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The Long and Winding Road of the Clean Power Plan Litigation

By Jim W. Rubin and H. Alex Iliff*

The authors of this article provide an update on the status of the Clean Power Plan litigation in light of the U.S. Supreme Court's stay and Justice Antonin Scalia's death.

The Clean Power Plan ("CPP") is without a doubt one of the most complex and controversial regulatory undertakings in the U.S. Environmental Protection Agency's history, so much so that it was challenged in court—twice—before it was even published in the Federal Register. Likely because of this far-reaching scope and impact, the U.S. Supreme Court, on February 9, 2016, took the highly unusual step of issuing an order staying the CPP pending resolution of the many challengers' petitions for review of the rule in the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), a court that had earlier denied requests for such a remedy.

A week later, Justice Antonin Scalia, perhaps the most outspoken critic on the Court of the EPA's greenhouse gas regulations, suddenly passed away, leaving uncertainty as to the future composition of the Court. The largely unexpected stay immediately threw into doubt the future of what may be the Obama Administration's signature environmental initiative. At the very least, the stay ensures that the key compliance deadlines will not arrive until after the change of administration in January 2017. But the decision also signals that the plan may face difficulties upon ultimate Supreme Court review, although that could depend on the future configuration of the Court.

WHAT THE SUPREME COURT DID

Twenty-seven states and a large number of utilities, companies, and industry groups challenged the CPP in October 2015, soon after it was published. Many of these petitioners then moved for a stay of the rule in the D.C. Circuit as well as expedited briefing, claiming the rule was unlawful and that they would be irreparably harmed if they were forced to begin preparing to comply while the D.C. Circuit was still considering their challenges. On January 21, 2016, the D.C. Circuit denied the stay without a written opinion, but it did expedite the

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matter so it would be briefed and heard by the court by June 2–3, 2016.

A number of states and other petitioners then took the unprecedented step of seeking a stay of the rule from the Chief Justice of the Supreme Court, by and large repeating the same arguments presented to the D.C. Circuit on the original stay petition—that the rule was likely unlawful and that they would be irreparably harmed if the rule were to remain in effect.

The Chief Justice asked for the EPA and other respondents to file briefs, allowed reply briefs and then brought the matter to the full Court for consideration. On February 9, 2016, the Court issued a brief order, without opinion, granting the stay of the rule until the D.C. Circuit rules, and, if a petition for certiorari is filed, the Supreme Court either denies the petition or takes review and rules on the merits.

What this means in practical terms is that the CPP is essentially stayed until both the D.C. Circuit and Supreme Court rule on the merits of the challenges (or the Supreme Court denies a review request).

EFFECT OF THE STAY ON IMPLEMENTATION AND LITIGATION SCHEDULES

The first significant deadline under the CPP is September 6, 2016, when states are required to either (a) submit plans designed to ensure the power plants in their state achieve CO_2 emission reduction targets set by the EPA, or (b) submit a formal request for an extension until September 6, 2018, when they must submit a complete plan. Although the deadlines for submission of state plans are relatively aggressive, the states are not required to impose actual emission restrictions until 2022, allowing the regulated community time to make the modifications and other investments needed to comply.

With the stay in place, the September 6, 2016 deadline is almost certainly no longer effective, because there is no reasonable prospect that the challenges to the CPP will be entirely resolved before that date, and even if they were, the states would likely be given additional time to comply in light of the stay.

Under the D.C. Circuit's current schedule, all briefing on the EPA's legal authority is to be completed by April 2016, and oral argument is set for June 2, 2016, with the potential of an extra day if needed. Assuming the typical period between oral argument and decision, it is unlikely that the D.C. Circuit will rule until late 2016 or early 2017.

Even if the D.C. Circuit rules more quickly, the losing party is likely to seek review by the Supreme Court. In that case, the Supreme Court is unlikely to decide on whether to hear the case, let alone rule on it, until well into 2017 at the earliest.

LIKELIHOOD OF SUCCESS BEFORE THE SUPREME COURT

The Supreme Court's decision to issue a stay suggested that at least five of the justices—Roberts, Scalia, Thomas, Kennedy, and Alito, all of whom joined in the order granting the stay—may have had significant doubts as to the CPP's validity.

The Supreme Court's order contained no explanation of the Court's rationale for issuing the stay, but under the legal standard for issuing such stays, the Court considers, among other things, whether there is "a fair prospect that a majority of the Court w[ould] vote to reverse the judgment below [upholding the CPP]."[1]

The issuance of the stay suggested five justices believed the CPP may fail before the Supreme Court on the merits, which is not an encouraging sign for supporters of the regulations. This may not be unexpected, given recent warnings by Justice Scalia in *UARG v. EPA* (a 5-4 decision) that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy . . . we typically greet its announcement with a measure of skepticism."[2] As noted below, however, the death of Justice Scalia could change the balance of views on the EPA's authority in this case.

