TEXAS PUBLIC POLICY FOUNDATION
PolicyPerspective

April 2016
Armstrong Center for Energy and the Environment

Why Suspending State Planning Makes Sense in Light of the Stay of the 111(d) Rule

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The Clean Power Plan Makes Electricity More Expensive, Hurts Consumers, is Likely Unconstitutional, and Does Little to Improve the Environment

Three Fundamental Reasons Why All States Should Put Their Pencils Down

1. The Supreme Court has suspended the 111(d) Rule, including all deadlines, in response to state declarations to the Court—some of the strongest of which made the argument that precious state resources should be focused on other priorities until it is clear that the 111(d) Rule will survive judicial scrutiny. States should not undermine this premise by continuing to dedicate state resources to a rule that has no deadlines in effect and might not survive.
2. Even states that opposed the stay motions should stop work because, as stewards of taxpayer dollars, state agencies should not be consuming state resources unless and until it is necessary and prudent to do so. Based on prior precedent and judicial review timelines, it is a near certainty that no state plan submittal deadline will be imposed in a timeframe that would warrant continued state planning activities next year, let alone before the new president is elected.
3. The 111(d) Rule's future is uncertain at best and leading legal scholars believe the rule will, at minimum, need to be changed by the EPA to survive. States should not waste taxpayer dollars and stakeholder time and resources shooting at a moving target, especially given how politically divisive the state planning process is likely to be.

Key Points

- States should not continue to dedicate state resources to a rule that has no deadlines in effect and might not survive.
- Even states that opposed the stay motions should stop work because state agencies should not be consuming state resources unless and until it is necessary and prudent to do so.
- The Court's stay of the rule likely means the Court will require the EPA to, at a minimum, substantially alter the deadlines and technical requires, if it does not throw it out altogether.

INTRODUCTION

On February 9, 2016, the United States Supreme Court ("the Court") granted a stay of the EPA's 111(d) Clean Power Plan rule (the "111(d) Rule" or "Rule") through the completion of any proceedings in the Court. The Court's stay order was unprecedented, and it has dealt a major blow, at the very least in the short term, to efforts by environmental groups and states allied with the EPA to use the 111(d) Rule to impose restrictions on electricity fleets to favor renewable energy at the expense of fossil fuels—first coal and ultimately gas.

These same pro-111(d) Rule forces are now reshaping their message in hopes of keeping state planning going even though the impetus of most states' planning activities—the September 2016 initial submittal deadline and the subsequent 2018 final plan deadline—are no more. In hopes of convincing states to do what the federal government currently cannot and may never be able to do, they have made both the false claim that the Rule's compliance deadlines are not subject to the stay as well as the exaggerated claim that compliance deadlines could be reinstated so soon that states will lose precious time if they suspend state planning activities even for a short time.

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The purpose of this paper is to provide the legal context necessary to understand and evaluate these claims and to convey our strategic suggestions and recommendations for how states should proceed pending a final judicial determination of the Rule's legality. Political considerations will also need to be factored into state strategies, and this analysis does not presume to provide advice on those issues. The bottom line recommendation of this paper is that there is no legal or strategic rationale for continuing state planning activities in the near term. At the very least, states can and should suspend activities for the remainder of 2016, after which the, the intentions of a new president, the legal fate of the Rule and the future makeup of the Court will be in much sharper focus.

LEGAL/PRODECURAL BACKGROUND

One-hundred and fifty-seven parties filed 39 petitions challenging the Rule in court. Most, if not all, of those parties filed motions with the D.C. Circuit to stay the Rule pending judicial review. On January 21, 2016, the D.C. Circuit denied all the pending stay motions, stating only that the moving parties had not satisfied the "stringent requirements of a stay pending court review," which include demonstrating a likelihood of success on the merits and irreparable harm if a stay is not granted. Instead of a stay, the D.C. Circuit set the case on an expedited briefing schedule, with opening briefs due February 19, and oral argument set for June 2 (and possibly June 3 as well).

Numerous state and industry challengers applied to the chief justice of the Court for an emergency stay. On Tuesday, February 9, 2016, the Supreme Court, in a 5-4 decision, granted the applications, staying the 111(d) Rule through the conclusion of the litigation.

