The Importance of *Murray Energy Corp. v. McCarthy*

Background

Murray Energy Corp. (Murray) sued EPA for failing to comply with section 321(a) of the Clean Air Act (CAA),[1] which requires the agency to continuously evaluate potential losses or shifts of employment resulting from administration or enforcement of the CAA. Murray argued that EPA has not evaluated the job losses and job shifts within the coal industry that have resulted from CAA rules. On October 17, 2016, the court granted summary judgment to Murray, and entered a Memorandum Order requiring EPA to provide a plan and schedule for compliance with §321(a) within two weeks.

EPA responded to the court's order on October 21, 2016, stating that the agency would comply with §321(a) only because of the court's order, that the timeframes are too short, and that it will take EPA about two years to develop a methodology to use to comply.

The Court's January 11, 2017 Final Order

The court issued a Final Order on January 11, 2017 that sharply rebuked the agency and ordered that specific actions be completed by court-ordered deadlines. The court noted that EPA's October 31 response "evidences the continued hostility on the part of the EPA to acceptance of the mission established by Congress."[2]

The court demonstrated through legislative history that "Congress unmistakably intended to track and monitor the effects of the Clean Air Act and its implementing regulations on employment in order to improve the legislative and regulatory processes."[3] For example, the court cites the House Committee Report accompanying the 1977 CAA amendments as clarifying that §321(a) was added to address concerns about "the extent to which the Clean Air Act or other factors are responsible for plant shutdowns, decisions not to build new plants, and consequent losses of employment opportunities."[4]

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[1] 42 U.S.C. §7621(a).
[2] Final Order at 2.
[3] *Id.* at 3.
[4] H.R. Rep. 95-294, at 316, 1977 U.S.C.C.A.N. 1077,1395.

Considering the practical impact of §321(a), the court observed that EPA must both track and monitor the effects of the Clean Air Act and its implementing regulations on employment, and evaluate the **cause of specific** job dislocations.[5] Thus, EPA is both **prospectively** investigating threatened plant closures or reductions in employment and **retrospectively** evaluating any actual closures or reductions which are alleged to have occurred because of CAA requirements.[6]

The court noted that evidence had been introduced that EPA itself had developed a evaluation tool called the Economic Dislocation Early Warning System ("EDEWS"), which the agency used beginning in 1972 to identify at-risk workers, track actual worker dislocations and potential community impacts, and identify root causes.[7] Through the EDEWS program, EPA was able to identify threatened, actual, and avoided worker dislocations. The program was intended to bring into play any government program available to provide financial assistance which would **prevent plant closings or production curtailments**.[8] In the first ten years, the EDEWS program identified actual closures or curtailments at 155 plants and the dislocation of 32,899 workers resulting from environmental requirements.[9]

In response to requests from six Senators in 2009, two House members in 2010, a 2011 request from the House Oversight Committee, another 2011 request from Senator Vitter, a request from the Senate Environment and Public Works Committee in 2013, and a request from the House Science Committee in November 2013, EPA consistently argued that it interpreted §321(a) not to require any analysis apart from the standard Regulatory Impact Analysis (RIAs), and any further analysis would be of "limited utility."[10]

After finding that the record shows that RIAs do not satisfy the objectives of §321(a) because they seek essentially different information, the court next found that EPA's Science Advisory Board **already** reviewed EPA guidelines for estimating plant closures and employment impacts, but stated that EPA inexplicably deleted sections of the guidelines that dealt with these effects.[11]

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[5] Final Order at 9.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 11.
[9] *Id.*
[10] *Id.* at11-15.
[11] *Id.* at 19-20.

The court next stated that "EPA cannot redefine statutes to avoid complying with them. The record in this case demonstrates hostility on the part of the EPA to doing what is ordered by §321(a)."[12]

The court ordered EPA to (a) prepare and submit to the Court a §321(a) evaluation of the coal industry and other entities affected by **the rules and regulations affecting the coal mining and power generating industries** as expeditiously as possible and by **no later than July 1, 2017**, (b) identify facilities at risk of closure or loss of employment because of regulations, (c) evaluate the impacts of plant closures or loss of employment on communities and familites, (d) evaluate coal mines and coal-fired power plants that have closed reduced employment since January 2009, and evaluate whether CAA requirements caused the impacts, and (e) identify impacts on subpopulations such as minority groups.[13]

EPA is further ordered to show by **December 31, 2017** that it has adopted measure to comply with §321(a) in the future.

EPA's Appeal of the Order

On February 3, 2017, EPA appealed the court's order to the Fourth Circuit Court of Appeals. The agency requested that the appeals court set an expedited schedule for the case. EPA seeks an expedited schedule based on its assertion that the order imposes a "significant" burden. EPA specifically cites the difficulty in obtaining the data for a §321(a) analysis and complying with OMB's information collection requirements and Information Quality Act by July 1, 2017. Under the schedule proposed by EPA, Murray Energy would have to file its brief with the Fourth Circuit by **March 31, 2017**.

On February 8, the Fourth Circuit consolidated EPA's appeal of the January 11, 2017 order with the Obama administration's earlier appeal of the October 21, 2016 order. The Court also consolidated an appeal by three West Virginia environmental groups of the district court's denial of their request to intervene in the lawsuit. The environmental groups are known as the Mon Valley Clean Air Coalition.

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[12] *Id.* at 21.
[13] *Id.* at 26-27.

The Importance of the *Murray Energy* Decision

In 1977, Congress was clearly concerned that major environmental regulations were having major economic effects on key industries (steel, mining, autos, energy, etc.). Section 321 of the Clean Air Act, and equivalent sections of other statutes, were incorporated into environmental statutes to help manage the balance between economic growth and environmental protection. By getting essentially real-time data on prospective and retrospective employment effects of regulations, Congress and the public would get critical information about the desired stringency and timing of major new requirements. Major new requirements for a specific industry could be phased in and/or sequenced with contemporaneous rules to avoid overwhelming that industry. Workers in an industry likely to be hard hit by environmental rules could get early warning of difficult times ahead. And EPA would have a better sense of economic tradeoffs anticipated as a result of new environmental restrictions.

When EPA refused to comply with §321, and took the stance that an employment analysis has "limited utility," Congress and the public lost the opportunity to make "mid-course corrections" to the environmental regulatory effort. The ***Murray Energy*** decision restores the opportunity to have EPA account for the localized employment consequences of EPA's wide-scale regulation of the economy. Because the employment consequences are so critical in coal communities and other struggling areas of the country, it is critical that the district court's decision stands.

Recommended Action

EPA and the Department of Justice (DOJ) have the option to cease the appeal of the ***Murray Energy*** case and withdraw. This would mean that EPA will be required to comply with the district court's January 11, 2017 order. As discussed above there are important policy reasons to withdraw the appeal and take steps to complete a §321(a) evaluation in accordance with the district court's order.

As the district court has noted, Congress unambiguously directed EPA to conduct § 321(a) studies on a continuous basis. EPA has never complied with the statutory mandate. This type of information, which Congress believed was sufficiently important to include similar employment evaluation requirements in other environmental statutes such as the Clean Water Act,[14] is more valuable than ever as

[14] 33 U.S.C. § 1367(e).

the new administration considers policy changes at EPA. It is critically important that EPA now establishes a strong precedent of conducting this evaluation and signaling that job losses and job displacements are taken seriously in this new administration.

EPA should instruct DOJ to take immediate action to withdraw its appeal of *Murray Energy Corp. v. McCarthy*.