

## Daily Environment Report™

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### Climate Regulation

## Clean Power Plan Lawsuits Could Shape EPA Authorities

### BNA Snapshot

#### Clean Power Plan Litigation

**Key Development:** Litigation over the Clean Power Plan could further define how the EPA can apply its Clean Air Act authority amid increased Supreme Court scrutiny, legal experts say.

**Implications:** The Clean Power Plan lawsuits could touch on statutory interpretation, deference due to the EPA, cooperative federalism and how the agency can apply little-used Clean Air Act programs.



By Andrew Childers

Feb. 25 — Upcoming litigation over the Environmental Protection Agency's Clean Power Plan could further define the parameters of the agency's ability to use its existing statutory authority to tackle new environmental challenges, legal experts said.

The U.S. Supreme Court, led by the late Justice Antonin Scalia, has increasingly narrowed the options open to the EPA for consideration under environmental statutes in decisions setting limits on greenhouse gas permitting requirements and requiring the agency to consider costs when regulating toxic pollutants from power plants, Emily Hammond, a George Washington University Law School professor, said Feb. 25 at a symposium sponsored by the Georgetown Environmental Law Review.

Upcoming litigation over the carbon dioxide standards for the existing fleet of power plants (RIN 2060-AR33) may set new standards for cooperation with states and the EPA's ability to pursue further regulation of greenhouse gases under the Clean Air Act, symposium participants said.

The Clean Power Plan is being challenged by 27 states as well as several utility and industry groups in the U.S. Court of Appeals for the District of Columbia Circuit ( *West Virginia v. EPA*, D.C. Cir., No. 15-1363, amicus briefs filed, 2/23/16).

#### Innovation Up Against Court 'Skepticism.'

The symposium's theme was "Legal Innovation Within Old Laws," but opponents of the Clean Power Plan have repeatedly cited Scalia's 2014 opinion in a decision that limited the scope of the EPA's greenhouse gas permitting program that warned attempts to find new powers in existing statutes would be met with "skepticism" from the court ( *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2014 BL 172973, 78 ERC 1585 (2014)).

"That played a huge role in the briefing of the Clean Power Plan," Georgetown University Law Center professor and former EPA policy official Lisa Heinzerling said.

Attorneys from the Georgetown University Law Center represent several medical groups that will file amicus briefs in support of the EPA in the lawsuits.

States and industry groups opposed to the Clean Power Plan repeatedly cited the *Util. Air Regulatory Grp. v. EPA* decision in their opening briefs to the D.C. Circuit (35 DEN A-16, 2/23/16).

#### Opponents 'Emboldened' by Supreme Court

Though the D.C. Circuit hasn't yet heard oral arguments in challenges to the Clean Power Plan, the Supreme Court has

already stepped in to stay the rule's implementation, a move legal experts say is unprecedented and already changing how opponents of regulation view litigation ( *West Virginia v. EPA*, U.S., No. 15A773, 2/9/16).

Heinzerling said that decision will “embolden” opponents of EPA regulations to petition the Supreme Court for earlier intervention.

“The Supreme Court is probably going to see a lot more requests for stays,” she said. “Who knew the Supreme Court was available to review executive actions directly? That's so fantastic. Cut out the middle man. No more D.C. Circuit. And guess what? Two weeks later we've already seen this.”

A coalition of 20 states, led by Michigan, on Feb. 24 petitioned the Supreme Court to also stay the EPA's Mercury and Air Toxics Standards for power plants ( *Michigan v. EPA*, U.S., No. 15A886, 2/24/16; 37 DEN A-2, 2/25/16).

### **Utilities' Compliance Costs**

The Supreme Court has already ruled that the EPA erred by not considering utilities' compliance costs when deciding whether regulating toxic pollutants from power plants under Section 112 of the Clean Air Act was warranted. The D.C. Circuit has remanded the rule to the agency for correction.

However, states opposed to the rule argue that the Supreme Court's prior decision on the toxic pollutant standards is nullified if the rule is allowed to stay in place while the EPA works on corrections.

