

EPA Announces Stay of Deadlines and Reconsideration of Effluent Limitations Guidelines for Steam Electric Power Plants



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On April 12, 2017, the EPA announced that it will reconsider and administratively stay future deadlines of the 2015 final rule that set new, technology-based effluent limitations guidelines (ELGs) and standards for steam electric power plants under the Clean Water Act. The final rule places significant burden on affected segments of the steam electric power generating industry. While certain requirements of the new ELGs were generally set to become effective as soon as November 1, 2018 through incorporation into NPDES permits, the compliance timetable and future of the final rule is now unclear.

The Rule

As we previously [posted](#), the EPA published the final rule on November 3, 2015. The final rule generally applies to steam electric power plants that use fossil fuels (e.g. coal, oil, or gas) or nuclear energy to heat water in boilers, except those with a nameplate capacity of 50 megawatt (MW) or less. It regulates six types of waste streams, setting stringent limits for many pollutants, including a zero-discharge

requirement for some waste streams as early as November 1, 2018. Compliance costs associated with new ELGs have been estimated to cost \$480 million per year. Legal challenges to the final rule are currently pending before the U.S. Court of Appeals for the Fifth Circuit.

The Stay and Reconsideration

On March 24, 2017, and April 5, 2017, respectively, the Utility Water Action Group and U.S. Small Business Administration petitioned the EPA to reconsider and administratively stay future deadlines of the final rule. The petitions raise various challenges to the final rule and argue that the new ELGs are not technologically or economically feasible within the proscribed timeframe, which requires compliance as early as November 1, 2018. With its actions last week, the EPA has granted the petitions under Section 705 of the Administrative Procedures Act, declaring that future deadlines of the ELGs will be stayed, pending judicial review and effective upon publication in the Federal Register. Litigation challenging the EPA's issuance of the stay, including whether the EPA has the authority to stay future deadlines of an already effective rule, is anticipated. The EPA previously attempted to stay the effective date of two final rules, including the Boiler Rule, in 2011, though under different circumstances. In that case, the D.C. Circuit required the agency to satisfy the traditional criteria for a temporary restraining order to sustain the stay. The Court ultimately rejected the agency's attempted stay as arbitrary and capricious. *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11 (D.D.C. 2012).

The EPA announcement also explained an intention to ask the U.S. Court of Appeals for the Fifth Circuit to stay the pending litigation on the final rule until September 12, 2017, by which time the agency will inform the Fifth Circuit of any parts of the final rule that it seeks to have remanded to it for further rulemaking. The EPA filed such a motion with the Fifth Circuit on Friday, April 14, 2017. The motion affirms that the EPA also plans to conduct notice and comment rulemaking on the stay of the effective dates and/or the compliance dates of the final rule. Various organizations are expected to file opposition pleadings contesting the EPA's motion shortly.

The Impact

While the EPA's administrative stay of future ELG deadlines does not serve to stay the rule itself, it does remove, at least temporarily, many important compliance deadlines. Issued NPDES permits which have already incorporated those deadlines as permit requirements now likely lack supporting authority. Indeed, the EPA's intended reconsideration of the ELGs calls into question all substantive rule requirements.

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