

EXPERT ANALYSIS

Is EPA Ignoring Clean Air Act Mandate to Analyze Impact of Regulations on jobs?

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Common sense tells us that when the law instructs us to do something, it is not a suggestion but a requirement. Likewise, when the law instructs a federal agency to do something, it follows that the agency must also comply with statutory requirements. A recent lawsuit against the Environmental Protection Agency, however, alleges that the agency has for decades systematically failed to do just that, essentially ignoring a requirement under the Clean Air Act to conduct ongoing employment impact analyses of its regulations.

In *Murray Energy Corp. v. McCarthy*,¹ a group of energy companies is suing the EPA for failing to comply with a section of the CAA that requires the agency to “conduct continuing evaluations of potential loss or shifts of employment” from the act’s regulations, administration, and enforcement.² The energy company plaintiffs, which together employ over 7,200 coal industry workers, allege that the EPA’s “refusal to evaluate the impact [its] actions are having on the American coal industry and the hundreds of thousands of people it directly or indirectly employs, will irreparably harm plaintiffs if allowed to continue unchecked.”³ The employers seek an order compelling the EPA to conduct the job analyses and enjoining the agency from promulgating new regulations impacting the coal industry until it does so.

THE CAA REQUIREMENT FOR A JOB IMPACT ANALYSIS

Congress enacted the CAA in an effort to control and reduce air pollution. It set up a regulatory regime that gives the EPA broad authority to regulate specific emissions from a wide variety of sources. Congress, though, did not grant the EPA carte blanche authority to adopt whatever regulations it sought fit; rather, in certain provisions it required the EPA to carefully consider the economic impact of its proposed regulatory regimes.⁴ Specifically, Congress adopted Section 321(a) of the CAA in 1977 to require the EPA to conduct *ongoing* job impact analyses of its regulations.⁵

Section 321(a) is simple and straightforward. It is titled “Continuous Evaluation of Potential Loss or Shifts of Employment” and states in its entirety the following:

The [EPA] administrator shall conduct continuing evaluations of potential loss or shifts of employment, which may result from the administration or enforcement of the provisions of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.⁶

Consequently, measuring the impact of CAA regulations on jobs is intended to be a comprehensive, ongoing responsibility to analyze the job impact of the EPA’s regulatory regimes, the opportunity cost of complying with CAA regulations, and the costs of enforcement actions. Section 321(a)’s enactment was an express recognition that while the CAA can, and has, achieved improvements in air quality, there can be a trade-off between environmental regulations and the ability of companies to engage in their business endeavors which affects hiring and retaining employees.

Energy companies say the EPA's "refusal to evaluate the impact [its] actions are having on the American coal industry and the hundreds of thousands of people it directly or indirectly employs, will irreparably harm plaintiffs if allowed to continue unchecked."

Indeed, CAA regulations are often highly detailed and enforced through hefty fines, and, in some instances, criminal prosecution. According to an EPA study, the estimated costs to achieve compliance with the CAA between 1970 and 1990 totaled \$520 billion in 1990 dollars.⁷ By 2020, according to a more recent EPA study, the cost of complying with the CAA will balloon to \$65 billion annually.⁸ These statistics do not include the job impacts on local communities when regulation makes an otherwise economically viable endeavor unworkable. Congress wanted to make sure that the environmental benefit achieved under the CAA is not outweighed by these costs, particularly when jobs are concerned.

EPA'S POSITION REGARDING SECTION 321(A)

The EPA's stance on Section 321(a) is strained, at best. The agency argues that Section 321(a), despite its plain language, does not require the EPA to conduct job impact studies. It acknowledges that it has not conducted such a study on CAA regulations for decades.

The issue surfaced when Gina McCarthy, the current EPA administrator, sat for her confirmation hearing. U.S. Sen. David Vitter, R-La., asked McCarthy whether the agency had performed any evaluation of the CAA pursuant to Section 321(a), and she replied that the "EPA has not interpreted this provision to require EPA to conduct employment investigations in taking regulatory actions."⁹ She continued that the "EPA has found no records indicating that any administration since 1977 has interpreted Section 321 to require job impacts analysis for rulemaking actions."¹⁰

McCarthy said the EPA, instead, takes the position that Section 321(a) was "intended to protect employees in individual companies by providing a mechanism for EPA to investigate allegations that specific requirements, including enforcement actions, *as applied to those individual companies*, would result in lay-offs."¹¹ Thus, the EPA suggests that Section 321(a) was not a congressional check on agency authority, but, instead, another vehicle for the EPA to regulate industry.

