

PUBLICATION

Obama's Clean Power Plan Rule Halted By SCOTUS

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On February 9, 2016, the Supreme Court of the United States (SCOTUS) took an unprecedented step by halting the implementation of the Obama Administration's federal regulation to control carbon dioxide emissions, generally recognized as the most significant component of greenhouse gas (GHG) emissions.

The Supreme Court's move is unprecedented because it blocked implementation of federal regulations intended to combat global warming before the issue could be heard by an appellate court on its merits.

The U.S. Environmental Protection Agency's (EPA's) rule, announced in August 2015, under Section 111(d) of the Clean Air Act, was highly touted by the Obama Administration as transforming our national energy sector. The Supreme Court's intervention has major implications, some of which are discussed below.

GHG emissions are recognized as emanating from fossil fuel-fired electric generating units (EGUs), referred to as power plants in this alert, and also from oil refineries and transportation.

Specifics on the U.S. Supreme Court's Action

By a 5-4 margin, the U.S. Supreme Court, voting along ideological lines of their appointing presidents, granted an application to stay EPA's rule, entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: "Electric Utility Generating Units." rule has been referred to as the Clean Power Plan (CPP). The application for stay had been filed by 27 states and a number of industry trade groups.

The stay was granted pending disposition of the applicants' petition for substantive review in the U.S. Circuit Court of Appeals for the District of Columbia (D.C. Circuit) and any subsequent petition to the U.S. Supreme Court. While the D.C. Circuit had denied a similar request of stay by petitioners in that court on January 21, 2016, it agreed to expedite the hearing before a three judge panel of the D. C. Circuit Court on June 2-3, 2016.

The legal standard by which a court, such as the U.S. Supreme Court, will prevent a regulation from going into effect provides that the petitioner must make a strong showing that it is likely to prevail on the merits of its appeal, and that the petitioner has shown that without such relief it will be irreparably harmed. The fact that the U.S. Supreme Court has found for the petitioners challenging the Obama Administration's CPP sends a strong signal about how the U. S. Supreme Court may ultimately view the case on the merits.

The U. S. Supreme Court's stay is a major setback for President Barack Obama and EPA in the administration's efforts to control climate change.

A Recap of the Rule

The Obama Administration's CPP relied upon an aggressive strategy and first instance interpretation of Section 111 of the Clean Air Act. The CPP enabled EPA to set emission reduction goals for each state, based upon their current electricity generating mix, and thereby shift a state's energy grid from coal to low- and zero-emission carbon sources. The CPP is intended to achieve an estimated 32 percent national reduction in power

plant GHG emissions (below 2005 levels) by the year 2030. Interim targets for emission reductions kick in beginning January 1, 2022.

Once state goals are set by EPA, states are then given latitude to design a mix of alternatives to reduce carbon emissions. These include control options, such as fuel switching (coal-to-gas, biomass), utilizing renewable energy sources, and improving energy efficiency; and/or utilizing market-based approaches, such as cap-and-trade programs, carbon taxes, and trading of renewable energy credits.

The CPP program varies from traditional Section 111 Clean Air Act controls which provided for technology-based New Source Performance Standards (NSPS) applicable to specific categories of pollution sources. Traditionally, NSPS requirements have limited emissions to sources behind the industrial fence line, or at the emission stack. The new CPP program was viewed as granting EPA a novel regulatory approach to regulate fossil fuel-fired power plants with control options and market-based approaches that are applicable beyond the fence line of the industrial source. This led the state petitioners to argue that the regulation mandates a shift of power generation from coal to alternative energy competitors.

For additional information on the CPP as announced in August 2015, see this [Baker Donelson alert](#).

What Is At Stake?

Reputation and Legacy on International Stage

President Barack Obama's international climate control legacy is at stake. In December 2015, Paris, France, hosted the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (COP21) where the U.S. touted the CPP and its auto emission standards and made commitments which are to become a part of the Paris Agreement to cut global GHG emissions by 26-28 percent by 2025. The Paris Agreement is open for signature on April 22, 2016. Now, the U.S. commitments in Paris are in serious doubt.

Completing Claims of Dire Consequences

The Clean Power Plan has been the centerpiece of the U.S. commitment to controlling GHG's, which EPA has identified as the major culprit in raising thermal temperatures around the globe with dire predictions for melting glaciers, sea level rise, pestilence, extreme weather conditions, a shift in agricultural zones, threats to coastal cities and changing demographics. Some have even postulated that climate change is a cause of wars and population refugees across the globe. On the opposite side, concerns have been raised about the science behind climate change and dire warnings have been sounded about the cost of, and the reliability of, alternative energy sources, and the potential for fundamental changes in our standard of living.

The gauntlet has been thrown down by both sides, and there are huge issues at risk in this debate.

A Clean Power Future and International Innovation and Investment Leadership

The Obama Administration has touted the CPP as a revolutionary approach to global warming that will transform energy generation away from coal and oil, toward low- and zero-carbon renewable energy sources. The mantra, heralded by many business interests, has been that the U.S. could once again capture a position as an international leader in the new energy infrastructure of the future.

For more information on how this issue may affect your business or related matters, contact the author of this alert, Wayne Cropp, or any members of the firm's Environmental Group.

