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Climate Regulation

Three Conservative Judges to Hear Arguments over EPA's Clean Power Plan

By Andrew Childers

March 19 — The Environmental Protection Agency will face a panel of three conservative judges April 16 when it defends its legal authority to issue its proposed Clean Power Plan, possibly jeopardizing the rule before it's even finalized (*In re Murray Energy Corp.*, D.C. Cir., No. 14-1112, *merits panel assigned*, 3/18/15; *West Virginia v. EPA*, D.C. Cir., No. 14-1146, *merits panel assigned*, 3/18/15).

The U.S. Court of Appeals for the District of Columbia Circuit announced that Judges Thomas Griffith, Karen LeCraft Henderson and Brett Kavanaugh will hear oral arguments in Murray Energy Co.'s challenge to the EPA's proposed rule as well as in a lawsuit brought by several states challenging an accord in which the agency agreed to regulate carbon dioxide emissions from power plants.

Griffith and Kavanaugh were appointed to the court by President George W. Bush. Henderson was appointed by President George H.W. Bush.

"Before this panel was announced, I thought EPA had a pretty strong case on procedural issues. With this panel, I feel like it's going to be more of a toss-up," Brian Potts, an attorney at Foley & Lardner LLP, told Bloomberg BNA March 19.

Though the judges hearing the arguments have conservative backgrounds, observers said the unusual nature of Murray Energy's challenge—asking the D.C. Circuit to block a rule before it's even finalized—may be a more significant factor in the case than how they view other regulatory issues.

BNA Snapshot

Clean Power Plan Lawsuits

Key Development: Three conservative judges will hear oral arguments in a lawsuit challenging the EPA's authority to propose its Clean Power Plan.

Potential Impact: But lawyers said jurisdictional issues may be a greater concern to the judges than their regulatory views during arguments.

What's Next: The D.C. Circuit will hear oral arguments April 16.

Rule Not Yet Final

Legal experts said the court is likely to be very wary of opening up proposed rules to legal challenges, which would upend decades of precedent.

"They will understand this is opening the floodgates to enormous litigation the courts don't want to deal with and would change the face of the regulatory state," Richard Revesz, director of the Institute for Policy Integrity at the New York University School of Law, told Bloomberg BNA March 19.

Murray Energy is challenging the EPA's authority to propose the Clean Power Plan (RIN 2060-AR33), which would set carbon dioxide emissions limits for the power sector in each state.

The company argues that the EPA can't regulate carbon dioxide emissions from power plants under Section 111(d) of the Clean Air Act because power plants are already subject to hazardous air pollutants standards under Section 112.

House, Senate Approved Conflicting Amendments

When the Clean Air Act was amended in 1990, the House and Senate approved conflicting amendments to Section 111(d).

The Senate amendment would bar the EPA from regulating pollutants under Section 111(d) if they already are subject to hazardous air pollutant standards under Section 112.

The House amendment can be read as barring the agency from regulating industrial sources under Section

111(d) if they are subject to standards under Section 112. Both provisions were included in the bill that was signed into law.

The EPA has argued that the language of the conflicting amendments is ambiguous and therefore open to interpretation by the agency. Section 111(d) has been rarely used, and its limits have never been defined by the courts.

The D.C. Circuit may be reluctant to address that question this early in the rulemaking process because the EPA could offer an alternate interpretation of its Clean Air Act authority in the final rule, expected this summer, Revesz said.

"We don't know what the final rule will look like," he said. "We don't even know for sure what EPA's interpretation of Section 111(d) will look like."

Potts Sees Court Eager to Rule

Potts, however, said the court could be eager to rule on the validity of the EPA's proposal, provided it can clear the jurisdictional hurdles.

"Kavanaugh and Griffith, my gut tells me they're going to want to make a decision on the legality of the Clean Power Plan," he said. "If they get there, I don't think that's going to be good for EPA."

Thomas Lorenzen, an attorney at Dorsey & Whitney LLP, told Bloomberg BNA March 19 that the case could hinge on Griffith.

As a long-serving judge, Henderson will probably be wary of opening proposed rules to early legal challenges, he said. Whether Griffith agrees with that concern or follows the more aggressive tack attorneys predict Kavanaugh might take will determine how the court addresses Murray Energy's challenge, he said.

Judges Cautioned EPA on Broad Interpretations

Griffith and Kavanaugh were the majority judges in the D.C. Circuit's 2012 decision overturning the EPA's cross-state air pollution rule and cautioned the EPA against broad interpretations of its Clean Air Act authority (*EME Homer City Generation LP v. EPA*, 696 F.3d 7, 75 ERC 1776, 2012 BL 213202, D.C. Cir., 2012)

Though that decision was eventually overturned by the U.S. Supreme Court, Potts said it dealt with a similar Clean Air Act interpretation issue. There the court examined how the EPA interpreted Section 110(a)(2)(D)'s requirement that upwind states that "significantly contribute" to air quality violations in downwind states be required to control their emissions.

In that decision, Kavanaugh and Griffith cautioned the EPA against reading its statutory authority too broadly.

"It seems inconceivable that Congress buried in Section 110(a)(2)(D)(i)(I)—the good neighbor provision—an open-ended authorization for EPA to effectively force every power plant in the upwind States to install every emissions control technology EPA deems 'cost-effective,'" they said in that decision.

Supreme Court Case Could Be Factor

The D.C. Circuit's case could be further complicated by an upcoming Supreme Court argument over the EPA's mercury and air toxics standards for power plants. The Supreme Court will hear arguments in that case March 25 (*Michigan v. EPA*, U.S., No. 14-46, *order filed* , 3/9/15).

The rule is being challenged by states and utility groups and focuses on whether the phrase "appropriate and necessary" in Section 7412(n)(1)(A) of the Clean Air Act requires the EPA to consider cost when setting toxic emissions limits for power plants.

If the Supreme Court were to overturn the EPA's rule, issued under Section 112 of the Clean Air Act, that would moot Murray Energy's argument against the proposed Clean Power Plan.

"There are a whole host of reasons why the D.C. Circuit may not want to rule right now," Lorenzen said.

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