The Supreme Court granted the Clean Power Plan stay after “a very hasty review” that lasted only a few days, said Vickie Patton, general counsel at the Environmental Defense Fund, which is coming to the EPA's aid in the litigation. By contrast, the D.C. Circuit had deliberated for a month after a lengthy briefing process before denying similar stay requests.

Patton called the decision “radical, shocking, without precedent in American law.” Without the benefit of a lower court's ruling on the Clean Power Plan, Patton said attorneys have very little context to interpret the Supreme Court's decision or the factors it weighed in granting the stay.

“We have very scant information about what the court based the decision on. We have just a few lines in an order,” she said.

### **Court's Action Called 'Power Grab.'**

Heinzerling, who analyzed the Supreme Court's stay decision in a Feb. 24 paper, “The Supreme Court's Clean-Power Power Grab,” said the court never articulated where it found the authority to reach down and stay the Clean Power Plan before it could even be litigated by the D.C. Circuit. Even petitioners seeking the stay couldn't agree on where the Supreme Court would derive its authority from, she said.

“That's a very consequential decision, yet it was made on the basis of minimal briefing, confused briefing,” Heinzerling said. “I just don't think that's the way to govern.”

The upcoming Clean Power Plan litigation also could have implications for cooperative federalism between the EPA and states moving forward.

### **Role Delegated to States**

Many Clean Air Act programs delegate a role to states, giving them the authority to implement EPA regulations and providing a space for local regulators to experiment with innovative new approaches, William Buzbee, a law professor at Georgetown University Law Center, said.

The EPA had touted its outreach to states and the way the Clean Power Plan builds on successful state programs when developing the rule. However, states opposed to the regulation have argued that it violates the principles of cooperative federalism by overstepping authority reserved to states to regulate the power sector.

“Both sides are building on federalism, and how the court rules on federalism will be absolutely central,” Buzbee said.

### **Old Statute Offers New Opportunities**

Though the Supreme Court has warned the EPA about seeking new powers from existing statutes, Michael Burger, executive

director of the Sabin Center for Climate Change Law at Columbia Law School, said the agency could tap its international air pollution authorities under Section 115 of the Clean Air Act.

Legal experts have touted Section 115 as an alternative approach to greenhouse gas regulations after the Supreme Court stayed the Clean Power Plan, which many took as a sign the rule is in jeopardy (28 DEN A-5, 2/11/16).

Section 115 would give the EPA “broad latitude” to require states to update their state implementation plans to include measures to reduce greenhouse gas emissions, which could include economywide emissions trading, said Burger, who represents cities and mayors supporting the EPA in the Clean Power Plan litigation.

### **Agency Would Make Endangerment Finding**

Section 115, which the EPA has never previously used, requires that the agency make an endangerment finding for an international pollutant—which it has for greenhouse gases—and then ensure reciprocity with other nations, a condition that could be fulfilled by the international climate agreement reached in Paris in December, Burger said.

Burger had joined other academics from the Center on Global Energy Policy at the Columbia University School of International and Public Affairs, the Institute for Policy Integrity at the New York University School of Law and the Emmett Institute on Climate Change and the Environment at the University of California, Los Angeles School of Law in writing a recent paper exploring the possibility of regulating greenhouse gases under Section 115.

The EPA under President George W. Bush had included Section 115 as one of its regulatory options in a 2008 advance notice of proposed rulemaking detailing options for regulating greenhouse gases.

### **Would Let EPA Cast Wide Net**

Employing Section 115 would allow the EPA to achieve emissions reductions from a wide range of sectors at once without having to regulate each source category individually, as it does now.

Given the upcoming battle over the EPA's interpretation of its authority under Section 111(d) of the Clean Air Act as part of its Clean Power Plan, Burger said Section 115 offers another advantage: The statute is much clearer and speaks more directly to global pollutants like greenhouse gases.

“It is the plain language of the statute as well,” he said.

To contact the reporter on this story: Andrew Childers in Washington at [achilders@bna.com](mailto:achilders@bna.com)

To contact the editor responsible for this story: Larry Pearl at [lpearl@bna.com](mailto:lpearl@bna.com)