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Daily News

Environmentalists Raise Early Legal Attacks Over Plan To Delay Utility ELG

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Environmentalists are raising early legal attacks on EPA's proposal to indefinitely delay many provisions of the Obama-era power plant effluent limitation guideline (ELG) by arguing no federal law allows such a stay, though utilities and coal companies argue the the delay is needed to avoid unnecessary compliance costs.

In comments filed ahead of a July 5 deadline for input on the proposal, a coalition of environmental groups calls for EPA to withdraw the plan entirely, charging that there is no law giving it the power to halt implementation of an ELG and that even if the regulatory stay was within the agency's authority, it has offered no evidence that a delay is needed.

"Even if EPA had authority to postpone the ELG compliance deadlines, which it does not, its action is arbitrary and capricious. . . . EPA has failed to provide a reasoned explanation of the advantages and disadvantages of its proposed action," says a [comment letter](#) filed by 11 environmental and public-health groups.

If courts back those claims, it could further set back the Trump EPA's strategy of delaying implementation of Obama-era rulemakings it plans to eventually weaken or rescind, after the U.S. Court of Appeals for the District of Columbia Circuit [ruled](#) that the agency's delay of methane standards for new oil and gas operations was unlawful.

Even though the methane rule is based on the Clean Air Act while the ELG is a Clean Water Act (CWA) rule, the environmentalists' letter cites the court's decision as backing limits on EPA's ability to stay prior rules.

"Less than a week before these comments were filed, the D.C. Circuit issued an opinion forcefully restating precedent that agencies have no inherent authority to issue a stay of a rule pending reconsideration, but rather only the authority granted to them by Congress under statute," the groups' letter says.

However, comments on the proposed delay filed by power companies led by American Electric Power (AEP) and the coal firm Murray Energy say a delay is needed to spare power plants the expense of complying with a rule that could soon be modified or scrapped altogether.

"If EPA does not postpone the Compliance Dates, but subsequently determines that the limitations in the 2015 ELG Rule are not technologically and economically feasible, it will be too late for coal-fired generation facilities to avoid the devastating expense of compliance with the 2015 ELG Rule," Murray says in [its comments](#).

Effluent Guideline

The 2015 ELG sets technology-based mandates for power plants to reduce their effluent releases, to be implemented in CWA National Pollutant Discharge Elimination System (NPDES) permits.

But the Trump EPA's June 6 proposal would extend many of its compliance deadlines that would otherwise arrive in 2018 indefinitely, until EPA finishes reconsidering the rule in response to petitions from the Utility Water Act Group (UWAG) -- which represents many power industry groups on water issues -- and the Small Business Administration's (SBA) office of advocacy.

If finalized, the proposal would supplant EPA's current stay of those same deadlines under its Administrative Procedure Act (APA) authority to delay implementing a rule pending the outcome of a court challenge.

Environmentalists are [already suing](#) over that delay, saying it goes far beyond the limited circumstances where the APA allows an agency to block implementation of a previously issued rule.

While the environmentalists' letter largely raises issues on which the groups could base a future suit over the delay, it also claims that the stay proposal is already having concrete impacts by discouraging state regulators from issuing new CWA permits.

"In fact, other than a handful of draft NPDES permits just issued by the Maryland Department of the Environment, pursuant to a consent decree, we have seen no other draft or final NPDES permits issued since the stay became effective. We attribute this slowdown to uncertainty on the part of permit writers as to what to include in permits regarding the ELGs," the 11 groups' letter says.

Similarly, a separate [July 5 letter](#) from Quad Cities Waterkeeper warns that delaying the ELG would foster "regulatory chaos and uncertainty" that will undermine any effort to reduce pollution from power plants.

Environmentalists' Arguments

The environmental and health groups that weighed in on the proposal include Sierra Club, Earthjustice, Environmental Integrity Project, Clean Water Action, Prairie Rivers Network, Physicians For Social Responsibility, Chesapeake Physicians For Social Responsibility, Natural Resources Defense Council, Southern Environmental Law Center, the Environmental Law and Policy Center and Waterkeeper Alliance.

They use their letter to lay out legal attacks they could raise in a suit to block an eventual final rule, starting with the lack of any specific citation to a law allowing EPA to extend compliance deadlines for an already-issued CWA rule.

"EPA cites no statutory authority for the present action because there is none. The Clean Water Act contains no provision for staying regulations pending reconsideration, in contrast to the Clean Air Act, and moreover, requires compliance with [best available technology (BAT)] standards within three years of promulgation," the groups say.

Going beyond the issue of whether the CWA allows a deadline extension, the groups are also claiming that EPA has failed to show that a delay is necessary for the ELG in particular.

They argue that the June 6 proposal includes no analysis of benefits to human health or the environment that will be lost if facilities are no longer required to comply with the ELG, and that it fails to account for potential impacts on listed species under the Endangered Species Act -- both of which, they say, show that the rule fails the APA requirement that agency actions not be "arbitrary and capricious."

"EPA's failure to consider the public's loss of these benefits violates a basic tenet of reasoned decisionmaking and as such, renders its action arbitrary and capricious," the letter says.

The groups also attack the substance of the UWAG and SBA reconsideration petitions, saying EPA cannot base a delay on those requests because they lack merit. In particular, they target the claim that the ELG must be reworked since the Obama administration assumed power plants would also comply with EPA's rule governing disposal of coal ash and its Clean Power Plan for limiting greenhouse gas emissions -- two policies the Trump administration is also revisiting.

"UWAG's suggestion that EPA must redo its cost analysis because of impending and uncertain changes to the Coal Combustion Residuals rule and Clean Power Plan has been repeatedly rejected by courts because it is a recipe for perpetual analysis and delay in agency action -- perhaps exactly what UWAG intends," the environmental groups say. Finally, they say that even if the reconsideration petitions were valid, the stay goes beyond the rule provisions UWAG and SBA targeted for reconsideration, by including deadlines for limiting wastewater from fly ash and flue gas mercury control systems.

"While EPA is not justified in postponing any of the requirements of the ELG rule, to the extent that the proposed postponement would affect fly ash or flue gas mercury control wastewater, the action bears no rational relationship to the petitions it cites as the basis for reconsidering the rule," the letter says.

Industry's Arguments

Meanwhile, AEP and Murray do not raise defenses for the stay proposal's claimed legal flaws, but rather argue that it is needed to prevent the power sector from being subjected to NPDES requirements that would turn out to be unnecessary after EPA revises the ELG -- a step that AEP says in [its letter](#) should be considered a certainty.

"Rather than specifying a period of time for the postponement, AEP urges EPA to implement the postponement until a revised ELG rule is promulgated. At that time, new compliance dates would be specified in a final rule," it says.

Both AEP and Murray warn that without a stay power plants will end up paying for treatment technology that the Trump administration is likely to write out of its revised ELG, with AEP singling out flue-gas desulfurization (FGD) waste as a prime target for such a rewrite.

"If the FGD waste water limits are revised, AEP may be spending millions of dollars that may not be necessary, wasting rate-payer resources," it says.

Murray claims that EPA's cost and feasibility analyses in the 2015 rule are tainted by "self-interested vendors" of treatment technology who provided overly optimistic cost estimates in hopes of ensuring a rule that would increase demand for their products. Unless the rule is rewritten it will impose ruinous costs on facilities, the company argues.

"The reality is that existing technology simply will not work at most coal-fired generation facilities to enable them to meet the more stringent requirements. In short, the 2015 ELG Rule seriously threatens to put coal-fired electric generation out of business," Murray says in its comments. -- *David LaRoss* (dlaross@iwpnews.com)