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EPA To Use Standing As Shield In Attack On Carbon Authority

By **Juan Carlos Rodriguez**

Law360, New York (April 14, 2015, 7:59 PM ET) -- The U.S. Environmental Protection Agency is expected to argue before the D.C. Circuit on Thursday that efforts to shut down its proposed rule to regulate carbon dioxide emissions at existing power plants are premature, while state and industry groups are likely to focus on the rule's massive impact and shaky legal foundation, experts say.

The EPA's Clean Power Plan, proposed in June, calls for existing power plants to cut carbon dioxide emissions 30 percent below 2005 levels by 2030. Murray Energy Corp. and several intervenor industry groups asked the D.C. Circuit to kill the plan, which they say is premised on an improper interpretation of the Clean Air Act and would severely damage their economic sector. And 12 states led by West Virginia have separately argued the proposed rule is based on an illegal settlement agreement.

At oral arguments, experts say the EPA is likely to focus on the fact that the rule is only in the proposed phase and therefore legal review is inappropriate. They said the extent to which the agency is able to control how much time is devoted to the jurisdictional question could portend the outcome.

"If they didn't proceed to the merits, it would not be a good harbinger for the petitioners. If they focus solely on the procedural arguments and don't get to the merits, there's not a second round of oral arguments," Kevin Desharnais, a partner at Mayer Brown LLP, said Tuesday.

Paul M. Seby, a partner at Holland & Hart LLP, said the biggest hurdle to the businesses' and states' cases are the traditional ripeness considerations, because federal courts and the D.C. Circuit in particular traditionally don't review nonfinal agency actions.

But he pointed out that one of the interesting things about the dispute is that the EPA has not focused solely on the jurisdictional question.

"They have briefed the legal issues in the case, and that’s pretty telling ... at least that there has been a decision in the Justice Department that it had better not leave that question unaddressed," Seby said.

According to the EPA, two different versions of Section 111(d) of the Clean Air Act were enacted into law in 1990 amendments, thus making the section ambiguous and open to the agency’s interpretation.

The agency has argued that those amendments created a list of hazardous air pollutants in Section 112. Under the Senate version, Section 111(d) directs the EPA to require performance standards for any existing source for any air pollutant for which air quality criteria have not been issued or which is not on

a list published under Section 112. Since carbon dioxide isn't on the Section 112 list, the EPA said, its 111(d) rule is therefore clearly allowed.

But there was also a House version of the bill, which Murray has relied upon. Its language, which was adopted into the U.S. Code, bars the EPA from regulating under Section 111(d) any pollutant emitted by a facility listed under Section 112, even if that type of pollutant is not on the list. Because the power plants the agency is trying to regulate are listed under 112, the carbon dioxide they emit is exempt from 111(d) rulemaking, Murray argues.

Murray and the other petitioners say the text of the law now in force is accurately reflected in the code. And they say that even if there were reasonable doubt, Congress tasked its own legislative agency, not the EPA, with determining what the text of the law in force is. They say Congress instructed courts to defer to that agency's determinations.

The petitioners will likely try to get these arguments on the merits as soon as they can, but they'll still have to tackle the standing question first, according to Alexandra Magill Bromer, counsel at Perkins Coie LLP.

"They have to establish standing, so Murray Energy would need to convince the court that it's actually suffering concrete or imminent harm because of the government's actions," Bromer said. "But the government's action is a proposed rule, and there are no live obligations on anybody. That makes establishing standing difficult."

The states have argued that the CPP comes out of a 2010 settlement agreement in which the EPA committed to regulate carbon dioxide emissions from existing power plants under Section 111(d) of the Clean Air Act. They have argued that this is an inappropriate use of the section for the same reasons as Murray has argued.

The EPA, on the other hand, has said the plan is not the result of the "obsolete" settlement agreement, in which the agency agreed to propose a rule addressing power plant greenhouse gas emissions by mid-2011. The agency said the deadlines set forth in the agreement were not strictly enforceable, and it preserved the discretion to withdraw the proposed guidelines for existing power plants.

"[The states'] challenge to the settlement agreement is not justiciable because the agreement does not 'injure' petitioners in any way that could give rise to Article III standing," the agency said in a brief.

Seby said there is some doubt about the likelihood of a win by the petitioners. But he said the debate has been valuable because it's contributed to a broader discussion about the EPA's initiatives in general.

"It's shining tremendous light on the nature and the complexity and the magnitude of what EPA's doing," Seby said.

Desharnais pointed out that the entire debate centers on a provision from 25 years ago that has never been challenged before.

"All of this comes down to the broader question of why are these issues coming up now. They are coming up now because we have not adopted broad-based greenhouse gas regulation. The administration has been unable to move forward with that successfully, so they are therefore attempting to shoehorn it into the existing statutory structure, which never contemplated the regulation

of greenhouse gases," he said.

Regardless of what happens on Thursday, the oral arguments will be only one battle in what is sure to be a lengthy war over this and other climate change efforts. It's very possible that the D.C. Circuit might not issue an opinion in this case before the final CPP is released by the EPA's stated deadline of midsummer.

"I expect the oral arguments on Thursday to be used by both sides as a temperature-taking. I think the petitioners will pursue the authority argument even after the final rule comes out, but it is possible that the nature of the questions and the results could fine-tune arguments on both sides," Bromer said.

--Additional reporting by Keith Goldberg. Editing by Kat Laskowski and Katherine Rautenberg.
