

SIERRA CLUB v. JACKSON: THE FAILED POTENTIAL OF JUDICIAL REVIEW TO SPUR TIMELY CLEAN AIR ACT REGULATIONS

INTRODUCTION

Nearly every day courts across the country issue orders telling individuals and groups either to take action or to cease taking action. Though these orders are indeed the miracle of the modern world, they have become so ubiquitous as to no longer grasp the public's attention. But a court ordering an administrative agency to do something can, and often does, impact the public at large in profound ways. This is because the court order is not isolated to the litigants, but is an insinuation into the relationship between the legislative and executive branches of government. Given this context, should a court hew an order in the same manner when reviewing the work of an administrative agency as in a classic adversarial dispute? Any case of a federal court reviewing an agency action gives rise to this question. One case—unreported and unheralded as it may be—helps answer the question: *Sierra Club v. Jackson*.

In January of 2011, the United States District Court for the District of Columbia, in *Sierra Club v. Jackson*, forced the Environmental Protection Agency (EPA) to issue Clean Air Act (Act or CAA) regulations impacting thousands of companies and institutions across the country.¹ Because of the prolonged and mercurial rulemaking process, most of these industries instantly violated the Act.² The court order was a culmination of a decade-long legal battle between EPA and Sierra Club. Sierra Club initially sued EPA in 2001 for failing to promulgate regulations limiting emissions of hazardous air pollutants (HAPs) by the deadlines required by the Act—

1. *Sierra Club v. Jackson*, No. 01-1537, 2011 WL 181097, at *3 (D.D.C. Jan. 20, 2011).

2. See National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 76 Fed. Reg. 80,532, 80,532–34 (proposed Dec. 23, 2011) (codified at 40 C.F.R. pt. 63) (proposing reconsideration of certain elements in the March 21, 2011 final rule establishing emission standards for HAPs from ICI boilers); No Action Assurance Letter from Cynthia Giles, Asst. Adm'r for Enforcement and Compliance Assurance, Env'tl. Prot. Agency (Feb. 7, 2012), available at http://www.epa.gov/ttn/atw/boiler/boiler_ciswi-no_action_2012-02-07.pdf [hereinafter Giles]. EPA first promulgated several HAP regulations in 2004. National Emissions Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 75 Fed. Reg. 32,006, 32,009 (proposed June 4, 2010) (codified at 40 C.F.R. pt. 63). *Sierra Club and Natural Resource Defense Council challenged the rules. Natural Res. Def. Council, Inc. v. EPA*, 489 F.3d 1250, 1253 (D.C. Cir. 2007); *Sierra Club v. EPA*, 479 F.3d 875, 876 (D.C. Cir. 2007). The Circuit Court of Appeals for the District of Columbia Circuit vacated the HAP rules. *Natural Res. Def. Council*, 489 F.3d at 1254. Moreover, the court significantly altered the formula for determining the maximum achievable control technology (MACT) floor. *Sierra Club*, 479 F.3d at 880, 882–83 (rejecting, inter alia, EPA's reference to actually achievable emissions levels in determining MACT).

Sierra Club v. Johnson.³ The district court in that case revised the CAA schedule to allow EPA more time to issue regulations.⁴ The injunctive order failed to spur EPA to act.⁵ In short, EPA did not issue the regulations in time, prompting Sierra Club to sue EPA again in 2011—*Sierra Club v. Jackson*.⁶ Throughout the decade-long litigation, the Agency successfully complained that it could not possibly meet the court’s deadline.⁷ *Sierra Club v. Jackson* is the inevitable byproduct of the court’s misguided and ineffective use of equity powers.

The D.C. District Court used traditional common law mechanisms for tailoring an injunction to revise the rulemaking schedule.⁸ This Note argues that the district court improperly revised the rulemaking schedule in *Johnson* precisely because the common law tailoring mechanisms should not be applied to agency regulatory delay cases. The common law methods are ill suited for the domain of public-interest litigation. A court cannot treat EPA or Sierra Club as insular private litigants. Siding with either party is a distinct, nuanced policy choice. Moreover, the district court failed to follow the precedent of injunctions stemming from modern environmental litigation. District courts faced with tardy regulations should effectively remand the issue to the legislature by issuing immediate injunctions.

This Note uses the *Sierra Club* litigation as a looking glass into the proper role of the reviewing court in stimulating timely regulations. Part I puts EPA’s failure to issue HAP regulations in the context of general agency inaction. This Part also describes the Clean Air Act’s HAP control regime. Finally, Part I details EPA’s efforts to regulate industrial, commercial, and institutional (ICI) boilers and solid waste incinerators, the regulations at issue in the *Sierra Club* litigation. Part II frames *Sierra Club v. Jackson* as the offspring of a misguided approach to tailoring injunctions in agency delay cases. Specifically, this Part explains the standards for measuring injunctions laid down in *Natural Resources Defense Council v. Train* and how those standards dictated the district court’s schedule in *Johnson*. Part III details the court’s equity powers to issue injunctions and how the court measures or tailors injunctions. Part IV discusses the

3. *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 47, 51 (D.D.C. 2006).

4. *Id.* at 59, 61.

5. *See Jackson*, 2011 WL 181097, at *4 (describing a series of extensions that allowed EPA to avoid issuing the regulations at least until 2011).

6. *Id.* at *1.

7. *See id.* at *3–4 (tracing the litigation to its 2001 origin); *Johnson*, 444 F. Supp. 2d at 51, 59–61 (revising CAA schedule so as to preserve Congress’s intent without asking EPA “to do the impossible”).

8. *See Jackson*, 2011 WL 181097, at *3 (“[T]he only matter before the Court was to fashion an appropriate equitable remedy.”).

consequences of using the traditional common law approach to tailoring remedies. This Part provides three alternatives to the traditional approach: judge as policy maker, statutory interpretation, and the legislative remand. Finally, this Note argues that the legislative remand is mandated by current trends in environmental litigation and provides the best method of stimulating timely regulations.

I. BACKGROUND

A. Context of Agency Inaction

The hallmark of twentieth century environmental statutes is the ability of private citizens to hold polluters directly accountable for violations. In essence, Congress made each person a private attorney general, enforcing environmental law for the benefit of all.⁹ Even challenges to final agency action catalyzed famous cases and accompanying literature.¹⁰ The subject of this Note—equitable remedies for holding a delinquent agency accountable for failure to regulate—has been less of a cause célèbre. Citizens’ ability to compel agency action, however, is just as important as suing industry directly or challenging an agency’s rule. Without timely, defensible regulations, industries across the country are left uncontrolled. Accordingly, how courts scrutinize and remedy agency inaction is a subject of incredible importance.

Agency inaction is divided between discretionary inaction and nondiscretionary inaction. When Congress gives an agency the authority to regulate a certain program but not a requirement to do so, an agency’s failure to act is discretionary.¹¹ Conversely, when Congress mandates the agency regulate a program, an agency’s failure to act is nondiscretionary.¹² The Administrative Procedure Act (APA) allows federal courts to review

9. See Clean Air Act, 42 U.S.C. § 7604 (2006) (authorizing citizen suits against any party who violates an emissions standard or limitation or against the EPA administrator for failing to perform a nondiscretionary duty); Clean Water Act, 33 U.S.C. § 1365(a) (2006).

10. See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”); Kristine Cordier Karnezis, Annotation, *Construction and Application of “Chevron Deference” to Administrative Action by United States Supreme Court*, 3 A.L.R. FED. 2d 25, 25 (2005) (examining “the Supreme Court cases that have construed or applied Chevron deference to administrative actions”).

11. See Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (2012) (declaring judicial review inappropriate when an agency’s action is discretionary by law).

12. See, e.g., 42 U.S.C. § 7412(b)(2) (2006) (requiring Administrator to periodically review list of pollutants and add to it).

agency delay in both cases.¹³ Specifically, the APA allows a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed.”¹⁴ Similarly, the CAA and the Clean Water Act (CWA)¹⁵ allow citizens to challenge agency inaction.¹⁶ This Note discusses the failure of EPA to issue nondiscretionary regulations under the CAA.

B. Clean Air Act

The Clean Air Act is a landmark environmental law designed to reduce emissions of air pollutants that harm humans and the natural environment.¹⁷ During the 1950s and 1960s, the federal government played a passive role in reducing air pollution.¹⁸ However, Congress passed the CAA of 1970¹⁹ in response to growing concern over the nation’s rapidly deteriorating air quality.

