Unprecedented Stay by Supreme Court Casts Long Shadow Over Clean Power Plan

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Written by John Egan for Industrial Info Resources (Sugar Land, Texas)--The Power Industry, U.S. states, consumer advocates and environmental organizations have spent a lot of time and effort assessing whether the U.S. Supreme Court's stay of the Clean Power Plan (CPP) might mean the rule itself could be struck down. The consensus seems to be: Yes.

It's possible the rule will not be fully litigated until after President Barack Obama leaves office next January, throwing a new set of uncertainties onto a complex and controversial rule to reduce carbon dioxide (CO2) emissions from the nation's coal-fired power plants.

In staying the rule on February 9, the court did not issue an explanation, though the vote was 5-4, with the four liberal members of the court opposing a stay. Instead, the court sent the parties back to the U.S. Court of Appeals for the D.C. Circuit, where a trial on the merits of the rule will take place in June. That decision, when it is rendered, likely will be appealed to the Supreme Court. That court would not hear the case until October at the earliest. The court’s action was the last decision made that included Justice Antonin Scalia, who died February 13.

Both supporters and opponents of the CPP agreed it was unprecedented for the Supreme Court to stay a rule that had not been litigated in the federal court system. When the Supreme Court issues a stay, legal analysts said, it does so according to several specific factors: that failure to act would cause grave and irreparable harm to one of the litigating parties, that there was a reasonable probability that four justices will agree to review a challenge and that there was a good potential that five of the nine justices would side with the challengers on the merits.

The appeal, State of West Virginia, State of Texas, et al. v. U.S. Environmental Protection Agency, had been filed with the D.C. Circuit Court, but a three-judge panel there unanimously rejected it last month. Now that court will hear the appeal, which is being brought by 25 states, four state agencies, electric utilities and coal companies.

The CPP, finalized last August and published in the Federal Register last October, required a 32% national reduction of carbon dioxide (CO2) emissions from coal-fired power plants by 2030 compared to a 2005 baseline. States are required to file their implementation plans with the Environmental Protection Agency (EPA) by this September, though the agency could grant states up to two additional years to file their implementation plans.

West Virginia Attorney General Patrick Morrisey, who spearheaded the states' stay request, said the decision showed the court was leery of the plan. “We are thrilled that the Supreme Court realized the rule's immediate impact and froze its implementation, protecting workers and saving countless dollars as our fight against its legality continues,” he said in a statement.

Nathan Richardson, a University of South Carolina law professor, told *The Washington Post* the court rarely, if ever, had intervened to halt a regulation that had not already been reviewed by a lower court. “The bigger signal here is that there's a lot of skepticism from the Supreme Court. You're getting an earlier view of how the justices feel,” said Richardson, who is now a visiting fellow at Resources for the Future (Washington, D.C.), a nonpartisan think-tank.

Bruce Nilles, a Sierra Club lawyer who had worked in the Department of Justice, told *The Washington Post*, "”t is unprecedented for the Supreme Court to stay a rule at this point in litigation. They do this [only] in death-penalty cases.”

“It's a stunning development,” Jody Freeman, a Harvard law professor and former environmental legal counsel to the Obama administration, told *The New York Times*. “The order certainly indicates a high degree of initial judicial skepticism from five justices on the court.”

Another lawyer, Jeff Holmstead with Bracewell & Giuliani (Houston, Texas), said the court's stay “sends a pretty strong signal that ultimately (the CPP) pretty likely to be invalidated. There are a lot of people who are celebrating.” His firm represented energy companies opposed to the rule.

Even before the CPP was finalized last August, utilities and states incurred significant costs analyzing earlier drafts of the rule to determine its impact and devise cost-effective way to comply with it. In its request for the Supreme Court to issue a stay, those opposed to the rule argued it called for “massive legislative and regulatory changes” as well as "massive financial expenditures by States, which are entirely irreparable." Citing outlays already made by some state and utilities, the litigants seeking a stay claimed “the states' efforts under the (CPP) will cost them tens of thousands of unrecoverable hours and millions of non-refundable dollars.” Because of the interstate nature of the plan, regional reliability organizations also must be part of any state implementation plan, making the CPP “the most complex rule the States have faced.”

Commenting on the Supreme Court's stay, Hal Quinn, president and chief executive of the National Mining Association (NMA) (Washington, D.C.), said: “The Supreme Court's decision to stay the costly power plan is a powerful assertion of judicial restraint on this administration's unbridled use of executive authority to regulate an industry out of existence. The decision adds to the growing recognition--by Congress and by more than half the states that are challenging EPA in court--that the Clean Power Plan is already creating economic havoc in the nation's power grid. The costs it imposes will ultimately be paid by households, businesses and industries across the country.”