Monday, October 26, 2015 6:13 PM ET Exclusive

Opponents face difficult hurdles to prove Clean Power Plan's harm

By Annalee Grant

As has often been the case, the pending challenges to the U.S. EPA's Clean Power Plan will hinge on a few key statutory words that could make the difference between the rule rolling out as planned or a court intervention halting the rule in its tracks.

During the Mercury and Air Toxics Standards case that went all the way to the Supreme Court, the phrase "appropriate and necessary" was central to the argument of when the EPA had to consider the cost of complying with the rule. In the case of the Clean Power Plan, opponents will need to prove that they will suffer "irreparable harm" if the rule is allowed to proceed while being challenged in the courts. A coalition of states has already asked the U.S. Court of Appeals for the District of Columbia to stay the rule, calling it illegal and onerous.

The Clean Power Plan establishes statewide carbon dioxide emissions standards for existing fossil fuel-fired electric generating units with the goal of cutting CO2 emissions by 32% — instead of 30% as initially proposed — as measured from a 2005 baseline by 2030. The EPA published the final edition of the rule in the Federal Register Oct. 23, setting off a 60-day period for opponents to file legal challenges. The petitioners do not need to explain how they will challenge the rule, but must indicate their intent to do so.

Sierra Club Chief Climate Counsel Joanne Spalding explained during a media call Oct. 22 that petitioners will need to overcome "a high bar" for being granted a stay given the four hurdled they must overcome. The court will first need to look at the legal arguments submitted by the petitioners, which will later be used during the course of the trial, and determine whether the challenger is likely to win.

The petitioners will then have to clear the second hurdle showing that they will suffer irreparable harm in the time it takes to decide the case, which Spalding said is usually about a year. But the D.C. Circuit, which will hear the case, has a strict test to prove irreparable harm, and Spalding does not believe any of the Clean Power Plan's challengers will be able to meet the requirements because the rule does not begin to go into effect until 2022. Therefore, proving irreparable harm while a case grinds through the courts will be difficult to prove, Spalding suggested.

States that argue they do not have enough time to develop a state implementation plan for meeting the plan's requirements could have similar difficulties because plans are not due until September 2018 with a two year extension. Moreover, Spalding said states do not have to submit a plan but instead can use one the EPA develops for them. Many states, however, are opting to develop a plan even as they challenge the rule in the courts because they prefer to be in charge of their own energy futures.

The third hurdle petitioners' face is proving that the irreparable harm outweighs the harm of delaying the rule. And finally, petitioners must prove that the stay is in the public interest.

"Litigants must show that no harm will be done to anyone else if a stay is implemented. Many opponents of the rule have said both privately and publicly they are quite confident that the stay will be granted," said Elizabeth Gore, policy director at the firm Brownstein Hyatt Farber Schreck. "I am less certain of that." Gore, too, believes the irreparable harm test will be difficult for the petitioners to meet.

Even with the odds against them, many industry groups, utilities and states filed requests for a stay of the Clean Power Plan, as well as petitions for review. Opponents have until Dec. 22 to file suit against the rule.

Gore, a former White House staffer for former President Bill Clinton and a legislative director for two Democratic congressmen, expects the many cases will eventually be consolidated and will be heard in the first quarter of 2016.

Brian Potts, a partner at Foley & Lardner who has litigated the Clean Air Act and other environmental laws, said the preliminary requests for stay could be decided within four to six months. The D.C. Circuit responded to a similar request for stay of the Cross-State Air Pollution Rule in about five months.

As for a final timeline for the case, Gore thinks the D.C. Circuit could finish up by the end of 2016, and the losing party will have the option to appeal to the Supreme Court.

In other EPA-related news, the EPA published its new ozone standard Oct. 26.

Article amended at 9:25 a.m. ET on Oct. 27, 2015, to correct a reference to Sierra Club Chief Climate Counsel Joanne Spalding.