This explanation is inconsistent with the plain language of the statute. The statute requires "continuing" evaluations of "potential" employment loss or "shifts of employment." Such general terms are directly at odds with the EPA's assertion that Section 321(a) requires specific, individual studies of job loss on a case-by-case basis.

A report of the House Interstate and Foreign Commerce Committee supports this argument. The report includes the following passage on the pending legislation that would become Section 321(a):

Under this provision, the administrator is mandated to undertake an ongoing evaluation of job losses and employment shifts due to requirements of the act. This evaluation is to include investigations of threatened plant closures or reductions in employment allegedly due to requirements of the act or any actual closures or reductions which are alleged to have occurred because of such requirements.¹²

MURRAY ENERGY CORP. V. MCCARTHY AND EPA'S FAILURE TO COMPLY WITH SECTION 321(A)

A dozen employers associated with the coal industry brought the *Murray Energy Corp.* lawsuit in federal district court alleging that "[i]n the past five years, EPA has administered and enforced the Clean Air Act in a manner that places immense pressure on the electric generating sector — and other industries that traditionally burn coal — to reduce their consumption of coal."¹³ The plaintiffs assert that the EPA, rather than continuing its traditional approach of seeking sustained, incremental improvements in air quality from coal operations, is using its regulatory and enforcement authority to wage a "war on coal."¹⁴

For example, the plaintiffs specifically allege the EPA is promulgating regulations "that are more onerous for facilities burning coal than facilities burning other types of fuel."¹⁵ They also identify various regulatory examples to support claims that the EPA is "selectively targeting coal-fired emission sources for additional regulation," developing "proposed regulations that discourage the construction of new coal-fired power plants," and "engaging in enforcement activities that have targeted coal-fired sources."¹⁶

The plaintiffs' complaint additionally states that, as a result of these new regulations and enforcement actions, "numerous coal-fired power plants have been idled, shut down, or converted to other fuels."¹⁷ "Since 2010 alone, it has been estimated that 330 coal-fired electric generating units across the nation have been or are retiring or converting to other fuels."¹⁸ The net effect, the complaint continues, is that "national coal mine employment has dropped nearly 20 percent in the past two years, from a high of about 94,000 jobs in the fourth quarter of 2011 to about 77,000 people today."¹⁹ Yet, the EPA has not done a job impact analysis pursuant to Section 321(a).

To remedy this situation, the plaintiffs are requesting an order requiring the EPA to evaluate whether its implementation of the CAA over the past six years has resulted in "job losses or shifts in the coal industry."²⁰ In addition, the plaintiffs seek to enjoin the EPA from enacting new regulations under the CAA affecting employment in the coal industry until the EPA has completed this evaluation.²¹

IMPLICATIONS IF PLAINTIFFS PREVAIL

Murray Energy Corp. could add valuable grist to the public policy mill of CAA regulations by addressing the EPA's acknowledged decades-long failure to follow Section 321(a). If the plaintiffs succeed, the EPA would have to evaluate the job impact of existing and new regulatory regimes. Congress, the administration and the public could then have the debate Congress envisioned when it enacted Section 321(a): Is the trade-off in job losses worth the environmental benefits that are actually being achieved by the regulations?

The importance of this debate is also heightened in light of newly announced proposals that threaten jobs in the electric generating sector and other industries that traditionally burn coal. On June 1, for example, the Obama administration announced a proposed rule requiring a 30 percent reduction in carbon dioxide emissions from power plants by 2030.²²

Right now, the impact of such initiatives on employment is considered only during the standard regulatory impact analysis when a regulation is proposed.²³ But, there is no check on RIA hypotheses. Section 321(a) analyses would provide new information about whether job impacts estimated during RIAs were accurate or wildly missed the mark once regulations became effective.

