Clean Power Plan Gets Its Day in the U.S. Court of Appeals for the D.C. Circuit

The recent *en banc* hearing regarding the validity of the Clean Power Plan (CPP) had each side of the argument claiming a likely favorable disposition for their side. The judges asked tough questions of both sides in oral argument, originally scheduled for three and a half hours, but lasting nearly seven hours.

THE BIG QUESTIONS

- Whether "generation shifting" (from coal to lower-emitting sources) is so "transformative" that the CPP requires clear indications of approval from Congress and that the Environmental Protection Agency (EPA), therefore, does not benefit from its usual judicial deference to administrative rulemaking
- Whether EPA's "best system of emission reduction" (BSER)—mandated by the CPP—impermissibly goes "outside the fence" in regulating other than pollution sources

There were arguments from defenders of the CPP that the current trend away from coal-fired generation, driven in large part by low natural gas prices, makes "generation shifting" less remarkable or "transformative" and more business as usual. Challengers of the rule—even invoking EPA Administrator McCarthy's own characterization of the CPP's importance—asserted that using Clean Air Act Section 111(d) to effectively restructure the grid and the composition of power supply, without clear Congressional support, would be a significant expansion of regulatory authority. Indeed, they argue that EPA's broad interpretation might overstep its bounds.

Certainly, many would acknowledge that going beyond the fence line is a novel approach since EPA rules usually govern the physical source of emissions. And "best systems of emissions reduction" have typically been "best systems" of reduction as applied to an emitting source.

Much of the debate, in our mind, centers around where there should be a natural break between EPA's regulatory authority and statutory authority reserved to Congress. Should the court affirm EPA's broad interpretation of its mandate, it is unclear where EPA's authority would end; or at least there would not appear to be a bright line unless it was made clear by specifics in the ruling. One commentator from The Brookings Institution has observed:

> "[I]f EPA should win, that would make § 111(d) an extraordinarily flexible and powerful tool for it in future decades—the agency could comfortably ratchet up carbon emissions controls to deliver a zero-carbon economy as long as they could make the case that doing so was just a matter of adopting one cost-feasible, reliability-consistent, incremental step after another."[1]

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[1] Philip A. Wallach, The D.C. Circuit Considers the Clean Power Plan, and Our Constitutional Future, at Brookings FIXGOV Blog (posted Sept. 27, 2016)

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STATUTORY INTERPRETATION AND OTHER IMPORTANT QUESTIONS

Other issues before the court included:

- Whether the EPA developed unlawfully duplicative rules for coal-fired power plants by issuing the CPP pursuant to CAA §111(d) (existing source standards) as they are already subject to toxic air pollutant standards under CAA §112
- Whether the CPP violates principles of federalism (reserving power to the states not delegated to the U.S. government) by meddling with state authority to regulate in-state energy resources
- Whether the final CPP differs so dramatically from the proposed rule as to require a new notice and opportunity to comment under federal administrative law
- Whether the goals mandated in the final CPP are achievable and whether they will create potential electric reliability problems

The §111(d) vs. §112 argument was the third most significant issue, with much debate centering on the legislative history of the Clean Air Act amendments putting in place those provisions. §111(d) is essentially a "none of the above" provision and can only be used to regulate that which is not regulated by other sections of the statute. However, because the House and Senate versions were not properly reconciled, the language in the statute is conflicting. It is unclear whether the prohibition for using §111(d) refers to emitters (the power plants) regulated under other language or emissions (the CO_2). If the former, §111(d) could not be used since power plants are regulated under §112 for mercury and other pollutants. If the latter, §111(d) could be used as CO_2 is not regulated under §112.

As a part of this arcane and lawyerly parsing of the statute and prior precedents, there was a debate about the significance (or insignificance) of a footnote in Supreme Court Justice Ginsburg's opinion in AEP vs. Connecticut, which affirmed EPA's authority to regulate greenhouse gases. In that footnote, Justice Ginsburg said: "There is an exception: EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program...or the 'hazardous air pollutants' program, [Section 112]."[2] Challengers said that this indicated that there could be no CPP under §111(d) since stationary sources (e.g., power plants) were regulated under §112.

Defenders of the CPP noted that the footnote was not determinative in the AEP case and that it was a legislative "glitch" that was not reconciled between the House and Senate in the statute. One judge characterized that regulation under both sections is a little like having to obey the speed limit and drive on the right side of the road.

In any event, these and other questions will be important, but it is anybody's guess how the court will rule. More significant will likely be the decision on the threshold issue of transformative regulation and BSER.

[2] American Elec. Power Co. *v.* Connecticut, 131 S. Ct. 2527 (2011), Docket No. 10-174, footnote 7, available at https://www.supremecourt.gov/opinions/10pdf/10-174.pdf

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WHAT'S NEXT: CONTINUED UNCERTAINTY AND A TICKING CLOCK

A decision of the court is expected in early 2017, with the Supreme Court potentially hearing a near-certain appeal sometime in its 2017–18 term. Regardless of the outcome, uncertainty around the CPP will continue to dominate the power industry. As of late September 2016, 19 states had suspended CPP planning, and nine states were assessing it; only 19 states were proceeding with state implementation plans.[3]

Meanwhile, utilities and power generators are in a quandary. It is imprudent to get ahead of your regulator in planning or acting upon issues upon which they have demurred and where the litigation outcome is uncertain. An ultimate Supreme Court decision on the topic, should it take an appeal, is unlikely to occur before 2018, the same year as the final CPP state compliance plans are due. EPA has not indicated that it would move any filing or compliance dates. It is an open question whether the stay means that the dates are "tolled," meaning they will be deferred, or will remain as they are. But even if upheld, EPA's BSER interpretation is expansive enough to warrant tolling or revisiting of the regulatory timeline, if only to address the reliability implications of the CPP.

For now, only time will tell what the courts will decide and what the power sector will have to do in response.

[3] E&E News, at http://www.eenews.net/interactive/clean_power_plan

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