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Project Finance Group Client Alert: Cloudy Future for the Clean Power Plan After the Supreme Court Stay and Scalia's Passing

On February 9, 2016, in a 5 to 4 majority, the U.S. Supreme Court granted an emergency stay of the Clean Power Plan (“CPP”). The decision was unprecedented, since the Supreme Court has not previously stayed implementation of a federal regulation while litigation challenging the regulation was still pending before a lower court. By issuing the stay, a majority of the Supreme Court determined that the pending case had a “fair prospect” of overturning the CPP.

Just four days later, the likely fate of the CPP was rewritten due to the sudden passing of Justice Antonin Scalia. The stay remains in place, but the likelihood of the Supreme Court overturning the CPP is now uncertain since Justice Scalia, one of the most conservative members of the Supreme Court, had been a key member of the majority that had voted in favor of the emergency stay. Suddenly, upon his passing, the Supreme Court became evenly split with four justices apparently in favor of the CPP and four justices apparently against the CPP. The fate of the CPP now depends on who fills the vacant seat on the Supreme Court, and when that seat can be filled.

I. WHAT IS THE CLEAN POWER PLAN?

The CPP is a program designed to reduce CO₂ emissions from existing power plants by 32% from 2005 levels by 2030. The regulations implementing the CPP, issued by the Environmental Protection Agency (“EPA”) in August of 2015 pursuant to Section 111(d) of the Clean Air Act, set state-specific targets, while granting states the authority to determine how best to reduce greenhouse gas emissions. States can achieve emission reductions by balancing the weight given to each of the CPP’s four “building blocks,” which include (1) increasing fossil fuel power plant efficiency, (2) switching electricity production from coal to natural gas-fired power plants, (3) increasing renewable

energy capacity and (4) reducing energy demand through enhanced efficiency measures.

The CPP requires each state to submit an implementation plan, or an initial submittal with a request for an extension, by September 6, 2016. Extensions may be granted until September 6, 2018. If a state does not submit an approvable plan, then the EPA will implement a federal plan for that state. Emission reductions would be scheduled to begin on January 1, 2022, with interim goals between 2022 and 2029 and full compliance targeted for 2030. The stay may alter this timeline and block implementation of the CPP until the legal challenges are resolved.

II. HOW WAS THE CPP STAYED?

Legal challenges against the CPP have been filed by twenty-nine states and state agencies (“States”) and by a large group of utility companies and energy industry trade groups (“Energy Group,” together with the States, “Petitioners”) in the D.C. Circuit against the EPA, claiming the CPP was an unlawful exercise of the EPA’s authority to regulate emissions from fossil fuel-fired power plants.¹ The Petitioners argued, among other points, that the EPA does not have the authority to broadly regulate the electric industry in the proposed “market-based manner” and instead can only address emissions “within the fenceline” at individual fossil-fuel fired power plants.

The States claimed that they would be “irreparably harmed” if required to comply with the CPP during the pendency of the litigation, citing the costs to the States of implementing new state policies and programs to reduce emissions and costs to the Energy Group of reconfiguring existing plants and modifying the mechanics of the existing electricity grid. The States moved for a stay, or suspension, of the regulation’s implementation until a final ruling is issued.²

On January 21, 2016, in a two page decision, the D.C. Circuit³ denied the States’ request to stay implementation of the CPP, citing *Winter v. NRDC*.⁴ In the *Winter* decision, the Supreme Court strengthened the threshold that a party seeking a preliminary injunction, or another form of stay pending further court review, must

¹ State of West Virginia, et al. v. EPA, U.S. Court of Appeals for the D.C. Circuit, No. 15-1363, Motion to Stay (October 23, 2015) page vi,
<http://www.ago.wv.gov/publicresources/epa/Documents/StatePetrsMotionForStay.pdf>.

² State of West Virginia, et al. v. EPA, U.S. Court of Appeals for the D.C. Circuit, No. 15-1363, Motion to Stay (October 23, 2015) page vi,
<http://www.ago.wv.gov/publicresources/epa/Documents/StatePetrsMotionForStay.pdf>.

³ Note that the case bypassed the District Court pursuant to Section 307(b) of the Clean Air Act since the CPP is a nationally applicable rule. As a result, an appeal of the D.C. Circuit’s final decision would go to the Supreme Court and thus have one less hurdle to clear on appeal.

