

## Climate Regulation

### Challenges to EPA Power Plant Proposal Highlight Issues Central to Future Litigation

Lawsuits challenging the Environmental Protection Agency's proposed carbon dioxide standards for existing power plants have little chance of success but do highlight issues that will be central to later litigation, legal analysts said.

The U.S. Court of Appeals for the District of Columbia Circuit takes a dim view of lawsuits challenging rules the EPA has not yet finalized, lawyers said. While that means a lawsuit brought by Murray Energy Corp. and a second lawsuit filed by 12 states are unlikely to succeed, the early litigation allows opponents to begin honing their arguments before the court.

"Murray Energy is a long shot. The new case is a somewhat shorter shot, but it still rests on asking the court to issue a declaration on a rule that hasn't been issued yet," Michael Gerrard, director of the Center for Climate Change Law at Columbia Law School, told Bloomberg BNA.

The EPA's proposed standards (RIN 2060-AR33) would set a unique carbon dioxide emissions rate for the power sector in each state. The states would administer the standards under Section 111(d) of the Clean Air Act (79 Fed. Reg. 34,959). The EPA is expected to finalize the rule in 2015.

The lawsuits turn on the argument that the EPA is barred from regulating carbon dioxide from power plants under Section 111(d) of the Clean Air Act because it has already issued power plant standards for hazardous air pollutants under Section 112. The EPA has argued that conflicting amendments to the Clean Air Act adopted in 1990 are ambiguous and the agency should be given deference to interpret the statute.

However, even opponents of the proposed rule said the lawsuits at this stage are unlikely to succeed.

"In terms of getting this heard, I'm not optimistic about the odds," William Yeatman, a senior fellow at the Competitive Enterprise Institute, told Bloomberg BNA. "I'm sympathetic to the cause. I think the legal argument about 111 versus 112 is legit."

**Murray Energy Lawsuit Premature.** Murray Energy Corp. was the first to file a lawsuit asking the D.C. Circuit to overturn the proposed rule, arguing it is blatantly illegal. Nine states filed an amicus brief in support of that lawsuit as well (*In re: Murray Energy Corp.*, D.C. Cir., No. 14-1112, 6/26/14; 124 DEN A-3, 6/27/14).

"This particular lawsuit, both the Murray one and the most recent one, you have significant jurisdictional and standing issues. They're attempting something novel," Yeatman said.

The Murray Energy lawsuit centers on competing amendments to Section 111(d) adopted by Congress in 1990. Both the House and Senate amendments were intended to prevent EPA from issuing duplicative regulations under Sections 111 and 112 of the Clean Air Act. The House amendment prevents EPA from regulating under Section 111(d) any industrial source that was already regulated under Section 112. The Senate amendment only prevents EPA from using its authority under Section 111(d) to regulate the pollutants listed under Section 112(b).

Whatever the merits of the argument about how to read the amendments, Gerrard likens the Murray Energy lawsuit to a similar case filed in 2012 by several power companies challenging the EPA's proposed new source performance standards for carbon dioxide emissions from existing power plants. Several power companies had filed a similar lawsuit in 2012 to overturn an EPA proposed rule that would set carbon dioxide new source performance standards for new fossil fuel-fired power plants. That lawsuit was quickly dismissed by the D.C. Circuit (*Las Brisas Energy Center LLC v. EPA*, D.C. Cir., No. 12-1248, 12/13/12; 240 DEN A-1, 12/14/12).

**Settlement Litigation Questioned.** Lawyers also doubted the success of a second lawsuit brought by 12 states challenging a voluntary settlement between the EPA and several states and environmental groups that had sued the agency to force it to regulate carbon dioxide emissions from power plants.

West Virginia and 11 other states asked the D.C. Circuit to overturn a 2010 settlement in which the Environmental Protection Agency agreed to issue carbon dioxide standards for power plants (*West Virginia v. EPA*, D.C. Cir., No. 14-1146, 8/1/14; 149 DEN A-4, 8/4/14).

The EPA missed all of the deadlines set out in the settlement and overturning that voluntary agreement would not affect the agency's Clean Air Act authority to regulate greenhouse gases under the Clean Air Act. However, the states argued in their lawsuit that the EPA's proposed power plant standards reopen the window to challenge the settlement, which would allow them to bring the argument about Sections 112 and 111(d) to the court earlier than waiting for the power plant rule to be finalized.

"Unless they draw a particularly conservative panel of the D.C. Circuit, and even if they do, I think it will be difficult to persuade the court to wrestle with the difficult issues involved," Gerrard said.

**Ginsburg Footnote Highlighted.** The states in their lawsuit highlight a footnote Justice Ruth Bader Ginsburg included in the U.S. Supreme Court's 2011 decision in *American Electric Power Co. v. Connecticut* that seems to endorse the idea that Section 112 bars the EPA from issuing carbon dioxide standards under Section 111(d).

"EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408-7410, or the 'hazardous air pollutants' program, § 7412," Ginsburg wrote (*American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 72 ERC 1609 (2011)).

At the time the decision was issued, the EPA had not yet regulated power plants under Section 112. Attorneys question how much weight a footnote from an unrelated case will have when the EPA's carbon dioxide rule is inevitably litigated.

