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EFFECT OF SUPREME COURT STAY ON CLEAN POWER PLAN DEADLINES

On February 9, 2016, the Supreme Court stayed the Environmental Protection Agency's rule "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("the Rule"). *See* Order, No. 15A773, *State of West Virginia v. EPA* (U.S. Feb. 9, 2016), *et al.* We have received several questions regarding the effect of the Supreme Court's stay ("the Stay") on the Rule's deadlines. As described below, we believe the proper interpretation of the Court's order is that the Stay tolls all the Rule's deadlines—not just those that actually fall during the Stay—for at least the period of time the Stay is in place. In the hypothetical scenario in which the courts might eventually uphold the Rule, EPA is required to move all the Rule's deadlines into the future by at least the amount of time between the Stay's issuance and its expiration.

Tolling of the deadlines is required by straightforward operation of the Stay; indeed, EPA itself represented to the Supreme Court that the Stay would toll all of the Rule's deadlines if granted. This conclusion is also consistent with Supreme Court and D.C. Circuit case law, which holds that a stay preserves the status quo and that deadlines must therefore be tolled, and with EPA's own past statements regarding the impact of a stay on deadlines. It is further necessary to toll all of the Rule's deadlines in this case to avoid the concerns expressed by EPA in the Rule itself that the states and industry must be given sufficient time to prepare for compliance in order to avoid "compromising electricity system reliability" and other adverse impacts.

Background

The Supreme Court stayed the Rule through the entirety of the pending D.C. Circuit proceeding and until the Supreme Court disposes of any subsequent petitions for certiorari. Specifically, the Stay is in effect until the earliest of the following occurs: 1) the D.C. Circuit decides the case and no petition for certiorari is filed; 2) the D.C. Circuit decides the case, a petition for certiorari is filed, and the Supreme Court denies the petition; or 3) the D.C. Circuit decides the case, a petition for certiorari is granted, and the Supreme Court decides the merits of the case.

The case is scheduled for argument in the D.C. Circuit on June 2, 2016. Even if the circuit court issues an opinion with remarkable speed, and even if any petitions for panel rehearing and rehearing en banc are swiftly decided, certiorari briefing at the Supreme Court would almost certainly not be completed before the end of 2016. If certiorari is granted, the case will likely be argued sometime in the 2017 Term or even later; a decision thus will likely not issue until the end of 2017 at the earliest, and perhaps not until 2018.

Regardless of the courts' eventual disposition of the Rule, the Stay has a major impact on the Rule's deadlines that fall both during *and* after the Stay. (See addendum for list of impacted deadlines). First, it is beyond dispute that any of the Rule's deadlines that fall during the period in which the Stay is in place are without effect. The Rule is the only authority supporting these

deadlines; because the Rule is of no legal effect during the Stay, the Rule's deadlines cannot be enforced during this period. EPA agrees that it "cannot currently enforce the rule."[1]

Second, administration officials have suggested there is some debate about whether future deadlines will spring into effect as originally intended if the Rule is reinstated.[2] However, as described below, the law is clear that all of the Rule's deadlines should be tolled for at least the length of the Stay itself in the event the Rule is eventually upheld.

The Clear Scope of the Stay Includes Tolling

The Supreme Court granted the "application for a stay submitted to The Chief Justice." Order, No. 15A773, *et al.* As the stay applicants and even EPA itself made clear, the stay that the applicants requested from the Supreme Court, and that the Court granted, included tolling of the deadlines that will occur after the Stay's expiration.

First, the stay applicants left no doubt that the stay they sought included tolling of any deadlines that fell after the Stay's expiration:

- The Applicants therefore request an immediate stay of EPA's rule, extending all compliance dates by the number of days between publication of the rule and a final decision by the courts, including [the Supreme Court], relating to the rule's validity.

  Stay Application, No. 15A776, *Basin Electric Power Coop. v. EPA* at 22 (U.S. Jan. 27, 2016).

- [The Rule] should be stayed, and all deadlines in it suspended, pending the completion of all judicial review.

  Stay Application, No. 15A778, *Murray Energy Corp. v. EPA* at 36 (U.S. Jan. 27, 2016).

- [T]olling would be appropriate as a matter of basic fairness.

  Reply in Support of Stay Application, No. 15A773, *State of West Virginia v. EPA* at 30 (U.S. Feb. 5, 2016).