The 1970 Act sets National Ambient Air Quality Standards (NAAQS) for the country to obtain via permitting and regulations.²⁰ The NAAQS are expressed as numeric volumes of “criteria pollutants” per volume of ambient air.²¹ Criteria pollutants are five substances that industries ubiquitously emit: particulate matter, carbon monoxide, nitrogen oxides, sulfur oxides, and lead.²² The Clean Air Act of 1970 requires companies that emit a certain level of criteria pollutants to obtain permits.²³ Moreover, the Clean Air Act of 1970 contains the National Emissions Standards for Hazardous Air Pollutants (NESHAP) to limit emissions of HAPs.²⁴

13. 5 U.S.C. § 706(1) (2012).

14. *Id.*

15. Clean Water Act, 33 U.S.C. § 1365(a) (2006).

16. 42 U.S.C. § 7604(a)(2) (2006); accord Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 IND. L.J. 65, 75 (1996).

17. 42 U.S.C. § 7401(b)(1) (2006).

18. See Air Pollution Control Act, Pub. L. No. 84-159, 69 Stat. 322, 322–23 (1955) (providing funds for air pollution research); Air Quality Act of 1967, Pub. L. No. 90-148, §§ 101, 103, 81 Stat. 485, 485–86 (authorizing the federal government to conduct air monitoring as well as commissioning studies on air pollution control techniques).

19. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

20. *Id.* § 4, 84 Stat. at 1679–82.

21. *What are the Six Common Air Pollutants?*, U.S. ENVTL. PROT. AGENCY, <http://epa.gov/airquality/urbanair/> (last updated Apr. 20, 2012); 40 C.F.R. § 50.1–50.17 (2012).

22. 40 C.F.R. § 50.1–50.17. Particulate matter is split between particulate matter at less than ten micrometers in aerodynamic diameter and particulate matter at less than two-and-a-half micrometers in aerodynamic diameter. *Id.* § 50.6–50.7 (2012).

23. Clean Air Amendments of 1970, Pub. L. No. 91-604, sec. 4(a), § 110(a)(2)(D), 84 Stat. 1676, 1680 (1970) (requiring states to include in their implementation plans a procedure to permit new stationary sources subject to a performance standard prior to construction).

24. *Id.* § 4, 84 Stat. at 1676, 1685 (1970).

Although less ubiquitous than criteria pollutants, HAPs are more dangerous to human health.²⁵

Congress amended the Clean Air Act of 1970 in 1977²⁶ and, finally, in 1990.²⁷ Despite the amendments, Congress maintained the basic framework of regulating criteria pollutants through permits and HAPs via the NESHAPs.²⁸

1. Citizen Suits

In addition to establishing the structure for regulating air pollution in the United States, the Clean Air Act of 1970 authorizes citizen suits.²⁹ Specifically, since 1970, every citizen may (1) enforce the Act against polluters and (2) challenge EPA's regulatory actions.³⁰ In 1990, Congress amended the Act to allow citizen suits to compel EPA to regulate.³¹ *Sierra Club v. Jackson*³² and *Sierra Club v. Johnson*³³ both involve a citizen suit against EPA under the CAA for failure to issue regulations by a proscribed deadline.

2. Hazardous Air Pollutants

The CAA requires EPA to regulate HAPs as part of the National Emissions Standards for Hazardous Air Pollutants program.³⁴ Congress listed nearly 200 HAPs for EPA to regulate.³⁵ The NESHAP program requires EPA to first group similar HAP sources together into "source categories"³⁶ and second to issue regulations to control the HAP emissions

25. See Clean Air Act, 42 U.S.C. § 7412(b)(2) (2006) (indicating that HAPs can be "carcinogenic, mutagenic, teratogenic, neurotoxic," and may "cause reproductive dysfunction"); see also *What are the Six Common Air Pollutants?*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/airquality/urbanair/> (last updated Apr. 20, 2012).

26. An Act to Amend the Clean Air Act, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended at 42 U.S.C. §§ 7401–7515 (2006)).

27. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified at 42 U.S.C. §§ 7401–7515 (2006)).

28. 42 U.S.C. § 7409 (National Ambient Air Quality Standards); 42 U.S.C. § 7410 (standards for state permitting programs); 42 U.S.C. § 7412 (2006) (NESHAP program).

29. Act to Amend the Clean Air Act, Pub. L. No. 91-604, § 12, 84 Stat. 1676, 1706–07 (1970) (codified at 42 U.S.C. § 7604(a)); H.R. REP. NO. 91-1146, at 5 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356.

30. Act to Amend the Clean Air Act § 12, 84 Stat. at 1706.

31. Clean Air Act, 42 U.S.C. § 7604(a)(2) (2006); *accord* Selmi, *supra* note 16.

32. *Sierra Club v. Jackson*, No. 01-1537, 2011 WL 181097, at *3 (D.D.C. Jan. 20, 2011).

33. *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 47, 51 (D.D.C. 2006).

34. 42 U.S.C. § 7412.

35. *Id.* § 7412(b)(1).

36. *Id.* § 7412(c)(1). The process is further bifurcated between major stationary sources of

from those sources.³⁷ Congress also required EPA to complete certain steps of this process of grouping and regulating HAP sources by a mandatory schedule.³⁸ EPA should have issued all HAP regulations by November 15, 2000.³⁹ *Sierra Club v. Johnson* and *Sierra Club v. Jackson* arose when Sierra Club sued EPA for failure to promulgate regulations controlling the emissions of HAPs for ICI boilers and solid waste incinerators by the statutory deadline.⁴⁰

C. Regulating Hazardous Air Pollutants

The *Sierra Club* litigation concerns EPA's process for regulating HAPs.⁴¹ The CAA requires EPA to promulgate regulations controlling HAP emissions from every listed source category.⁴² The regulations must require

HAPs and area sources of HAPs. *Id.* § 7412(a), (c)(1), (d)(5), (k)(3). Major stationary sources of HAPs are those sources that have the potential to emit ten tons of any single HAP or twenty-five tons of aggregate HAPs. *Id.* § 7412(a)(1). An area source is any source which is not a major source; i.e., smaller sources. *Id.* § 7412(a)(2). Generally, the CAA requires EPA to regulate major sources and area sources differently. *Id.* § 7412(c)(3), (k)(3). EPA lists area source and major source categories separately. *Id.* Also, in some circumstances EPA may assign different emissions standards to area sources than to major sources. *Id.* § 7412(d)(5). Accordingly, EPA separated ICI boilers into area sources and major sources. See National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 76 Fed. Reg. 15,554, 15,557 (Mar. 21, 2011) (codified at 40 C.F.R. pt. 63) (explaining that ICI boilers are listed as area sources); National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters: Final Rule, 76 Fed. Reg. 15,608, 15,608 (Mar. 21, 2011) (codified at 40 C.F.R. pt. 63).

37. 42 U.S.C. § 7412(d)(1).

38. *Id.* § 7412(e)(1). Congress required EPA to promulgate regulations for certain area sources by November 15, 2000. *Id.* § 7412(c)(3). Congress also required EPA to promulgate regulations for all listed sources by November 15, 2000. *Id.* § 7412(e)(1)(E).

39. *Id.* § 7412(c)-(e).

40. *Sierra Club v. Jackson*, No. 01-1537, 2011 WL 181097, at *1 (D.D.C. Jan. 20, 2011); *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 47 (D.D.C. 2006).

41. *Johnson*, 444 F. Supp. 2d at 47.

42. Clean Air Act, 42 U.S.C. § 7412(d) (2006). Several different CAA sections implicate regulating major source and area source ICI boilers and waste incinerators. *Id.* §§ 7412(a)-(k), 7429. EPA must list and regulate all major and area source categories that emit any of the HAPs listed by Congress. *Id.* § 7412(c)(1), (d). EPA must also list "sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section." *Id.* § 7412(c)(3), (k)(3). In addition, by November 15, 2000, EPA must list and set MACT standards for ALL source categories that account for "not less than 90 per centum of the aggregate emissions of . . . alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin." *Id.* § 7412(c)(6). EPA listed ICI boilers and waste incinerators as a major source category pursuant to subsections (c)(1) and (c)(6). Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 31,576, 31,591 (Jul. 16, 1992); Source Category Listing for Section 112(d)(2) Rulemaking Pursuant to Section 112(c)(6) Requirements, 63 Fed. Reg. 17,838, 17,849 tbl.2 (Apr. 10, 1998); National Emissions Standards for

each source within the category to implement the maximum achievable control technology (MACT) to reduce HAP emissions.⁴³ MACT is the maximum degree of reduction in emissions of HAPs factoring in the cost of achieving the reduction.⁴⁴ The MACT standard applies to all sources whether the source existed prior to the regulation or not.⁴⁵ However, MACT is different for new sources than for existing sources.⁴⁶ For *new sources*, MACT cannot be less stringent than the emissions control which is achieved in practice by the best controlled similar source.⁴⁷ MACT for *existing sources* cannot be less stringent than the average limitation achieved by the best performing twelve percent of existing sources in that category.⁴⁸