"I wouldn't read the footnote as an indication of where Ginsburg was coming from. Since it was totally peripheral to the case at hand, I doubt that she considered the dueling amendments at all," Michael Livermore, associate professor of law at the University of Virginia School of Law and senior adviser to the Institute for Policy Integrity, told Bloomberg BNA in an e-mail.

Gerrard said Ginsburg's footnote is dicta, an unrelated aside that had no bearing on the case before the

Supreme Court. However, he said it is a useful tool for opponents of the power plant rule looking to shape the argument when it heads to D.C. Circuit.

"If I were representing Murray Energy or West Virginia, I would highlight that quote," he said. "But I don't think it ultimately reveals much of the court's thinking."

In *American Electric Power Co. v. Connecticut*, the Supreme Court held that the EPA's authority to regulate greenhouse gases displaced federal common law climate change lawsuits. If the court were to interpret Section 111(d) of the Clean Air Act to mean that regulating power plants under Section 112 bars the EPA from issuing its carbon dioxide rule, that would remove the displacement, David Doniger, director of the Natural Resources Defense Council's Climate and Clean Air Program, told Bloomberg BNA in an e-mail.

"It's inconceivable that she meant to convey this in the footnote, or that she—or the other justices—would agree with the AGs in a future case," he said. "It would revive the federal common law issue, and 8-0 they do not want to do that. So I remain completely untroubled by this argument. It will go nowhere."

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## Water Infrastructure

### California Lawmakers Get More Time To Pass State Water Bond Measure

**C**alifornia Gov. Jerry Brown (D) and the state's Democratic leadership joined forces with water agencies and environmental, labor and business groups Aug. 12 to urge state lawmakers to take prompt action on a water bond proposal.

The call for action followed a meeting at the state Capitol on a \$7.2 billion water bond package lawmakers introduced Aug. 11 to replace the \$11.14 billion measure now slated for the Nov. 4 statewide ballot, widely criticized as too costly and larded with "pork" projects.

At the end of a 30-minute meeting with more than 20 leaders from the organizations, Brown told reporters they were "very close" to a final agreement on the bond package.

"We just need a few more heads, or votes," Brown said.

The meeting included Democratic leaders from the Assembly and Senate, along with the California Farm Bureau Federation, Association of California Water Agencies, California Chamber of Commerce, Westlands Water District, Natural Resources Defense Council and California Labor Federation.

Brown signed a bill, S.B. 1195, on Aug. 11 that lawmakers had approved earlier in the day, extending by two days a voter guide printing deadline in hopes that agreement can be reached on an alternative water bond proposal by Aug. 13.

**Passage Uncertain.** A two-thirds vote of the legislature is required for a new bond measure, so passage of the Aug. 11 proposal is uncertain.

The proposal, outlined in identical bills (S.B. 866 and A.B. 1471), would authorize \$6.995 billion in revenue bonds and reallocate \$200 million in existing funds to be spent on various water projects throughout the state. As drafted the bond proposal would provide:

- \$500 million for clean, safe and reliable drinking water;
- \$1.47 billion to protect rivers, lakes, streams, coastal waters and watersheds;
- \$780 million for regional, water security and drought-related preparedness;
- \$2.5 billion for water storage projects;
- \$700 million for water recycling;
- \$850 million for groundwater sustainability; and
- \$395 million for flood management.

None of the bond money could be used to fund construction of the twin tunnels conveyance system beneath the Sacramento-San Joaquin River Delta that is proposed in the Bay Delta Conservation Plan or to mitigate ecosystem harm related to the project.

The prohibition on using funds for building the tunnels is a move to avoid opposition from Restore the Delta and other groups opposed to the planned, but still unapproved, infrastructure project.

**'Tunnel Neutral' Measure Needed.** Restore the Delta wants any bond measure to be completely "tunnels neutral." Language is needed to ensure none of the bond money for delta water and habitat restoration projects would go into accounts that could be used to "pave the way" for the tunnels project, the group said in an Aug. 12 written statement.

Senate President Pro Tempore Darrell Steinberg (D) said if the final bond package passes, it is likely to be late Aug. 13. He acknowledged that the proposal still lacks support from Republican lawmakers and some major environmental groups, such as the Sierra Club.

"We always hope for as much support as we can," Steinberg said. "I think \$2.5 billion for storage on a \$7.2 billion bond, almost 40 percent, is a significant investment and represents more than good faith in meeting that objective."

Senate Republicans said they continue to oppose the proposal because it doesn't offer enough funding to build water storage.

"There is not support for the governor's current proposal because it still lacks sufficient water storage funding and it does no good to build half a dam," Peter DeMarco, spokesman for Senate Republican Leader Bob Huff, told reporters.

Senate Democrats initially proposed a \$10 billion bond with \$3 billion for storage, DeMarco said.

"Clearly it means they've got some room, potentially we hope, to meet what is needed to build storage," he said.

In July, the Republicans rejected the Sen. Lois Wolk's (D) \$10.5 billion bond proposal that included \$3 billion for water storage.

Failure to reach agreement on a downsized water bond would leave the \$11.14 billion bond measure on the November ballot. Approved in 2009 as part of bipartisan water reform package, the \$11.14 billion measure already has been delayed twice.

By CAROLYN WHETZEL AND LAURA MAHONEY