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EPA Must Consider Regulatory Impacts on Coal/Utility Industry Jobs and Plant Closure

By Denise Dragoo, Snell & Wilmer

On October 17, 2016, the U.S. District Court for the Northern District of West Virginia granted summary judgment to Murray Energy Corporation and its subsidiary coal companies, including UtahAmerican Energy, Inc. The decision requires the United States Environmental Protection Agency (EPA) to follow the mandate of Section 321(a) of the Clean Air Act, 42 U.S.C. Section 7621(a). This provision requires EPA to evaluate plant closures or reductions in employment that may result from its administration or enforcement of the federal Clean Air Act. Murray Energy Corporation alleged that EPA failed to consider the impacts of the Clean Power Plan and implementing regulations contributing to the shutdown of coal-fired power plants and reduction of employment in the utility and coal mining industries.

As set forth in the complaint, Murray Energy, its subsidiaries and co-plaintiffs comprise the largest underground coal mining operations in the United States and collectively employ more than 7,200 workers. The company alleged injury resulting from the actions of EPA causing a reduced market for coal which threatens its economic viability. The Court agreed that the injuries alleged by Murray Energy were

related to EPA's actions and the agency's failure to evaluate losses or shifts of employment related to its actions as required by CAA Section 321. EPA was required to file a schedule of compliance with Section 321 (a) within two weeks of the Court's memorandum opinion.

On October 31, 2016, EPA filed a qualified response to the Court which reserves the right to appeal. Citing the short time frame for compliance, EPA proposes a process rather than a compliance schedule. As a first step, EPA proposes to seek the scientific and technical advice of the EPA Science Advisory Board (the Board) as to the analytic tools and methodologies appropriate to undertaking the Section 321(a) economic analysis. EPA agreed to draft preliminary requests to the Board relating to the required employment evaluations, provide public notice of these requests and solicit public comment. These procedures are needed in EPA's view to comply with the Federal Advisory Committee Act, 5 U.S.C. app Section 3(2)(1972).

The estimated timing for this procedure set forth in the EPA's response is more than two years. Clearly, given the current impact on the coal industry

of EPA's proposed Clean Power Plan and other CAA regulations, a two-year delay in the economic analysis is not acceptable. Murray Energy Corporation Chairman, President and CEO Robert E. Murray, found the EPA's response to be a clear admission of EPA's failure to comply with the CAA or the court order stating, "Indeed, the Obama EPA has plainly admitted in their filing that they have never counted the job losses required under Section 321(a) of the Clean Air Act of 1971 and will require up to two years to do so. They have totally flouted and ignored the law and the court."¹

Commentators have suggested that the economic analysis required by Section 321 is informational only and will have no substantive impact on EPA's regulations.² In fact, this ruling and EPA's two-year compliance plan comes too late for at least one power plant in Utah. The Carbon Plant located near Helper, Utah was forced into early retirement last year due to the cost of retrofits needed to meet EPA's mercury emission standards.³ Closure resulted in the loss of 74 jobs in Carbon County and was only one of an estimated 150 coal-fired power plants shuttered since 2010. The decline of the coal market was also a factor in

PacifiCorp's decision to shut down the Deer Creek Coal Mine in December 2015. This closure resulted in the loss of 182 jobs in Emery County, Utah.⁴

However, even at this late date, an analysis as required by CAA Section 321(a) would help confirm the importance of coal mining and the coal-fired power plants to the Utah economy. In 2013, Utah's coal industry contributed some \$887 million to Utah's economy, generated more than 2,000 jobs and contributed significantly to the tax base of rural counties in the State.⁵ More than seventy percent of Utah's power is generated by coal-fired plants.⁶ This contributes to keeping the average price of electricity per kWh significantly below that of many other Western States. The Section 321 (a) analysis could be influential in determining the future of two coal fired-generating units at the Intermountain Power Project in Delta, Utah. IPP's long term coal supply agreements with California come to

an end in 2027; however IPA is committed to providing coal-fired power from these units so long as there is a market for the power.⁷

If the Court or the plaintiffs in this proceeding can require EPA to produce the Section 321(a) economic analysis in a meaningful timeframe, it may be a significant help to the coal mining industry. The detailed analysis of regulatory impacts on jobs and plant closure may inform the decisions of the EPA and those who oversee their actions.

Denise A. Dragoo is a partner with the Salt Lake City office of Snell & Wilmer. Dragoo focuses her practice in natural resources and environmental law, including coal, water, mining, public land, and issues affecting energy-related minerals and the oil and gas industry. She serves on Utah's Energy Advisory Council to the Governor's Office of Energy Development and on the Board of Directors, Utah Mining Association.

¹ Herald-Star, November 1, 2016. <http://www.heraldstaronline.com/news/local-news/2016/11/epa-issues-response>.

² Law360, October 18, 2016, Keith Goldberg, "Coal Co.'s Win Won't Diminish EPA's Regulatory Clout," <http://www.law360.com/energy/articles/85267/coal-co-s-win-won-t-diminish-epa-s-regulatory-clout>.

³ The Salt Lake Tribune, October 21, 2013, Brian Maffly, "Utah's Carbon Power Plant heads for early retirement."

⁴ The Salt Lake Tribune, July 7, 2015, Mike Gorrell and Michael McFall, "Emery County mine to shut down; 182 losing their jobs."

⁵ 2015 Report by Applied Analysis. http://energy.utah.gov/wp-content/uploads/UtahsEnergyEconomy_EconomicImpactAssessment.2015.compressed.pdf

⁶ Energy Information Administration power pricing tables. <http://www.eia.gov/totalenergy/data/monthly/archive/00351607.pdf>

⁷ "Renew IPP, Securing the Long Term Future of a Major Contributor to Utah's Economy." Intermountain Power Agency, www.ipautah.com.

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DENISE DRAGOO | 801.257.1998 | DDRAGOO@SWLAW.COM
GATEWAY TOWER WEST | 15 WEST SOUTH TEMPLE | SUITE 1200 | SALT LAKE CITY, UT 84101
DENVER | LAS VEGAS | LOS ANGELES | LOS CABOS | ORANGE COUNTY | PHOENIX | RENO | **SALT LAKE CITY** | TUCSON