EPA must engage in a sophisticated process to determine the MACT for a given category, then form regulations to implement the MACT.⁴⁹ The first step is to establish a MACT floor.⁵⁰ The MACT floor is the average emission rate for the best performing new sources or top twelve percent of existing sources.⁵¹ EPA then implements the MACT through a combination of numeric emissions limits, work practice standards, control equipment standards, monitoring requirements, and recordkeeping obligations for source categories.⁵²

Thus, to regulate ICI boilers and waste incinerators, EPA had to determine the top performing new boilers and the best performing twelve percent of existing boilers.⁵³ Given the thousands of boilers in the country, determining the MACT floor required EPA to conduct extensive research.⁵⁴

Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 76 Fed. Reg. 15,554, 15,556 (Mar. 21, 2011) (codified at 40 C.F.R. pt. 63). The Agency also listed ICI boilers as an area source category pursuant to subsections (c)(3) and (c)(6). *Id.* Hence, EPA's failure to promulgate either area source or major source ICI boiler regulations violates section 112 of the Act. 42 U.S.C. § 7412(c)(6). Section 129 of the CAA also specifically regulates solid waste incinerators. 42 U.S.C. § 7429. That section requires, *inter alia*, that EPA promulgate separate MACT standards for waste incinerators. *Id.* § 7412(a)(2).

43. *Id.* § 7412(d)(2).

44. *Id.*

45. *Id.* § 7412(d)(3).

46. *Id.*

47. *Id.*

48. *Id.*

49. See DAVID R. WOOLEY & ELIZABETH M. MORSS, CLEAN AIR ACT HANDBOOK: A PRACTICAL GUIDE TO COMPLIANCE § 3:5, at 235 (13th ed. 2003).

50. *Id.*

51. 42 U.S.C. § 7412(d)(3); WOOLEY & MORSS, *supra* note 49, § 3:5, at 235.

52. 42 U.S.C. § 7412(d)(2); WOOLEY & MORSS, *supra* note 49, § 3:5, at 236.

53. National Emission Standards for Hazardous Air Pollutants for Industrial/Commercial/and Institutional Boilers and Process Heaters, 68 Fed. Reg. 1660, 1662–63 (proposed Jan. 13, 2003) (codified at 40 C.F.R. pt. 63).

54. See Memorandum from Amanda Singleton, E. Research Grp., to Brian Shrager, Env'tl. Prot.

EPA had to request information from regulated industry regarding existing boilers and incinerators.⁵⁵ What is more, no two ICI boilers are alike.⁵⁶ The miscellany of configurations all have an impact on the rate at which sources emit HAPs.⁵⁷ In order to craft implementable regulations, EPA had to account for the nuances between sources when crafting MACT regulations.

II. THE *SIERRA CLUB V. JACKSON* LITIGATION

Sierra Club v. Jackson is part of a broader legacy of equity cases regarding agency delay.⁵⁸ The United States Court of Appeals for the District of Columbia in *Natural Resources Defense Council v. Train* established guidelines for the federal district court to craft a remedy when an agency fails to issue regulations by a mandatory deadline.⁵⁹ Sierra Club sued EPA, then headed by Administrator Stephen L. Johnson, in 2001 for failure to issue HAP regulations by November 15, 2000.⁶⁰ Following *Train's* requirements, the D.C. District Court modified the CAA HAP regulation deadlines.⁶¹ EPA was unable to meet the D.C. District Court's schedule in *Johnson*; thus, Sierra Club sued again in *Sierra Club v. Jackson*.⁶² Although the federal courts in these cases properly applied common law remedy doctrines, the doctrines themselves do little to correct agency delay.

Agency (Jan. 4, 2011) [hereinafter Singleton Memo], available at http://www.epa.gov/ttn/atw/boiler/rev_mact_floor_analysis_major_boilers_process_heaters.pdf (describing research process).

55. *Id.*; Memorandum from E. Research Grp., to Toni Jones, U.S. Envtl. Prot. Agency (Nov. 3, 2011), available at http://www.epa.gov/ttn/atw/129/ciwi/ciswi_mact_floor_analysis_memo.pdf.

56. 1 OFFICE OF AIR QUALITY PLANNING AND STANDARDS, EPA, COMPILATION OF AIR POLLUTANT EMISSIONS FACTORS: STATIONARY POINT AND AREA SOURCES § 1.0–1.11 (5th ed. 1995) [hereinafter AIR POLLUTANT EMISSIONS FACTORS], available at <http://www.epa.gov/ttn/chief/ap42/ch01/index.html>. Boilers vary in fuel type and firing methods. *Id.* For example, boilers can burn coal, liquid fuels such as oil, gaseous fuels such as natural gas, or wood-derived fuels. *Id.* § 1.1–1.2 (coal), 1.3 (fuel oil), 1.4–1.5 (gaseous fuels), 1.6 (wood). Moreover, not all boilers burn the same fuel the same way. *Id.* Manufacturers, for instance, build fuel oil boilers in up to four different configurations: fire tube, water tube, cast iron, and tubeless. *Id.* § 1.3.2. The emissions spectrum varies considerably depending on the firing configuration. *Id.*

57. Singleton Memo, *supra* note 54.

58. See *Sierra Club v. Jackson*, No. 01-1537, 2011 WL 181097, at *1 (D.D.C. Jan. 20, 2011) (chronicling the litigation that resulted from a particular instance of agency delay).

59. *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 705–06 (D.C. Cir. 1974).

60. *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 47–49 (D.D.C. 2006).

61. *Id.* at 53, 61.

62. *Jackson*, 2011 WL 181097, at *1.

A. Natural Resources Defense Council v. Train⁶³:
The Impossibility Standard

The D.C. District Court's orders in *Johnson* and *Jackson* are the byproduct of the D.C. Circuit Court of Appeals' decision in *Natural Resources Defense Council v. Train*. Shortly after Congress amended the Federal Water Pollution Control Act in 1972, the Natural Resources Defense Council (NRDC) sued EPA to force the Agency to issue effluent limitation regulations.⁶⁴ The 1972 amendments require EPA to establish effluent limitation guidelines within one year of October 18, 1972.⁶⁵ The purpose of the guidelines is to help determine effluent limits to impose on industry through individual discharge permits: the National Pollutant Discharge Elimination System (NPDES).⁶⁶ Much like the NESHAP program, the guidelines are also tailored to certain source categories, such as petroleum refining.⁶⁷ The Act lists twenty-six such categories and requires EPA to list more that contribute to water pollution.⁶⁸ Finally, the Act prohibits unpermitted discharges after December 31, 1974.⁶⁹

EPA failed to issue guidelines by October 18, 1973.⁷⁰ Therefore, NRDC sued, and the district court enjoined EPA to issue effluent guidelines by a multi-date schedule.⁷¹ The court established ultimate deadlines for the twenty-six categories listed in the CAA as of October 1, 1974, and all other source categories by November 29, 1974.⁷²

EPA appealed the order to the D.C. Court of Appeals.⁷³ Overall, the circuit court upheld the trial court's actions.⁷⁴ The court affirmed the October 1 deadline for the twenty-six listed categories, but rejected the November 29 deadline.⁷⁵ The D.C. appellate court made three important holdings. First, the trial court may use equity powers to set "enforceable deadlines both of an ultimate and intermediate nature."⁷⁶ Second, the

63. *Train*, 510 F.2d at 692.

64. *Natural Res. Def. Council, Inc. v. Train*, No. 1609-73, 1973 BL 803, at *1 (D.D.C. Nov. 15, 1973) (Bloomberg Law).

65. Clean Water Act, 33 U.S.C. § 1314(b) (2006).

66. *Id.* § 1342.

67. *Id.* § 1316(b)(1)(A).

68. *Id.*

69. *Id.* § 1342(k).

70. *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 697, 704 (D.C. Cir. 1974).

71. *Natural Res. Def. Council, Inc. v. Train*, No. 1609-73, 1973 BL 803, at *1 (D.D.C. Nov. 15, 1973) (Bloomberg Law).

72. *Id.*

73. *Train*, 510 F.2d at 695.

74. *Id.* at 704-05.

75. *Id.* at 697, 704.

76. *Id.* at 705.

district court's mechanism for setting the timeline—requiring the parties to draft schedules—was also reasonable.⁷⁷ Third, a court cannot use its equity powers to force a defendant to perform the impossible.⁷⁸ This third holding is of most significance to *Johnson* and remedies law in general.