The results could go either way. If job impacts were more negative than anticipated, it could prompt amendment of a regulation or perhaps even corrective action by Congress. Alternatively, a Section 321(a) job impact analysis could show that there was no significant adverse impact and that any employer/employee concerns about such losses were allayed, including by effective EPA management of its regulations. Congress likely understood the old maxim that what gets measured, gets managed.²⁴

With respect to the specific allegations in *Murray Energy Corp.*, a plaintiff victory would make it more difficult for any administration to use the EPA's statutory authority to promulgate CAA regulations in ways designed to achieve a political, rather than a regulatory agenda. The allegations that the EPA allegedly crossed this line here is likely the reason why the coal companies were the first to challenge the EPA on its Section 321(a) obligations. Coal companies, their workers and the communities they support (often singlehandedly) are fighting for their livelihoods as a direct result of the EPA's regulatory and enforcement agenda.

Just as the coal companies cannot skirt statutory requirements, the EPA must not either. No federal agency may pick and choose which requirements to follow or turn a blind eye to the impact of its regulatory decisions. Congress enacted Section 321(a) to provide a necessary "check" on EPA overreach under the CAA when the impact is not just about money, but people's jobs. The EPA should do its job and fulfill its obligations under the CAA. If it is unwilling to do so, *Murray Energy Corp.* could provide the courts with a vehicle to order the EPA to comply.

NOTES

¹ See Complaint for Declaratory and Injunctive Relief, *Murray Energy Corp. v. McCarthy*, No. 5:14-CV-00039, 2014 WL 1229925 (N.D. W. Va. Mar. 24, 2014).

² 42 U.S.C. § 7621(a).

Section 321(a) of the Clean Air Act requires the EPA to measure the impact of CAA regulations on jobs in order to analyze the job impact of the EPA's regulatory regimes, the opportunity cost of complying with CAA regulations, and the costs of enforcement actions.

According to a recent EPA study, by 2020, complying with the CAA will cost \$65 billion annually.

³ Murray Energy, Complaint at 3.

⁴ See, e.g., 42 U.S.C. § 7411(a)(1) (cost consideration required in setting new source performance standards); 42 U.S.C. § 7412(d)(2) (cost consideration required in setting emissions standards for hazardous air pollutants).

⁵ See Pub. L. No. 95-95, 91 Stat. 685 (1977).

⁶ 42 U.S.C. § 7621(a).

⁷ See U.S. ENVTL. PROT. AGENCY, OFFICE OF AIR AND RADIATION, *The Benefits and Costs of the CAA, 1970 to 1990*, at 8 (October 1997), available at http://www.epa.gov/cleanairactbenefits/1970-1990/chptr1_7.pdf.

⁸ See U.S. ENVTL. PROT. AGENCY, OFFICE OF AIR AND RADIATION, *The Benefits and Costs of the Clean Air Act from 1990 to 2020: Summary Report*, at 21 (March 2011), available at <http://www.epa.gov/cleanairactbenefits/feb11/summaryreport.pdf>.

⁹ Sen. David Vitter Questions for the Record, Gina McCarthy Confirmation Hearing, Environment and Public Works Committee, at 17, at http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9a1465d3-1490-4788-95d0-7d178b3dc320.

¹⁰ *Id.*

¹¹ *Id.* (emphasis added).

¹² H.R. Rep. No. 95-294, at 317 (1977).

¹³ Murray Energy, Complaint at 7.

¹⁴ *Id.*

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 8-9.

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 14.

²⁰ *Id.* at 21.

²¹ See *id.*

²² See EPA Seeks 30 Percent Cut In Power Plant Emissions, ASSOCIATED PRESS, June 2, 2014, available at <http://www.npr.org/2014/06/02/318078298/epa-seeks-30-percent-cuts-in-power-plant-emissions>.

²³ See, e.g., U.S. Envtl. Prot. Agency, Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants (June 2014).

²⁴ For example, in a recent decision upholding the mercury air toxics regulation, Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit criticized EPA for not considering the estimated \$9.6 billion annual cost to comply with this new CAA regulation. He explained that “EPA’s failure to do so is no trivial matter,” and that “[t]o put it in perspective, that amount would pay the annual health insurance premiums of about 2 million Americans. It would pay the annual salaries of about 200,000 members of the U.S. military. It would cover the annual budget of the entire National Park Service three times over.” *White Stallion Energy Ctr. v. EPA*, No. 12-1100, 2014 WL 1420294, at *34 (D.C. Cir. Apr. 15, 2014) (Kavanaugh, J. concurring in part and dissenting in part).



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