



## **Frequently Asked Questions on the Supreme Court Stay of the Clean Power Plan (April 2016)**

### ***What Happened?***

In response to petitions by states and industry, including NRECA and 39 of our members, the Supreme Court granted a stay of the Clean Power Plan rule. This stay is unprecedented – never before has a stay been granted by the Supreme Court prior to the Circuit Court of Appeals issuing a decision on the contested regulation.

### ***What does a stay mean?***

The Supreme Court's stay means that the Clean Power Plan has no legal effect throughout the court review. During this period of time, EPA cannot enforce any of the deadlines or requirements contained in the rule. States (or anyone else subject to the rule) are under no obligation to work on implementing the rule and they cannot be penalized for missing a deadline or a requirement.

### ***What happens to the deadlines in the rule?***

The deadlines in the rule are all currently suspended. The question of what happens to the deadlines is relevant only if our side loses and the Clean Power Plan is upheld. Based on prior experience with other environmental regulations that were stayed and then upheld at least in part (the NOx SIP Call, the Cross-State Air Pollution Rule), lifting the stay results in the deadlines being reset based on the length of time that the stay was in place. For example, if the stay were in place for 500 days, then 500 days are added to every deadline in the rule to establish new deadlines. Ultimately, changes to the deadlines will be decided in a future court decision.

### ***Does the granting of the stay mean we will win the litigation?***

In granting the stay the Supreme Court sent a strong signal that at least five Justices (including Justice Kennedy who is widely viewed as the key swing vote) had serious questions about the legality of the Clean Power Plan. However, the passing of Justice Scalia changes that dynamic as the court is now split 4-4. This increases the chance that the circuit court could uphold the CPP and that the current members of the Supreme Court are likely to be split on the issue. A split 4-4 vote in the Supreme Court on review of the lower court's decision means that the DC Circuit court decision stands.

### ***Since the Judges on the D.C. Circuit denied the stay, does that mean they are likely to uphold the CPP?***

The decision by the DC Circuit to deny the stay gives no indication of their views on the merits of the legal issues. At the same time that the Circuit court denied the stay, the court also issued an

expedited litigation schedule. It is possible that the judges on the panel felt that an expedited schedule would prevent utilities from suffering irreparable harm and therefore a stay was not warranted.

***When do we think the litigation will be resolved?***

The stay does not change the briefing schedule in the D.C. Circuit. Argument in that court will be heard on June 2, with a decision likely in the fall of 2016. Depending on how quickly the D.C. Circuit issues its decision and resolves any petitions for rehearing, if certiorari is sought and granted, it is possible the Supreme Court could hear argument in the case in early 2017 with a decision in June of 2017. However, it is also possible that Supreme Court review would not occur until the fall of 2017 with a decision in June of 2018.

***What should co-ops, states be doing while litigation is proceeding?***

States have no obligation to work on implementation of the Clean Power Plan. That being said, nothing prevents states from working on climate mitigation strategies if they choose to do so (as California and the states in the Regional Greenhouse Gas Initiative have chosen to do). But states are not required to do anything related solely to comply with the Clean Power Plan while the stay is in effect and should not feel compelled to do so by EPA.

States should not file a state plan or an initial submittal in September 2016. States and co-ops may choose to continue activities to prepare for the rule being upheld or for a Court decision that upholds a rule with limited EPA authority.

***Can EPA proceed with the development of a final federal plan and model trading rules?***

While EPA can proceed to finalize the model trading rules and federal plan, the uncertainty surrounding the stay and pending circuit court decision suggests that the Obama Administration's EPA would use their remaining time and resources on other projects. So at this time it is unlikely EPA would make these plans a priority – at least until the lower court makes their ruling later this year. Regardless of whether the proposed federal plan and model trading rules are finalized, they would have no effect until the litigation over the Clean Power Plan concludes.

***If the next Administration does not support the Clean Power Plan, could the next Administration take action on the final rule prior to the Supreme Court decision?***

The next Administration could tell the Court that it is reversing its position, specifying legal and/or factual defects in the CPP, withdrawing its defense of the rule and filing a substitute brief opposing the rule. This could still leave supporters of the rule to continue to defend the rule before the Supreme Court. The next Administration could also initiate a rulemaking to replace the Clean Power Plan but this would take time and would also be subject to legal challenge.