The “impossibility” holding was couched in the appellate court's rejection of the November 29 deadline.⁷⁹ The court reasoned that the statute did not direct EPA to issue effluent limit guidelines for non-listed source categories by an explicit deadline.⁸⁰ Rather, the court analyzed the statute as a whole and determined that the NPDES provisions anchored the program.⁸¹ Specifically, the Act functioned by requiring permits for discharges.⁸² Therefore, EPA needed to pass effluent guidelines to assist writing the permits prior to the date the Act required industries to acquire a permit.⁸³ The *court* thus established December 31, 1974, as the deadline for non-listed source categories.⁸⁴

Anticipating EPA's possible struggles in meeting the deadline, the court then set guidelines for district courts for extending the deadline should EPA fail to issue timely regulations.⁸⁵ Accepted excuses for requiring an extension included budget limits and insurmountable time constraints.⁸⁶ The circuit court legitimized allowing exceptions by stating that “the sound discretion of an equity court does not embrace enforcement through contempt of a party's duty to comply with an order that calls him to do an impossibility.”⁸⁷

B. *Sierra Club v. Johnson*⁸⁸: *The Impossibility Standard in Action*

Twenty-seven years after *Train*, Sierra Club sued EPA in the United States District Court for the District of Columbia for an order to compel EPA to issue HAP regulations.⁸⁹ EPA had failed to issue regulations for several source categories by 2001.⁹⁰ The parties entered a consent decree to

77. *Id.*

78. *Id.* at 713.

79. *Id.* at 711–13.

80. *Id.* at 705–06.

81. *Id.* at 707.

82. *Id.*

83. *Id.*

84. *Id.* at 706–07.

85. *Id.* at 712–13.

86. *Id.* at 713.

87. *Id.* at 713 (internal quotation marks omitted).

88. *Sierra Club v. Johnson*, 444 F. Supp. 2d 46 (D.C.C. 2006).

89. *Id.* at 47.

90. *Id.* at 51–52; *see also* Memorandum in Support of Plaintiff Sierra Club for Summary Judgment at 4–5, 9–10, *Sierra Club v. Johnson*, 444 F. Supp. 2d 46 (D.C.C. 2006) (No. 01-537), ECF

resolve some of EPA's delinquencies.⁹¹ They then litigated the remaining regulations under dispute in 2003, including ICI boilers and solid waste incinerators.⁹²

Given that EPA undeniably failed to exercise mandatory duties under the Act, the only substantive issue in the case was how the court should fashion an equitable remedy; i.e., by what date should EPA be required to promulgate regulations?⁹³ Following *Train*, Judge Paul L. Friedman required the parties to file suggested schedules.⁹⁴ Sierra Club suggested an ambitious schedule that required regulations at regular intervals until December 15, 2007.⁹⁵ Conversely, EPA requested until 2012 to promulgate regulations.⁹⁶

Judge Friedman excoriated EPA for its prolonged foot-dragging.⁹⁷ The Judge even proclaimed that EPA had not shown that issuing regulations by Sierra Club's proposed schedule was impossible.⁹⁸ While reviewing *Train*, however, Judge Friedman reasoned that Sierra Club's proposed schedule was impossible for EPA to meet.⁹⁹ Thus, instead of ordering Sierra Club's schedule, the Judge fashioned median deadlines.¹⁰⁰ Judge Friedman reasoned that *Train* forbade courts from issuing orders which would force an Agency to do the impossible, regardless of Congress's intent.¹⁰¹ The court thus stated: "[O]rdering [EPA] to promulgate regulations under the following timetable . . . will best preserve the intent of Congress . . . *without calling upon defendants to do the impossible.*"¹⁰² Rather, Judge Friedman interpreted the purpose of the order as encouraging the agency to shift

No. 63 (detailing EPA's failure to issue fifty-five area source standards ((c)(3)), standards for bioaccumulative toxics ((c)(6)), and commercial chemical products).

91. *Johnson*, 444 F. Supp. 2d at 51; Revised Partial Consent Decree at 3, *Sierra Club v. Johnson*, 444 F. Supp. 2d 46 (D.C.C. 2006) (No. 01-537), ECF No. 45.

92. *Johnson*, 444 F. Supp. 2d at 51; see Joint Status Report and Motion for Briefing Schedule and Oral Argument ¶ 2, *Sierra Club v. Johnson*, 444 F. Supp. 2d 46 (D.C.C. 2006) (No. 01-537), ECF No. 53 (explaining that the parties could not agree on a regulatory schedule for several source categories); Declaration of Steve Page ¶¶ 27-28 & n.6, *Sierra Club v. Johnson*, 444 F. Supp. 2d 46 (D.C.C. 2006) (No. 01-537), ECF No. 67-3 [hereinafter Page Declaration] (showing that ICI boilers and solid waste incinerators were one category for which Sierra Club and EPA could not agree on a regulatory schedule).

93. *Johnson*, 444 F. Supp. 2d at 52.

94. *Id.* at 54.

95. *Id.*

96. *Id.*

97. *Id.* at 58.

98. *Id.*

99. *Id.* at 58-59. The court did, however, order EPA to issue regulations for ICI boilers and incinerators by December 15, 2007. *Id.* at 59.

100. *Id.* at 58-59.

101. *Id.* at 59.

102. *Id.* at 61 (emphasis added).

resources to expeditiously issue regulations.¹⁰³ The court's order did not have the desired effect.

C. *Sierra Club v. Jackson*¹⁰⁴: *The Failure of the Impossibility Standard*

Starting in October 2007,¹⁰⁵ EPA motioned for at least five unopposed extensions to the district court's schedule.¹⁰⁶ EPA's final motion came on December 7, 2010.¹⁰⁷ Sierra Club finally opposed this motion.¹⁰⁸ Although EPA had promulgated several HAP rules by December 2010, the Agency failed to issue regulations for ICI boilers and solid waste incinerators.¹⁰⁹ Finding that EPA had no legitimate excuse for missing the court's deadline set in *Johnson*, the Judge ordered EPA to promulgate regulations within one month of the order.¹¹⁰ EPA argued that the order for immediate promulgation forced EPA to do the impossible.¹¹¹ Again reasoning that an immediate injunction would force EPA to do the impossible, the court extended the deadline until February 21, 2011—one month.¹¹² Subsequently, EPA issued final rules for ICI boilers and incinerators on March 21, 2011.¹¹³ The Agency immediately notified the public that EPA

103. *See id.* at 58–59 (discussing how plaintiff's proposed schedule does not afford EPA sufficient time to “shift resources to regulation” and instead ordering a “slightly more relaxed” schedule).

104. *Sierra Club v. Jackson*, No. 01-1537, 2011 WL 181097 (D.D.C. Jan. 20, 2011).

105. Motion on Consent to Amend Order of March 31, 2006 at 1, *Johnson*, 444 F. Supp. 2d 46 (D.D.C. 2006), ECF No. 98.

106. *Jackson*, 2011 WL 181097, at *4. *See supra* note 2, for a discussion of litigation between *Johnson* and *Jackson* impacting EPA's ability to promulgate NESHAP regulations.

107. EPA's Motion to Amend Order of March 31, 2006, *Sierra Club v. Jackson*, No. 01-537, 2011 WL 181097 (D.C.C. Dec. 7, 2010), ECF No. 136.

108. Sierra Club's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Amend Order of March 31, 2006, *Sierra Club v. Jackson*, No. 01-1537, 2011 WL 181097 (D.C.C. Dec. 24, 2010), ECF No. 140 [hereinafter *Sierra Club's Memorandum*].

109. *Jackson*, 2011 WL 181097, at *4. Because EPA listed ICI boilers pursuant to 42 U.S.C. § 7412(c)(6), *see supra* note 42, Sierra Club sued for failure to regulate both area source and major source ICI boilers. Sierra Club's Memorandum, *supra* note 108, at 2–3.

110. *Jackson*, 2011 WL 181097, at *14.

111. EPA's Reply Memorandum in Support of Motion to Amend Order of March 31, 2006 at 4–6, *Sierra Club v. Jackson*, No. 01-01537, 2011 WL 181097 (D.D.C. Jan. 3, 2011), ECF No. 144 [hereinafter *EPA's Reply*].

112. *Jackson*, 2011 WL 181097, at *14.

113. National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 76 Fed. Reg. 15,554, 15,554 (Mar. 21, 2011) (codified at 40 C.F.R. pt. 63); National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters: Final Rule, 76 Fed. Reg. 15,608, 15,608 (Mar. 21, 2011) (codified at 40 C.F.R. pt. 63); Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 76 Fed. Reg. 15,704, 15,704 (Mar. 21, 2011) (codified at 40 C.F.R. pt. 60).

would reconsider the rules, effectively rescinding them.¹¹⁴ Then EPA issued a letter to industry assuring companies that the Agency would not enforce any of the new rules.¹¹⁵

Only in 2011, after ten years of litigation without result, did Congress act.¹¹⁶ Senator Susan Collins introduced the EPA Regulatory Relief Act of 2011 to extend the HAP deadlines.¹¹⁷ I argue in the ensuing sections that had the D.C. District Court correctly enjoined EPA, Congress would have acted sooner and EPA would have issued defensible regulations more expeditiously. In effect, the D.C. District Court's adherence to the impossibility standard provided EPA with a perpetual escape from devoting adequate resources to passing HAP regulations.

