

CPP Challengers Insist High Court Stay Is Warranted

By **Keith Goldberg**

Law360, New York (February 8, 2016, 1:31 PM ET) -- Utility and labor groups urging the U.S. Supreme Court to block the Clean Power Plan while it's challenged in court on Friday said that the U.S. Environmental Protection Agency's argument that issuing a stay would be extraordinary glosses over the sweeping authority being asserted by the agency over existing power plants.

Opponents of the rule, including 29 states and state agencies and several industry and trade groups, have appealed the D.C. Circuit's decision not to stay the rule slashing carbon emissions from existing power plants while litigation over it plays out. They oppose the rule, saying it is an economy-damaging regulatory overreach. The EPA, in its brief in opposition to their bid for a Supreme Court a stay, said that the relief they are seeking is "extraordinary and unprecedented" and urged the high court to uphold the appeals court's decision.

The agency has never attempted to reorganize an entire sector of the U.S. economy — the electric power sector — in its efforts to reduce emissions, utility groups, electric cooperatives and labor groups told the high court in a reply brief.

"Never has EPA interpreted its charge under Clean Air Act Section 111 to encompass not just requiring the reduction of plant level emissions through installation of pollution control technology, but also the forced retirement or curtailment of many existing sources coupled with the forced investment in new alternative sources that are not even regulated by Section 111," their brief stated. "EPA's action is both unprecedented and unfounded, and it warrants this court's intervention."

The EPA on Thursday said that CPP opponents want much more than interim relief that would "temporarily divest the rule of enforceability" while review proceeds. The agency said that the opponents are asking the high court to toll all of the relevant deadlines set forth in the rule, even those that would come due many years after the resolution of their challenge, for the period between the rule's publication and the final disposition of their lawsuits.

It said that the challengers are seeking a stay before any court has expressed a view about, let alone made a final decision on, the merits of their legal claims. The fact that the Supreme Court is ordinarily "a court of final review and not first view" weighs strongly against its intervention, the EPA said.

The agency said that the opponents are not entitled to relief under the traditional stay factors because they cannot establish a likelihood that they will ultimately succeed on the merits, as the D.C. Circuit found. Nor have they shown that they will suffer irreparable harm during the "relatively brief" period of

expedited review in the D.C. Circuit, the EPA said.

But it will take years to build the necessary infrastructure to comply with the CPP's goals of reducing carbon emissions by 32 percent from 2005 levels by 2030, and the agency itself has acknowledged that 70 percent of those carbon emissions reductions must be achieved before 2022, the groups argued in their reply brief.

And the EPA's contention that utilities don't have to act immediately because states don't have to submit CPP compliance plans until 2018 doesn't change the fact that utilities are faced with uncertainty over what state plans will actually require, the groups said.

"The uncertainty itself requires that utilities act now to ensure that they can provide a reliable electric supply for hundreds of millions of customers no matter what state programs are adopted and whether viable emission credit trading programs emerge or not," the brief stated. "A stay will avoid forcing utility applicants into an aggressive transformation of the power sector while the rule's dubious legality is reviewed."

In a separate reply brief filed on Monday, the state of North Dakota argued that the CPP is already affecting the state, since it gets most of its electricity from coal, and the rule requires the state to slash its power plant carbon emissions by nearly 45 percent.

"The rule requires North Dakota coal plants to close beginning this year, and the generation shifting that the rule requires must continue until state meets the 44.9 percent emission reduction mandate imposed by the rule," the state's brief said.

The utility challengers are represented by Holland & Hart LLP, Hunton & Williams LLP, and Crowell & Moring LLP, among others.

North Dakota is represented by assistant attorney general Margaret Olson, as well as Paul M. Seby of Greenberg Traurig LLP.

The EPA is represented by Solicitor General Donald B. Verrilli Jr.

The cases are Basin Electric Power Cooperative et al. v. EPA, case number 15A776, and North Dakota v. EPA, case number 15A793, both in the U.S. Supreme Court.

--Additional reporting by Juan Carlos Rodriguez. Editing by Stephen Berg.
