National Rural Electric Cooperative Association
A Touchstone Energy® Cooperative

Frequently Asked Questions on the Supreme Court Stay of the Clean Power Plan

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 while courts are reviewing the rule to determine whether it is lawful. 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) 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?

While it is not a guarantee of victory, the granting of the stay greatly improves our odds. The Supreme Court sent a strong signal that at least five Justices (including Justice Kennedy who is widely viewed as the key swing vote) have serious questions about the legality of the Clean Power Plan. In spite of the brave face in public comments from representatives of the Obama administration, EPA, and environmental groups, this ruling is a severe blow to the rule.

How does this affect the Judges on the D.C. Circuit who denied the stay and will be hearing the case on the merits?

The Supreme Court stay signals to those D.C. Circuit judges that at least five Justices have serious reservations about legal issues surrounding the Clean Power Plan. It is also a strong indication that the case on the merits will ultimately be reviewed by the Supreme Court. We believe that this will prompt the reviewing D.C. Circuit judges to review the Clean Power Plan with much greater skepticism than might typically occur when the court reviews challenges of

administrative agency actions. We hope that the Supreme Court's action will lead at least two of the three reviewing judges on the D.C. Circuit to find the Clean Power Plan to be unlawful. But even if two reviewing judges vote to uphold the rule, the Supreme Court's action will likely encourage the remaining judge to write a powerful dissent based on the arguments in petitioners' briefs that can be used to support subsequent petitions asking the Supreme Court to review this case.

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?

Yes. EPA intends to finalize at least the model trading rules as these would be "tools" to aid the states in plan development. If the proposed federal plan and model trading rules are finalized, those will 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.