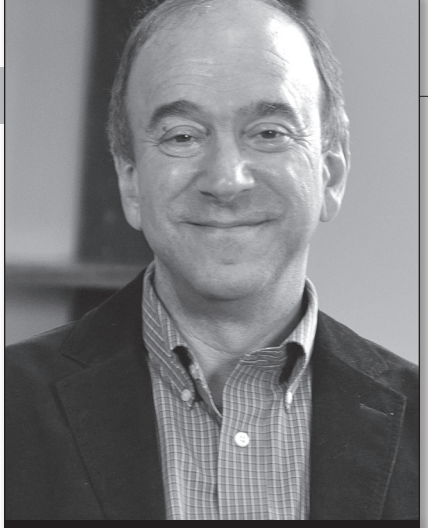
A District Court Admonishes EPA; Will the White House Now Pile On?



Richard Lazarus is the Howard J. and Katherine W. Aibel Professor of Law at Harvard University. He can be reached at lazarus@law.harvard.edu.

The formal transition of power from President Barack Obama to President Donald Trump occurred in an instant at noon on January 20, but it takes many months for a new president to achieve meaningful control. One great challenge that a new administration faces is to get a handle on pending litigation, which does not wait for the new appointees to be confirmed and settle in. As of 12:01 p.m., decisions must immediately be made whether current legal positions will be maintained, modified, or abandoned.

An otherwise seemingly incidental recent federal district court ruling in West Virginia offers an early opportunity to take the measure of the new administration in meeting this challenge. In *Murray Energy v. McCarthy,* decided little more than a week before the inauguration, the trial judge agreed with the plaintiffs that Section 321(a) of the Clean Air Act imposes on EPA a nondiscretionary duty to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration of the" CAA. Further, these "includ[e] where appropriate, investigating threatened plant closures or reductions in employment resulting from such administration or enforcement." The court admonished the agency for what the court described as "hostility" both to making public the job losses caused by the CAA and to considering those losses in deciding how best to administer the statute.

In certain respects, the decision is unremarkable. Section 321(a)'s requirement of a study of employment dislocations and losses is readily susceptible to being read as nondiscretionary if for no other reason than its threshold wording that "the administrator shall." Nor was the judge wholly out of bounds in rejecting EPA's backup argument that its routine preparation of regulatory impact analyses accompanying agency rules could be retroactively deemed agency compliance with 321(a). EPA's argument was necessarily undermined by its repeated acknowledgment in response to congressional inquiries that it had not prepared any 321(a) analysis for more than three decades. And, Section 321(a)'s focus on job loss and dislocation at specific plants is different from the kind of generic RIA analysis of employment impacts covered.

What was instead more remarkable was the judge's undisguised disdain for the federal agency. Twice, the court's opinion explicitly embraced industry's characterization of EPA policy as a "war on coal." The court also permitted the plaintiffs to engage in months of intrusive discovery of agency decisionmaking, capped off by ordering a deposition of the administrator, which the Fourth Circuit overruled by writ of mandamus.

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Finally, this past January, the judge ordered EPA to comply with Section 321(a) by July 1 by evaluating the impact on the coal industry jobs from EPA's administration of the CAA back to January 2009. The judge further ordered the agency to adopt measures to comply with Section 321(a) on an ongoing basis by the end of the year. The trial court, however, denied the plaintiffs' extravagant request to enjoin EPA in the interim from proposing or finalizing new CAA regulations affecting the coal industry.

EPA has filed a notice of appeal. But, of course, that was prior to the inauguration, and the incoming political appointees must now decide whether to abandon the appeal. The plaintiffs and their supporting amici can be expected to urge abandonment. After all, the new president campaigned in West Virginia with the promise to restore coals jobs lost there due to the CAA.

Career EPA employees, however, are likely to favor appeal because there are strong jurisdictional grounds for reversal. The agency's position on the discretionary nature of Section 321(a) reviews in decisionmaking was also hardly the creature of the Obama administration. The decision to discontinue their regular preparation finds its origins in 1982, during the Reagan administration.

Even more interesting still, much of the impetus for Section 321(a)'s inclusion in the 1977 Clean Air Act Amendments came from air pollution control boosters such as Senator Ed Muskie (D-ME). They saw the provision as a way to dispel what they perceived as the myth perpetuated by industry "environmental blackmail": threatening to close plants and blaming environmental protection laws for resulting job losses and plant closures.

Should EPA decide to maintain the appeal notwithstanding the likely political pressure to the contrary, that step will suggest that the new administration may be more incremental in modifying longstanding agency policy. By contrast, should EPA instead abandon the appeal, agree to comply with the court orders, and further volunteer to subject itself to the moratorium on CAA rulemaking unsuccessfully sought by the *Murray Energy* plaintiffs, there is reason to anticipate potentially seismic changes at EPA.

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