All sides agree that the stay is unprecedented. It is the first time the Supreme Court has blocked any challenged EPA rule—indeed any federal regulation—from taking effect before the D.C. Circuit has reviewed and passed on the challenge on its merits. The Court gave no reason for its action, but to obtain a stay, it normally must be shown that there is a "reasonable probability" that at least four justices will agree to hear the case, that there is a "fair prospect" that a majority of the Court will find that the lower court's decision was erroneous, and that "irreparable harm" will result if a stay is not granted.

Although responses to the Court's decision ranged from near certainty that the Rule will ultimately be struck down by the Court to those characterizing the stay as a purely procedural bump in the road, all agree that the stay was a major rebuke to the D.C. Circuit panel that refused to grant a stay (after examining the same evidence) and which will also decide the merits of the legal challenge to the Rule. There is certainly a general feeling that the grant of the stay might cause the panel to be more circumspect in its review. Justice Scalia's death factors in, but is not necessarily dispositive on the issue of whether the Rule is ultimately upheld.

DISCUSSION

I. What is the effect of the Stay?

Five stay applications were submitted to the Supreme Court. Three requested "an immediate stay of the" Rule. These applications were filed by (a) a coalition of 29 states and state regulatory agencies led by West Virginia and Texas; (b) a coalition of business associations led by the U.S. Chamber of Commerce and the National Association of Manufacturers; and (c) the state of North Dakota.[1]

An application filed by Peabody Energy and Murray Energy requested "an immediate stay of the final [R]ule,"[2] and, in addition, argued in its "Conclusion" section that "the [Rule's] magnitude and scope are unprecedented. It should be stayed, and all deadlines in it suspended, pending the completion of all judicial review."[3]

Finally, the application filed by a coalition of utilities and allied parties, including electric cooperatives, asked the Court to "immediately stay the effectiveness of the final [R]ule,"[4] and, additionally, specifically requested "an immediate stay of [the Rule] extending all compliance dates by the number of days between publication of the rule and a final decision by the courts, including this Court, relating to the rule's validity." Id. at 22 (emphasis added).

Supreme Court stay applications are made to the justice responsible for the Circuit Court of Appeals where the underlying case is pending. The five stay applications concerning the Rule were filed with the chief justice of the Supreme Court because he is the circuit justice for the D.C. Circuit, the court in which the legal challenges to the Rule are pending. A justice to whom a stay application is referred may act on the application alone or refer it the full Court. The chief justice referred all five applications to the full Court, and all were granted.

The text of each stay order is the same:

> The application for a stay submitted to the chief justice and by him referred to the Court is granted. The Environmental Protection Agency's (EPA's) "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

It is indisputable that these orders stay the Rule and any and all of its deadlines that pass while the litigation is pending. In addition, the general rule is that a judicial stay "halt[s] or suspends[s]" a regulation by "suspending the source of the authority to act"[5] and maintain[s] the status quo pending a final determination of the merits of the suit."[6]

Applying this general rule to the stay of the 111(d) Rule would result in a stay and extension of each and every one of the Rule's deadlines from the stay was granted, February 9, 2016, until the final conclusion of the litigation. This includes not just a stay and extension of the 2016 deadline to file a state plan or request a two-year extension and the 2018 deadline to file a state plan if an extension is granted, but also the 2022 deadline to begin emissions reductions and the 2030 final compliance deadline.

Just such a stay and extension of all the Rule's deadlines was expressly requested by the utility and allied petitioners, and arguably at least impliedly request by the other applicants. Further, the EPA's response in the Supreme Court stated that it understood all applicants to be seeking a stay of all the Rule's deadlines,[7] and that "[t]he effect of such relief would be that, even if the Rule is ultimately held to be valid, every sequential step in the Rule's implementation (including, for example, the 2030 deadline for full compliance by regulated sources) would be delayed for a significant period."[8] Thus, any arguments by EPA-friendly states or environmental groups that the deadlines were not stayed along with the Rule are misleading because all of the deadlines and lead time contained in the Rule are a part of the Rule provisions that were formally noticed, commented upon, and finally adopted by the EPA. If the EPA ultimately prevails, however, and the stay is lifted, it could seek to shorten some of the deadlines, such as, for example, shortening the final compliance deadline back to its original, pre-stay 2030 date. This issue is addressed in the next section.

Notably, the Supreme Court's stay of the Rule and its deadlines will remain in place even if the D.C. Circuit rules in the EPA's favor and upholds the Rule. It is unimaginable that the losing side at the D.C. Circuit will not petition the Supreme Court for review, and it is virtually certain that that petition will be granted—especially if the D.C. Circuit rules in the EPA's favor.[9] Although a seemingly minor procedural observation, this affirms the notion that all hypothetical timelines should assume the Court will review the D.C. Circuit decision, which adds several months to the timelines discussed in the next section.

