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Miners Drop Planned Data Quality Suit Over CCS Mandate In EPA's NSPS

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Coal miners have dropped their planned legal challenge under the Data Quality Act (DQA) that would have sought to block EPA's proposed requirement that new coal-fired power plants install partial carbon capture and sequestration (CCS), though the agency may soften the mandate in its final rule.

A source familiar with the effort says the miners have dropped their planned suit because of fears over “protracted litigation” that few could afford to litigate while continuing to work. “I'd love to do it, but at the end of the day, I can't, and I can't despite the validity of the issue(s) at hand,” the source says. “They win this one because they are putting many of us in poverty while they do it,” the source adds.

According to recent press reports, the miners had been gathering signatures from thousands of miners from multiple states and jurisdictions who had planned to sue EPA over its proposed new source performance standard (NSPS) requiring new coal plants to install partial CCS as a way to limit greenhouse gas (GHG) emissions.

One of the likely plaintiffs, Kurtis Armann, told local reporters that the rule “can be challenged now” even though the measure was not yet final. “It is an administrative and legislative error. It doesn't have to do with the final rule and we are not attacking the rule in its entirety. We'll let the states and the coal companies do that at a later date.”

Instead, the group planned to adopt a legal approach first advanced by the Center for Regulatory Effectiveness (CRE) that the NSPS violates DQA requirements because the agency did not comply with the law's peer review requirements since it did not allow for adequate scientific review of the CCS requirement. The strategy sought to combine DQA requirements with a *mandamus* order that allows suits to stop unreasonable government action as a way to overcome DQA litigation hurdles.

Under the data law, agencies are generally required to ensure that scientific data they use to develop policy decisions are objective, reproducible and peer-reviewed. The law requires agencies to accept and respond to petitions to correct allegedly flawed data used in rulemakings and other decisions.

But key federal courts have so far held that the agency responses to DQA petitions are not judicially reviewable, eliminating an enforcement mechanism for private parties to pursue challenges if agencies deny their petitions.

In the case of the NSPS, EPA had proposed to require that new coal plants install partial CCS -- though the proposal is believed to be on shaky legal ground because few plants with CCS were operating.

In addition, some critics claimed EPA did not allow adequate scientific review of its proposed determination that CCS technology is “adequately demonstrated” as the Clean Air Act requires. For example, the agency blocked a Science Advisory Board panel from reviewing its determination, charging that the issues the panel wanted to review -- such as the technology's safety -- were beyond the scope of the proposed rulemaking.

CRE and others argued this was a violation of the DQA and the group has already filed a DQA petition seeking to correct the data. It had also urged the administration to instead craft an interim rule that required “CCS-ready” plants and floated the legal strategy that urged critics to seek to block EPA from completing the rulemaking -- even though it was not yet finalized.

The group acknowledged the proposed legal strategy was risky, because seeking a *writ of mandamus* to block the proposed rule faces a high legal bar and could be difficult to win. “The *writ* of mandamus is considered a 'drastic'

remedy that courts do not often grant. Given this high standard, it is not unthinkable that the courts may deny the motion and leave the petitioner subject to standard penalties," CRE warned when it first proposed such a suit.

New Problems For CCS

But even as the miners have dropped their planned suit, sources say EPA is facing further hurdles -- and opposition -- from mine worker interests to its proposed requirement -- though the agency is believed to have dropped or delayed its immediate CCS mandate in the draft final rule it sent to the White House earlier this spring.

According to one labor lawyer, critics of EPA's proposal are optimistic -- following meeting with officials from the White House Office of Management & Budget, EPA and other agencies -- that the agency will drop the proposed CCS mandate. "We understand there is a strong likelihood they will back down from CCS largely for legal reasons, and we applaud" that outcome, the source says.

The source says a new legal problem for EPA's CCS mandate has cropped up under a line of cases known as Portland Cement Association (PCA), which the source says set a precedent that any performance standard "has to be reasonably anticipated as the future method of control of emissions. . . . And who today can reasonably anticipate that CCS is going to become a performance standard in the future? All trends are going 180 degrees in the other direction. All [new plants] are going to natural gas."

The source adds that EPA may be just realizing that the PCA line of cases poses additional problems for CCS in the NSPS, which also faces hurdles due to the fact that nearly all of the projects EPA pointed to in the proposal to demonstrate CCS are faltering, as well as energy law language that could bar the agency from mandating new technology based on projects that receive federal funding, as all the U.S. CCS plants at issue here have.

The source is unsure what standard EPA is considering adopting in lieu of a CCS requirement. But the National Mining Association urged administration officials at a meeting June 17 to allow traditional but highly efficient pulverized coal technology known as ultra super critical (USC) to serve as the NSPS coal plant standard. The group pointed to the John W. Turk USC plant that came online in late 2012 in Arkansas as the one that should set the NSPS standard.

The labor lawyer suspects that the miners opted to drop the planned legal effort because of concerns that any challenge to a proposed rule would "be deemed premature by the courts for the same reasons that the D.C. Circuit rejected" in a different lawsuit by Murray Energy and 12 attorneys general that sought to challenge the proposed version of EPA's existing source performance standards (ESPS).

"Namely, the new source rule remains a proposal and has not been issued as a final rule," the source says.

However, another source familiar with the issue believes it was dropped not because of flaws in the strategy but due to hurdles to organizing a suit, which the source says is "not impossible but not trivial. . . . I don't think they had any money so I don't think they had any permanent staff. I am not completely surprised." -- *Dawn Reeves* (dreeves@iwpnews.com)

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