Effects of the Supreme Court's Stay on
Compliance Deadlines in the Clean Power Plan
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This document discusses whether and for how long EPA may be required to toll compliance deadlines in the Clean Power Plan (CPP) because of the Supreme Court's stay of the rule, if it is ultimately upheld after judicial review.

In brief, EPA would likely need to toll at least some of the CPP's deadlines when the stay is ultimately lifted. But which deadlines would be tolled, and by how much time, are questions of equity that appear to have not yet been decided by the Supreme Court and would likely be decided once the stay is lifted.[1]

The CPP's earliest deadlines, those for state plan submittals, are likely to be tolled by some time when the stay of the CPP is lifted. There appears to be more room for EPA to argue that later deadlines, including the start of the compliance obligations for power plants, may not need to be tolled significantly, if at all.

I. *The Supreme Court's Orders Are Unclear*

On February 9, 2016, the Supreme Court Court granted five applications requesting a stay of the CPP in five identical orders, each of which expressly granted "the application for a stay submitted to The Chief Justice[.]"[2] But those five applications are not identical, and in fact differ on the issue of tolling.

One stay application requested that the CPP "be stayed, and *all deadlines in it suspended*, pending the completion of all judicial review."[3] Another application requested "an immediate stay of [CPP], *extending all compliance dates by the number of days between the publication of the rule and a final decision by the courts . . .* relating to the rule's validity."[4] The Solicitor General, in his brief opposing the stay applications, argued that the applicants "explicitly or implicitly ask . . . to toll *all* of the relevant deadlines set forth in [CPP], even those that will come due many years *after* the resolution of their challenge[.]"[5]

It is hardly obvious that the Court did in fact impliedly toll compliance deadlines in the CPP when it issued five *identical* orders granting a stay in response to five *distinct* stay applications. In addition, EPA Administrator McCarthy, testifying on March 22, 2016 before a House subcommittee, signaled that, in EPA's view, the Court's stay order did *not* reach the question of tolling compliance deadlines and that the tolling question would instead be addressed when lifting the stay.[6] Even one reply brief in support of the stay noted that while "tolling would be appropriate as a matter of basic fairness . . . the exact shape of such an equitable disposition need not be decided today."[7]

II. *Prior Cases Illustrate Timing and Purpose of Tolling Compliance Deadlines*

Two prior examples in the D.C. Circuit suggest that the decisions of whether and by how much time to toll deadlines in a stayed EPA rule are made when the court lifts a stay rather than when the court grants a stay.[8] These examples also illustrate that, when considering whether and by how much time to toll compliance deadlines, the relevant inquiry is how to "restore the status quo preserved by the stay."[9]

In *Michigan v. EPA*, the D.C. Circuit had issued a stay of EPA's NO_X SIP Call Rule when affected states had 128 days left to submit their implementation plans.[10] Upon *lifting* the stay, the D.C. Circuit provided states with 128 days, running from the date of issuance of the order, to submit plans.[11] The D.C. Circuit noted

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that to give covered states the same number of days to comply that they had at the date when the stay was imposed, "[did] no more than restore the status quo preserved by the stay."[12] The D.C. Circuit did not state, however, that restoring the same number of days is a required practice.

In *EME Homer City Generation, L.P. v. EPA*, EPA acknowledged that the proper question is "how to lift the stay in a manner that returned the Rule as much as possible to the status quo that would have existed, but for the stay."[13] In its motion to lift the stay, EPA asked the D.C. Circuit to extend compliance deadlines by more than the number of days that the stay was in effect in order "to maintain the calendar-year compliance schedule set forth in the Rule" because a calendar-year compliance schedule was part of the status quo preserved by the stay.[14] The D.C. Circuit lifted the stay but said nothing about tolling deadlines.[15] EPA interpreted this silence in the order lifting the stay[16] as impliedly tolling compliance deadlines according to EPA's request.[17] EPA too recognized that such tolling of the compliance deadlines in the Cross-State Air Pollution Rule (CSAPR) "return[ed] the rule and the parties to the status quo that would have existed but for the stay[.]"[18]

The principle that tolling deadlines ought to "restore the status quo preserved by the stay" is firmly rooted in the case law.[19] Moreover, the Administrative Review Act, which authorizes courts to provide litigants with relief pending review of an agency action, explains that a stay "preserve[s] status or rights pending conclusion of the review proceedings."[20] Thus, in the event that the CPP is upheld, arguments to lift the stay and toll compliance deadlines would need to address how tolling the CPP's compliance deadlines as requested would "restore the status quo preserved by the stay."

