

Clean Power Plan Foes Not Ready To Give Up The Fight

By **Juan Carlos Rodriguez**

Law360, New York (August 14, 2015, 10:19 PM ET) -- New challenges to President Barack Obama's plan to cut carbon emissions from power plants are designed both to impede that effort and to retain what the petitioners feel is a sympathetic panel of judges at the D.C. Circuit for future litigation.

On Thursday, 15 state attorneys general filed an emergency petition for extraordinary writ seeking to delay the effectiveness of the Clean Power Plan's various deadlines until litigation over the rule is complete. In an unusual move, they asked that their petition be joined with three other CPP challenges that were rejected as premature in June by a D.C. Circuit panel.

One of the parties to those cases, Peabody Energy Corp., also filed an emergency renewed petition for extraordinary writ Thursday seeking the same remedy as the states. And the company said it has no objection to the states' petition being added to its case.

"What's going on here is an attempt to manipulate the D.C. Circuit in a way that allows the petitioners to maintain what they regard as a favorable panel that they drew randomly in the original Murray Energy and West Virginia trio of cases," Brendan Collins, a partner at Ballard Spahr LLP, said Friday.

Collins noted that although the D.C. Circuit rejected the initial attempts to halt the rule, the petitioners may feel there is some sympathy for their position, possibly from Circuit Judge Karen LeCraft Henderson. In a concurring opinion, Judge Henderson said she agreed with the other panelists on the jurisdictional question before them but felt there was a broader interpretation of the All Writs Act that could be applied in this case. The other judges that sat on the panel were Thomas B. Griffith and Brett M. Kavanaugh. Henderson was appointed by President George H. W. Bush, and Griffith and Kavanaugh were appointed by President George W. Bush.

The final version of the CPP, which was unveiled this month, calls for power plants to slash their greenhouse gas emissions by 32 percent from 2005 levels by 2030. States must submit a final compliance plan or an initial submission with an extension request by late 2016 and start showing emissions cuts by 2022. States seeking an extension would have until September 2018 to submit a final plan.

The states argue they'll be irreparably harmed without a stay because it's not clear when the final rule will be published in the Federal Register — normally the green light for rule challengers. But the finite time for the submission of state plans will continue to run down, requiring the states to continue to work on their plans.

Peabody says the final rule will hurt its business and consumers. The new regulations would force coal-fueled power plants to close or lock in the closure process before judicial review is complete if a stay is not granted, Peabody argues.

Collins said once the final rule is actually published, there will be a slew of new petitions to review it, and the normal procedure is that eventually they'll be consolidated and a panel chosen. He said the current petitioners may try to keep their cases alive and argue to the circuit court that the new petitions are related to their own case, thus keeping their set of judges.

Andrew Wheeler, a principal and team leader of the energy and environment practice group at FaegreBD Consulting and a Murray Energy lobbyist who is not involved in the litigation, said it makes sense for the same panel to hear the anticipated challenges to the published final rule.

"The EPA did not change its legal rationale — those judges have already been briefed and heard arguments on the case — so part of this is the states and Peabody wanting to get in front of the same panel of judges, since they are already up to speed and can go forward without much delay," Wheeler said.

He said the U.S. Supreme Court's recent decision that went against the U.S. Environmental Protection Agency's Mercury and Air Toxic Standards illustrates that if the Clean Power Plan litigation is allowed to go through the entire legal process without a stay, states and utilities will likely comply before the high court renders a decision.

But Collins said the extraordinary writ petitioners' chances are slim.

"We still have a rule that is not effective, that is not published, that will be published in due course, as the EPA has said, and that is not subject to review under the Clean Air Act, which is obviously the right jurisdictional hook under which to review the rule," he said.

John Renneisen, counsel at O'Melveny & Myers LLP, agreed. He said that in order to obtain the sort of preliminary injunctive relief they are seeking, the petitioners must demonstrate both a likelihood of success on the merits and a likelihood of irreparable harm without the stay.

"The first actual deadline for emissions reductions is not until 2022, which I think is going to make the prong of demonstrating irreparable harm difficult to overcome," Renneisen said.

However, he noted that the state implementation plans are due next year. There is a question as to how much harm the industrial petitioners would suffer because the states were putting together SIPs, and how much harm the states would suffer by being required to go through that administrative effort, if the rule were struck down, Renneisen said.

Martin Booher, a partner at BakerHostetler, said the strategy employed by the petitioners is creative, but it may be a difficult legal battle, particularly given that this panel is the same panel that recently determined it would not review rules that aren't yet final.

"But they're going to have an opportunity to file a petition to stay the rule after it appears in the Federal Register, and quite frankly, they're going to have a much better chance of getting this legally vulnerable rule stayed at that point," Booher said.

The petitioners' tactics could backfire on them, according to Andres Restrepo, an attorney at the Sierra Club.

"Courts really much prefer and appreciate litigants to follow the normal procedures for seeking review," he said. "In a case like this that's going to have very heavy litigation, and in which there is very high interest, that's all the more reason for respecting and adhering to the court's normal procedures."

—Editing by Brian Baresch.

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