III. EQUITABLE REMEDIES

The D.C. Court in the *Sierra Club* suits followed long-standing common-law principles of equity in revising the rulemaking deadlines.¹¹⁸ Though the court's approach has sufficient historical underpinnings, the court issued the wrong remedy because it failed to acknowledge the impact of programmatic legislation on traditional equity powers. Judge Friedman should have issued a mandatory injunction requiring immediate promulgation of all HAP regulations.

Modern day equitable remedies descend from the bifurcated legal system of England: courts of law and courts of equity.¹¹⁹ Courts of law issued remedies as the law dictated.¹²⁰ The most common legal remedy is damages.¹²¹ Courts of equity, presided over by a Chancellor, invented substantive rules of conduct and corresponding remedies.¹²² Modern American courts are the product of a merger between the law and equity courts.¹²³ Therefore, courts may issue both legal and equitable remedies.¹²⁴

114. National Emission Standards for Hazardous Air Pollutants for Area Sources; Notice of Reconsideration, 76 Fed. Reg. 15,266, 15,266–67 (Mar. 21, 2011) (codified at 40 C.F.R. pts. 60 & 63).

115. Giles, *supra* note 2.

116. EPA Regulatory Relief Act of 2011, S. 1392, 112th Cong. (2011) (referred to the Committee on Environment and Public Works); EPA Regulatory Relief Act of 2011, H.R. 2250, 112th Cong. (2011) (placed on Senate Legislative Calendar under General Orders).

117. EPA Regulatory Relief Act of 2011, S. 1392, 112th Cong. (2011) (referred to the Committee on Environment and Public Works).

118. *Sierra Club v. Jackson*, No. 01-1537, 2011 WL 181097, at *5–6 (D.D.C. Jan. 20, 2011); *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 52–54 (D.D.C. 2006).

119. DAN B. DOBBS, *DOBBS LAW OF REMEDIES* § 2.1(1), at 55–56 (2d ed. 1993).

120. *See id.* § 2.1(1), at 57 (contrasting the use of discretion in courts of equity with courts of law).

121. *See id.* § 3.1–3.12, at 277 (devoting an entire treatise section on the law of damages).

122. *Id.* § 2.1(1), at 56.

123. *Id.* § 2.1(1), at 56, § 2.6(1), at 148.

Courts have the power to issue several different types of equitable remedies. In particular, courts can issue coercive, declaratory, and restitutionary remedies.¹²⁵ The most common type of coercive remedy, and the remedy at issue in the *Sierra Club* litigation, is the injunction.¹²⁶ Courts may issue prohibitory and mandatory injunctions.¹²⁷ While a prohibitory injunction prevents a party from acting, a mandatory injunction commands a party to perform an action.¹²⁸ This Note focuses exclusively on the mandatory injunction.

A party is not entitled to an equitable remedy as a matter of right.¹²⁹ Ordinarily, a court will not issue an injunction or other equitable remedy if a legal remedy—damages—is available, and but for the injunction, the plaintiff will suffer irreparable harm.¹³⁰ However, when a statute provides for an injunction, as in the case of the CAA,¹³¹ then the courts may issue injunctive relief regardless of whether the plaintiff has an adequate legal remedy or is not at risk of irreparable harm.¹³²

Assuming the party is eligible for injunctive relief, the court then must determine (1) whether to issue an injunction and (2) how to tailor the injunction. Accordingly, the court balances the equities and hardships in determining whether to grant an injunction.¹³³ Equities means the actions of the parties, such as good faith or negligence of the defendant or delay of the plaintiff.¹³⁴ Professor Dan Dobbs cites the example of a defendant intentionally building her garage on a plaintiff's land.¹³⁵ In that case, the equities militate in favor of the plaintiff.¹³⁶ The court then addresses the hardships on the parties.¹³⁷ Specifically, the judge must measure the

124. *Id.* § 2.6(1), at 149.

125. *Id.* § 2.1(2), at 59–61. Declaratory remedies essentially involve a court declaration of a party's rights. *Id.* § 2.1(2), at 60. The large body of law surrounding restitution is designed to prevent unjust enrichment. *Id.* § 2.1(2), at 61.

126. *Id.* § 2.9(1), at 223.

127. *Id.* § 2.9(1), at 224.

128. *Id.*

129. *See id.* § 2.5, at 123–48 (describing the limits on equitable remedies).

130. *Id.* § 2.5, at 123.

131. Clean Air Act, 42 U.S.C. § 7604 (2006).

132. DOBBS, *supra* note 119, § 2.10, at 243.

133. *Id.* § 2.4(5), at 108.

134. *Id.* § 2.4(5), at 109.

135. *Id.*

136. *Id.*

137. *Id.* § 2.4(5), at 110; *see also* Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 537 (1982) (terming the balancing-the-equities stage as threshold balancing whereby a plaintiff must overcome several hurdles before the court may consider awarding an equitable remedy).

defendant's hardship if the judge issues the injunction and, conversely, the plaintiff's hardship if the injunction is not issued.¹³⁸

If the court balances the equities and hardships in favor of issuing an injunction, the judge may then determine the form of the injunction that best serves the parties.¹³⁹ Hence, the court fashions the injunction according to the peculiarities of each case in a process called *tailoring the remedy*.¹⁴⁰ The judge may tailor the remedy between two spectrums: maximizing the plaintiff's right and minimizing the defendant's hardships.¹⁴¹ If the judge finds the plaintiff's right to be particularly compelling, the judge may then order a remedy to ensure vindication of that right.¹⁴² A court reinstating an employee illegally discriminated against is an example of tailoring the remedy based on the plaintiff's rights.¹⁴³

In contrast, if the judge finds that an injunction that fully vindicates the plaintiff to be unduly burdensome on the defendant, the judge may narrow the injunction to lessen the impact on the defendant.¹⁴⁴ A famous example of limiting the remedy to minimize hardship on the defendant is found in the case of *Boomer v. Atlantic Cement Co.*¹⁴⁵ Faced with the choice between shutting down an expensive cement factory and allowing the defendant to continue harming homeowners' properties,¹⁴⁶ the court granted an injunction, but conditioned termination of the injunction on the defendant paying permanent damages to the plaintiff.¹⁴⁷

An extension of the limiting the hardships method is the impossibility principle. The court cannot tailor an injunction that forces the defendant to do the impossible.¹⁴⁸ Proponents of the impossibility standard argue that the purpose of ordering an injunction is to compel action—the court accomplishes nothing by ordering a party to do the impossible.¹⁴⁹

138. DOBBS, *supra* note 119, § 2.4(5), at 110–11.

139. *Id.* § 2.4(6), at 113.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Brown v. Trs. of Bos. Univ.*, 891 F.2d 337, 359–61 (1st Cir. 1989) (reinstating plaintiff with tenure because reinstatement made plaintiff whole).

144. *See* DOBBS, *supra* note 119, § 2.4(6), at 113 (stating hardships to defendant and economic concerns as a basis for narrowing the remedy).

145. *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 872–73 (N.Y. 1970).

146. *Id.* at 871.

147. *Id.* at 875.

148. *See* *Tenn. Valley Auth. v. Tenn. Elec. Power Co.*, 90 F.2d 885, 894–95 (6th Cir. 1937) (denying motion to enjoin TVA from operating dams because the court cannot “command the waters of the Tennessee river and its tributaries to cease their flow”).

149. *See* Plater, *supra* note 137, at 531–32 n.28 (“Since equity is attempting to see that something be done, or not be done—rather than issuing pronouncements against discerned evils—it would be both useless and unnecessary for a court to command a physical impossibility.”).

Judge Friedman of the D.C. District Court drew heavily from traditional equity principles.¹⁵⁰ The Judge analogized the *Sierra Club* dispute with *Boomer v. Atlantic Cement*. Sierra Club was entitled to HAP regulations by a proscribed date,¹⁵¹ as the plaintiffs in *Boomer* were entitled to abatement of an unreasonable nuisance.¹⁵² However, mandating immediate regulations would have subjected EPA to undue hardship, the impossible task of issuing complex rules within a narrow schedule.¹⁵³ In the district court's equity equation, EPA is Atlantic Cement: shutting down the plant is akin to assigning EPA a crippling rulemaking schedule. The ensuing discussion argues that courts should not apply the equitable remedy precedents to non-discretionary rulemaking schedules.

