

TO: State Commissioners

**FR: Brad Ramsay, NARUC GC
Jennifer Murphy, NARUC AGC**

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

Understanding the Implications of the Stay

What did the Supreme Court do?

- The Supreme Court granted a request for stay of the final Clean Power Plan rule pending judicial review on the merits by the DC Circuit, and any subsequent judicial review undertaken by the Supreme Court.
- A stay is not a determination on the merits. In granting a stay however, a court must generally determine that there is some likelihood of success on the merits as well as the potential for irreparable harm if the stay is not granted.
- The fact that a stay was granted does not tell us what the ultimate outcome of the court challenge will be. It is possible that the final decision could uphold the rule, strike down the rule or remand the rule for changes to address any partial legal infirmities that the Court finds in the rule.

How long will the stay be in place?

- There are a range of potential implications for the timing of state plans and the beginning of compliance under the CPP. Assuming the rule is ultimately upheld, the delay may be relatively short or relatively long depending on the timing and basis of the court decisions.
- If one makes the reasonable assumption that the case will be heard by the Supreme Court, whatever the outcome in the DC Circuit, then the stay is likely to remain in place for at least one year and possibly 2 years, depending on the timing of the DC Circuit decision and the Supreme Court's review.
- A key element of the timing is whether the DC Circuit issues its decision in time for an appeal to go to the Supreme Court for a decision in the session ending in June 2017. The longer it takes the DC Circuit to issue its decision in 2016 (or into 2017), the less likely a Supreme Court decision will be made in the first half of 2017.
- While the stay is in effect, states are not subject to any of the deadlines in the final CPP rule, including the requirement to file a plan or request for an extension in September 2016. The stay does not impose any obligations or restrictions on states.

What effect will the stay have on the deadlines in the final rule for state plan submissions and the start of compliance by affected power plants?

- In the final rule, EPA provided states with approximately 3 years to put a final plan in place from the time the final rule was issued. The first compliance period begins in 2022

under the final rule.

- The stay and the timing of the final disposition of the legal challenges may result in a delay in the 2018 state plan filing deadline and possibly also the compliance timeline under the CPP, but this is not a given. Indeed, EPA may seek to shorten the time leading up to the filing deadlines and keep the compliance timelines intact given the lengthy time periods offered in the final rule.
- In other words, states may have less time to plan after the court case is decided than they had under the final rule. There is thus a potential downside for states that choose to put off additional planning until after the court case is resolved.

Should states continue to plan for the Clean Power Plan while the courts review the rule?

- States will need to consider whether continued planning is prudent preparation in the event that the Supreme Court ultimately upholds the rule.
- If the ultimate delay in the planning deadline is less than a year, the stay may not buy states more time than is already needed to carry out a thoughtful review of their options.
- The delay may be longer than a year, and in that event states might decide they can prudently relax their planning schedules but keep things moving to put themselves in a position to make sound decisions when the final timeline is known.

What is the “no regrets” path forward?

- To date, a number of states have pursued a “no regrets” path to better understand their policy options while they wait out the court challenges. Some states have undertaken analyses to determine least cost alternatives and/or the approaches that best fit their unique state circumstances. Most have taken part in multi-state conversations to learn from their counterparts in other states and explore whether trading among states can lower costs or lead to other benefits for their states.
- The stay lifts the requirement to file a plan or extension request with EPA in 2016. It will probably also end up giving states more time to devise state plans should the CPP survive judicial challenge, but how much additional time is unknown.

If you have any questions or comments on this discussion draft, please contact Franz Litz at flitz@gpisd.net or Doug Scott at dscott@gpisd.net.

111(d) Stakeholder Meeting Agenda

Date: February 22, 2016

Time: 10:00 am

Location: Council Bluffs Public Library

40 Willow Avenue

Council Bluffs, Iowa

Topic	Presenter
1. Welcome (10 min) <ul style="list-style-type: none">• <i>Please sign in and confirm your contact information on the sheet that is passed around.</i>	Bill Ehm, DNR Libby Jacobs, IUB
2. Update on Clean Power Plan Stay (10 min)	Jason Marcel, DNR Amy Algoe-Eakin, Region 7 EPA
3. What is EM&V* and What's Already Happening in Iowa (50 min)	Sue Hanson, Tetra Tech
4. EPA's Draft EM&V Guidance (50 min)	Lisa Gotto, Region 7 EPA
5. Lunch on Your Own (60 min)	
6. Bright Energy Solutions (20 min)	Shannon Murfield, MRES
7. Iowa's Technical Reference Manual (40 min)	Jennifer Easler, OCA Kari Gehrke, Alliant Energy
8. Discussion of Next Steps for the Stakeholder Process (45 min)	All

Next meeting: March 22, 2016 at the Lime Creek Nature Center in Mason City

*Evaluation, Measurement, and Verification
