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Supreme Court Blocks Obama Administration's Clean Power Plan

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On February 9, 2016, the Supreme Court of the United States issued an unprecedented grant of applications to stay the Clean Power Plan, President Obama's signature climate change rule. The rule is being challenged in the U.S. Court of Appeals for the District of Columbia Circuit, and the stay prevents the rule from becoming effective until the DC Circuit issues a ruling on the merits and the Supreme Court takes final action on appeals from that ruling. Appeals of the DC Circuit ruling are all but assured and, if the DC Circuit decides the case on an expedited basis as is expected, the Supreme Court could consider the case in the Court's next term starting October 2016. Because the Supreme Court is unlikely to issue a ruling on the fate of the Clean Power Plan before 2017, the stay will mean that the current administration will have no further role in shaping the rule (if remanded) or implementing it (if upheld).

The Clean Power Plan aims to reduce carbon dioxide emissions from existing coal-fired power plants by 32 percent below 2005 levels by 2030. The rule would achieve most of these reductions through increased use of renewable energy and the transition of energy production from coal-fired power plants to natural gas-fired power plants. While EPA has made changes to the rule based on comments, there are no existing coal-fired power plants that, standing alone, can achieve the reductions required by the rule. The rule is viewed as the cornerstone of the Obama administration's strategy for meeting the emissions reductions agreed to in the Paris climate change pact signed this past December. Although the first deadline for power plants to reduce carbon dioxide emissions is not until 2022, with additional reductions required by 2030, the rule required states to submit implementation plans by September 2016, with an allowance for a two-year extension.

The Supreme Court's decision to stay the Clean Power Plan was unexpected given the very limited instances in which the higher courts have granted such stays of environmental rules. A three-judge panel of the DC Circuit had declined to grant a stay of the Clean Power Plan just last month. In fact, the DC Circuit has only issued one stay of an environmental statute in recent memory (and perhaps in its history): That being a stay of the controversial Cross-State Air Pollution Rule—also known as the Transport Rule—which required certain states to improve air quality by reducing power plant emissions that contribute to ozone and fine particulate pollution in other states. It appears the Supreme Court has never stayed an EPA rule prior to a decision on the merits by a court of appeals.

The standard for granting a judicial stay is high. An applicant for a stay must show (1) that there is a "reasonable probability" that four Justices will grant certiorari from a final decision of the court of appeals, (2) that there is a "fair prospect" a majority of the Court will conclude that an adverse decision on the merits was erroneous, (3) that irreparable harm to the applicant will result without a stay of the challenged rule, and (4) that the balance of equities and relative harms to the parties and the public interest support a stay.

The Supreme Court granted the stay by a 5-4 vote, with Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito in the majority. Justices Ginsburg, Breyer, Sotomayor, and Kagan would have denied the applications for a stay. The one-paragraph order issued by the Court does not include any explanation as to why the stay was granted, but given the standard for such action, the five justices granting the stay appear to have telegraphed their skepticism of the rule.

Opponents of the Clean Power Plan argue that the rule impermissibly forces states to expend resources developing plans to implement the rule and that coal-fired power plants will be forced to shut down as early as this year. EPA argued that initial compliance by states is not required until later this year (with the possibility of a two-year extension) and that power plants are not required to reduce carbon dioxide emissions until 2022. States are divided in their response to the Clean Power Plan, with 29 states challenging the rule and 18 states supporting it.

The implications of the Supreme Court's stay of the Clean Power Plan will become increasingly apparent over the next several months. The following are likely effects:

I. **The Clean Power Plan will not go into effect, if at all, until after the 2016 presidential election.** Even the most accelerated predictions of the judicial review timeline indicate that a decision from the Supreme Court will not occur—and the stay will remain in effect—until mid-2017, after the next President has taken office. The next President's administration will likely have to decide whether to continue the government's legal support of the rule.

II. **Many states will stop, or substantially slow, implementation planning for the Clean Power Plan.** The stay effectively invalidates the September 2016 deadline for states to submit implementation plans, so states will divert resources away from preparing implementation plans. If the Clean Power Plan ultimately survives judicial review, EPA will be forced to set new deadlines for plan submittals.

III. **Some states—including California and some of the Regional Greenhouse Gas Initiative states—are likely to continue taking steps to promote renewable energy production and developing regional climate change pacts.** These states already have laws with climate change mandates similar to or more stringent than the Clean Power Plan. Some other states—particularly those with low coal-fired power plant inventories—may continue voluntary implementation plan development, because they may perceive a competitive advantage to be in front of other states in renewable energy investments.

IV. **Focus will be on the DC Circuit over the next six months.** The DC Circuit has granted expedited briefing of the consolidated petitions challenging the rule, and oral argument is set for June 2 (and June 3, if needed). Under this schedule, a decision may be forthcoming as early as September 2016, with petitions for rehearing and rehearing by the full or en banc DC Circuit immediately following. Because the three-judge DC Circuit panel assigned to hear the case is comprised of two judges appointed by Democratic presidents and one judge appointed by a Republican president, some observers have speculated that the panel will be inclined to uphold the rule. However, predictions of this nature are inherently speculative. Regardless, the Supreme Court's apparent skepticism of the rule's legal basis is a signal that the Court is inclined to grant certiorari if the rule is upheld by the DC Circuit.

V. **The Supreme Court's stay will have implications beyond the Clean Power Plan.** Historically, the DC Circuit has been extremely reluctant to grant stays of environmental rules under the Clean Air Act and other environmental laws it has special jurisdiction to review, often weighing the environmental benefits predicted by EPA more heavily than the economic and other harmspredicted by the regulated community. While the Clean Power Plan is unique in some ways—especially with regard to the large number of states and other parties opposing the rule and the wide-ranging impacts for electricity producers and consumers—this action by the Supreme Court is likely to result in closer consideration of stay motions and more stays being granted in the future.

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