IV. DISCUSSION

The traditional common-law methods of tailoring the remedy do not properly guide the trial court in fashioning rulemaking schedules. *Jackson* represents the failure of the traditional method of limiting the hardship approach to fashion an adequate rulemaking schedule. By choosing a median schedule, the district court attempted to minimize the hardship on EPA while still providing Sierra Club with some measure of relief.¹⁵⁴ I argue the median schedule represented the single worst remedy and resulted in *Jackson* and the ensuing obliteration of the rulemaking deadline. The common-law rules of tailoring the remedy are not applicable to mandatory deadlines.

A. The District Court Incorrectly Tailored the Remedy in Johnson

The district court incorrectly revised the rulemaking schedule because it failed to properly frame the remedy itself. Tailoring an injunction for a statutory violation is a matter of statutory interpretation.¹⁵⁵ The appropriate question is whether the statute narrows a court's traditional equity powers. Tailoring the remedy arising from a statutory cause of action is necessarily a legislative choice issued by the judge. As opposed to a dispute between

150. *Sierra Club v. Jackson*, No. 01-1537, 2011 WL 181097, at *5-6 (D.D.C. Jan. 20, 2011); *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 52-54 (D.D.C. 2006).

151. *Johnson*, 444 F. Supp. 2d at 51-52.

152. *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970).

153. See *Johnson*, 444 F. Supp. 2d at 58-59 (explaining that such a schedule was "likely an impossibility" for EPA).

154. *Id.* at 59; *Jackson*, 2011 WL 181097, at *14.

155. See DOBBS, *supra* note 119, § 2.10, at 243 (offering statutory construction as a guide to determining when an injunction is appropriate).

two litigants, the *Sierra Club* disputes represent public litigation at its most pronounced.¹⁵⁶ Accordingly, the court's injunction impacts thousands of citizens, businesses, and entities, not just the two litigants.¹⁵⁷ Therefore, scholars have developed three viable options for when courts are faced with statutory violations: (1) craft a schedule that best vindicates the rights of the public in light of the overarching goals of the statute;¹⁵⁸ (2) assess whether modifying the schedule is consistent with legislative goals and if the legislature foresaw the current dilemma;¹⁵⁹ or (3) effectively remand the issue to the legislature.¹⁶⁰ Because courts are ill-equipped to tackle complex programmatic legislation, the best option for courts faced with a delinquent agency is to remand to the legislature.

1. The Judge as Policy Maker Approach

Under the judge as policy maker approach, the judge uses considerable discretion to frame the injunction to guide public policy.¹⁶¹ This approach parallels the common-law guidelines, except the judge assesses the policy considerations within the statute.¹⁶² The judge thus interprets the deadlines only as evidence of a broader legislative intent.

Abram Chayes is a proponent of giving courts discretion to tailor remedies in the face of legislative commands.¹⁶³ Chayes argues that public interest litigation has supplanted the "bipolar" model where insular advisories use the court to settle a private dispute.¹⁶⁴ Litigants sue under statutory causes of action on behalf of the public at large.¹⁶⁵ As a result, courts must use their equity powers to vindicate the rights of persons not even before the court. Chayes argues that the only way for an equity court to adequately address the public's rights is to act as a "policy planner and manager."¹⁶⁶

156. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (defining "public law litigation").

157. See *id.* (explaining how public law litigation often involves complex relief that has "widespread effects on persons not before the court").

158. *Id.* at 1296–97.

159. David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 647–48 (1988).

160. Plater, *supra* note 137, at 588.

161. Chayes, *supra* note 156, at 1302.

162. *Id.*

163. *Id.* at 1307–09.

164. *Id.* at 1282, 1302.

165. *Id.* at 1284.

166. *Id.* at 1302.

Following Chayes' approach, instead of focusing exclusively on the mandated schedule in the Act,¹⁶⁷ the court in *Johnson* should have discerned the overall policy goals of the Act and framed the schedule to best achieve those goals. Specifically, Congress declared several purposes in the CAA including: "protect and enhance the quality of the Nation's air resources"¹⁶⁸ and "encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention."¹⁶⁹

The court should have also looked at the context of the schedule within section 112 of the CAA. In particular, the majority of section 112 is dedicated to explaining how EPA can determine MACT.¹⁷⁰ The section also requires EPA to determine MACT differently for new sources and for existing sources¹⁷¹—a substantial undertaking.¹⁷² Accordingly, the district court judge should then have determined the schedule that would best vindicate the public's rights considering the section 112 schedule *in light of* the schedule's context within the section and within the CAA's pollution strategy.

If the district court followed the policy maker approach, the court would have accepted EPA's proposed schedule. The court should have determined that forcing hurried regulations is against the overall purpose of the CAA and was an improvident consequence of Congress's schedule. Issuing defensible and accurate regulations is more likely to protect the quality of the nation's air resources as poorly designed regulations will not guide industry improvement and will stall enforcement.¹⁷³ Also, issuing poorly designed regulations will not help promote companion state regulations of HAPs. Finally, section 112 stresses the accuracy of the process more than the proscribed timelines.¹⁷⁴ Thus, under Chayes's approach, the district court should have accepted EPA's proposed schedule because the agency was focused on issuing defensible, accurate regulations.¹⁷⁵

167. 42 U.S.C. § 7412 (2006).

168. *Id.* § 7401(b)(1).

169. *Id.* § 7401(c).

170. *Id.* § 7412(d)(2); WOOLEY & MORSS, *supra* note 49, § 3:5, at 235.

171. 42 U.S.C. § 7412(d)(3).

172. *See supra* notes 49–57 and accompanying text.

173. *See* EPA's Reply, *supra* note 111, at 3–6 ("Promulgating a flawed rule does nothing, however, to advance the goals of Congress. Such an action can ultimately delay implementation of effective standards.")

174. 42 U.S.C. § 7412(d)(2); WOOLEY & MORSS, *supra* note 49, § 3:5, at 236.

175. *See* EPA's Reply, *supra* note 111, at 3–5 (urging the D.C. District Court to take the judge-as-policy-maker approach).

2. The Legislative Intent Approach

David Schoenbrod advances a position that preserves tailoring powers depending on Congress's intent. Accordingly, Schoenbrod takes a slightly less aggressive position than Chayes.¹⁷⁶ Under Schoenbrod's approach:

The injunction should impose terms to achieve the plaintiff's rightful position unless (a) different relief is consistent with the goals of the statute *and* (b) the case involves a factor justifying departure from the statutory rule that was not reflected in its formulation, but the injunction may never aim to achieve more than the plaintiff's rightful position.¹⁷⁷

Hence, Professor Schoenbrod approves of courts tailoring the remedy in the face of a statutory directive as long as the goals of the statute are met and the legislature did not anticipate the current controversy.¹⁷⁸ Arguably, Judge Friedman followed the first component of Schoenbrod's doctrine. The Judge reasoned that Congress desired EPA to issue expedient regulations.¹⁷⁹ Crafting a different regulatory schedule that still pressures EPA to issue rules quickly meets Congress's goal. However, one could make an equally compelling argument that Congress intended the schedule as a definitive and explicit goal.

Judge Friedman did not adequately address the second component, however. In order to justify revising the schedule, the Court had to address whether Congress anticipated agency delay. The HAP regulatory deadlines were clearly ambitious.¹⁸⁰ Under this approach, Judge Friedman should have determined whether the CAA contains some provisions evincing consideration of agency delay. For example, Congress could have provided EPA with a contingency or relief mechanism. The Judge should have also analyzed the legislative history regarding the amendments.

Requiring such a taxing endeavor shows the futility of Professor Schoenbrod's theory when applied to agency delay. Schoenbrod crafted his approach with an eye towards private industry violating regulations.¹⁸¹ In that context, Congress cannot foresee all the potential hardships on industry

176. Schoenbrod, *supra* note 159, at 647.

177. *Id.* (emphasis in original).

178. DOBBS, *supra* note 119, § 2.10, at 246.

179. *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 57–58 (D.D.C. 2006).

180. *See* WOOLEY & MORSS, *supra* note 49, § 3:6, at 238 tbl.3.1 (listing the general timetable for promulgating regulatory standards).

