

CLEAN POWER PLAN

Opponents push to block rule while defenders prep for battle

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EnergyWire: Monday, October 26, 2015

Defenders of U.S. EPA's Clean Power Plan are wading through stacks of challenges this week in the wake of a massive new legal assault against the climate rule.

The lawsuits came pouring in Friday morning after the much-contested plan was published in the *Federal Register*, more than two months after EPA officials unveiled the final version in early August. After multiple previous attempts to block the rule were thrown out as premature, the *Federal Register* publication means the Clean Power Plan is now officially ripe for review.

West Virginia led the charge last week, banding with 23 other states for a federal lawsuit that accuses EPA of creating an unprecedented regulatory scheme without legal backing.



"EPA claims to have sweeping power to enact such regulations based on a rarely-used provision of the Clean Air Act but such legal authority simply does not exist," West Virginia Attorney General Patrick Morrisey (R) said in a statement Friday.

The coalition of states also has asked the court to block the rule's implementation while considering its legality. Two other states, Oklahoma and North Dakota, have filed separate challenges.

Affected industry groups, meanwhile, brought challenges on many fronts. Murray Energy Corp. and coal industry groups, which led previous efforts

against the plan, filed suit Friday and also requested a stay of the rule. A coalition of 37 electric cooperatives filed their own suit, and the U.S. Chamber of Commerce, the National Association of Manufacturers and 13 other business groups filed one more.

"This plan restricts resources and reduces reliability, while setting a dangerous precedent for future regulation of other sectors," NAM general counsel Linda Kelly said in a statement. "Manufacturers can't sit by while this Administration makes it increasingly difficult to make things and create jobs in the United States, especially at a time when the regulatory weight borne by manufacturers is heavier than ever."

And that's just to start. Other critics of the rule, including the American Public Power Association and the International Brotherhood of Boilermakers, have also filed suit, and more are expected to follow -- making it one of the biggest legal attacks EPA has ever faced.

Prospective litigants have until Dec. 22 to make their move in the U.S. Court of Appeals for the District of Columbia Circuit, which is fielding all of the challenges. The various lawsuits will likely be consolidated.

Previewing arguments

EPA allies say they don't expect any novel arguments to arise as the litigation moves forward.

"The arguments against the Clean Power Plan are going to be the ones we've already seen," said Richard Revesz of New York University School of Law's Institute for Policy Integrity.

So far, that's been the case. The legal theories will be spelled out in further detail in court briefs, but several of the litigants gave a preview in their stay requests. The filings focus on earlier arguments that EPA cannot impose new rules on already-regulated sources, that the agency lacks authority to regulate "beyond the fence line" of power plants and that the Clean Power Plan commandeers state energy programs.

In one [request](#) filed Friday, a large group of electric utilities, co-ops and industry associations led with the second argument, that EPA's rule violates limitations in the Clean Air Act by regulating beyond the actual power plant.

"The Rule's restructuring of the electric sector is not only wholly untethered from the CAA, but is an assertion of authority over energy policy that is greater than what Congress has given to any federal agency, including the Federal Energy Regulatory Commission," the request said, adding that FERC and the states have been sidelined while EPA acts as an "energy czar."

West Virginia and the rest of the state coalition made similar arguments, saying EPA's approach "runs

roughshod over States' sovereign rights" in an area where states have more expertise.

Mounting a defense

EPA and environmental attorneys picked apart arguments against the rule last week, defending the plan as a necessary step in achieving greenhouse gas emissions reductions.

"We are confident we will again prevail against these challenges and will be able to work with states to successfully implement these first-ever national standards to limit carbon pollution, the largest source of carbon emissions in the United States," EPA Administrator Gina McCarthy said in a statement.

Responding to the "fence line" argument, environmental lawyers say EPA is on firm legal ground because the Clean Air Act requires the agency to consider the "best system of emissions reduction." EPA has found that system to be a full-grid approach, they say.

As for federalism complaints, Earthjustice attorney Howard Fox said in a Thursday call that the Clean Power Plan includes ample flexibility for states to design their own approaches and includes the option for a federal plan for states that opt not to craft their own.

"The Clean Power Plan follows the tradition of federal-state partnerships that courts have upheld time and again against constitutional challenge," he said. "Constitutional arguments against the plan are last-ditch attempts to block the transition to clean energy that is already underway."

NYU's Revesz added that states and industry will have a tough time persuading the court that the rule needs to be stayed, given the long compliance schedule and the option for states to request an extension for submitting a final plan.

The Natural Resources Defense Council, the Environmental Defense Fund, Earthjustice and the Sierra Club plan to intervene in the litigation on EPA's side. Attorneys general from 15 states, New York City and Washington, D.C., have vowed to get involved, and Boulder, Colo., is also expected to join.

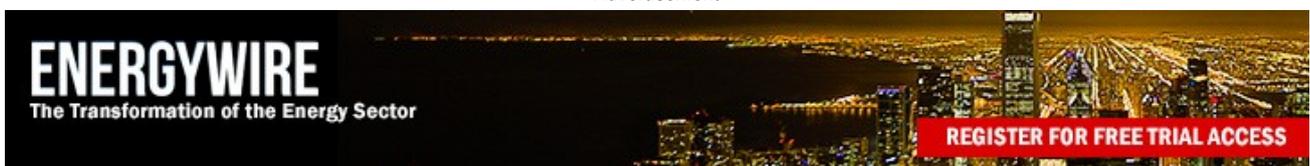
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