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Initial Challenge to Clean Power Plan Receives Rocky Reception

Apr 16, 2015

Reading Time : **1 min**

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Murray Energy invoked the All Writs Act, which authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law,"[2] and argued that EPA's interpretation of its legal authority was "final action." Neither argument appeared to gain much traction, since the court repeatedly pressed petitioners for precedent supporting judicial review of a proposed rule and queried why a challenge to the final rule would not be adequate. Only Judge Henderson expressed any sympathy for the contention that EPA's legal interpretation and subsequent public statements by Administrator McCarthy produced final action.

The substance of the petitioners' challenge presented issues only law school professors could love, including such arcane topics as conflicting provisions in the U.S. Code and the Statutes at Large and whether the court should defer to the Office of Law Revision Counsel, an office of the House of Representatives under the authority of the speaker. Murray Energy argued that the Clean Air Act precluded EPA from regulating nonhazardous emissions from sources already subject to regulation of hazardous emissions.

Murray Energy's argument derived from changes made during the 1990 Clean Air Act amendments and the reconciliation–or not–of competing House and Senate bills. Again, Judges Griffith and Kavanagh appeared skeptical of Murray Energy's attempts to characterize the statute as unambiguously precluding regulation under both Sections 111 and 112 of the Clean Air Act.

As if all this was not complicated enough, two additional developments clouded the outcome for petitioners. First, the court noted that EPA expects to issue a final rule this

summer, implicitly suggesting that Murray Energy's challenge could be made in that context. Second, the Supreme Court heard arguments last month on challenges to EPA's MATS rule, which imposed regulation of hazardous emissions on power plants for the first time. If the Court were to vacate the MATS rule, Murray Energy's dual regulation argument could be rendered moot. A decision from the D.C. Circuit in the Murray Energy challenge is expected late this year.

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[1] *In re: Murray Energy Corp.*, Nos. 14-1112 and 14-1151 and consolidated cases (D.C. Cir. argued April 16, 2015).

[2] 28 U.S. Code 1651(a).

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