Published on *The National Law Review* https://natlawreview.com

First Litigation Challenge to EPA's Greenhouse Gas Rule

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The First Litigation Challenge to EPA's Greenhouse Gas (GHG) Rule is likely to be decided fairly soon after the December 1, 2014 deadline for comments on the rule. Two separate suits brought by Murray Coal Corp. ask the D.C. Circuit to bar EPA from proceeding with the rulemaking, on the ground that EPA has no legal authority to regulate GHG emissions from existing fossil-fuel fired electricity generating plants. Murray claims that section 111(d) of the Clean Air Act "expressly prohibits" EPA from regulating such those GHG emissions. Murray's final brief is due November 17., and given the importance of the issue and the close of the comment period on December 1 – after which EPA will begin addressing the comments — it is reasonable toGiven the importance of the rule and this schedule, many expect to the D.C. Circuit to issue a ruling reasonably promptly.

To recap, on June 2 EPA proposed its Clean Power Plan to require states to meet emission budgets for GHG pollution from existing power plants. On October 28, issued a notice of data availability and issued a supplemental proposal shifting in some respects how those budgets would be calculated and how compliance would be demonstrated. Comments on the main rule proposal close on December 1 and on the supplemental proposal on December 19. Thus, the rulemaking schedule and the court's briefing schedule roughly coincide. After December 19, EPA is likely to begin considering comments and is free to issue the final rule whenever it has completed that task.

Murray brought one suit under a Clean Air Act provision authorizing judicial review of "final action" by EPA; the other suit seeks an "extraordinary writ" to prohibit EPA from proceeding with the rulemaking. EPA responded to both suits by claiming they are premature, because the court has no jurisdiction to address the merits of what section 111(d) allows until the conclusion of the EPA's rulemaking process. It is well-established in federal administrative law that generally, regulations can be challenged only when issued in final form. That principle allows agencies to address comments they receive during the rulemaking process (including comments addressed to the agency's legal authority), and to make adjustments to proposed rules based on comments received. Murray claims, however, that EPA's decision to issue the GHG rule represents "final action" that is reviewable now, and nothing that happens during the rulemaking will change the nature of the "pure legal question" concerning EPA's statutory authority that both of its suits present.

The steps necessary to achieve the significant GHG reductions called for bythat will result from EPA's regulation will would have a severe adverse impact on Murray's coal business, which has led Murray to make legal arguments supporting the current reviewability of the proposed rule that are both aggressive and creative. Nonetheless, most observers expect the D.C. Circuit to apply the

general rule that regulations can only be challenged when issued in final form, and thus dismiss both of Murray's suits as premature. Regardless of the outcome, however, we doubt that the court will let EPA get very far into the process of analyzing and responding to comments before issuing a ruling in the two Murray cases. What is even more clear is that this is only the first of what is likely to be a large number of lawsuits challenging all or part of the EPA GHG rule and/or one or more of the GHG reduction plans that the rule when finalized will require each of the 50 states to prepare.

National Law Review, Volume IV, Number 314