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Subject: Appeals Court Blocks EPA Cross-State Rule

Importance: Normal

Appeals Court Blocks EPA Cross-State Rule; Predecessor Program to Remain in Place

Wednesday, January 4, 2012

By Jessica Coomes

A federal appeals court temporarily blocked an Environmental Protection Agency rule targeting power plant emissions that cross state lines, leaving an existing air pollution reduction program in place for at least several months (EME Homer City Generation L.P. v. EPA, D.C. Cir., No. 11-1302, stay ordered 12/30/11).

The Cross-State Air Pollution Rule is expected to be on hold through at least the spring while the U.S. Court of Appeals for the District of Columbia Circuit weighs legal challenges to the rule. In the meantime, a predecessor program, the Clean Air Interstate Rule, will continue to regulate interstate transport of power plant emissions.

The cross-state rule was set to require emissions reductions beginning Jan. 1, but the D.C. Circuit on Dec. 30 granted the petitioners' motions to stay the rule. The court said it expects to hear the case by April. EPA said it was disappointed the health benefits of the new rule will be delayed, but the agency told BNA Jan. 3 it has confidence in the rule's legality. The stay order "is not a decision on the merits of the rule, and EPA firmly believes that when the court does weigh the merits of the rule it will ultimately be upheld," the agency said.

Decision Called 'Pretty Big Deal.'

Jeff Holmstead, a former EPA assistant administrator for air and radiation and now an attorney for Bracewell & Giuliani LLP, told BNA Jan. 3 that the court rarely stays EPA rules. He called the Dec. 30 order "a pretty big deal."

"These three judges believed that there was a good likelihood that this rule was flawed in some way, and we know they wouldn't have issued the stay unless that were the case," Holmstead said.

The rule, which EPA released in July, would require power plants in 28 states to reduce emissions of nitrogen oxides and sulfur dioxide that migrate across state lines. It is intended to help downwind areas meet national ambient air quality standards for ozone and fine particulate matter (131 DEN A-6, 7/8/11). The Dec. 30 per curiam order did not explain in detail the court's reasons for granting the stay, but the court said the petitioners satisfied the standards required for a stay.

Specifically, the court took into account petitioners' assertions that they are likely to prevail on the merits of the case and that they would be irreparably injured if a stay were not granted.

Several power plants and some states were among the petitioners who asked the D.C. Circuit to review and stay the rule.

Power Company Alleged 'Irreparable Harm.'

Luminant, the largest power company in Texas, issued a statement Dec. 30 saying it had asked the court for a stay "because of the irreparable harm it would cause to our company and others." The company previously announced it would close some coal-fired electric generating units and shut down mines in Texas on Jan. 1 to comply with the rule.

However, Luminant said Dec. 30 the units will continue operating because the stay is in place.

Rep. Ed Whitfield (R-Ky.), chairman of the House Energy and Commerce Subcommittee on Energy and Power, issued a statement Dec. 30 calling the stay order "a major win for consumers." He said he expected the rule would "increase electricity rates, threaten electric reliability, and unfairly penalize electricity generated from coal."

Merits of Arguments Not Addressed

However, David Marshall, senior counsel for the Clean Air Task Force, which is representing the American Lung Association as an intervenor in the case, cautioned against reading too much into the order.

"Frankly, there were so many different stay petitions making so many different arguments, and the court didn't address that at all in the order," Marshall told BNA Jan. 3. "It's impossible to know what the court thought of the various stay petitions. It's inconceivable it thought all of them were meritorious."

Holmstead noted that the D.C. Circuit has not stayed many air pollution regulations in recent years.

In 2003, the court stayed a rule expanding an exemption for routine maintenance projects from new source review requirements (248 DEN A-1, 12/29/03).

And in 1999, the court stayed an emissions trading program for nitrogen oxides, called the NOx SIP call (102 DEN AA-1, 5/27/99).

Marshall pointed out that the court eventually upheld the NOx SIP call rule, which, like the cross-state rule, addressed pollution transported across state lines.

Predecessor Program Remains in Place

In granting the stay, the appeals court said it expected EPA to continue to administer the Clean Air Interstate Rule until the court resolves the petitions for review of the cross-state rule.

Holmstead said companies now expect the Clean Air Interstate Rule will remain in place for all of 2012, even if the court upholds the cross-state rule this year.

EPA issued the Clean Air Interstate Rule in 2005, but the D.C. Circuit remanded it to EPA in 2008 (North Carolina v. EPA, 531 F.3d 896, 67 ERC 1151 (D.C. Cir. 2008)).

However, the court allowed EPA to continue to administer the rule until a replacement program was put in place.

The Dec. 30 stay order by the U.S. Court of Appeals for the District of Columbia Circuit in EME Homer City Generation L.P. v. EPA is available at <http://op.bna.com/env.nsf/r?Open=thyd-8q3m6w>