

From: [Stein, Mark](#)
To: [Carl Dierker](#); [Cayleigh Eckhardt \(eckhardt.cayleigh@epa.gov\)](mailto:Cayleigh.Eckhardt@epa.gov); [Curley, Michael](#)
Subject: FYI...
Date: Friday, March 24, 2017 7:17:00 AM

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March 24, 2017

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Daily News

Power Groups Ready Reconsideration Petition For EPA CWA Effluent Rule

March 23, 2017

Power sector groups are readying an administrative petition urging EPA to reconsider its Clean Water Act (CWA) effluent rule for power plants, setting the stage for the Trump administration to potentially agree with the request and try to short-circuit litigation over the Obama-era rule that industry has charged lacks a scientific justification.

The Department of Justice (DOJ) says the petition is expected to be filed by March 24, according to a recent [deadline extension motion](#) that it filed with the U.S. Court of Appeals for the 5th Circuit panel. The court is reviewing *Southwestern Electric Power Co. (SEPC), et al. v. EPA*, which tests the legality of EPA's CWA effluent limitation guideline (ELG) for power plants. "EPA further wishes to inform the Court that counsel for Utility Water Act Group and Southwestern Electric Power Co. advised EPA that these petitioners plan to submit to EPA an administrative petition for reconsideration of the Rule under review no later than March 24, 2017," says the motion which requested more time to file EPA's opening brief in the suit -- a request that the 5th Circuit granted on March 21, extending the deadline from April 4 to May 4.

SEPC and other utility groups challenging the ELG [have argued](#) that because EPA withheld crucial documents from the regulatory record, on the basis that they contain confidential business information (CBI), it is impossible to review regulators' findings on whether the rule's technology mandates are "affordable" for facilities.

"On the record before the Court, the Final Rule is arbitrary and capricious because it lacks adequate justification and support. The pervasiveness of CBI is so great that the Rule must be vacated in its entirety," the groups

argued in their opening brief asking the 5th Circuit to scrap the ELG. The 2015 ELG sets “best available technology” standards for power plants to minimize the pollution content of their wastewater discharges. Rather than coming into effect immediately, those requirements are scheduled to be included in future CWA discharge permits for the utilities.

Ongoing Litigation

DOJ has yet to file a response to the petitioners' opening briefs, meaning the Trump administration has not been locked into a defense of the Obama EPA's rulemaking.

The forthcoming reconsideration petition could thus give it an avenue to avoid arguing in favor of a rule the White House does not support, by asking the court to either halt or end the litigation while it potentially revises the rule to address the concerns outlined in the reconsideration petition.

Similarly, the agency is already weighing reconsideration petitions on the Obama administration's [facility safety rule](#) and its [2016 renewable fuel standard mandates](#) for cellulosic biofuels.

Beyond attacks on EPA's withheld documents, the power companies are also saying that EPA should have sought public comment on how technological upgrades required by the Clean Air Act standards for greenhouse gas (GHG) emissions from existing power plants, known as the Clean Power Plan, will affect ELG compliance.

However, that issue is unlikely to factor into reconsideration of the ELG since the Trump administration is widely expected to drastically scale back the GHG rule or eliminate it altogether.

Separately, environmentalists are [suing EPA in the D.C. Circuit](#) to win release of data EPA collected on power plants' effluent treatment processes in order to support the ELG and which the agency says is confidential. The groups say the Freedom of Information Act requires releasing those documents, but the Trump DOJ has argued that doing so would violate the information law and discourage facilities from turning over confidential data to EPA in the future.

Environmentalists' Claims

Meanwhile, environmentalists' involvement in the *SEPC* case challenging the utility ELG on its merits could complicate any effort to hold or settle the suit, since they would need to agree to any settlement and could argue against staying the case while EPA considers the industry petition.

The advocates, together with some drinking water utility groups, [are asking the 5th Circuit](#) to overturn the rule's exemption for “legacy” wastewater held in coal ash impoundments -- facilities that store waste ash left over from burning coal -- that was generated before the rule took effect but will be discharged afterward.

They say the agency's decision to set less stringent requirements for the wastewater based on when it was generated, rather than when it will be discharged, “finds no support either in the Clean Water Act or the agency’s own rulemaking record.” -- *David LaRoss* (dlaross@iwpnews.com)

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