

# THE SUPREME COURT STAY STOPS THE CLOCK ON ALL CLEAN POWER PLAN COMPLIANCE DEADLINES

***EVEN IF STATES ULTIMATELY LOSE AND THE CLEAN POWER PLAN (“CPP”) IS REINSTATED, PLENTY OF TIME REMAINS TO COMMENCE IMPLEMENTATION***

## **The Supreme Court Stay “Stopped the Clock” on All CPP Compliance Deadlines**

- On February 9<sup>th</sup>, the Supreme Court stayed the CPP from that date through the completion of any Supreme Court appeal process. Even if challengers lose at the D.C. Circuit, the CPP is stayed until the Supreme Court decides on the appeal.
- A judicial stay “halt[s] or suspend[s]” a regulation by “suspending the source of authority to act”<sup>1</sup> and “maintain[s] the status quo pending a final determination of the merits of the suit.”<sup>2</sup> Thus, the “clock” ticking down the time remaining before any CPP compliance deadline was stopped, or “tolled,” on February 9<sup>th</sup>.

## **What Happens with Deadlines if the Challengers Lose and the Stay is Lifted?**

- Since the purpose of a stay is maintain the status quo pending a final outcome, it is well-established that, if the CPP is upheld and the stay is lifted, the original compliance deadlines are extended by the length of the stay. Put another way:

*New Deadline = (Original Deadline + Number of Days the CPP was Stayed)*

- For example, when the D.C. Circuit lifted a stay on EPA’s NOx SIP Call in 2000, it also extended compliance deadlines for SIP submissions because doing so was necessary to “restore the status quo preserved by the stay.”<sup>3</sup>
- When the Supreme Court ruled in EPA’s favor on the Cross-State Air Pollution Rule and remanded the case to the D.C. Circuit, EPA asked that court to extend the rule’s compliance deadlines by three years “to truly preserve the status quo.”<sup>4</sup>

## **Supreme Court Knew Granting a Stay Would Extend CPP Deadlines if Ever Lifted**

- The Supreme Court granted five separate motions to stay the CPP, one of which also requested that the Court “extend[ ] 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.”<sup>5</sup> As to the other four motions, EPA noted to the Court that “[a] request for such tolling is inherent even in the applications that do not explicitly address that subject, as all of them rest on the premise that a stay would forestall harms alleged to arise from future deadlines.”<sup>6</sup>
- EPA explicitly told the Supreme Court that granting the stay would toll all CPP deadlines if it were ever lifted: **“The 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.”**<sup>7</sup>

***CONCLUSION: IF THE CPP STAY IS EVER LIFTED, STATE COMPLIANCE DEADLINES WILL BE EXTENDED, ALLOWING SUFFICIENT TIME TO RE-START AND COMPLETE ACTIVITIES.***

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<sup>1</sup> *Nken v. Holder*, 556 U.S. 418, 428 (2009).

<sup>2</sup> *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

<sup>3</sup> Order, *Michigan v. EPA*, No. 98-1497, ECF 524995 (D.C. Cir. June 22, 2000).

<sup>4</sup> Respondents Motion to Lift the Stay Entered on December 30, 2011 at 14-16, *EME Homer City Generation v. E.P.A.*, Document #1499505 (June 24, 2014) *available at*: [http://www3.epa.gov/crossstaterule/pdfs/Transport\\_motion\\_to\\_lift\\_stay\\_ECF.pdf](http://www3.epa.gov/crossstaterule/pdfs/Transport_motion_to_lift_stay_ECF.pdf).

<sup>5</sup> Application of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review at 22, No. 15A773, et al., (U.S., Jan. 27, 2016) *available at*: <http://www.ago.wv.gov/publicresources/epa/Documents/1.pdf>.

<sup>6</sup> Memorandum for the Federal Respondents in Opposition at 3, No. 15A773, et al. (U.S. Feb. 4, 2016) *available at*: <http://www.ago.wv.gov/publicresources/epa/Documents/M0117886-1.PDF>.

<sup>7</sup> *Id.* at 71 (emphasis added).