

May 5, 2016

The Clean Power Plan: An Update on the Stay

Background

- Clean Power Plan (“**CPP**”) regulates CO2 emissions from existing fossil fuel-fired power plants.
- EPA promulgated final version of CPP on October 23, 2015.
- Petitions filed same day challenging the CPP in U.S. Court of Appeals for D.C. Circuit.
- Petitioners include: 28 states, industry challengers (including utilities, co-ops, manufacturing and natural resources groups) and members of congress.
- Parties who have intervened in defense of the CPP include states, municipalities, industry groups and environmental and public health groups.

The petitions – broad arguments

1. The EPA does not have the legal authority to impose these regulatory requirements on existing power plants under Section 111(d) of the Clean Air Act.
 - Section 111(d), they argue, states that the EPA cannot use Section 111(d) to regulate air pollutants emitted from a source category regulated under Section 112 – power plants are regulated under Section 112.
 - Section 111 does not allow EPA to restructure the energy sector or require generation shifting.
2. The CPP abrogates authority delegated to the States in the CAA and coerces States to carry out federal energy policy.
3. The EPA made so many changes between the original proposed and the final rule that the resulting CPP was not a “*logical outgrowth*” of the proposal, and, accordingly, the EPA should be forced to consider new objections to the rule.
4. The EPA should not be able to consider third-party factors (such as renewable energy technology) to set a standard for emission reductions at coal-fired power plants.
5. The EPA has not demonstrated that its Best System of Emissions Reduction is “adequately demonstrated”

Seeking a stay in D.C. Circuit

- D.C. Circuit denied the petition for a stay on January 21, 2016.
 - The D.C. Circuit very rarely stays a Clean Air Act rule – the last time was in respect of the Cross-State Air Pollution Rule.
- D.C. Circuit included only one sentence to explain its reason for denying the petition:

“Petitioners have not satisfied the stringent requirements for a stay pending court review. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2015).”

Seeking a stay in the Supreme Court

- Petitioners subsequently sought a stay from the Supreme Court, in an application directed to Chief Justice Roberts.
- In an unprecedented action, the Supreme Court granted the stay on February 9, 2016 with five Justices voting in favor:

“The application for a stay submitted to The Chief Justice and by him referred to the Court is granted. The Environmental Protection Agency’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.

D.C. Circuit Merits Decision Timing

- Merits briefing has concluded and oral argument is scheduled for June 2, 2016.
- The current proposal is five hours of argument, but June 3 has also been reserved in the event that arguments do not conclude within this time.
- Merits panel includes Judges Henderson, Rogers and Srinivasan.
- A decision from the D.C. Circuit *may* be seen this summer.