181. Schoenbrod, *supra* note 159, at 648–51 (discussing examples and applications to private industry).

resulting from regulations. Agency delay is fundamentally different. When Congress sets a rulemaking schedule, there are only two possible outcomes: the agency meets the schedule or it does not. Congress is clearly clairvoyant enough to anticipate both outcomes. Moreover, the relief from agency delay is lobbying Congress or litigation. Regardless, the D.C. District Court failed to even attempt to fairly assess the CAA under Schoenbrod's principle, immediately relying instead on traditional common-law mechanisms of tailoring the remedy.¹⁸²

3. The Legislative Remand Approach

The final and preferable approach would have been to order a mandatory injunction in *Johnson* requiring immediate issuance of HAP regulations. In *Johnson*, EPA was tardy by several years.¹⁸³ The court could have legitimately ordered immediate issuance of the regulations because the public was entitled to HAP regulations by a proscribed date.¹⁸⁴ The mandatory injunction would have forced EPA to issue completely indefensible regulations.¹⁸⁵ Congress would then be forced to revisit the Act to extend the regulatory deadlines. Unfortunately, courts interpret this alternative as incongruous with the traditional equity notion of not requiring a party to perform the impossible.¹⁸⁶ The impossibility standard espoused in *NRDC v. Train*,¹⁸⁷ however, is inapplicable to cases where an agency fails to meet a statutory deadline.

B. The Impossibility Standard Should Not Apply to Agency Delays

The D.C. District Court in both *Johnson* and *Jackson* substantiated the decision to not remand the issue to the legislature by citing *Train*.¹⁸⁸ The prohibition of courts issuing injunctions that force the impossible is inapplicable to a delinquent agency. In the traditional common-law action

182. See *Johnson*, 444 F. Supp. 2d at 52–53, 59 (failing to address whether Congress anticipated agency delay).

183. *Id.* at 51–52.

184. DOBBS, *supra* note 119, §§ 2.4(6), at 113, § 2.10, at 244.

185. Notwithstanding the lack of time to develop coherent regulations, immediate issuance of HAP regulations would certainly violate procedural requirements under APA. See Administrative Procedure Act, 5 U.S.C. §§ 553(b), (d), 706(2)(A) (2012) (establishing deadlines for notice and comment, and empowering a court to set aside agency action that is not in accordance with law).

186. See *Tenn. Valley Auth. v. Tenn. Elec. Power Co.*, 90 F.2d 885, 894–95 (6th Cir. 1937) (“The possibility of maintaining the status quo by means of the injunction is not established.”).

187. *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974).

188. *Sierra Club v. Jackson*, No. 01-1537, 2011 WL 181097, at *5–7 (D.D.C. Jan. 20, 2011); *Johnson*, 444 F. Supp. 2d at 52, 59.

where only two litigants have proverbial skin in the game, the impossibility standard is appropriate. Any equitable remedy that requires the defendant to perform an impossible act is no remedy at all because it does not stimulate action.¹⁸⁹

On the other hand, when Congress proscribes agency action the court is merely enforcing the statute, not fashioning an impossible remedy.¹⁹⁰ In *Train*, the court manufactured the deadline for EPA to issue effluent standard rules through statutory interpretation.¹⁹¹ Hence, the court imposed its own remedy on the defendant as opposed to the court enforcing Congress's directive. The impossibility standard is plainly an encroachment on legislative will. A mandatory rulemaking schedule is an unequivocal abrogation of the court's equity powers, including the impossibility standard. An equity court's primary concern is effectuating the clear priorities of Congress, not necessarily stimulating action. Indeed, if the court does not issue an immediate injunction, then the schedule is no longer mandatory.¹⁹² Therefore, the D.C. District Court should have distinguished *Train* and not applied the impossibility standard. The court then should have remanded the issue to Congress.

C. *The Legislative Remand Approach is Superior*

Judge Friedman should have ordered EPA to immediately issue regulations not only because doing so is good policy, but also because the remand is required by United States Supreme Court precedent. In this section, I discuss the legal requirement for courts to remand agency statutory violations to Congress.¹⁹³ I also illustrate the propriety of the legislative remand in both the private party context and in cases brought under the APA. Finally, I argue that courts should extend the legislative remand approach to the delinquent agency context because the current approach is legally flawed and ineffective in stimulating agency action.

189. See *Tenn. Valley Auth.*, 90 F.2d at 894–95 (suggesting that an injunction would not provide petitioner adequate relief).

190. DOBBS, *supra* note 119, § 2.10, at 246.

191. *Train*, 510 F.2d at 713.

192. Judge Friedman acknowledged that altering Congress's schedule frustrated the statute, but remained locked in the traditional tailoring-the-remedy analysis. *Johnson*, 444 F. Supp. 2d at 52–53, 57–59 (“When Congress expresses its intent that regulations be promulgated by a date certain, that intent is of utmost importance; a court . . . must not ‘order a remedy that would . . . completely neutralize the mandatory nature of the statutory directive.’” (quoting *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 95 (D.D.C. 2001))).

193. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194–95 (1978).

1. *Tennessee Valley Authority v. Hill* Requires the Legislative Remand

The Supreme Court case of *Tennessee Valley Authority v. Hill* commands district courts to enjoin clear statutory violations.¹⁹⁴ *TVA v. Hill* is the famous “snail darter” case where the Tennessee Valley Authority (TVA) planned to build the Tellico Dam, but adjacent landowners challenged the agency under the Endangered Species Act because the dam would destroy the snail darter’s habitat.¹⁹⁵ The applicable section of the Endangered Species Act reads: “All . . . federal departments . . . [shall take] such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of [species listed as endangered by the Secretary of Interior] or result in the destruction or modification of habitat of such species.”¹⁹⁶

TVA urged the Court to balance the equities and hardships when determining whether to issue an injunction.¹⁹⁷ TVA argued that the dam required significant financial investment and would provide economic benefits to the community.¹⁹⁸

The Court was not persuaded by TVA’s argument.¹⁹⁹ Rather, Justice Burger reasoned that Congress made explicit the country’s priority to protect endangered species—effectively precluding court balancing powers.²⁰⁰ Accordingly, the Court enjoined TVA from building the Tellico Dam.²⁰¹ For his final salvo, Justice Burger asserted: “Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.”²⁰²

The district court in *Johnson* should have followed *TVA v. Hill*. “EPA shall promulgate regulations by x date” is just as unambiguous as “insure actions do not result in the destruction of endangered species’ habitat.” In fact, there is hardly a more explicit way for Congress to express its will than to set a mandatory deadline. Congress did not compel EPA to issue regulations “within a reasonable time” or “as expedient as possible.” Congress left no room for interpretation. The Supreme Court interpreted clear legislative will as a congressional command to enjoin violations of the

194. *Id.* at 193–94.

195. *Id.* at 157–59.

196. Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1976).

197. *Hill*, 437 U.S. at 169.

198. *Id.*

199. *Id.* at 172.

200. *Id.* at 194 (“Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities . . .”).

201. *Id.* at 195.

202. *Id.* at 194.

Endangered Species Act.²⁰³ By extension, the district court should have interpreted the HAP schedule as a command to immediately enjoin EPA.

2. The Plater Approach²⁰⁴: Legislative Remand in Private Litigation

The propriety of the legislative remand is further buttressed by sound policy. Zygmunt Plater argues that when private industries violate statutes, the court's sole duty is to enjoin the violation no matter the hardship on the defendant.²⁰⁵ Plater builds his argument around the *TVA* case—asserting that in cases of unambiguous environmental statutes, the court is precluded from balancing the equities to determine whether to issue an injunction.²⁰⁶

Although Plater discusses violations by private industry, his thesis is persuasive here.²⁰⁷ Essentially, the legislature makes a policy choice when it prohibits certain conduct that harms the environment.²⁰⁸ If the court does less than issue an immediate injunction, then the court “take[s] on the garb of a mini-legislature.”²⁰⁹ Plater further demonstrates that in the face of technical or trivial statutory violations with significant consequences, courts are obliged to remand the issue to the legislature so that members may appreciate the impact of their decision.²¹⁰ Most importantly, the legislative remand stimulates Congress to action because the order forces Congress to fix its error or to allow significant economic loss and continued violations.²¹¹ Finally, the remand refocuses Congress on its strategy and can result in better legislation.²¹²

The Plater approach is instructive in agency delay cases. The district court undeniably acted as a legislature in erasing Congress's rulemaking schedule and crafting its own. Moreover, by acting as a “mini-legislature,” the court crowded out legitimate congressional action. The court precluded Congress from appreciating the ambitiousness of the HAP schedule. A remand to the legislature would likely have forced both EPA and industry to lobby Congress to immediately revise the schedule. At that moment, Congress could gain input from all stakeholders to determine the most

203. *Id.*

204. Plater, *supra* note 137, at 583–88.

205. *Id.* at 525–26.

206. *Id.* at 586–87.

207. *Id.* at 546, 568, 572.

208. *Id.* at 562–63.

209. *Id.* at 581.

210. *Id.* at 583–85.

211. *See id.* at 584, 586–87 (discussing the impact on Congress of the District of Columbia Court of Appeals halting the trans-Alaska pipeline project because the oil companies violated a minor provision in the Mineral Lands Leasing Act of 1920).

212. *Id.* at 587–88.

feasible and fair deadline or even craft a more effective mechanism for issuing timely HAP regulations.

