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Confronting EPA's Refusal To Consider Industry Costs

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Law360, New York (October 31, 2016, 4:06 PM EDT) --Over the past several years, the U.S. Environmental Protection Agency has asserted broad authority under federal statutes such as the Clean Air Act, imposing stringent regulations against the energy industry. Recently, for example, the EPA finalized the Clean Power Plan, which would establish stringent national carbon emission standards and push energy producers to switch from coal to natural gas and renewable resources.[1] In its press releases and impact analyses, the EPA has justified itself by touting the benefits of its actions. But what about the costs?

It is a fundamental principle of federal administrative law that agencies must consider both the advantages and disadvantages of their actions. Yet, time after time, the EPA has given short shrift to the question of cost, imposing draconian regulations based on skewed cost-benefit analyses and, often, failing to consider costs altogether.

Faced with overbearing regulations and enforcement actions, regulated industries and affected states have mounted a robust opposition in the courts, alleging that the EPA's actions are both unreasonable and beyond its statutory authority. These efforts appear to be paying off. As shown by a series of recent federal court decisions, courts are increasingly pushing back against the EPA's failure to consider the potential consequences of its actions. These decisions are clear victories for rational regulatory policy, affirming that agencies such as the EPA are required to take into account all of the relevant factors before taking action, including the costs of compliance and any detrimental effects on employment or the economy.

In Murray Energy Corporation v. EPA,[2] the U.S. District Court for the Northern District of West Virginia ruled that the EPA has a nondiscretionary duty to monitor and evaluate how its regulations affect employment, particularly in the coal industry. As described in a recent Law 360 article,[3] the dispute in Murray Energy centered on Section 321(a) of the Clean Air Act, which provides that the EPA "shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement" of the law, "including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement."[4]

Plaintiff Murray Energy contended that the EPA's enforcement of the CAA, coupled with its refusal to evaluate the impacts its policies and actions are having on workers, is irreparably harming "the American coal industry and the hundreds of thousands of people it directly or indirectly employs."[5] The EPA argued, inter alia, that Section 321 does not create a nondiscretionary duty and that, in any event, the EPA was fully complying with Section 321(a). The court granted summary judgment to Murray Energy, rejecting the EPA's arguments on all counts.

The district court found that Section 321(a)'s plain language constitutes a direct order: The EPA "shall conduct" evaluations of potential loss or shifts of employment on a continuing basis. Although the EPA asserted that the statute imposed no obligation to fulfill its requirements by a specific date, the court dismissed this argument: "While the EPA may have discretion as to the timing of [employment evaluations], it does not have the discretion to categorically refuse to conduct any such evaluations, which is the allegation of the plaintiffs."[6] The court quoted the Second Circuit, stating that "[n]o discernible ... purpose is served by creating [a] bureaucratic twilight zone, in which many of the act's purposes might become subject to evasion."[7] Accordingly, the court ordered the EPA to file a plan to conduct Section 321(a) evaluations within 14 days of the date of the order. Failure to take into account the effect of the EPA's regulations on the coal industry, in particular, would be "an abuse of discretion."[8]

The Murray Energy decision comes on the heels of other recent, high-profile decisions reining in similar EPA attempts to expand its authority by ignoring statutory commands to consider costs. In Michigan v. EPA,[9] the U.S. Supreme Court overruled the EPA's proposal to regulate hazardous air pollutants from power plants, holding that the agency acted unreasonably in refusing to consider the potential financial consequences of its proposed regulations. Congress had directed the EPA to regulate power plants if the agency found regulation "appropriate and necessary."[10] The Supreme Court held that that "capacious[]" phrase is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors," including cost.[11] As the court explained, "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[12]

Following along with the reasoning of the Supreme Court in Michigan, the D.C. Circuit recently reversed an EPA rule exempting backup generators from emission requirements because the agency failed to adequately respond to concerns raised about the exemption's effect on grid efficiency and reliability. In Delaware Department of Natural Resources v. EPA,[13] energy companies showed that the rule would create incentives for backup generators to flood the market, raising costs for more efficient, traditional power generators. The D.C. Circuit found that the EPA "refused to engage with the commenters' dynamic markets argument" and criticized the agency for promulgating a rule that was "arbitrary and capricious."[14]

These decisions affirm a central principle of administrative law — that agencies must evaluate both the benefits and the costs of a proposed agency action. As the Supreme Court explained in Michigan, "administrative agencies are required to engage in reasoned decision making."[15] Accordingly, an agency must consider all of the factors relevant to the particular decision facing the agency, including costs.

The EPA's continued failure to consider the full consequences of its regulations is especially troubling in light of its refusal to comply with basic statutory requirements in carrying out its mission. As the Murray Energy court explained, "[w]ith specific statutory provisions like Section 321(a), 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. The legislative record for these statutory provisions, as well as Supreme Court precedent, confirm this purpose."[16] Such requirements not only promote rational regulatory policy; they can also serve an important oversight purpose, alerting the public and Congress of the actual consequences of the EPA's actions.

The Murray Energy case, in particular, illustrates the harm that can follow from the EPA's refusal to comply with congressionally mandated procedures. Section 321(a) plays an important role in the CAA's statutory scheme. The provision requires the EPA to evaluate and document job losses and shifts of

employment from one region or sector to another, the kind of localized, real-world impacts that the EPA tends to overlook in its broader focus on public health and welfare. These costs are ultimately borne by the hundreds of thousands of ordinary Americans whose livelihoods depend on the jobs created by regulated industries.

Frankly, it comes as little surprise that the EPA continues to ignore the directives of Congress; the agency has acted with total disregard of its legislative mandate for years. Its "we know best" attitude toward regulating industry has placed a high burden on our economy with minimal benefit to public health or the environment. Regardless of whether the EPA determines that the environmental benefits of its policies will outweigh the job-related costs, the EPA must at least pretend to consider these impacts by conducting the evaluations required by Section 321(a).

The rulings discussed above do not direct the EPA to reach specific conclusions. But the EPA's conclusions must be reasonable, and it must comply with the administrative procedures required by law. Unfortunately, the EPA's recent refusal to consider costs fits into a general pattern of recklessness and evasion of accountability. Hopefully, courts will remain vigilant in evaluating the EPA's politically motivated decision making to ensure that provisions like those at issue in Murray Energy and Michigan achieve their intended purpose: promoting rational regulatory policy and providing a much-needed measure of public and congressional oversight.

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[1] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

[2] No. 5:14-cv-00039, 2016 WL 6083946 (N.D.W. Va. Oct. 17, 2016).

[3] Keith Goldberg, EPA Ordered to Examine Air Regs' Impact on Coal Jobs, Law 360 (Oct. 17, 2016), http://www.law360.com/articles/852426/epa-ordered-to-examine-air-regs-impact-on-coal-jobs?article_related_content=1.

[4] 42 U.S.C. § 7621(a).

[5] Murray Energy, 2016 WL 6083946, at *1.

[6] Id. at *9.

[7] Id. at *8, quoting Environmental Defense Fund v. Thomas, 870 F.2d 892, 900 (2d Cir. 1989).

[8] Id. at *28.

[9] 135 S. Ct. 2699 (2015).

[10] 42 U.S.C. § 7412(n)(1)(a).

[11] Michigan, 135 S. Ct. at 2707.

[12] Id.

[13] Delaware Department of Natural Resources & Environmental Control v. EPA, 785 F.3d 1 (D.C. Cir. 2015).

[14] Id. at 15-16.

[15] Michigan, 135 S. Ct. at 2706 (internal citation and quotation marks omitted).

[16] Murray Energy, 2016 WL 6083946, at 17.
