

TO: State Commissioners

**FR: Brad Ramsay, NARUC GC
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RE: Q&A on the U.S. Supreme Court's Decision to Grant a Stay of the EPA's Clean Power Plan

[1] What happened?

On Tuesday, February 9th, the United States Supreme Court granted the stay request filed by the 27 States (and others) parties opposing the EPA's Clean Power Plan in pending litigation before the D.C. Circuit Court of Appeals (DC Circuit). It was a 5 to 4 decision (please see below or attached). Chief Justice Roberts, along with Justices Scalia, Kennedy, Thomas, and Alito voted to stay the rule. Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented. This is unusual. I am not aware of any other administrative law based appeal where the Supreme Court has effectively reversed a US Court of Appeals that denied a stay request.

[2] What does “granting the stay” mean?

The stay halts the implementation of all the regulations during all stages of the litigation.

The Supreme Court order specifies that the stay will remain in effect until the Supreme Court has ruled on any petition for certiorari (discretionary Supreme Court appeal) that comes back to them after the DC Circuit hears the oral argument this June and releases a decision on the merits sometime in the fall.

In other words, the stay will remain in place through the proceedings before the DC Circuit and, assuming that the losing party appeals to the Supreme Court, until the Supreme Court takes final action on the case either by denying a petition for writ of certiorari or entering a judgment on the merits

[3] So what is the impact on the deadlines for State Action in the rule?

The deadlines established in the rule will necessarily change.

Even if the EPA rules are ultimately upheld in toto, the agency will be obliged to reset deadlines after the litigation is over – likely after additional proceedings governed by APA's adequate notice standard. In other words, after the litigation is complete, the EPA will set the rules. Due process will require them to establish deadlines that - at that time - give States a reasonable time to comply.

In the more likely case where either the rules are remanded for correction or elimination of any perceived legal defects, the EPA will have to complete a notice and comment proceeding to set new deadlines as part of a rulemaking proceeding that corrects the rules.

[4] So the D.C. Circuit is still hearing the case?

Yes, that's correct. The stay does not forestall the briefing and oral argument set before the DC Circuit. The June oral argument will go forward and the DC Circuit will issue a decision on the validity of the Clean Power Plan. At that point – whoever is on the losing side will file a petition for certiorari.

[5] Ballpark – how long before we see action from the Supreme Court that will

A. Allow the EPA to establish new deadlines assuming the rule survives judicial review intact? -

OR – a bit more likely given the Supreme Court's Stay

B. Open a rulemaking proceeding on remand to make changes imposed by either the D.C. Circuit or the Supreme Court?

The earliest that the DC Circuit could get out a decision and the Supreme Court could rule on a subsequent petition seeking discretionary review - and thereby end the legal proceedings would be first quarter 2017.

However, that assumes the Supreme Court would deny the petition for certiorari that almost certainly will be filed.

That won't happen. Only four Supreme Court Justices have to vote to "grant" review of a petition seeking certiorari. Even though a majority is needed to issue a decision on the merits. Whatever the DC Circuit does with the merits – at least four Supreme Court Justices are likely to vote in favor of certiorari. Assuming this more likely scenario, the earliest the Supreme Court could rule would be the second half of 2017 or even 1st quarter 2018.

[6] Do we know what petitioner argument the 5 Supreme Court Justices think has "a substantial likelihood of success on the merits?"

No. The order denying the stay is one paragraph and provides no information.

To prevail on a petition for a stay, the requesting parties must demonstrate that they would suffer irreparable harm without the stay and that they have a likelihood of success on the merits of the case.

So, while the granting of the stay is not a ruling on the merits, it does indicate five Justices think that there is a likelihood that the petitioners opposing the Clean Power Plan will succeed on the merits of the case.

Based on the arguments presented in the Stay requests, one can speculate if all or specific parts of the EPA's rule might survive or be remanded for modification or elimination – but that's all it would be – speculation.

(ORDER LIST: 577 U.S.)

TUESDAY, FEBRUARY 9, 2016

ORDER IN PENDING CASE

15A773 WEST VIRGINIA, ET AL. V EPA, ET AL.

The application for a stay submitted to The Chief Justice and by him referred to the Court is granted. The Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application