CLEAN POWER PLAN - EPA denies time-worn petitions against rule

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The Obama administration yesterday denied a slew of petitions from states, industry and others that in 2015 asked U.S. EPA to reconsider or pause its landmark plan for cutting carbon emissions from the power sector.

Challengers to the Clean Power Plan filed the requests after the rule was finalized in 2015 but before the Supreme Court froze implementation in February 2016.

The 38 reconsideration petitions from states, electric utilities and interest groups raise a variety of concerns about the climate plan. They included complaints that the final rule is too different from the proposed rule, that EPA's interpretation of the "best system of emission reduction" under the Clean Air Act is overly broad, and that the plan doesn't properly account for waste-to-energy and biomass.

Another 22 administrative stay petitions asked EPA to simply pause the rule.

EPA denied all the requests except a handful of reconsideration petitions focused on waste-to-energy and biomass issues. The agency is deferring action on those issues, noting yesterday that the agency is engaged in a separate investigation of scientific and technical issues related to biomass that "may result in further clarification of the appropriate treatment" of the fuel source.

In a document outlining its decision, the agency said the remaining issues in the reconsideration petitions had already been adequately considered through public comment, and the administrative stay petitions were moot because of the Supreme Court stay.

"Over the past year, EPA considered the variety of technical and legal issues that petitioners raised and has determined that the petitions failed to satisfy one or both of the legal conditions necessary to grant reconsideration," the agency said on its website.

Legal impact

The then-pending petitions featured prominently in marathon oral arguments over the Clean Power Plan last September at the U.S. Court of Appeals for the District of Columbia Circuit. Crowell & Moring attorney Tom Lorenzen, representing electric cooperatives, argued that the final version of the rule was so different from the draft that EPA should have opened it back up for comment. Several of the petitions focused on that issue.

But under D.C. Circuit precedent, the pending nature of the petitions would have precluded judicial review. In other words, the court could not consider that argument until EPA responded to the petitions. Lorenzen urged the court to reconsider its practice (*Energywire*, Sept. 28, 2016).

"That certainly puts to rest any questions about whether the issue is ripe for judicial resolution," Lorenzen said yesterday after the agency denied the petitions.

Sean Donahue, an environmental lawyer defending the Clean Power Plan, said opponents of the rule could now file new challenges that focus on the petition denials.

"Certainly challengers to this rule haven't been shy about filing challenges, so it wouldn't surprise me if there were some," he said.

But, Donahue added, broader questions of constitutionality and Clean Air Act compliance are already "squarely" before the court, which could issue a ruling any day, so challengers may opt not to file new challenges to the petition denials.

"I think there's an understanding on both sides that the core issues in the case were squarely presented and were argued and are poised for a decision," he said.