Second, EPA itself recognized that granting the Stay would necessarily include tolling of all the Rule's deadlines, and further expressly argued that this was a basis for denying the Stay. As the agency explained:

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[1] Emily Holden, Elizabeth Harball, & Rod Kuckro, *Clean Power Plan: Court stay may slow, not stop, state carbon-cutting talks*, E&E Publishing, LLC: ClimateWire (Feb. 12, 2016), http://www.eenews.net/stories/1060032320 (citing Administrator McCarthy).

[2] *See* Richard Wolf, *Supreme Court blocks Obama's climate change plan*, USA Today (Feb. 9, 2016), http://www.usatoday.com/story/news/politics/2016/02/09/supreme-court-halts-obamas-emissions-rule/80085182/.

> [A]pplicants … seek much more than interim relief that would 'temporarily divest[] [the Rule] of enforceability' while review is ongoing. *Nken v. Holder*, 556 U.S. 418, 428 (2009). Rather, they explicitly or implicitly ask this Court to toll *all* of the relevant deadlines set forth in the Rule, even those that would come due many years *after* the resolution of their challenge, for the period between the Rule's publication and the final disposition of their lawsuits …. Entry of such a 'stay' would mean that, even if the government ultimately prevails on the merits and the Rule is sustained, implementation of each sequential step mandated by the Rule would be substantially delayed. A request for such tolling is inherent … in the applications …, as all of them rest on the premise that a stay would forestall harms alleged to arise from future deadlines.

Response in Opposition to Stay Application, No. 15A773, *et al.* at 2-3 (U.S. Feb. 4, 2016).

Thus, as the stay applicants and EPA acknowledged, the "application for a stay submitted to The Chief Justice," Order, No. 15A773, *et al.*, included tolling deadlines that fell after the Stay's expiration. That is the stay application the Supreme Court granted. Further, as EPA itself recently recognized, when a court grants a motion related to staying a rule, it grants the treatment of the rule's deadlines that the movants had sought. *See* 79 Fed. Reg. 71,663, 71666 (Dec. 3, 2014) ("interpret[ing] the Court's order lifting the stay as already tolling … deadlines" that EPA had proposed to toll in its motion to lift the stay); *see also id.* at 71,669 & n.34. Having attempted to dissuade the Supreme Court from granting the Stay by representing that doing so would toll all of the Rule's deadlines, EPA may not change its position now that the Court has acted in light of EPA's representation.

Governing Case Law and EPA's Own Prior Positions Warrant Tolling

The purpose of a stay is "to maintain the status quo pending a final determination of the merits of the suit." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). Thus, a stay "suspend[s] administrative alteration of the status quo." *Nken v. Holder*, 556 U.S. 418, 429 n.1 (2009). Likewise, the Administrative Procedure Act, under which the Supreme Court stay was sought, also provides for the "preserv[ation] [of] status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

The Stay accordingly preserves the state of affairs that existed before the Rule was issued. It does not allow deadlines which did not exist prior to the Rule to continue to run. Allowing deadlines to run while the litigation proceeds would not "maintain the status quo." Indeed, allowing the deadlines to run would achieve precisely what the applicants sought to avoid when they applied for a stay: forcing States and regulated parties to begin planning and implementation now to be able to comply by the deadlines. "It would be unfair to penalize states that reasonably relied on" the stay's "extended deadlines by … accelerating the [compliance] scheme." *NRDC v. EPA*, 22 F.3d 1125, 1137 (D.C. Cir. 1994).

That is why the D.C. Circuit has held that a stay tolled a deadline for submitting State implementation plans by the same number of days the States "had remaining when the stay was imposed." Order, No. 98-1497, *Michigan v. EPA*, ECF 524995 (D.C. Cir. June 22, 2000). The court explained that this delay "d[id] no more than restore the status quo preserved by the stay."

Id. The D.C. Circuit recently adopted a very similar approach—at EPA's urging—in the Cross-State Air Pollution Rule litigation. *See* Order, No. 11-1302, *EME Homer City Generation, L.P. v. EPA*, ECF 1518738 (D.C. Cir. Oct. 23, 2014) (lifting stay and granting EPA's request to toll); *see also id.*, Respondents' Motion to Lift the Stay Entered on December 30, 2011, No. 11-1302, *EME Homer City Generation, L.P. v. EPA*, ECF 1499505 at 14-16 (D.C. Cir. June 26, 2014) (EPA requesting tolling for entire time stay had been in place, plus additional time to ease and simplify compliance). Indeed, in the Cross-State Air Pollution Rule, EPA recognized that tolling a stayed rule's deadlines for at least as long as the stay is in place "is equitable and consistent with this Court's precedent" and "restore[s] the status quo preserved by the stay." *Id.* at 15; *see also* 79 Fed. Reg. at 71,666 ("tolling [a stayed rule's] deadlines … returns the rule and parties to the status quo").