II. How soon could state plans be due if the Rule is ultimately upheld?

Even assuming the D.C. Circuit issues an opinion shortly after oral argument—and even on a fast track it should take a few weeks—the earliest the case could be taken up by the Supreme Court is during the term that begins in October 2016. Traditionally, the Court issues opinions in important cases—and this surely qualifies as an important case—on the last few days of the term, which ends in late June or early July.[10]

The only directly relevant judicial precedents for how compliance deadlines will be reinstated upon the lifting of a stay are the Nitric Oxide State Implementation Plan (NO_x SIP) call and the Cross State Air Pollution Rule (CSAPR). In the NO_x SIP call case, when the stay was lifted, the EPA extended the deadlines for SIP submissions by the amount of time the stay had been in place because doing so was necessary to "restore the status quo preserved by the stay."[11]

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Similarly, in CSAPR, the D.C. Circuit stayed the rule shortly before it was to go into effect in January of 2012. After facial challenges were successful at the D.C. Circuit, but ultimately rejected by the Supreme Court, the D.C. Circuit opted to lift the stay during the pendency of EPA's resolution of deficiencies in the rule identified by the court in its decision on remand against the EPA on the as-applied challenges. The EPA reinstituted the start date and the subsequent deadlines three years into the future from the original dates, which was nearly the exact amount of time the stay was in effect.

If a similar approach is followed for the 111(d) Rule (assuming it is ultimately upheld) approximately 16-18 months would be added to the original schedule.

Some may disagree with this analysis and contend that the EPA could shorten some of the deadlines if the Rule is ultimately upheld. Even if that were true, however, it would not be legal or feasible for the EPA to require states to compress into one year all the work they would have been expected to complete between October 2015 and September 2018—this would render the stay a nullity and not preserve the status quo. And, even if the EPA could shorten deadlines to negate some of the effect of the stay, and even if it could do so by fiat, without having to go through notice and comment rulemaking, it would still almost certainly take several months to finalize these new deadlines which would delay the state plan deadline to no sooner than the Fall of 2019, almost exactly a year after it was initially required. This timeline solidifies the prudence of at least a 12-month suspension as further explained in the remainder of this paper.

III. What does this tell states about what they should be doing in 2016 and beyond?

Some states have said that they will continue to work on state plans notwithstanding the Supreme Court's order. Likewise, the EPA has said it will work with states that voluntarily choose to proceed while the stay is pending. The EPA appears to agree, however, that it likely lacks authority to approve any state plans until the stay is lifted.

In contrast, several states have made it clear that they will not proceed with state planning activities and others should follow their lead. The first to speak on the issue were the attorneys general of West Virginia and Texas when they sent a letter to the presidents of the National Association of Regulatory Utility Commissioners (NARUC) and the National Association of Clean Air Agencies (NACAA), arguing that states should suspend state planning activities given that the legal effect of the Supreme Court's ruling was to stay all the Rule's deadlines. Governor Scott Walker followed suit with an Executive Order saying basically the same thing. All these letters/measures are attached to this paper for reference, along with a table containing initial responses that have been voiced by a wide range of states.

Environmental groups have claimed that states will be losing precious time if they do not continue (based on many of the false/exaggerated timeline claims noted above). This section attempts to debunk these timeline myths and set out the basic facts that fully solidify the prudence of states putting their pencils down for at least the remainder of 2016 (and maybe forever).

As discussed in the prior section, even assuming the Rule is ultimately upheld, the most likely result is that the Rule's deadlines will be extended by the amount of time the stay was in place. This is especially true for the earlier deadlines, in particular the 2018 deadline for submitting final states plans and quite possibly the 2022 start date to begin emissions reductions.

Even assuming the Rule survives in whole or in part, it is unknown what a surviving rule would look like so it's impossible to know with certainty what a fully compliant state plan would look like. And the EPA may itself make modifications after the litigation is over and before any deadlines come into effect. Thus, any state planning activities at this time may very well end up being irrelevant after having almost certainly been costly, divisive, and controversial to develop.

