



EPA Creates Ambiguity Regarding Clean Power Plan Compliance Deadlines

On February 9, 2016, the U.S. Supreme Court issued a stay¹ of the U.S. Environmental Protection Agency's ("EPA") final rule, *Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, known as the Clean Power Plan.² The Court declared that the rule is stayed pending the disposition of petitions for review currently before the Court of Appeals for the District of Columbia Circuit³ and the disposition of any subsequent petitions for a writ of certiorari in the Supreme Court. Oral arguments before the D.C. Circuit are currently scheduled for June 2, 2016, and an appeal to the Supreme Court is almost certain following the D.C. Circuit's decision. A lift of the stay may therefore not occur until the end 2017 or early 2018. This timeline conflicts with some of the initial deadlines in the Clean Power Plan, including the requirement that states submit implementation plans to EPA by September 2016.

A statement on EPA's website regarding the stay indicates that "EPA firmly believes the Clean Power Plan will be upheld when the merits are considered" and that "EPA will continue to provide tools and support" for states that choose to continue to work on their respective state plans despite the stay.⁴ EPA has also

made statements indicating that it does not expect to change the Clean Power Plan's compliance deadlines, prompting Congress to accuse EPA of leaving state regulators and stakeholders "in the dark" and "in limbo,"⁵ and to advise governors to avoid implementing the Clean Power Plan until litigation is completed.⁶ EPA has not yet responded to these letters.

In addition to creating a confusing situation for those charged with implementing the Clean Power Plan, EPA's position is also contrary to recent precedent.

For example, in 2011 the D.C. Circuit granted a stay of EPA's Cross-State Air Pollution Rule ("CSAPR") pending judicial review.⁷ Following a 2014 Supreme Court decision reversing the D.C. Circuit's vacatur of CSAPR, EPA filed a motion asking the D.C. Circuit to lift the stay and to toll by three years all CSAPR compliance deadlines that had not passed as of the date of the stay order.⁸ EPA asserted that tolling the compliance deadlines was "equitable," would "truly preserve the status quo," and "would allow for the most orderly implementation of the Rule, while allowing ample lead time for parties subject to the Rule to come into compliance."⁹ The D.C. Circuit granted EPA's motion.¹⁰

In arguing for a tolling of the deadlines in the CSAPR case, EPA relied on the D.C. Circuit decision in *Michigan v. EPA*.¹¹ In *Michigan*, the court had granted a stay pending judicial review, which was lifted after the ruling. In its order lifting the stay, the court directed EPA to extend the compliance deadlines in the rule by the same number of days that the stay was in effect:

The original deadline for covered states to submit revised state implementation plans (SIPs) was September 30, 1999. On May 25, 1999 we stayed that deadline pending further order of this court. The purpose of a stay is “to maintain the status quo pending a final determination of the merits of the suit.” *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). At the time of the stay, covered states had 128 days left to submit their SIPs. Having made a final determination of the merits of the suit and denied the petitions for rehearing, and the full court having denied the petitions for rehearing en banc, we lift the stay but hereby order that covered states be given the 128 days, running from the date of issuance of this order, that they had remaining when the stay was imposed. While this grants somewhat more time than EPA’s current schedule of September 1, 2000, it does no more than restore the status quo preserved by the stay.¹²

A similar result was reached in a Tenth Circuit case, *Oklahoma v. EPA*.¹³ Petitioners in that matter argued that a stay of a Federal Implementation Plan pending a petition to the Supreme Court was necessary to delay the compliance periods established by that rule, which, if the rule were not stayed, would have required petitioners to move forward with significant and costly facility upgrades.¹⁴ EPA acknowledged in that case that the effect of a stay was to extend the relevant compliance dates.¹⁵ The court ultimately granted the stay.¹⁶

In opposing a stay of the Clean Power Plan, EPA similarly recognized that a stay would necessarily affect compliance deadlines: “Entry of such a ‘stay’ would mean that, even if the government ultimately prevails on the merits and the

Rule is sustained, implementation of each sequential step mandated by the Rule would be substantially delayed.”¹⁷ Although EPA was not successful in preventing the stay, the agency has failed to expressly acknowledge that compliance deadlines must therefore be postponed. Confirmation from EPA is needed to provide clarity to the regulated community and to state regulators responsible for executing the Clean Power Plan.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com/contactus/.

Charles T. Wehland

Chicago
+1.312.269.4388
ctwehland@jonesday.com

John A. Rego

Cleveland
+1.216.586.7542
jreg@jonesday.com

Mary Beth Deemer

Pittsburgh
+1.412.394.7920
mbdeemer@jonesday.com

Alina Fortson

Chicago
+1.312.269.1542
afortson@jonesday.com

Thomas M. Donnelly

San Francisco
+1.415.875.5880
tmdonnelly@jonesday.com

Casey F. Bradford

Atlanta
+1.404.581.8119
cbradford@jonesday.com

G. Graham Holden

Atlanta
+1.404.581.8220
ggholden@jonesday.com

Jennifer M. Hayes

Pittsburgh
+1.412.394.7992
jhayes@jonesday.com

Kevin P. Holewinski

Washington
+1.202.879.3797
kpholewinski@jonesday.com

Anna Claire Skinner

Atlanta
+1.404.581.8047
askinner@jonesday.com

Endnotes

- 1 [Case Nos. 15A773, 15A776, 15A778, 15A787, and 15A793.](#)
- 2 [80 Fed. Reg. 64662](#) (Oct. 23, 2015).
- 3 Case No. 15-1363.
- 4 EPA, "[Clean Power Plan for Existing Power Plants.](#)"
- 5 [Letter to the Honorable Gina McCarthy](#), Administrator, U.S. EPA, from Jim Inhofe, Chairman, U.S. Senate Committee on Environment and Public Works (Mar. 10, 2016).
- 6 [Letter to the National Governors Association](#) from Mitch McConnell, U.S. Senate Majority Leader (Mar. 21, 2016).
- 7 Case No. 11-1302, Doc. No. 1350421 (Dec. 30 2011).
- 8 Case No. 11-1302, Doc. Nos. 1499505 (June 26, 2014) and 1508914 (Aug. 22, 2014).
- 9 Case No. 11-1302, Doc. No. 1499505 (June 26, 2014).
- 10 Case No. 11-1302, Doc. No. 1518738 (Oct. 23, 2014).
- 11 Case No. 98-1497.
- 12 Case No. 98-1497, June 22, 2000 Order.
- 13 Case Nos. 12-9526 and 12-9527.
- 14 Case Nos. 12-9526 and 12-9527, Doc. Nos. 01019153450 (Nov. 6, 2013) and 01019161973 (Nov. 22, 2013).
- 15 Case Nos. 12-9526 and 12-9527, Doc. No. 01019157592 (Nov. 15, 2013).
- 16 Case Nos. 12-9526 and 12-9527, Doc. No. 01019180253 (June 2, 2014).
- 17 Memorandum for the Federal Respondents in Opposition to Applications for Immediate Stay of Final Agency Action, Case Nos. 15A773, 15A776, 15A778, 15A787, and 15A793.

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