Tolling the Deadlines Is Necessary to Support the Rule's Express Findings

Any attempt to avoid tolling the Rule's deadlines that fall after the Stay's expiration would be especially unlawful in light of EPA's own express findings in the Rule about the amount of time necessary for regulated parties to achieve compliance.

In the Rule, EPA postponed the first year of compliance from 2020 to 2022 due to a "compelling" record that "the required CO_2 emission reductions could not be achieved as early as 2020 without compromising electric system reliability, imposing unnecessary costs on ratepayers, and requiring investments in more carbon-intensive generation, while diverting investment in cleaner technologies." 80 Fed. Reg. at 64,669. Moving the beginning of the compliance period to 2022 was also necessary "to reflect the period of time required for state plan development and submittal by states." *Id.*

Failure by EPA to toll the Rule's deadlines would eliminate the additional time that EPA itself found necessary. As noted above, even in a scenario in which the courts uphold the Rule, review proceedings are unlikely to conclude until 2017 at the earliest. Thus, if the Rule's deadlines are not tolled, States are likely to have less than a year (until the beginning of September 2018) to formulate and submit implementation plans—despite EPA's finding in the Rule that States needed more than *three years* to formulate and submit plans. *See id.* (rejecting prior proposal to give States only thirteen months to submit plans in favor of an additional 2-year extension).

Likewise, if the Rule's deadlines are not tolled, industry would be forced to become compliance-ready over a period of only four years (2018-2021), despite EPA's express finding that forcing industry to achieve compliance within four years (and a few additional months) of the Rule's issuance "could not be achieved … without compromising electric system reliability, imposing unnecessary costs on ratepayers, and requiring investments in more carbon-intensive generation, while diverting investment in cleaner technologies," and that an additional two years were needed to avoid these concerns. *Id.*

EPA itself has recognized that tolling a stayed rule's compliance deadlines may be necessary to ensure regulated parties are not deprived of the ability to comply with the rule. *See* 79 Fed. Reg. at 71,668 ("[t]olling of these dates is necessary to … restore to states the same SIP

revision opportunities that would have existed if the rule had not been stayed"); *see also id.* at 71,666 (tolling "provides parties with sufficient time to prepare for implementation"). Here, failure to toll the Rule's deadlines after the Stay's expiration would deprive States and industry of time *EPA itself* has found they need to comply.

Were EPA to attempt to enforce the original deadlines despite the Stay, the agency would again be improperly "baking [its rules] into the system" before the courts can pronounce on their validity.[3] As the applicants explained in their stay applications, a stay is necessary precisely because, due to the Rule's stringent deadlines, States and industry would be required to start making massive changes now. If these deadlines are not tolled, States and industry would have to continue making irrecoverable investments now to avoid imperiling grid reliability in the event the courts eventually uphold the Rule. Such a situation would effectively undo the Supreme Court's Stay—requiring the stay applicants to engage in the very activities that gave rise to the irreparable harm that justified the Stay. Just a few months ago, EPA explained that a Supreme Court decision that the Mercury and Air Toxics Standards rule was unlawful would have no effect because industry had already made irrecoverable investments in compliance.[4] Failure to toll the deadlines here would likewise render the Supreme Court's stay of no effect.

Addendum: List of Significant Tolled Deadlines

September 6, 2016: States must submit implementation plans (or request extension).

September 6, 2017: States that received an extension must submit progress updates.

September 6, 2018: States that received an extension must submit final implementation plans.

January 1, 2022: Beginning of first interim compliance period.

January 1, 2025: Beginning of second interim compliance period.

January 1, 2028: Beginning of third interim compliance period.

January 1, 2030: Beginning of full compliance.

[3] Interview of EPA Administrator Gina McCarthy (BBC World News America Dec. 7, 2015), https://archive.org/details/KQED_20151207_235900_BBC_World_News_America#start/1020/end/1080.

[4] Timothy Cama & Lydia Wheeler, *Supreme Court overturns landmark EPA air pollution rule*, The Hill (June 29, 2015), http://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule.