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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Emissions Rule Foes Face Long Odds In Scientific Attack

By **Sean McLernon**

Law360, New York (November 06, 2013, 8:33 PM ET) -- Opponents of proposed federal emissions rules for new power plants are focusing their critiques on the technological feasibility of the carbon capture and storage requirements, which attorneys say is a risky legal strategy against the U.S. Environmental Protection Agency as it typically receives considerable deference on scientific issues.

A U.S. House of Representatives hearing last week highlighted concerns about the current status of carbon capture and storage, or CCS, that is part of the proposed emissions standards scheduled to be finalized next year. Arguments that the technology has not been "adequately demonstrated" as required under the Clean Air Act took center stage in the hearing.

Those same allegations are expected to be a critical part of the inevitable lawsuits challenging the rule, with opponents painting the measure as an EPA power grab that places impossible demands on coal-fired power plants. After all, power plants designed to use the technology aren't yet up and running.

The industry's strategy has raised eyebrows. Cost-based challenges would likely face better odds, plus the decision to question the EPA's scientific bona fides could easily backfire. Courts have typically deferred to agencies in technical areas where federal officials have expertise. Former head of the Pennsylvania Department of Environmental Protection and current Blank Rome LLP partner Michael L. Krancer stressed that the technology is available, even if there are questions about its current scalability.

"The whole thing is an exercise in overstatement and hyperbole from folks who are screaming that the sky is falling down," said Krancer, who directed the Pennsylvania DEP from 2011 until earlier this year as part of Republican Gov. Tom Corbett's administration. "It's not falling down."

There's nothing new about regulatory regimes providing incentives for technological investments in certain areas, Krancer said. Besides, the EPA spent a large portion of its proposed rule defending its scientific rationale and is poised to fight the legal battle, he said.

History doesn't seem to be on the industry's side either. Regulatory challenges based on science have been, for the most part, unsuccessful, according to LeClairRyan partner Thomas G. Echikson.

"Those are the hardest cases to win," Echikson said. "Substantively, it's an incredibly difficult battle."

The new source performance standards for carbon emissions are still in the proposal stage, during which the EPA will be reviewing submissions from the public about how the rules can be improved. Opponents of the proposal will likely turn in a slew of technical comments, which will probably say it's unreasonable to project that the technology will be available for full-scale plants, he said.

The EPA will then have to make sure it adequately addresses all those concerns, as opponents could later claim that the agency was ignoring their legitimate critiques. But as long as the EPA takes the comments seriously, it will look like a case of its word against the industry's, and that's where deference provides the EPA with an advantage.

"Given the scrutiny of this one, EPA is going to take extra care to make sure it responds to every substantive point that is raised in order to support its conclusions," Echikson said.

The D.C. Circuit has also previously backed the EPA's use of test data to show that a technology has been adequately demonstrated, albeit 40 years ago in the *Portland Cement Association v. Ruckelshaus* and *Essex Chemical Corp. v. Ruckelshaus* cases.

The Portland Cement opinion stressed that Section 111 of the Clean Air Act looks toward "what may be fairly projected for the regulated future" and that the technology does not need to be in actual routine use somewhere.

The appeals court also ruled, however, that the EPA must take into account the cost to industry when crafting its best system of emissions reduction, or BSER, which in this rule is partial carbon capture and sequestration.

Opponents of the proposal will likely make the cost argument a main part of their challenges, according to Weil Gotshal & Manges LLP partner Annemargaret Connolly.

"Cost is going to play a huge factor," Connolly said. "It can't be exorbitantly expensive; there has to be some level of reasonableness."

The agency will also have to explain how the existing applications of CCS technology adequately demonstrate that it's the best system of emissions reduction that can be rolled out across the country, according to Stoel Rives LLP partner Geoffrey B. Tichenor.

"The EPA often gets deference and will be afforded deference on its interpretation of regulations and on the CAA as a statutory matter, but given that commercial CCS has not yet been achieved or demonstrated in practice, I don't think this is a legal challenge that the EPA will be eager to confront," Tichenor said.

Showing that a functional power plant can use the technology would go a long way toward helping the EPA prove that the standards are reasonable. The \$4 billion Kemper County CCS plant in Mississippi has been touted by the administration as an example that coal-burning plants can significantly reduce their carbon emissions levels, but the project's launch has been postponed until late 2014.

Winston & Strawn LLP partner Elizabeth C. Williamson said the BSER cost evaluation will be a "tough hurdle" for the EPA because the agency's analysis doesn't appear to include all the costs of the projects, since there are no working facilities using the technology.

"EPA will have to prove that partially completed facilities are able to achieve these limits when they are fully completed," Williamson said. "That's going to be a difficult threshold for the agency to meet."

Luckily for the EPA, the delay of the Kemper plant doesn't doom the proposal, according to Echikson.

"The standard doesn't necessarily require that the technology be used in practice," Echikson said. "There is an element of evaluation of if it will be available in the future, and the reasonableness of that analysis."

The EPA has devoted plenty of time and energy into putting these regulations together, even going so far as completely scrapping a proposal from April 2012, after a wave of negative comments, and starting from scratch this fall. The agency could also revise the standards before they are finalized next year, to correct any details it believes could leave the rule vulnerable in court.

The agency also has the will of the people on its side, according to Krancer, for whatever that's worth.

"Elections have consequences," Krancer said. "President Obama was 100 percent clear on where he

was going with carbon and greenhouse gases and climate change. The American people had a choice, and they made a choice."

--Editing by Jeremy Barker and Edrienne Su.

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