Experts Examine the Legality of the Clean Power Plan

By Lisa McKinney [1]
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Experts discussed the legal arguments for and against the Clean Power Plan, or CPP, during a recent eCademy webcast, “What’s Next? Legal Perspectives on the Clean Power Plan,” presented by CSG and the Association of Air Pollution Control Agencies.

Following the release of the final rule addressing greenhouse gas emissions from existing power plants through Section 111(d) of the Clean Air Act, the U.S. Supreme Court stayed implementation of the Clean Power Plan pending judicial review. The U.S. Court of Appeals for the District of Columbia Circuit took another unexpected step by rescheduling oral arguments on challenges to the Clean Power Plan to September.

“The regulatory authority that EPA (Environmental Protection Agency) is claiming under this rule really is quite remarkable and goes well beyond anything that EPA or any other federal agency has ever claimed for itself,” said attorney Jeffery Holmstead of Bracewell, LLP. “EPA is saying that they have the authority to require a large number of plants to be shut down and to be replaced by new plants that are more in keeping with EPA's view on how electricity should be produced in the United States.”

Holmstead said EPA essentially is asserting that under Section 111(d) of the Clean Air Act, the agency can take about 30 percent of the business away from existing coal-fired power plants and award that business to different types of plants, primarily wind and solar facilities that EPA is requiring be built over the next 15 years.

The fact that EPA has authority to regulate carbon dioxide emissions under the Clean Air Act doesn’t really tell us anything about how EPA can go about doing that, Holmstead said. “In fact, the Supreme Court has made it pretty clear that they didn’t just give EPA a roving mandate to do good—to do whatever they think should be done to reduce CO2 emissions,” he said. “They can only use the specific programs that Congress has given them under the Clean Air Act.”

Attorney Sean H. Donahue of Donahue and Goldberg, LLP did not agree that the EPA’s rulemaking process in this case was so out of the ordinary.

“We think there has been a very effective and eloquent and skillfully presented campaign to characterize the rule as something abhorrent and bizarre and over the top, but we think the more one looks at the rule and the more courts look at it, the more it looks like an agency earnestly trying to apply law to facts,” he said. “In key respects it is not so very new at all. The daily, in fact minute-by-minute, practice of shifting generation (from high emitting to low emitting sources) among power plants has been a key factor in other regulations under the Clean Air Act.”
Donahue said the CPP is a result of EPA’s obligation under the Clean Air Act to regulate dangerous air pollution—and power plants are the single biggest source of greenhouse gases in the United States. “The question arises—what’s the best tool in the Clean Air Act to do that?” he said. “I think there is a compelling case that the statutory tool the EPA is using in the Clean Power Plan—Section 111(d)—is in fact a really sensible one.”

He said the rule is about emission control, not EPA’s preferences about how electricity should be generated.

The rule is consistent with and based upon trends that have been going on already in the sector, according to Donahue. The 30 percent reduction in emissions in the CPP is a metric that is born in part from international climate discussions.

“We are already about halfway there based on very large reductions that have occurred during the last decade, largely due to the economic forces that have made natural gas much cheaper than coal—and natural gas plants emit about half as much as coal power plants—and the growth of renewables,” he said. “The rule mimics and tracks what the market is already doing.”

Holmstead, on the other hand, believes that if all of the passion surrounding climate change were removed from this case, it wouldn’t be a close call—the rule would be found illegal.

“But we can’t remove all the passion and concern about climate change from this case,” he said. “In fact, I think EPA has done its best to wisely tell the D.C. Circuit Court and the Supreme Court that this rule is important to the future of the planet and is the centerpiece of international efforts to reduce greenhouse gas emissions.”

The future of the Clean Power Plan will depend a lot on how the presidential election goes, according to Holmstead. A Republican president would be able to undo the rule relatively easily given its structure, he said. A Democratic president is likely to defend the rule and will have the opportunity to appoint the new Supreme Court justice, who will likely be in place before the CPP case is decided and could tip the balance in the EPA’s favor.

Attorney Brian H. Potts of Foley & Lardner, LLP conducted a poll during the proposed rule stage asking 141 environmental lawyers and law professors whether or not they believed the CPP was legal as written. The results were almost exactly split—the opinion that it is legal as written won by one vote over the opinion that it is not legal.

According to Holmstead, states likely will be given more time to comply with the CPP if the Supreme Court ultimately upholds the rule and it goes back into effect—all of the deadlines in the rule would be pushed back by at least the amount of time the rule was stayed.

However, the attorneys agreed that states should continue to plan for compliance. “To be frank, state regulators are in a tough position right now because if the Clean Power Plan happens, in a lot of states it is going to be a really big deal,” said Potts. “To plan utility infrastructure takes a long time, especially to build new plants and new transmission lines. While on one hand you don’t want to spin your wheels for nothing if the rule gets overturned, on the other hand you don’t want to be left holding the bag—at the end of the day I always advocate that planning is better just in case.”

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