JONES DAY

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COMMENTARY

D.C. Circuit Considers Challenges to Clean Power Plan

On September 27, 2016, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") heard oral argument before an *en banc* panel in *West Virginia v. EPA*,[1] a case involving challenges to the U.S. Environmental Protection Agency's ("EPA") 2015 rule known as the Clean Power Plan ("CPP").[2] The CPP regulates carbon dioxide ("CO_2") emissions from existing power plants. Oral argument lasted approximately seven hours, with the court hearing from various advocates for the states, industry, and EPA.[3] Pursuant to an August 17, 2016, order of the court, argument was divided according to five of the major topics addressed in the briefing. Each of the argument segments is summarized in more detail below.

Argument Segment 1: Statutory Issues (other than Section 112)

The CPP was promulgated under Section 111(d) of the Clean Air Act ("CAA"),[4] which authorizes EPA to create a procedure under which each state submits a plan establishing "standards of performance" for existing sources. A standard of performance is an emissions limitation achievable though application of the "best system of emission reduction."[5] The petitioners argue that Section 111 applies to individual sources, and that the CPP is unlawful because the rule's performance rates cannot be achieved by any single source. Instead, the CPP necessitates "generation-shifting," requiring owners or operators of existing sources to comply by subsidizing other, lower-emitting generation rather than by improving emission performance at their own sources. In considering these arguments, some of the judges questioned whether the investments in new renewable generating sources required by the CPP are substantially different from investments in source-specific pollution controls, such as scrubbers, that have been required by previous CAA rules.

The D.C. Circuit also focused its questions on the standard of review that should apply to EPA's interpretation of what it can require existing sources to do under Section 111(d). If the court applies "*Chevron* deference,"[6] it would defer to EPA's interpretation of Section 111, to the extent the court finds that Section 111(d) is ambiguous and EPA's interpretation is reasonable. The petitioners advocated for the court to use the "clear statement" rule (also known as the "major questions doctrine").[7] Under that rule, where "decisions of vast economic and political significance" are concerned, the statute must "speak clearly" to authorize the agency's action.[8] On this point, many of the judges seemed to recognize that the CPP is novel and significant. Judge Kavanaugh further explained that the standard of review is at its core a separation of powers issue, stating that "Congress, in our system of

separation of powers, should be making the big policy decisions; or we want to be sure they've clearly assigned the big policy decision to the agency."

In further considering separation of powers, some of the judges questioned whether the Supreme Court of the United States has already established that EPA may regulate CO_2 from power plants under Section 111, through landmark cases such as *Massachusetts v. EPA*[9] and *American Electric Power v. Connecticut*.[10] However, the petitioners consistently stressed that the CPP is transformative not just because it regulates CO_2 but, more importantly, due to the *manner* in which EPA chose to do so—namely, by forcing power plants to invest in their renewable energy competitors, and leaving many sources with no option but to prematurely retire.

Argument Segment 2: Section 112

The CAA prohibits EPA from regulating a source category, such as power plants, under Section 111(d) if that source category is already regulated under the provisions for hazardous air pollutants in Section 112 of the CAA.[11] Power plants are regulated under Section 112. The petitioners therefore assert that the CPP is unlawful because it is prohibited by what is referred to as the "Section 112 exclusion." EPA counters by arguing that the Section 112 exclusion language is ambiguous. EPA also relies on the fact that two different versions (one from the House and one from the Senate) of the Section 112 exclusion were passed by Congress during the 1990 CAA amendments, creating greater ambiguity.

Questions from the panel during this segment of the oral argument focused on process. For example, the judges asked for clarification as to which version of the CAA (the Statutes at Large or the U.S. Code—one has text from both houses and one does not) should be referenced, and what the standard procedures are for addressing conflicting versions of enacted laws. Several judges expressed the view that the statutory language was difficult to understand and interpret regardless of which version of it they read. It appeared that most of the judges had extensively reviewed the legislative history and were interested in the advocates' positions as to whether and how Congress's intent should influence interpretation of the Section 112 exclusion. The panel acknowledged that the following statement from the Supreme Court in *American Electric Power* supports the petitioners' reading: "EPA may not employ § 7411(d) if existing stationary sources … are regulated under the … hazardous air pollutants program, § 7412."[12] However, there seemed to be some disagreement among the judges regarding the weight that statement should be afforded.

