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# Supreme Court Issues Stay of Clean Power Plan - What Now?

By Mark J. Steger / Mar 07, 2016

In early February, in an extraordinarily rare move, the Supreme Court of the United States ("SCOTUS") stayed implementation of the Environmental Protection Agency's ("EPA") Clean Power Plan ("CPP") before the Court of Appeals for the District of Columbia ("D.C. Circuit") had ruled on its merits. The CPP is one of the most hotly contested EPA regulation in some time, impacting 47 states (3 states are exempt - AK, HI and VT) and involving states, state agencies, municipalities, industry, environmental groups, utilities, and trade associations, all supporting one side or the other. Because of this, the D.C. Circuit's decision on the merits will undoubtedly be challenged, returning to SCOTUS for further consideration.

According to EPA, the CPP is expected to reduce carbon dioxide emissions by 32% below 2005 levels by 2030 from two categories of electric generating units: (1) coal - fired power plants, and (2) natural gas-fired turbines. In order to achieve this reduction, the CPP establishes certain carbon dioxide emission guidelines that states are to use in developing their emission reduction plans. The plans would be based on EPA's Clean Air Act § 111 determination of "best system of emission reductions" (BSER). The emission reductions were to begin incrementally over an 8-year period starting in 2022 with final compliance by 2030, while attempting to simultaneously ensure a reliable and affordable electricity grid. EPA's BSER for the two affected fossil fuel-fired electric generating unit categories is a "combination of emission rate improvements and limitations on overall emissions" using the following three building blocks: (1) the introduction of efficiency improvements/equipment upgrades at existing coal-fired power plants; (2) the increased use of lower-emitting natural gas plants; and, (3) the increased use of renewable energy sources (wind, solar, hydroelectric).

Under the CPP, a state must first choose either a rate-based plan or a mass-based plan. A rate-based plan requires affected units to meet a performance rate stated in "pounds of carbon dioxide emitted per mega-watt hour produced" whereas a mass-based plan caps the total tons of carbon dioxide that can be emitted each year. After choosing what type of plan, the states then have two options in developing their compliance plans. One option is an "emission standards" approach that applies federally-enforceable emission standards to each affected unit to achieve the required emission reductions. The other option is a "state measure" approach that includes a combination of enforceable emission standards and other measures designed to achieve the required emission reductions. Both options allow the development of an emission trading program. Absent SCOTUS's stay, state plans were to be due for submission and approval to EPA in September 2016, with a two-year extension available.

The CPP is one of the more complex and potentially pervasive regulatory schemes adopted by EPA. Not surprisingly, numerous interested parties began taking sides many years ago. The current litigation involves virtually all of the affected states in the nation on one side or the other along with other interested state agencies, environmental groups, industry, utilities, and trade associations. Oral arguments on the merits before the D.C. Circuit are set to occur in June, 2016, with a decision by the Court expected this year. Briefing has already begun.

Despite SCOTUS's stay, which some thought to be the death knell for the CPP before the death of Justice Scalia, states on either side of the controversy as well as interested parties are continuing to prepare for the nation's shift to cleaner energy sources. According to the latest reports, twenty (20) states are moving forward with their state plans while nine (9) states are assessing their approach by conducting outreach programs and listening sessions so that they are not left behind in planning whichever way the Supreme Court ultimately rules. Finally, at least 18 states have stopped their planning efforts altogether. However, as the marketplace increases the demand for cleaner energy sources even without the CPP, utilities are continuing to plan for the shift in electricity generation by closing down older, poor performing coal-fired plants and replacing them with renewables or cleaner burning plants.

EPA claims that the CPP will result in climate and health benefits of \$25 to \$45 billion by 2030, even with coal and natural gas providing nearly 60% of the electricity generation in the United States in 2030. For affected sources and the electricity industry as a whole, it remains to be seen how the marketplace will react to the CPP delay and what state plans will look like once a reconstituted Supreme Court rules on the validity of the CPP.

For more information on EPA's Clean Power Plan and state planning efforts, please contact Mark Steger at [msteger@clarkhill.com](mailto:msteger@clarkhill.com) | 312-985-5916 or your Clark Hill attorney.