

US Supreme Court Stay and Possible Timelines for Judicial Review¹

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February 18, 2016

As you all know, on February 9, 2016, the United States Supreme Court granted a stay of the EPA's Clean Power Plan rules regulating carbon dioxide from existing power plants. The stay will remain in effect until the DC Circuit Court of Appeals decides the merits of the litigation over the rules, and, if the parties ask the Supreme Court for review of the lower court's ruling, which they will, until the Supreme Court rules on the request for review. If review is denied, the stay will terminate automatically. If review is granted, the stay will remain in place until the Supreme Court issues its decision.

The very short order granting the stay does not explain why the Court granted it. The order says that Justices Ginsberg, Breyer, Sotomayor, and Kagan would deny the application for a stay.

Justice Scalia was one of the 5 justices who supported granting the stay. As you also know, Justice Scalia died on Saturday, February 13, 2016.

This means there is a great deal of uncertainty about what will happen. The following description provides information on some of the things we do know and some of the things we do not know.

We **do** know the stay means the EPA cannot implement or enforce the rules until the stay is lifted. Because of the time it will take for the litigation to work through the courts, it means the states will not have to file their initial compliance plans by September 6, 2016. It means that even if a state chooses to voluntarily file an initial plan, the EPA has no authority to act on it.

We **do not** know the effect the stay will have on the remaining deadlines in the rules if the rules are ultimately upheld. There were 5 separate applications for a stay. Basin Electric Power Cooperative's request for a stay asks the Court to extend all compliance dates by the number of days between publication of the rule and a final decision by the Supreme Court. However, it is unclear whether the Court's grant of the stay included a grant of this particular request, so I would not assume this is what will happen even if the rules are ultimately upheld.

The litigation on whether the 111(d) rules are legal or not is currently before a 3-judge panel of the DC Court of Appeals, and the Court has placed the case on a fast track.

¹ The time estimates provided in this document are the best guesses of the author and are based, in part, on information provided by NARUC's General Counsel Brad Ramsey and a Great Plains Institute paper authored by Franz Litz and Doug Scott.

Briefs are due in that case in April and oral argument is scheduled for June 2. We do not know when the Court will issue a decision, but it is safe to assume it will be within a very few months of the date of oral argument. There is no way to know whether the Court will uphold the rules, partially uphold them, or rule that the rules are invalid.

The losing party before the 3-judge panel may ask the entire Court of Appeals to hear the case. The process before the entire Court of Appeals could take several months.

The losing party before the full Court of Appeals will likely ask the Supreme Court to hear the case, and it very likely the Supreme Court will grant review. The Supreme Court hears cases and issues decisions in yearly terms. If the Court of Appeals is very fast and issues its decision by October of this year, it is possible the Supreme Court could hear the case during the 2016-2017 term and issue a decision by June of 2017. If the Court of Appeals takes longer, the Supreme Court may not issue a decision until June of 2018.

There is no way to predict whether the Supreme Court will uphold the rules or not. It is not reasonable to make a prediction on how the Justices will decide the merits of the case based on the Court's grant of the stay. The stay does indicate at least five Justices had concerns about requiring the parties to take action to comply with the rules while the litigation is pending. However, as we know, Justice Scalia is now deceased, and we do not know who the new Supreme Court justice will be or when the position will be filled.

In thinking about what is reasonable for Iowa, we will have to make some decisions about how to proceed without knowing whether the rules will ultimately be the same as they are now, whether they will be partially overturned, or whether they will be completely struck down.