Argument Segment 3: Constitutional Issues

The petitioners claim that the CPP unconstitutionally commandeers and coerces states by obligating state officials to carry out federal energy policy. During oral argument, the D.C. Circuit questioned whether the CPP is markedly different in this respect from other federal mandates. An additional issue the judges seemed to struggle with is whether electricity grid regulation is in fact within the scope of traditional state police power. Focusing again on separation of powers issues, some of the judges suggested that if the CPP does infringe on state police power, then EPA would need a clear statement from Congress to upset the existing cooperative federalism scheme.

Argument Segment 4: Notice Issues

The final CPP is very different from the version of the rule originally proposed by EPA. The petitioners therefore argue that there was inadequate notice and comment. In addition to the present petition for review before the D.C. Circuit, various petitions for reconsideration have also been filed with (and are currently pending before) the agency, some also alleging that EPA did not provide adequate notice. During oral argument, the D.C. Circuit focused on procedural issues, including whether EPA must first render a decision on the petitions for reconsideration before the court could hear the petitioners' notice arguments. The petitioners stressed that EPA's briefing and arguments before the court made clear that the agency believes there was adequate notice, and therefore pursuing the administrative process would be futile.

Argument Segment 5: Record-Based Issues Not Submitted on the Briefs

The petitioners filed separate and extensive briefing on procedural and record-based issues that warrant *vacatur* of the CPP even assuming EPA has authority to promulgate the rule. At the parties' and the court's request, oral argument was limited to

particular record-based issues, including whether EPA has met its burden of showing that the CPP is "adequately demonstrated" and "achievable" as required by Section 111(d). For example, the petitioners argue that EPA has not shown that sufficient renewable energy credits will be available to allow compliance with the rule. The panel's questions during this argument segment indicated that some of the judges consider these claims to be premature, and that the petitioners should instead bring specific issues before the court at a later date through as-applied challenges. The judges asked several questions of EPA seemingly aimed at confirming that the rule allows the petitioners to come before the court again if practical problems arise during implementation of the CPP. The judges did, however, also seem concerned about whether certain aspects of EPA's projections were arbitrary and capricious due to, for example, the use of inaccurate or unrepresentative data.

Conclusions

It is difficult to predict the outcome of *West Virginia v. EPA*, in particular because the case is before the *en banc* panel and the parties presented myriad arguments both in the briefs and at oral argument. The D.C. Circuit seemed most receptive to the petitioners' statutory arguments, in particular the claim that generation-shifting is not contemplated by Section 111(d) of the CAA. If the court rules in favor of the petitioners on these grounds, it may not reach many of the other arguments. The court's opinion is not expected until late 2016 or early 2017.

Jones Day currently represents some of the parties challenging the Clean Power Plan in West Virginia v. EPA*, Case No. 15-1363.*

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Charles T. Wehland
Chicago
+1.312.269.4388
ctwehland@jonesday.com

Nancy MacKimm
Houston
+1.832.239.3776
nmackimm@jonesday.com

Mary Beth Deemer
Pittsburgh
+1.412.394.7920
mbdeemer@jonesday.com

John A. Rego
Cleveland
+1.216.586.7542
jrego@jonesday.com

Thomas M. Donnelly
San Francisco
+1.415.875.5880
tmdonnelly@jonesday.com

Alina Fortson
Chicago
+1.312.269.1542
afortson@jonesday.com

G. Graham Holden
Atlanta
+1.404.581.8220
ggholden@jonesday.com

Casey F. Bradford
Atlanta
+1.404.581.8119
cbradford@jonesday.com

Kevin P. Holewinski
Washington
+1.202.879.3797
kpholewinski@jonesday.com

Endnotes

1 Case No. 15-1363. Chief Judge Garland did not participate.

2 Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015).

3 Audio recordings of the oral argument are available.

4 42 U.S.C. § 7411(d).

5 § 7411(a)(1).

6 So named for the case *Chevron v. NRDC*, 467 U.S. 837 (1984).

7 *See*, e.g., *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014).

8 *Id.* at 2444.

9 549 U.S. 497 (2007).

10 131 S. Ct. 2527 (2011).

11 42 U.S.C. § 7411(d)(1).

12 131 S. Ct. at 2537 n.7.