III. *Equity May Not Require Tolling Deadlines by the Duration of the Stay*

In *EME Homer*, EPA argued that the equities at issue *in that case* required the amount of tolling that it requested. Here the equities may be different, and EPA would be able to argue in a motion to lift the stay which deadlines EPA ought to toll in the CPP and by how much time.

It seems likely that equity would require the tolling of some of the deadlines in the CPP by some amount of time in order to "restore the status quo preserved by the stay." This would likely apply with particular force to the earliest deadlines in the Rule that dictate deadlines for state implementation plan submissions. EPA noted in the CPP that these submission deadlines "reflect the period of time required for state plan development and submittal by states."[21] Submission deadlines for state implementation plans or extension requests were originally due on September 6, 2016, 210 days from the date the Court stayed the CPP. Perhaps the most straightforward manner of "restoring the status quo" would be to give states 210 days from the date the stay is lifted to submit implementation plans to EPA.

There may, however, be strong arguments that fewer days are be necessary for states to develop their implementation plans. Indeed, because some states are presently developing CPP implementation plans despite the stay, other states not doing so may piggy-back on these efforts after the stay is lifted. In addition, because the transition toward low-carbon sources is "happening . . . even more quickly than [EPA] anticipated,"[22] market conditions may have sufficiently shifted to make decisions necessary to develop CPP implementation plans a bit easier.

Similarly, if it is still true when the stay is lifted that the sector is reducing CO_2 emissions faster than EPA anticipated in the CPP, EPA could argue that the CPP's compliance timeline should remain in effect. EPA noted in the CPP that the "period for mandated reductions should begin in 2022, instead of 2020 as [EPA] proposed, because of the substantial amount of comment and data [EPA] received indicating states and

utilities reasonably needed that additional time to take the steps necessary to start achieving reductions."[23] If EPA finds that those reductions are already being achieved, equity may not require that deadlines be tolled by the precise number of days the stay remains in effect, or even at all.

IV. *Conclusion: Tolling Is Anything But Settled*

Ultimately, the decision whether to toll deadlines in the CPP, and by how much time to do so, likely would not be made until the stay is lifted. And arguments regarding the propriety of tolling the CPP's compliance deadlines would thus likely be able to be made—and likely would be made—in motions to lift the stay. There is, of course, uncertainty regarding the timing of this litigation; and, indeed, the longer this litigation continues, which could be until mid-2018 if the Supreme Court grants review of the D.C. Circuit's decision, the more likely deadlines would need to be tolled by greater amounts of time.

But the bottom is line is simply that the status of compliance deadlines in the CPP is anything but settled as of now. The five identical Supreme Court orders granting stays in response to five different stay applications do not appear to have impliedly tolled any of the CPP's deadlines. And, even so, the tolling question would be bound to be hotly contested. The arguments on the tolling question would likely run the gamut because of the lack of precedent on the question, the salience of the CPP specifically and environmental policy generally, and the nature of this sort of equitable inquiry.

Endnotes

[1] *See* Letter from Janet G. McCabe, Acting Assistant EPA Administrator, to Senator James Inhofe (April 18, 2016); *available at* http://www.epw.senate.gov/public/_cache/files/ca20cabb-4494-47af-822c-3e814707eb80/epa-response-to-tolling-letter-04-18-2016.pdf; Richard L. Revesz, Alexander Walker, "Understanding the Stay: Implications of the Supreme Court's Stay of the Clean Power Plan," Institute for Policy Integrity (April 2016), *available at* http://policyintegrity.org/files/publications/CPP_Stay_PolicyBrief.pdf.

[2] Order, West Virginia v. EPA (No. 15A773) (U.S. Feb. 9, 2016); Order, Basin Elec. Power Coop. v. EPA (No. 15A776) (U.S. Feb. 9, 2016); Order, Murray Energy Corp. v. EPA (No. 15A778) (U.S. Feb. 9, 2016); Order, North Dakota v. EPA (No. 15A793) (U.S. Feb. 9, 2016); Order, Chamber of Commerce v. EPA (No. 15A787) (U.S. Feb. 9, 2016).

