

## DC Circ. Tosses Clean Power Plan Challenges

By Juan Carlos Rodriguez

*Law360 (September 17, 2019, 4:06 PM EDT)* -- The D.C. Circuit on Tuesday tossed legal challenges to the Obama administration's signature climate change plan, accepting the U.S. Environmental Protection Agency's argument that because it has replaced the regulations, the litigation is moot.

In a brief, anticlimactic order with no explanation, the court granted motions by the EPA and several groups to dismiss the high-profile litigation over the Clean Power Plan, which aimed to slash carbon dioxide emissions from existing power plants.

Several states, including Texas and West Virginia, and a variety of industry groups had challenged the CPP as a regulatory overreach. Other states, including California and New York, and environmental groups had intervened on behalf of the EPA to protect the rule.

The legal battle prompted rare intervention from the U.S. Supreme Court, which in 2016 — in one of the late Justice Antonin Scalia's last acts — stayed implementation of the rule. Following the stay, the D.C. Circuit took the unusual move of holding en banc oral arguments in lieu of panel review. Now, whether the judges would have upheld or struck down the CPP will likely never be known.

According to the EPA, the litigation over the 2015 Clean Power Plan was mooted because the agency published the final version of its CPP replacement rule, dubbed the Affordable Clean Energy, or ACE, rule in the Federal Register on July 8. The D.C. Circuit had stayed the case in 2017 in response to the Trump administration's statements that it would dismantle the CPP to make room for its own carbon dioxide emissions control plan.

Amanda Shafer Berman, who helped defend the CPP for the U.S. Department of Justice at the D.C. Circuit in oral arguments and has since become counsel at Crowell & Moring LLP, said the court's move was not surprising.



The D.C. Circuit granted the EPA's and others' requests to toss litigation over the 2015 Clean Power Plan, which the Trump administration has replaced with its own carbon dioxide emissions regulations. (AP)

"Once the ACE rule and repeal were promulgated, it was only a matter of time before the case was dismissed as moot," she said Tuesday. "For better or worse, it's the procedurally logical thing to do and obviously doesn't reflect on the merits."

She also said that many of the same issues in the CPP case will be raised in the context of the ACE rule litigation. She said whether those issues actually get decided this time around depends on the schedule the court sets for the litigation and what happens in the 2020 election.

While several states and industry challengers had asked the appeals court to dismiss the CPP case, a different coalition of states, cities, counties and environmentalists told the D.C. Circuit that the litigation should be preserved, saying it would be premature to end it. They said the ACE rule won't become final until at least September and noted that challenges have already been launched against ACE in the D.C. Circuit.

The EPA announced in October 2017 that it was getting rid of the CPP, saying that abandoning the plan would remove unnecessary regulations and align agency policy with President Donald Trump's March 2017 executive order aimed at strengthening American energy independence.

An EPA spokesperson said Tuesday the agency is pleased with the D.C. Circuit's decision.

"This ends an era of a regulation that lacked sufficient legal support and attempted to assert broad EPA regulation over the energy sector of our economy," the spokesperson said. "We look forward to turning the page and defending the Affordable Clean Energy Rule in the courts. We are confident that ACE provides a more balanced policy approach and will survive judicial review."

But David Doniger, director of the Natural Resources Defense Council's Climate and Clean Energy Program and an attorney who fought the Trump administration's efforts to sink the CPP, said the fight isn't over yet and invoked EPA Administrator Andrew Wheeler's past as a coal industry lobbyist.

"The former fossil fuel lobbyist running Trump's EPA is drastically misreading the Clean Air Act in an effort to block action to curb the dangerous pollution driving the climate crisis," Doniger said Tuesday. "He is wrong and we will see him in court."

Texas Attorney General's Office spokesperson Marc Rylander celebrated the end of the CPP litigation.

"Repealing the overreaching Clean Power Plan and ending this drawn-out litigation are steps toward more effective collaboration between the federal and state governments," Rylander said in a statement Tuesday. "By ending the failed Clean Power Plan and replacing it with the common-sense Affordable Clean Energy rule, states are better positioned to develop localized energy policies that can positively affect both environmental and economic growth."

Automakers have not responded enthusiastically to the SAFE rule. Although they asked the Trump administration early on to ease the standards, many were uncomfortable with how far the EPA went.

The EPA is represented by Meghan Greenfield and Benjamin R. Carlisle of the Environmental Defense Section of the U.S. Department of Justice's Environment and Natural Resources Division.

The industry challengers are represented by Sidley Austin LLP, Hunton Andrews Kurth LLP, Crowell & Moring LLP and others.

The green groups are represented by Donahue Goldberg & Weaver LLP, Environmental Defense Fund, Earthjustice, the Clean Air Task Force, the Center for Biological Diversity and the Natural Resources Defense Council.

The states are represented by their respective attorneys general.

The cities and counties are represented by their legal offices.

The case is State of West Virginia et al. v. EPA et al., case number 15-1363, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by John Campbell.