and the responding party has no formal review rights at all; (b) the EPA determines what facts will be considered by assembling the administrative record; (c) the EPA seeks to limit judicial review to the "record" established by the EPA; and (d) the statute itself purports to strictly limit review and remedies available to the party seeking to challenge the validity of the UAO. Even more so than the CAA, the CERCLA scheme arguably relegates Article III courts to "insignificant tribunals" in which the EPA merely needs to conduct a "show-cause" hearing. *TVA v. Whitman* at *64.[10]

Similar defects may inhere in the enforcement process under FIFRA, 7 U.S.C. §§ 136d and § 136n. Under FIFRA, the EPA Administrator issues pesticide registrations, prosecutes notices of intent to cancel or an intent to suspend, makes all factual determinations related to the notice of intent to cancel, establishes the process governing the adjudication, and determines the facts that will be considered. Judicial review is limited to the record. 7 U.S.C. §§ 136d(a)(4) and 136n.

Conclusion. Administrative enforcement orders have become increasingly important weapons for the EPA. They are quick, efficient means of mandating action. But in so doing, the EPA may have sacrificed constitutional protections in favor of efficiency. *TVA v. Whitman* clarifies those constitutional parameters and raises serious questions regarding whether the EPA can commingle prosecutorial and adjudicative functions in this way.

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[9]CERCLA section 106 requires the existence of "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility . . . ." 42 U.S.C. § 9606. Generally, these orders are issued to potentially responsible parties and require that they undertake expansive and expensive remedial activities at CERCLA sites.

[10]*See Memorandum of Horsehead Industries, Inc., and Horsehead Resource Development Company, Inc., in Support of Petition for Dispute Resolution and Judicial Review Related to Unilateral Administrative Order and in Support of Motion for Judicial Review of Unilateral Administrative Order and Partial Summary Judgment*, filed by the authors in *United States v. Horsehead Industries, Inc., et al.,* No. 3:CV-88-1688, at 27-35, arguing the constitutional infirmities of the UAO process. The court issued a Preliminary Injunction against the enforcement of the UAO.

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