That said, the Supreme Court may have had motivations for issuing the stay other than skepticism about the validity of the CPP. As the CPP's challengers argued in their application for a stay, the EPA in the past has been able to achieve its regulatory goals by setting aggressive timetables that drive the regulated community to comply before the courts can decide whether the EPA's regulations are valid.

That was the case in *Michigan v. EPA*, where, by the time the Supreme Court issued its 2015 decision finding the EPA had not properly considered costs in developing regulations limiting emissions of hazardous air pollutants from power plants, power plants had already made most of the investments necessary to comply, satisfying the EPA's objective. When the matter was remanded to the D.C. Circuit, one of the EPA's arguments in support of the regulations was that most facilities had already incurred the costs required to comply with the rules, so the disruption caused by remanding the rules to the EPA rather than vacating them would be limited.

In their request for a stay of the CPP, the petitioners placed great emphasis

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[1] *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); Br. of State of West Virginia, et al., in support of Application for Immediate Stay, No. 16-___ (Sup. Ct. Jan. 26, 2016) at 13.

[2] *Util. Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2444 (2014).

on the *Michigan* situation—apparently hoping that the Supreme Court would not be pleased at the way the EPA had sought to characterize the impact of the Court's *Michigan* decision—and the same five justices who remanded the EPA rule in *Michigan* were the ones who stayed the CPP. Hence, it seems likely that the Court may have been motivated, at least in part, by the argument that waiting for full review through the Supreme Court could significantly prejudice the power industry by requiring allegedly significant compliance costs to be incurred before litigation was complete.

As a result, it may be the case that the Supreme Court's issuance of a stay is less an indicator of its likely ruling on the validity of the CPP than of its view of harm and desire to avoid a repeat of *Michigan v. EPA*.

A POTENTIAL PATH TO SUCCESS FOR EPA

Regardless of the Supreme Court's motivation, the stay was not a welcome result for the EPA, as it indicated the Agency could face a difficult path in the Supreme Court with the five-justice majority that granted the stay. However, the death of Justice Scalia could very well change that path. The EPA still must win the case on the merits in the D.C. Circuit, but there it has drawn a panel with two Democrat-appointed judges (Rogers and Srinivasan) who could be more open to EPA's assertions of authority than others on that court. If it wins below, the EPA might face a Supreme Court split evenly between liberal and conservative wings, and a 4-4 tie would preserve a D.C. Circuit victory. Alternatively, the EPA could potentially face a full court with a new Democrat-appointed jurist who could provide a majority in favor of the rule, or even a Republican-appointed jurist who may move the Court in the other direction.

In any event, the path is neither easy nor clear. The EPA is not assured that any judge, regardless of the appointing party, would support the Agency's broad exercise of authority. But with Justice Scalia on the case, the future of the rule was much more doubtful.

BROADER IMPACTS

As noted above, the stay will remain in place until the D.C. Circuit rules on the merits and the Supreme Court either declines to review the D.C. Circuit's decision or rules on the merits itself.

For the regulated community, the decision to issue a stay means significant uncertainty. It remains possible that the CPP will be upheld, leading to the establishment of implementation plans with which utilities must comply, albeit on a delayed timeline. On the other hand, it is also distinctly possible that the Supreme Court will invalidate the rule, or that a Republican administration will seek to scuttle it before the courts reach a decision. The EPA has announced its

plans to continue working with willing states and could continue to finalize open issues. These include finalizing a federal plan that would be imposed on states that do not meet applicable compliance deadlines and setting model rules for allowance or rate-based trading programs that would provide guidance to states looking to trading as a cost-effective compliance technique. EPA might also consider some of the pending administrative petitions for reconsideration to the extent they suggest minor improvements in the rules.

At a minimum, however, there is now significantly less pressure on states to aggressively develop plans to meet the CPP's initial deadlines, and there is a strong chance that those deadlines will be pushed back to give states time to plan following resolution of the legal challenges. For states that challenged the plan, this may mean a slowdown or cessation in stakeholder and other programs undertaken to develop compliance plans. Some states like Montana, North Dakota, West Virginia, and Texas have announced cessation of planning activities. Other states may decide to continue planning, either because they have their own programs in place or because they wish to pursue clean energy programs in their states (e.g., California, Minnesota, Washington and the states of the Regional Greenhouse Gas Initiative).

For those states which decide to slow or stop their progress, the regulated community would be less likely involved in near-term discussions with regulators seeking input regarding their proposed plans under the CPP, and the focus may turn to other regulatory programs and the more typical state planning processes. It may take some time for states to figure out what position to take in the wake of the stay, so the regulated community may face uncertainty for some time.

The Supreme Court's decision has also prompted some commentators to raise concerns that the recent Paris climate change accords may now be in jeopardy, as major international players like China and India may have based their decision to submit to the accords on the understanding that the United States would also take aggressive action. The actual impact remains unclear as the CPP is still valid until otherwise determined, and the Obama administration has stated its climate change commitments remain solid and are based on a variety of programs, not just the CPP. Still, the Supreme Court's ruling has injected uncertainty into the international realm as well.