3. Strict Construction in Challenges Under the APA²¹³

The legislative remand approach is also gaining traction in suits brought pursuant to the APA. Section 706(1) of that Act commands courts to “compel agency action unlawfully withheld or unreasonably delayed.”²¹⁴ Catherine Zaller in her 2001 Note makes a compelling case for court enforcement of mandatory rulemaking deadlines under section 706(1).²¹⁵

Zaller argues that courts should not treat statutory deadlines as just one factor in determining whether to issue an injunction.²¹⁶ Rather, courts should view deadlines as stripping the traditional equity powers and requiring immediate enforcement.²¹⁷ Zaller further argues that missing statutory deadlines is tantamount to violating the law.²¹⁸ Essentially, agencies are unlawfully withholding regulations in direct contravention of the plain language of the APA.²¹⁹

Zaller thus establishes all the predicates for the legislative remand approach. Courts have no authority to supplant legislative mandates via equity powers. A statutory schedule is clear evidence of Congress’s intent to circumscribe a court’s equity powers. Zaller, however, allows agencies to resort to an impossibility defense.²²⁰ But allowing courts to construe what is an impossibility invites policy making. Moreover, allowing defendant-agencies to claim impossibility is at odds with the position that missing a statutory deadline violates the law and that mandatory deadlines strip courts of all power to tailor the remedy. A court is obligated to enforce a mandatory statutory deadline regardless of the hardship on the defendant.

4. Spurring Agency Action

The legislative remand approach is not only legally correct, but is also the more effective remedy for expediting agency rulemaking. Had the district court remanded the issue to Congress in 2001 in *Johnson*, EPA

213. Catherine Zaller, Note, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1545 (2001).

214. Administrative Procedure Act, 5 U.S.C. § 706 (2012).

215. Zaller, *supra* note 213, at 1562–70.

216. *Id.* at 1562, 1568.

217. *Id.* at 1568–69.

218. *Id.*

219. *Id.* at 1569.

220. *Id.* at 1547.

would have promulgated regulations sooner. The reason why the Agency did not promulgate regulations by the proscribed deadline was not because the agency could not physically do so,²²¹ but because the court provided EPA with a perpetual excuse: the impossibility standard.²²² As long as the EPA could cry impossibility before the D.C. District Court, it had no tangible impetus to expedite the ICI boiler or solid waste incinerator rules. The purpose of the mandatory injunction is to stimulate the Agency to act.²²³ Yet, the court erodes its own equity powers by allowing the impossibility argument.

In the eyes of EPA, the impossibility standard is the escape valve, the elixir from which agencies can gain more time to issue regulations. Time is undoubtedly precious for agencies. Statutory deadlines exist to set the agency rulemaking schedule and channel resources appropriately. The impossibility standard does not divert the agency's attention to the task at hand—issuing rules—but compels the agency to fixate on methods of manufacturing more time. For example, EPA twice had its leading air pollution control engineer draft memoranda for the D.C. District Court explaining why EPA could not meet its CAA obligations.²²⁴ These engineers are in charge of issuing the delinquent regulations and should be

221. The court in *Johnson* found that EPA could have issued regulations by the proposed schedule had the Agency abandoned the erroneous desire to ensure the regulations reflected scientific certainty. *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 56 (D.D.C. 2006). Moreover, EPA could have researched and written the delinquent regulations simultaneously. Plaintiff Sierra Club's Reply in Support of Motion for Summary Judgment at 5, *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 56 (D.D.C. 2006) (No. 01-01537), ECF No. 75. Moreover, EPA merely claimed it had competing obligations, but never explained why those obligations trumped issuing delinquent regulations. *Id.* at 4. In fact, by 2004, EPA already had the framework for the boiler rule, including all the necessary subcategories of boilers, monitoring and testing requirements, reporting requirements, and emissions limits. National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters, 69 Fed. Reg. 55,218, 55,253–82 (Sept. 13, 2004) (codified at 40 C.F.R. pt. 63). Also, many public comments relating to the ICI boiler MACT either misunderstood the rule or complained about maintenance or recordkeeping requirements. 2 ENVTL. PROT. AGENCY, RESPONSES TO PUBLIC COMMENTS ON EPA'S NATIONAL STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR MAJOR SOURCE INDUSTRIAL COMMERCIAL INSTITUTIONAL BOILERS AND PROCESS HEATERS 119, 407, 874 (2011), available at http://www.epa.gov/ttn/atw/boiler/majorboilercom_vol_2_fnl.pdf.

222. In fact, the D.C. District Court in the same breath rejected EPA's impossibility argument, then invoked the doctrine to provide EPA with more time. *Johnson*, 444 F. Supp. 2d at 58. Playing it fast and loose with an impossibility standard signals to an agency the potential fortuitousness of making a case for impossibility. Unsurprisingly, EPA raised the argument again in *Sierra Club v. Jackson*. *Sierra Club v. Jackson*, No. 01-1537, 2011 WL 181097, at *6 (D.D.C. Jan. 20, 2011).

223. *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 712 (1974) (“The court’s injunction should serve like adrenalin, to heighten the response and to stimulate the fullest use of resources.”).

224. Supplemental Declaration of Panagiotis E. Tsigotis, *Sierra Club v. Jackson*, No. 01-01537, 2011 WL 181097 (D.D.C. Jan. 20, 2011), ECF No. 144-1 [hereinafter Tsigotis Declaration]; Page Declaration, *supra* note 92.

devoting every second of time to issuing delinquent regulations.²²⁵ Instead, the Agency is compelled to fabricate impossibilities to gain more time to issue rules. Indeed, the impossibility standard encourages agencies to procrastinate rulemaking to bolster an impossibility argument.²²⁶

On the other hand, if courts no longer provide agencies with the “impossibility” escape route, then the agency has no choice but to divert available resources to issue timely rules. If the regulation is truly impossible, the agency can lobby congress to extend the deadline based on forthright testimony on agency resources. Hence, in the absence of the impossibility standard, EPA would have spent more time issuing CAA regulations instead of generating an impossibility defense.

5. Legislative Movement Post *Jackson*

Congress’s actions after the D.C. District Court ordered near immediate issuance of HAP regulations in *Jackson* evince the effectiveness of the legislative remand.²²⁷ The district court in *Jackson* effectively issued the decade-overdue regulations.²²⁸ Hence, the court remanded the issue to the legislature. The problem is that the court should have done so ten years earlier in *Johnson*. Instead, the court was mired in *Train*’s holdings.²²⁹

Since *Jackson*, both houses of Congress have recognized how over-ambitious prior Congresses were in setting the mandatory deadlines. Therefore, Senator Collins proposed a bill to extend EPA’s deadlines.²³⁰ The House also issued a companion bill.²³¹ Congress’s swift action post remand illustrates the effectiveness of immediate injunctions. Had the district court issued the mandatory injunction ten years earlier, Congress would have acted as it has now and amended the original schedule to allow EPA to issue expeditious, defensible regulations.

225. Tsirigotis Declaration, *supra* note 224, ¶ 1; Page Declaration, *supra* note 92, ¶ 1.

226. Sierra Club’s Memorandum, *supra* note 108, at 7 (arguing that EPA cannot “opt out of compliance with court-ordered deadlines at [its] convenience just by not taking the steps necessary to meet them and then, at the last minute, pleading impossibility”).

227. *Sierra Club v. Jackson*, No. 01-1537, 2011 WL 181097, at *14 (D.D.C. Jan. 20, 2011).

228. *Id.*

229. *Id.* at *5-7; *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 52, 59 (D.D.C. 2006).

230. EPA Regulatory Relief Act of 2011, S. 1392, 112th Cong. (2011) (referred to the Committee on Environment and Public Works).

231. EPA Regulatory Relief Act of 2011, H.R. 2250, 112th Cong. (2011) (placed on Senate Legislative Calendar under General Orders).

CONCLUSION

The CAA is as complex as it is ambitious. Congress charged EPA with issuing and enforcing hundreds of HAP regulations by 2000. Had Congress been forced to re-assess the providence of its regulatory schedule at that time, *Sierra Club v. Jackson* could have been avoided. Sound policy and Supreme Court precedent demanded that the D.C. District Court order EPA to immediately issue HAP regulations in *Sierra Club v. Johnson*. Mandatory rulemaking deadlines strip courts of traditional common-law equity powers to tailor the remedy. Moreover, courts may and should order a delinquent agency to do the impossible—if such is Congress’s will. The ultimate forum to determine when an agency can and should issue regulations is the legislature. Thus, in the face of clear statutory deadlines, a court should remand the issue to the legislature. Failure to do so encourages the agency to overstock regulations in the hopes of pleading impossibility before a reviewing court. The result: industry is left unregulated and the public is left unprotected.

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