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Clean Power Plan ignores 70 years of competent energy regulation, challengers say

By Annalee Grant

In the wake of a flurry of lawsuits filed against the U.S. EPA's Clean Power Plan since it was published in the Federal Register on Oct. 23, the picture of which legal arguments may ultimately make their way before the courts became clearer as states followed up with requests to stay the carbon rule while those suits are being litigated.

Although those wishing to challenge the Clean Power Plan need only to file their intent to do so with the courts in the 60-day period following Federal Register publication, parties seeking a stay of the rule must show that they face "irreparable harm" absent the stay and that pausing the rule while it is challenged in the courts is in the public interest. The court will then decide whether the opponents are likely to win the case on its merits, and can either grant or deny the early stay request based on that decision. Legal experts believe a stay is unlikely as the parties will have difficulty proving they will suffer harm.

Several stay requests were filed with the U.S. Court of Appeals for the District of Columbia Circuit by Oct. 27. One of those requests, filed jointly by the Utility Air Regulatory Group, American Public Power Association, four Southern Co. subsidiaries and others, questioned the EPA's use of "best system of emission reductions," which the agency shortened to BSER in the final rule. The utility petitioners argued that the agency is leveraging unprecedented Clean Air Act authority under the rarely used section that addresses BSER.

The EPA said in the rule that Section 111(d) of the Clean Air Act, under which the Clean Power Plan is promulgated, gives the agency authority to establish performance standards for existing fossil fuel-fired power plants. The standards must be achievable through adequately demonstrated emission reduction technologies such as scrubbers or operational processes. The rule pledges to cut CO2 emissions from existing power plants 32% — instead of 30% as initially proposed — as measured from a 2005 baseline by 2030.

"Now EPA purports to find … new authority to force CO2-emitting [power plants] to curtail their 'performance' or to shutter entirely in order to accomplish EPA's mandated emission reductions," the utility group petition argues. "This is because no single unit in the source category can achieve EPA's standards while continuing to perform, even through the use of technological controls or operational processes."

The utility petitioners said the EPA itself has claimed the Clean Power Plan will force the retirement of as much as 11 GW of coal-fired generation in 2016, and they asserted that the agency has overstepped its authority. "EPA … cannot show that Congress intended to allow any federal agency — much less one not even tasked with setting energy policy — to so radically restructure the nation's electricity system, bypassing all federal and state energy laws and the regulators that have overseen the industry for over seventy years," the petition said.

Several coal industry complainants, including Murray Energy Corp. and the National Mining Association, also took on the EPA's perceived lack of authority and the interpretation of BSER in their petition. Some legal experts have predicted that opponents will have a hard time proving irreparable harm because the compliance period begins in 2022, and coal petitioners in a nod to that argument said a stay is in the public interest because utilities will retire coal units rather than continue investing in them, which will result in another hit to struggling coal mining communities in the near term. "There is no public interest in laying off mining workers, depriving small rural communities of the revenue coal mining provides, and hollowing out state budgets that depend on taxes from coal production," the petition said.

The coal petitioners took issue with the EPA's performance standard for coal-fired generation — which the agency set at 1,305 lb/MWh — claiming that the current coal fleet averages about 2,200 lb/MWh and therefore the performance standard is impossible to achieve. They pointed out that the existing source rule is even more stringent than the new source rule, which was released the same day in August as the Clean Power Plan. The EPA "in reality … is implementing a program to force the substitution of natural gas and renewable power generation for coal-fired generation," the petition said.

In addition, the coal group's petition claimed that "delaying implementation of the rule for the time it takes to litigate this case will have no possible effect on the climate" because the Clean Power Plan, a pillar in President Barack Obama's climate change agenda, will have little impact on mitigating global temperature rise.

A coalition of states opposing the Clean Power Plan filed their own request for a stay in which they accused the EPA of picking "winners and losers in the energy field" and forcing states to participate. They claimed that energy policy should be left to the states and FERC.

The states argued that the EPA does not have the authority to force power plants or states to shift generation from so-called "dirtier" forms of energy to those the agency has dubbed as "cleaner." The EPA can only require power plants to add pollution control technology or operational and design advances, they said.

Section 111(d) "does not permit EPA to regulate the electric grid as a 'complex machine,' favor certain methods of energy generation as allegedly 'cleaner,' or premise emission reductions on the notion that the owners of a source of emissions can pay their 'cleaner' competitors to take their customers," that petition said, referring to the rule's preference for states setting up emissions trading programs.

The states cited the EPA's Supreme Court loss in June on the Mercury and Air Toxics Standards, which resulted in that rule being remanded back to the agency to re-consider the cost of compliance. At the time, the EPA said many utilities had already undertaken changes to their systems to comply with the rule that could not be reversed, and the states expressed concern that the same thing will likely happen for the Clean Power Plan if a stay is not granted.

Another high-profile Supreme Court opinion — *King vs. Burwell* — suggested that the EPA was invading regulatory territory that is traditionally performed by

states and the agency therefore should be granted no deference on the matter, the states argued. "EPA's view of Section 111(d) runs roughshod over states' sovereign rights, while asserting EPA authority over an area in which the agency has admitted it lacks expertise," the states' petition said.

Finally, among other things, all three petitions raised arguments that center on the long-debated dispute over the EPA's ability to regulate carbon under CAA Section 111(d) when existing sources are already regulated under Section 112. Petitioners also complained that the rule is not as flexible as perceived by the EPA, and that the timeline for developing state implementation plans is too short.