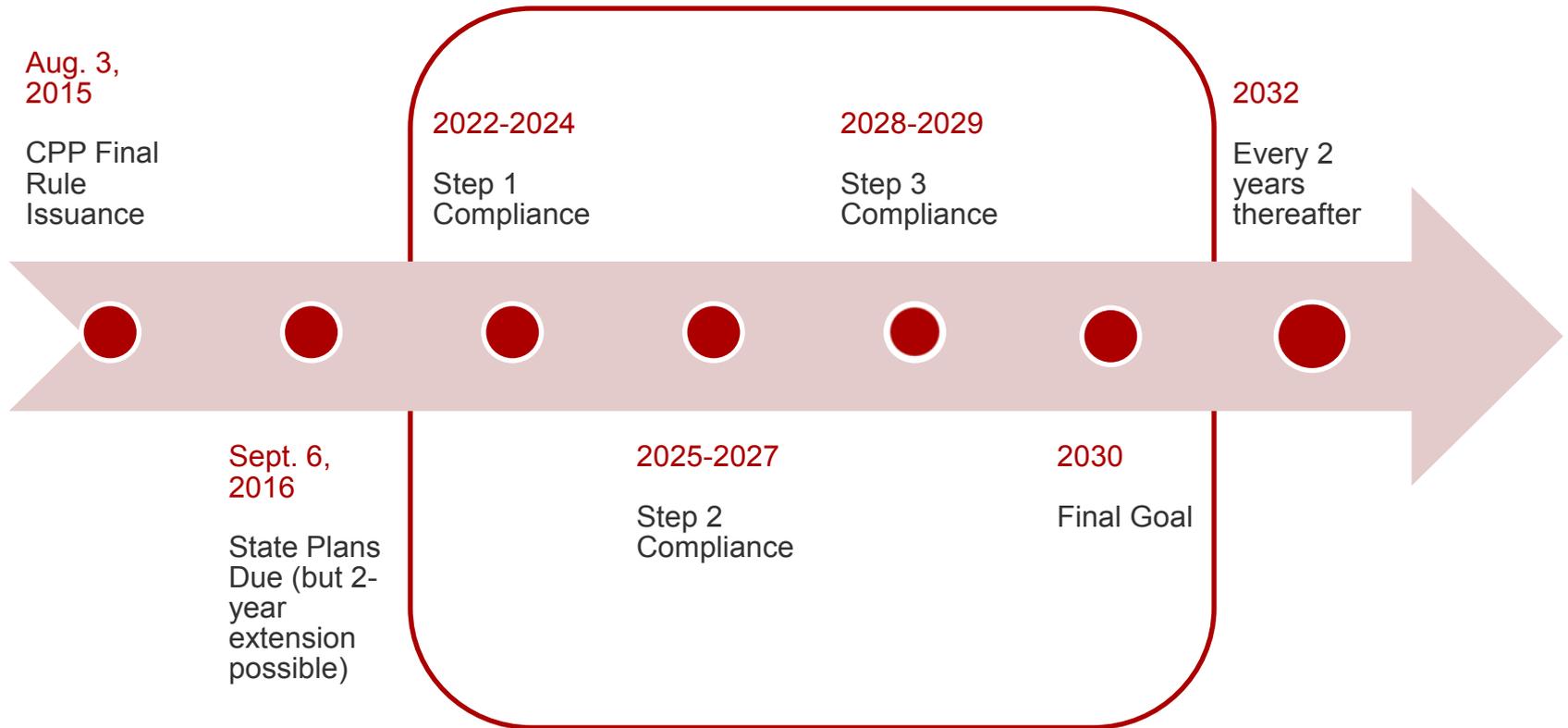
Likely Appeal to the Supreme Court

- The losing party is expected to appeal to the Supreme Court.
- If the Supreme Court takes up the case – considered likely given that it stayed the rule – it could be late 2017 or sometime in 2018 before a decision.

CPP Timeline (pre-stay dates)

2022-2030 CPP

“Glide Path” – 4 compliance periods



EPA's Views on Timing Implications

- In a letter to EPA Administrator Gina McCarthy, Senator Jim Inhofe argued that *“all [CPP] deadlines should be tolled even if the rule ultimately survives judicial review”* because a truncated deadline would *“coerce states and stakeholders into continuing their resource-draining planning activities.”*
- In a letter dated April 18, 2016 the EPA replied by asserting that, *“the ultimate effect of the stay on CPP deadlines will be determined when the stay is lifted [...] the question of whether and to what extent tolling is appropriate will need to be resolved once the validity of the CPP is finally adjudicated.”*
- The EPA noted that it will continue to develop the Clean Energy Incentive Program and proposed model trading rules in the interim.

Other Views on Implications for CPP Timing

- It remains uncertain at this stage whether deadlines will slip:
 - U.S. Chamber of Commerce white paper argues that the stay requires tolling because petitioners to the Supreme Court specifically requested tolling and relevant case law also supports tolling.
 - Institute for Policy Integrity, a think tank, has stated that the Supreme Court's stay order does not mention any such tolling and therefore it is wrong to reach the conclusion that tolling should or will take place.
- Accordingly, a number of states are still actively proceeding on CPP planning.

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