

Clean Power Plan Stayed – What Happens Now?

Article By:

Adam DeVoe

Thomas J. Dougherty

On February 10, 2016, we reported that the Supreme Court stayed the Clean Power Plan (CPP) pending review by the DC Circuit Court of Appeals. As we noted, it's an unusual development since the case is not currently before the Supreme Court. It poses a slew of interesting and thorny questions for EPA and the various States that are already deep into developing implementation plans. The first deadline for those implementation plans is September of this year. So what happens now?

First, on the procedural front, the oral arguments on the legality of the CPP will be heard by the DC Circuit on June 2, 2016. If the D.C. Circuit moves very quickly, it could issue an opinion upholding or striking down the CPP by late summer of this year. That first step is, in itself, problematic because the initial deadline for state submission of implementation plans in the CPP is September, 2016. Granted, there is a provision within the CPP allowing States to seek a two year extension to file an implementation plan, but many states have not yet sought an extension and are already deep into preparing an implementation plan. Should they proceed or seek an extension?

It may be prudent for States to seek an extension and wait out the litigation. The Supreme Court's order granting the stay says:

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.

Given the unusual step of issuing a stay in a case not currently pending before the Court, it seems unlikely that the Supreme Court would refuse to grant certiorari, regardless of the outcome of the merits in front of the D.C. Circuit. Even if the Court denied certiorari, that probably would not occur at the earliest until October of this year, after the initial deadline for submission of state implementation plans has passed.

The Supreme Court will most likely hear the merits of the Clean Power Plan litigation in the 2017

session. Even if they hear the case early in the session and move quickly to release an opinion, final disposition and lifting of the stay is unlikely to happen anytime before early 2017.

At this point, our assessment is that the September, 2016 deadline is no longer realistic. It's unclear whether, during the pendency of the stay, an implementation plan filed by a State in 2016 could even be considered by EPA. These realities will surely be considered by EPA and, should the CPP be upheld by the Court, it is reasonable to expect that EPA would likely implement an extension of the implementation plan filing deadlines.

The situation is probably even more confusing for EPA. Recognizing these timing and procedural problems, how far can EPA go at this time to deal with future contingencies? Can EPA take steps now to automatically extend state implementation plan deadlines, or would that be a violation of the stay? Would Congress weigh-in if EPA attempted to spend more time and money on contingency plans during the stay? For practical and political reasons, perhaps EPA is simply in a wait-and-see approach, but this is another example of the confusion caused by the Supreme Court's unusual action in this case.

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