

Insights: Alerts

# An Unexpected Supreme Court Decision Slows the Implementation of the Clean Power Plan

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Written by **Benjamin L. Snowden** and **Mark J. Riedy**

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The legal dispute over one of the Obama Administration's signature regulatory programs – the Clean Power Plan (the "CPP") – took an unexpected turn on February 9, 2016, when the Supreme Court granted a request by 27 states and other litigants to stay the implementation of the CPP until the legal challenges against it are settled (the "Ruling").<sup>1</sup>

The U.S. Court of Appeals for the District of Columbia Circuit had declined to stay the CPP, finding that the petitioners had failed to meet the stringent standards for obtaining a preliminary injunction pending court review.<sup>2</sup> The Supreme Court disagreed.

Never before has the Supreme Court stayed implementation of a rule before the lower court has ruled on its merits.<sup>3</sup> Furthermore, the Ruling is seemingly "politicized" by a 5-4 vote along ideological lines as well as by the absence of any textual reasoning behind the Court's unprecedented decision (including absence of reasoning for departing from long-standing court-made rules requiring considerable weight to be accorded to executive department's construction of statutory schemes it is entrusted to administer).<sup>4</sup>

Oral arguments are scheduled to be held in June 2016 before the D.C. Circuit. A ruling is not likely to be forthcoming for months after that, and however that court rules, the losing parties are likely to seek *certiorari* to the Supreme Court. Even if the CPP is upheld on review, the Supreme Court is not likely to issue a final decision (and thus allow the stay to be lifted) until late 2017 at the earliest.

The Ruling substantially hinders the implementation of one of the most important carbon dioxide emission reduction plans proposed by the Obama Administration. It also impedes the efforts to back the American commitments under the Paris 21<sup>st</sup> Conference of Parties accord (the "COP21 Agreement"), signed in December 2015.

In spite of the temporary setback for the CPP, the program is far from vanquished. In fact, a few considerations suggest that the CPP, or at the very least its objectives, may survive the legal challenges waged against it.

*First*, Supreme Court Justice Antonin Scalia passed away four days after the Ruling was issued. For over a decade, Justice Scalia contended that the statutory underpinnings for the Environmental Protection Agency's (the "EPA") authority to administer the CPP – the Clean Air Act – does not authorize the EPA to regulate

green-house gases (“GHG”) emissions but only conventional lower-atmosphere pollutants.<sup>5</sup> With Justice Scalia’s departure, the opposition to the CPP weakens and a possibility for a replacement justice holding less antagonistic views of the CPP has emerged.

*Second*, while the CPP is the only federal regulation tailored to reduce GHG emissions from existing electric generation, many other current and planned federal and state programs are designed to achieve emission reductions from the power generation sector. While these programs may not be as significant as the CPP in regards to its specific targets, they are substantially impactful when considered in the aggregate. Such programs include the EPA’s Mercury and Air Toxics Standard, the Carbon Pollution Standards for New, Modified and Reconstructed Power Plants, federal and state renewable energy, energy efficiency and demand-response incentives as well as renewable portfolio standards. In addition to these programs, future federal and state regulations are currently being considered to curb GHG emissions from other major-GHG-emitting industries and sources, such as the aviation, shipping, oil and gas industries. Prominent examples are the EPA’s proposed Oil and Natural Gas Air Pollution Standards<sup>6</sup>, and the first steps taken by the EPA to set standards for aviation GHG emissions to be adopted by the International Civil Aviation Organization.<sup>7</sup>

*Third*, not all states took part or agree with those suing the EPA over the CPP. Indeed, 25 states, counties and cities, some of which rank high among the most energy-producing states (e.g., California, Illinois, New Mexico)<sup>8</sup>, have vowed to continue defending the CPP and pursuing its emission reduction targets.<sup>9</sup> Other high-energy-producing states not forming part of the foregoing coalition, such as Pennsylvania, have made similar commitments.<sup>10</sup> Even some high-energy-producing states that have joined the legal action against the EPA, such as Colorado, have announced that they will continue to invest in curbing GHG emissions from their energy producing sector.<sup>11</sup> A significant number of states realize and embrace the great importance of shifting their electric sector to a cleaner and more efficient system. The EPA has stated that it would provide guidance and assistance to all states that choose to cut carbon pollution despite the CPP stay.<sup>12</sup>

*Fourth*, even in states hostile to the CPP, many players in the utility industry are also taking steps that will reduce GHG emissions, such as increasing their deployment of renewable generation. There are many commercial factors driving such moves, including the aging of coal-fired power plants; an increasing recognition of the need for resilience and diversification in utilities’ generation portfolios; the decreasing costs of renewable generation; and the introduction of new technologies, including energy storage and micro-grids, that will simultaneously reduce GHGs and create a more secure and resilient electric grid.

*Finally*, the United States, as the second largest CO<sub>2</sub> emitter in the world,<sup>13</sup> was among the leading forces behind the international efforts to combat climate change, culminating in the signing of the COP21 Agreement. This landmark agreement is the most comprehensive and legally binding climate-change agreement to date. Its unprecedented unanimity among its parties reflects a firm and growing international political support for its



targets. For these reasons, many believe the Ruling is unlikely to stave off the strong political and economic momentum for action against global warming.<sup>14</sup>

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<sup>1</sup> *West Virginia, et al. v. EPA*, No. 15A773, 2016 WL 502947, \_\_\_ S. Ct. \_\_\_ (2016).

<sup>2</sup> *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

<sup>3</sup> [http://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html?smid=pl-share&\\_r=0](http://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html?smid=pl-share&_r=0)

<sup>4</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 838, 104 S. Ct. 2778, 2780, 81 L. Ed. 2d 694 (1984).

<sup>5</sup> *Massachusetts v. EPA*, 549 U.S. 497, 533, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) ; *Utility Air Regulatory Grp. v. EPA*, 134 S.Ct.

2427, 2435 (2014)

<sup>6</sup>40 C.F.R. § 63.1

<sup>7</sup> <https://www3.epa.gov/otaq/documents/aviation/420f15023.pdf>

<sup>8</sup> <http://www.eia.gov/state/>

<sup>9</sup> <http://newyork.realestaterama.com/2016/02/18/joint-statement-by-a-g-schneiderman-states-cities-and-counties-in-response-to-temporary-stay-of-clean-power-plan-ID04061.html>

<sup>10</sup> <https://stateimpact.npr.org/pennsylvania/2016/02/10/wolf-says-pa-will-move-forward-on-clean-power-plan/>

<sup>11</sup> <https://www.colorado.gov/pacific/cdphe/cdphenews>

<sup>12</sup> <https://www.epa.gov/cleanpowerplanttoolbox>

<sup>13</sup> <http://www3.epa.gov/climatechange/ghgemissions/global.html>

<sup>14</sup> <http://climatenexus.org/experts-react-supreme-court-stay-clean-power-plan>

## Related People

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### **Benjamin L. Snowden**

Counsel

Raleigh, NC

t 919.420.1719

bsnowden@kilpatricktownsend.com



### **Mark J. Riedy**

Partner

Washington, DC

t 202.508.5823

mriedy@kilpatricktownsend.com