Opponents of EPA’s Proposed Clean Power Plan Face Tough Questions From the Court

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The U.S. Court of Appeals for the District of Columbia Circuit heard oral argument on the first legal challenges to EPA’s “Clean Power Plan” on April 16, 2015. The plan is a proposed rule under Section 111(d) of the Clean Air Act regulating carbon dioxide emissions from existing coal fired power plants. If made final as proposed, the new rule would require states to adopt plans to reduce carbon dioxide emissions from their existing fossil fuel-fired electric generating plants by a national average of 30%, with the exact reductions varying widely from state to state.

Generally, judicial challenges to proposed rules are not allowed because a proposed rule imposes no legal obligations. In this case, a coal company (Murray Energy) and others argued that the impact of the proposal was so extraordinary that it justified an exception. Although the case was argued before three appointees of Republican presidents, it did not go well for the challengers.

During oral argument, the court immediately questioned whether the opponents could rightfully challenge the rule before it is finalized. When pressed by the judges, the opponents could cite no other instance where the courts intervened in this manner. The court expressed concern about creating a precedent for such review, fearing it might create a “morass” of judicial review of the rulemaking process. The court further considered whether conducting its review while EPA is still evaluating the millions of public comments it received on the proposed rule would erode the Clean Air Act provisions for judicial review and the requirement that EPA consider such comments.

Notwithstanding these procedural obstacles, the rule’s opponents contended that the Clean Air Act does not allow EPA to regulate carbon emissions from coal fired power plants under § 111(d), on the ground that the Act forbids such regulation if EPA has already regulated emissions from that source category under § 112. The judges acknowledged the apparent congressional oversight that allowed potentially conflicting statutory amendments from the House and the Senate to be included in the final law without first being reconciled. The court pressed both sides regarding how to properly interpret the amendments, each of which relates to the scope of EPA’s authority under § 111(d). In questioning the opponents, the court noted that EPA’s interpretation of § 111(d) likely would be entitled to deference under existing U.S. Supreme Court precedent if the competing provisions were found to be conflicting and not the result of a “scrivener’s error.”

In the meantime, EPA has given every indication that it will finalize the proposed rule this summer. If the court ultimately rules only on the procedural issues, there is no doubt that the opponents will challenge the final rule.

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