[3] Stay Application at 36, Murray Energy Corp. v. EPA (No. 15A778) (U.S. Jan. 27, 2016) (emphasis added).

[4] Stay Application at 22, Basin Elec. Power Coop. v. EPA (No. 15A776) (U.S. Jan. 27, 2016) (emphasis added).

[5] Indeed, the Solicitor General argued that because the applicants requested to toll compliance deadlines concurrently with their requests for a stay itself, the relief they sought, would be "extraordinary and unprecedented[.]" Response in Opposition to Stay Applications, *supra* note 2, at 3; *see also id.* at 2 (characterizing the applicants' stay applications as applications for "stay[s]," using scare quotes, emphasizing the Solicitor General's view that the relief sought by applicants was extraordinary).

[6] *Fiscal Year 2017 EPA Budget: Hearing Before the Subcomm. on Energy and Power and the Subcomm. on Environment and the Economy of the H. Comm. on Energy and Commerce*, 114th Cong. 124–25 (2016).

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

[8] The two examples discussed here, *Michigan v. EPA* and *EME Homer City Generation, L.P. v. EPA*, appear to be the only recent cases in the D.C. Circuit where the question of tolling compliance deadlines in a stayed rule after a stay was lifted was at issue.

[9] Order, Michigan v. EPA (No. 98-1497) (D.C. Cir. Jun. 22, 2000).

[10] *Id.*

[11] *Id.* (emphasis added).

[12] *Id.*

[13] Motion to Lift Stay at 15, EME Homer City Generation, L.P. v. EPA (No. 11-1302) (D.C. Cir. Jun. 25, 2014) (citing the "restore the status quo preserved by the stay" language of the D.C. Circuit's order in *Michigan v. EPA*).

[14] *Id.* at 15–16.

[15] *See* Order, EME Homer City Generation, L.P. v. EPA (No. 11-1302) (D.C. Cir. Oct. 23, 2014).

[16] In this example, EPA interpreted silence in the *order lifting the stay* as impliedly tolling deadlines according to EPA's requested tolling in its motion to *lift the stay*. This does not imply that silence in the Supreme Court's order *granting the stay* of the CPP would do the same with respect to the stay applications' requests to toll deadlines.

[17] *See* Rulemaking to Affirm Interim Amendments to Dates in Federal Implementation Plans Addressing Interstate Transport of Ozone and Fine Particulate Matter, 81 Fed. Reg. 13275, 13277 (Mar. 14, 2016). Indeed, EPA interpreted the order in this way even though another brief and motion for alternative relief filed by a group of public health intervenors in the D.C. Circuit argued that compliance deadlines in CSAPR should *not* be tolled for as long as EPA requested because public health concerns compel the court to exercise its equitable power *not* to toll the deadlines so far into the future. *See generally* Response of Public Health Intervenors to Respondents' Motion to Lift the Stay combined with Motion for Alternative Relief at 8–15, EME Homer City Generation, L.P. v. EPA (No. 11-1302) (D.C. Cir. Jul. 11, 2014).

[18] Rulemaking to Amend Dates in Federal Implementation Plans Addressing Interstate Transport of Ozone and Fine Particulate Matter, 79 Fed. Reg. 71,663, 71666 (Dec. 3, 2014).

[19] *See, e.g.*, Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977) (noting that a stay "maintain[s] the status quo pending a final determination of the merits of the suit"); *see also, e.g.*, Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d. Cir. 2004) (noting that a stay "'maintain[s] the status quo, defined as the last, peaceable, noncontested status of the parties'" (quoting Opticians Ass'n of Am. v.Indep. Opticians of Am., 920 F.2d 187, 197 (3d. Cir. 1990)); Am. Hosp. Ass'n v. Harris, 625 F.2d 1328, 1330 (7th Cir. 1980) ("The purpose of a preliminary injunction is to preserve the status quo . . . during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits.").

[20] 5 U.S.C. § 705.

[21] Clean Power Plan, 80 Fed. Reg. 64,661, 64,669 (Oct. 23, 2015).

[22] *Fiscal Year 2017 EPA Budget*, *supra* note 8, at 108-109.

[23] Clean Power Plan, *supra* note 21, at 64,829.