INDUSTRY URGES EPA TO CRAFT NEW GHG RISK FINDING FOR POWER PLANT RULE
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The coal industry is urging EPA to craft a new greenhouse gas (GHG) endangerment finding to justify its proposed new source performance standard (NSPS) for power plant GHGs, saying that EPA's effort to issue the rule without such a finding or by using its 2009 motor vehicle GHG finding violates the air act and ignores public comment requirements.

"If EPA wishes to force society to conform to EPA mandates restricting coal usage, EPA must ground those mandates in the language of the [Clean Air Act], and it must provide an explanation of the public health and welfare danger its regulation will avoid and any public health and welfare disbenefits such regulation will create -- and it must give the public an opportunity to comment," Peabody Energy Co., a St. Louis-based coal company, says in June 25 written comments. Relevant documents are available on InsideEPA.com. (Doc ID: 2404652)

That and other arguments from Peabody and the National Mining Association (NMA) offer a glimpse of how opponents of the agency's climate regulations could shape a legal challenge to the NSPS for electric generating units (EGUs), which would set carbon dioxide (CO2) emissions limits. Those arguments add to many Republicans and industry groups' economic and policy arguments that the rule would virtually ban new coal power plants, harm public health and welfare by raising power rates and reducing reliability, and regulate GHGs under a law that was not meant for that purpose.

The agency is already facing an unusual legal challenge to the proposed rule from a group of new-plant developers, who say the proposal is already harming their efforts. But the indication from Peabody and other coal interests hints at legal arguments the agency will likely face if and when a final version of the rule is promulgated.

One environmental group lawyer, however, says that "legally, none of these [industry] arguments is going anywhere," noting that the U.S. Court of Appeals for the District of Columbia Circuit recently handed down a strongly worded per curiam opinion rejecting similar scientific and procedural arguments in upholding EPA's vehicle GHG endangerment finding in Coalition for Responsible Regulation (CRR), et al., v. EPA, et al. "The D.C. Circuit didn't show a lot of patience" for the industry attempts to throw up "procedural roadblocks to agency doing its job," the source says.

EPA gained the authority to regulate GHGs after the Supreme Court in 2007 ruled in Massachusetts v. EPA rule that GHGs meet the definition of air pollutants under the air act and that EPA must determine whether they threaten public health and welfare. The Obama EPA in December 2009 issued two separate findings that authorized it to regulate tailpipe GHG emissions: an "endangerment finding" deeming CO2 and five other GHGs to be pollutants that "may reasonably be expected to endanger public health or welfare," and a "cause-or-contribute-significantly" finding saying vehicles contribute to that health- and welfare-harming pollution.

EPA says in its April 13 proposed rule that it can regulate GHGs from EGUs using performance-based standards under the air act's "new stationary source" provisions

because it already regulates the power facilities for their other emissions. The agency proposes taking the current new source categories for coal power plants and natural gas plants and combining them into a new source category for regulating GHG emissions.

The agency says it can regulate GHGs from EGUs under section 111 of the air law because the statute only requires that EPA make endangerment and "cause-or-contribute-significantly" findings for the source categories, something the agency has already done for the EGUs in question. "Section 111 does not require the EPA, as a prerequisite to regulating any particular air pollutant, to issue an endangerment finding or a 'cause-or-contribute-significantly' finding for that air pollutant from that source category," EPA writes.

EPA rejects that it even needs to revisit the science behind the 2009 vehicle GHG endangerment finding, "given recent scientific findings that strengthen the scientific conclusion that GHG air pollution endangers public health and welfare."

But EPA also offers two alternative legal justifications in which the agency instead draws on the vehicle endangerment finding and argues that the agency can extend it to those EGUs. One alternative would extend the vehicle finding to EGUs while making a separate "cause-or-contribute-significantly" finding for the EGUs based on their "large amount of CO2 emissions."

The second alternative would justify the GHG regulation "on a rational basis for protection of public health or welfare." EPA explains the "rational basis" stems from the vehicle endangerment finding, its denial in 2010 of several industry petitions asking the agency to reconsider the finding, and on two National Academy of Sciences (NAS) assessment reports, "coupled with the fact that EGUs are the largest stationary source emitters of CO2."

But in their June 25 comments, NMA and Peabody call EPA's main justification a misinterpretation of the statute, saying the section 111 requires EPA to make a GHG endangerment finding for the EGUs if the agency wants to regulate the GHG emissions from those facilities. Section 111 says the EPA administrator "shall include a category of sources" in the agency's list of source categories subject to regulation under section 111 "if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."

Drawing on Massachusetts v. EPA, NMA argues that "EPA wishes to regulate GHGs simply because GHGs are air pollutants," saying that the Supreme Court directed EPA to make the finding before it could actually issue regulations. "Under EPA's approach, there would be no limiting principle as to what pollutants EPA could regulate," NMA writes, arguing that EPA could regulate steam from power plants without any justification, violating the air act's intent of "protecting public health and welfare."

The environmental group lawyer, however, defending EPA, says "the statute says what it says. You make the endangerment finding for the source category, not for every individual pollutant you want to cover."

NMA then says EPA erred by lumping two separate source categories together into a new category without making an endangerment finding, "a transparent attempt to avoid EPA's plain statutory obligation to make these findings."

Furthermore, the commenters argue that EPA cannot, in its alternatives, substitute the vehicle GHG finding and two NAS climate assessments for a separate finding for EGUs, saying that the statute does not allow a finding for that source to be applied to other source types, that the motor-vehicle finding uses outdated science and that such a move would violate notice-and-comment requirements.

NMA, for example, says EPA's GHG endangerment finding for vehicles "does not relieve EPA of the obligation of complying with the specific command of section 111," which the group says requires EPA to make a new GHG endangerment finding as part of the NSPS rulemaking.

The environmental group lawyer, however, points to the recent appellate ruling in suggesting a court may similarly view such an argument as another procedural roadblock. "We're talking about six well-mixed greenhouse gases, and they have the same climate impacts whether emitted from vehicle or emitted from power plant," the source says.

The industry commenters also argue that the 2009 vehicle endangerment finding rests on outdated science. NMA says that although EPA's second alternative would draw on the 2010 and 2011 NAS reports to bolster the motor vehicle endangerment finding, the agency fails its public-comment obligations because it "summarizes but does not ask for comment on the two [NAS] reports and does not discuss any other new science."

Even if EPA could use the NAS reports, Peabody and NMA write, new science has arrived "that undermines that finding, that contradicts the 2010 and 2011 NAS reports, and that argues against establishing CO2 NSPS."

That argument echoes the sentiments of Patrick Michaels, a **Cato Institute** fellow who in a June 27 blog post touted the latest draft of a document his group has worked on as a scientific resource to help legal teams "take down the Endangerment Finding." Instead of suggesting the science behind human-caused climate change is uncertain, as industry opponents did in the CRR case, the document seeks to go after the science itself. Michaels has argued that the endangerment finding, as a scientific document, should not be static and should therefore be subject to future challenge.

But some legal experts have said the D.C. Circuit's ruling sent such an unequivocal message rejecting industry arguments about the endangerment finding science that no court would take up a new challenge without significant new scientific information. Michaels has insisted that his document contains such new science and suggests it could serve as a resource for a legal challenge for the NSPS GHG power plant rule.

The lawyer suggests that "the reason these lawyers were making arguments about uncertainty are that science cannot be taken on head-on. If they thought it could, they would have made that argument." Furthermore, industry's contention that EPA did not take comment on the NAS reports is irrelevant because the D.C. Circuit upheld EPA's ability to draw on independent assessments to justify rulemakings, the source says. -- Puneet Kollipara