From: Emory Smith <ESmith@scag.gov>
To: Pisarik, HollyHollyPisarik@gov.sc.gov
Date: 2/10/2016 2:38:07 PM
Subject: RE: EPA Case - WV v. EPA 111d - Clean Power Plan - Carbon Emissions from Existing Power Plants
Attachments: Final States SCOTUS Stay App - ACTUAL (M0116774xCECC6)-c1.pdf

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Holly, I have a points to note re your proposed summary:

- the number of states and state agencies joining is 29, as you can see from the attached stay application, but 3 of the agencies that joined were in addition to their state AG's.

- I am not sure that the deadline is entirely correct and but DHEC could provide that information. See below. For example, the stay application states that "West Virginia currently obtains 95% of its energy from coal-fired power plants, and yet must reduce carbon dioxide emissions 26% by 2022, and a staggering 37% by 2030."

- DHEC would also need to be consulted as to the retrofit or shutdown as I believe that the rule goes with overall state emissions rather than plant by plant levels.

- I am also not sure that new plants have had to comply with the same standards. In fact, EPA has issued a rule re new power plants, and we have challenged that rule also.

A primary challenge to the rule is that the EPA lacked the authority to promulgate it under the Clean Air Act. I have pasted in below some excerpts from the Stay Application re the challenge:

- Relying on five words in a rarely-used provision of the CAA—"best system of emission reduction"—EPA claims the authority to require States to achieve massive carbon dioxide emission reductions that EPA has calculated based on "shifting" electric generation away from fossil fuel-fired power plants to other sources of energy—such as wind and solar—that EPA prefers. 80 Fed. Reg. at 64,726. And because there is no way to meet the Plan's targets solely by making performance improvements at fossil fuel-fired power plants, it is undisputed that the Plan will force a massive reordering of the States' mix of generation facilities. . . .

- The "generation shifting" at the heart of the Plan, 80 Fed. Reg. at 64,729, is a power that EPA has "discover[ed]" in Section 111(d) for the first time in that provision's 45-year history, UARG, 134 S. Ct. at 2444. And there simply is no argument that the statute can be read to "clearly" confer on EPA such transformative authority over the American economy.

- the Plan regulates existing power plants under Section 111(d), even though those plants are regulated under Section 112. By its terms, the Section 112 Exclusion prohibits EPA from regulating a source category under Section 111(d) where that source category is already "regulated under section [1]12." § 7411(d)(1)(A). Abandoning the understanding of that text that EPA has taken for 20 years (and honored in practice), the agency now claims that "the phrase 'regulated under section [1]12'" is ambiguous and "only exclud[es] the regulation of HAP emissions under [S]ection [74]11(d) and only when that source category is regulated under [S]ection 112."

The Rule is very complicated. The challenge by the States is focused on the legal issues of the authority of the EPA. DHEC is more involved in the technical aspects of the potential application of the rule to our State. The agency has also been involving in organizing meetings of interested groups – state agencies, utilities, environmental organizations at which the Rule has been discussed. I suggest that you check with Dawn Miller, Asst. Gen. Counsel at DHEC re the operation of the rule. Her number is 898-3360. Or you may contact Myra Reece, Director of Environmental Affairs for DHEC at 898-4102. Myra has chaired the meetings.

If you have questions or if I may be of other assistance, please let me know.

Emory

From: Pisarik, Holly [mailto:HollyPisarik@gov.sc.gov]
Sent: Wednesday, February 10, 2016 12:22 PM
To: Emory Smith
Subject: EPA Case

I want to give the Governor an update on this case. I'm late to the game because I haven't had any involvement in this case before now. Can you review the blurb below to make sure it's an accurate characterization of the case.

Last year, South Carolina joined 13 other states in challenging the EPA's regulation that was intended to impose limits on the carbon emissions from existing power plants. New power plants already have to comply with these standards. Once implemented, the regulation would require each state to cut its carbon dioxide emissions rate from current coal-filled power plants to meet state-specific standards starting in 2020. Existing power plants would have to retrofit their operations or shut down if they can't meet the standards. It is predicted that, if implemented, this rule would increase power bills for South Carolinians.

The states petitioned the court to block the EPA from implementing the rule, arguing the EPA lacked the authority to issue the regulation. They argue the regulation is an attempt to make law, not enforce the law. Yesterday, the Supreme Court granted the states' application for a stay, meaning the implementation of the EPA's regulation is halted pending disposition of the case in the Court of Appeals and the Supreme Court. The case is now at the briefing stage in the Court of Appeals. Final briefs are due April 22nd and oral argument is scheduled for June 2.

Holly G. Pisarik
Chief Legal Counsel
Office of Governor Nikki R. Haley
O: 803-734-8465 C: 803-322-6255