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Murray Energy's Creative Argument Against the Clean Power Plan (/full-blog/2015/4/23/murrays-energys-creative-argument-against-the-clean-power-plan)

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(http://www.enn.com/image_for_articles/47447-1.jpg/medium)

The Clean Power Plan, proposed by the EPA last summer, spawned much controversy. The proposed rule seeks to reduce carbon emissions from coal plants by promulgating guidelines for the creation of "state-specific rate-based goals for carbon dioxide emissions from the power sector, as well as guidelines for states to follow in developing plans to achieve the state-specific goals."[i]

Though the EPA has not finalized the rule, Murray Energy Corporation filed a Petition for Extraordinary Wit soon after the EPA published the proposed rule in the Federal Register.[ii] Under the All Writs Act, federal courts may set aside agency action in accordance with "principles of the law."[iii] Generally, judicial review of an agency is available only after the agency has undergone a final action.[iv] The All Writs Act, though, permits judicial review of a proposed rule, rather than the final rule, in "extraordinary circumstances."[v]

Murray argues that the EPA is acting beyond the scope of its authority, which constitutes an "extraordinary circumstance." The EPA, relying on Section 112 of the Clean Air Act (CAA), promulgated a rule in 2012 setting emission standards on existing power plants.[vi] Given the existing rule, Murray argues EPA's Clean Power Plan, promulgated under Section 111, is an ultra vires action because Section 111 prohibits mandating standards for emissions that are not "from a source category which is regulated under Section 112."[vii] Because, in Murray's view, the 2012 rule regulates a source category, the Clean Power Plan is contrary to the CAA.

Murray's interpretation relies on the House's 1990 amendment to the CAA, which competes with the Senate's amendment.[viii] The House version includes the above quoted portion, while the Senate version simply cross-references Section 112.[ix]

The EPA couches its argument in this ambiguity. First, the EPA's reply brief challenged Murray's standing and the ripeness of the issue, while reiterating that the Clean Power Plan is not a final rule and that the All Writs Act is used in very special circumstances.[x] With regard to the merits of Murray's claim, the EPA asserts the court should afford it Chevron deference based on the textual ambiguities within Section 111, drawing support from legislative history, structure, purpose, and context of the CAA.[xi] Though the House's version gives Murray's argument more credence, the EPA argues ambiguities create the need for agency deference.[xii] The EPA adds that, when faced with competing amendments, the need for agency deference grows.[xiii]

[i] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed.Reg. 34,830 (June 18, 2014). https://www.federalregister.gov/articles/2014/06/18/2014-13726/carbon-pollution-emission-guidelines-for-existing-stationary-sources-electric-utility-generating.

[ii] *See generally*, Petition for Extraordinary Wit, *Murray Energy Co. v. E.P.A.*, No. 14-1112 (D.C. Cir. filed June 18, 2014).

[iii] All Writs Act, 28 U.S.C.A. § 1651 (2012).

[iv] Administrative Procedure Act, 5 U.S.C. § 704 (2012).

[v] Aluminum Co. of Am. v. United States, 790 F.2d 938, 942 (D.C. Cir. 1986).

[vi] Federal Register, *supra*, note 1.

[vii] Clean Air Act, 42 U.S.C. §112, §7412 (2012).

[viii] *See* EPA Reply Br., at 6, *Murray Energy Co. v. E.P.A.*, No. 14-1112 (D.C. Cir. filed June 18, 2014).

[ix] *Id.*

[x] *Id.* at iv.

[xi] *Id.* at 41.

[xii] *Id.* at 45.

[xiii] *See id.* at 46.

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