Furthermore, if it is the EPA's intent to reset all the deadlines if the Rule is upheld, then it's not necessary for states to do anything during the pendency of the stay; states will still have the same amount of total time to seek extensions and develop state plans. If shortening the deadlines is the EPA's desire, it may play into the EPA's hands if states continue working on state plans while the stay is pending. If a majority of states have already made substantial progress on state plans when the stay is lifted, the EPA will have more leverage to argue for shortening the timelines since so much progress has been made on state plans notwithstanding the stay.

Moreover, those states that moved for a stay took the position that they would experience irreparable harm during the pendency of the litigation if a stay were not granted. It would be inconsistent with these arguments—and terrible optics—to continue to work on a state plan during the stay. This is especially true for states that filed declarations expressly stating that, without a stay, they would have to expend substantial resources between the publication of the final Rule and the conclusion of the litigation. The whole purpose of the stay is to prevent them from having to do exactly that.

From the perspective of the states challenging the Rule, the absolute worst thing that could realistically happen is the Rule could be upheld by the Supreme Court in mid-2017, and then the EPA could maneuver to require state plans between late 2018 and Fall 2019. The front end of this range is unlikely. First, it would probably be more trouble that it would be worth for the EPA to attempt it, as it would assuredly be subject to further legal challenge which would likely have the ultimate effect of extending the deadline to submit a state plan further out.

A much more likely result is that the three-year structure governing state plans are reinstituted, as happened in the CSAPR litigation. At the very worst, the EPA might compress that structure down to one to two years, which would mean that state plans would come due in the Fall of 2019-2020.

Accordingly, there are no real advantages—or at most very minimal—and some real potential disadvantages for states to continue working on state plans while the stay is in effect. Much time and money could be invested and ultimately wasted if the Rule is set aside or even upheld but changed.

Instead, it makes sense for states to do nothing for at least 12 months or, for stronger opponents of the Rule, while the stay is in effect. At most, states should probably do no more than prepare a "plan to develop a plan," i.e., a plan to go about developing a state plan on various timelines, depending on the ultimate outcome of the litigation.

Furthermore, with Justice Scalia's passing, there is no guarantee that the litigation will be concluded by mid-2017. For institutional reasons, the chief justice, and, indeed, the entire Court, may not wish to decide a case of this magnitude without a full complement of justices, regardless of the party affiliation of the president who appoints the next justice. If the Senate succeeds in delaying the appointment of a new justice until after the next presidential election, this may (but not necessarily will) delay final resolution of the challenges to the Rule until the next term. In that event, however, it is possible, although how possible is impossible to predict, that the Court might not wait until the end of the next term, i.e., until June or July 2018, to issue its decision but might do so earlier.

CONCLUSION

Now that a stay has been granted, states should avoid commitments or resource expenditures on detailed plan development as it is premature, and possibly prejudicial, to do so. Moving forward with state plans would be resource-intensive, divisive, and premature given the stay; if the Rule is upheld, it could be used by the EPA as a justification to try to maintain or reinstitute the deadlines in the original Rule. Actions that could be warranted in each state include executive orders, legislation directing agencies to forego planning activities, and/or appropriation restrictions on such activities for the duration of the stay, or at least for 12 months (until the election is over and the new administration and its plans are known).

END NOTES

[1] See Stay App. by 29 States and State Agencies, No. 15A773, at 1 (Jan. 26, 2016); Stay App. of Business Ass'ns, No. 15A787, at 1 (Jan. 27, 2016); Stay App. of North Dakota, No. 15A793, at 1 (Jan. 29, 2016).

[2] Coal Industry Stay App. at 1 (Jan. 27, 2016).

[3] Id. at 36 (emphasis added).

[4] Stay App. of Utility and Allied Parties at 1.

[5] *Nken v. Holder*, 556 U.S. 418, 428 (2009).

[6] *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

[7] See On Applications for Immediate Stay of Final Agency Action, Memorandum for the Federal Respondents in Opposition at 2-3, Nos. 15A773, 15A776, 15A778, 15A787, 15A793 (Feb. 4, 2016).

[8] Id. at 3.

[9] Justice Scalia's death does not change this analysis because, by tradition, it only takes four votes for the Supreme Court to accept a case for review.

[10] However, the fact that a stay has been entered might cause the Court to push up the announcement of the opinion somewhat. In the Cross State Air Pollution Rule case, the D.C. Circuit stayed the rule before it went into effect. The Supreme Court issued an opinion upholding the rule against a facial challenge in April, rather than at the end of term.

[11] Order, *Michigan v. EPA*, No. 98-1497, ECF 524995 (D.C. Circuit, June 22, 2000).

About the Author

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