Regulators Examine Clean Power Plan’s Legal Challenges and Impact on States

By Liz Edmondson [1]
Monday, May 16, 2016 at 11:18 AM

Air regulators from more than 20 state and local agencies discussed the Clean Power Plan and its potential impact on states during the Association of Air Pollution Control Agencies’ mid-year meeting April 28-29 in Columbia, South Carolina. Approximately 100 participants attended the event, which included presentations and panels on topics ranging from environmental justice to implementation of the National Ambient Air Quality Standards for sulfur dioxide, ozone and other pollutants to regulatory impact analyses.

While speakers discussed a wide variety of air-related topics, the Clean Power Plan was a key issue. This highly controversial EPA rulemaking that requires states to set carbon emissions limits on existing power plants was subject to numerous legal challenges after it was finalized in October 2015. The U.S. Court of Appeals for the District of Columbia Circuit denied opposing state and industry requests to stay the rule, but the U.S. Supreme Court granted a stay on Feb. 9, 2016, and froze implementation of the rule pending the outcome of the litigation in the D.C. Circuit.

Nathan Richardson, assistant professor of law at the University of South Carolina and a visiting fellow at Resources for the Future, noted that the Clean Power Plan is “arguably the biggest thing the federal government has ever done on climate.”

Richardson said that opponents have raised myriad challenges to the rule, most notably asking the court to strike down the rule in its entirety because they claim Section 111(d), the section of the Clean Air Act the rule is based upon, does not support the Clean Power Plan. However, Richardson noted that in his opinion this sort of challenge is “an attempt to re-litigate Massachusetts v. EPA,” the U.S. Supreme Court case that held that greenhouse gases are “emissions” under the Clean Air Act.

“Almost all environmental academics that I have spoken to think it is legal,” said Richardson.

Assuming the agency is granted deference in its interpretation of Section 111(d) and the Clean Power Plan is upheld, Richardson noted that other challenges to the rule could have the effect of making the rule more costly to implement without removing the stringency of the reduction requirements. For example, challengers argue that EPA can only regulate the emitter itself, in this case the power plant, and cannot regulate “outside the fence” by counting renewable energy generation as a method of compliance. “This is the most likely argument to succeed in the courts,” Richardson said, but he also noted that this provision is severable and would not invalidate the entire rule. Therefore, if this argument succeeds, EPA could remove the renewable energy component from the rule, but make the reductions in emissions from power plants more stringent, arguably making compliance more costly and less flexible for states.
Similarly, opponents argue that the trading of emissions credits is not authorized under Section 111(d). While it is axiomatic that trading is a key component in containing the costs of the rule, Richardson noted that the court could find that the rule is legal, but trading is not allowed. This just makes compliance more costly, according to Richardson.

“Just be careful what you ask for, I would say to challengers,” he said.

In addition, Richardson stressed the need for regulators and legislators to communicate about the Clean Power Plan and its implementation. Richardson noted that some states have passed legislation that would make compliance with the rule difficult. For example, one state prohibits engaging in trading to comply with the plan, which would only make compliance more costly, Richardson said. Legal briefs arguing both sides of the case have been filed in the D.C. Circuit and oral arguments will be heard on June 2. Experts expect the D.C. Circuit to issue a decision in the summer of 2016 and that the losing side will appeal to the U.S. Supreme Court, which likely would not issue a decision until at least 2017.

In addition to hearing from Richardson, state regulators also heard from several EPA officials, including Acting Assistant Administrator Janet McCabe. Not only did the AAPCA conference provide state regulators the opportunity to communicate with EPA officials, but as noted by AAPCA Past President Steve Hagle of the Texas Commission on Environmental Quality, “Texas appreciates the opportunity to compare notes with other agencies in a consensus-driven environment.”

Regardless of the outcome, the Clean Power Plan has reinforced the need for transparency and communication not only between the federal government and the states, but also between legislators, regulators and utilities.

AAPCA’s 2016 Annual Business Meeting will be held Sept. 21-23. More information on AAPCA can be found at http://www.cleanairact.org [2].

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