⁴ <http://blogs.edf.org/climate411/files/2016/01/STAY-DENIAL.pdf>.

meet. The Supreme Court determined that a test requiring a showing of the mere *possibility* of irreparable injury was too lenient. Instead, the Court required petitioners to demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest.⁵ The Supreme Court interpreted this as a disjunctive test, allowing courts the flexibility to consider certain factors more heavily.⁶ The Supreme Court in *Winter* found that public interest considerations were sufficient to grant the preliminary injunction in those circumstances, but noted that preliminary injunctions are “an extraordinary remedy never awarded as of right.”⁷ In succinctly denying the Petitioners’ request for a stay, the D.C. Circuit seemed convinced that the CPP did not present such an extraordinary case and, as a result, did not pass the test set by the *Winter* decision.

The States, and later the Energy Group, reiterating the States’ arguments⁸, appealed this decision and filed applications with Chief Justice Roberts of the Supreme Court, asking that implementation of the CPP be stayed until the D.C. Circuit’s review is completed. Eighteen states opposed the application for a stay, noting that continued delay in addressing emission reductions would only compound the harms attributed to climate change already experienced.

Since the standard for granting an emergency stay is extremely high, the applications appeared to have only a limited chance of success. Surprisingly, on February 9, 2016, in a brief one page decision, the Supreme Court issued an order that granted the stay. The Supreme Court was not persuaded by the D.C. Circuit’s decision. The Supreme Court gave no explanation for granting the stay, but its reversal of the D.C. Circuit’s denial of the request for a stay was split between the four conservative and four liberal justices, with Justice Kennedy voting with the conservative justices. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito voted to grant the stay, and Justices Ginsburg, Breyer, Sotomayor, and Kagan voting to deny the application.⁹ The Supreme Court’s ruling granting the stay prohibits the EPA from implementing or enforcing the CPP until (i) the D.C. Circuit issues a decision on the Petitioners’ challenges to the

⁵ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 2, 20 (2008).

⁶ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 13 (2008) (finding that “even if plaintiffs have shown irreparable injury from the Navy’s training exercises, any such injury is outweighed by the public interest”).

⁷ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 14 (2008).

⁸ Basin Electric Power Cooperative v. EPA, Application of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review, <http://www.ago.wv.gov/publicresources/epa/Documents/1.pdf>; *State of West Virginia v. EPA*, Application of Business Associations for Immediate Stay of Final Agency Action Pending Appellate Review, page 1, <http://www.ago.wv.gov/publicresources/epa/Documents/2.pdf>; *Murray Energy Co. v. EPA*, Coal Industry Application for Immediate Stay of Final Agency Action Pending Judicial Review, page 1, <http://www.ago.wv.gov/publicresources/epa/Documents/3.pdf>.

⁹ http://www.supremecourt.gov/orders/courtorders/020916zr3_hf5m.pdf.

regulation and no writ of *certiorari* is filed or (ii) if a writ of *certiorari* is filed with the Supreme Court, until such writ is denied or the Supreme Court hears the case and issues a final decision.¹⁰

The D.C. Circuit is not affected by the stay and may rule on the merits of the Petitioner's case without limitation. Nonetheless, while the Supreme Court's stay of the CPP pending resolution of the ongoing litigation is a procedural ruling only, the issuance of stay signaled that five of the Supreme Court justices had significant reservations about the EPA's attempt to regulate emissions from power plants in the way the CPP is currently designed. To grant the stay, the Supreme Court must have found that there was a "fair prospect" that a majority of the Court would vote to reverse a judgment if the D.C. Circuit were to uphold the CPP.

The D.C. Circuit has indicated that it will expedite its review, and oral arguments are currently scheduled for June 2, 2016. The Supreme Court's grant of the stay will likely delay the September 2016 deadline for each state to submit an implementation plan to the EPA or request an extension. Should a D.C. Circuit decision be issued by the Fall of 2016 and should the Supreme Court grant *certiorari* to consider the case on its merits, a final decision on the regulation would not be reached until 2017, at the earliest.

III. WHAT HAS THE SUPREME COURT DONE TO LIMIT EPA'S REGULATION OF CLIMATE CHANGE?

The conservative justices on the Supreme Court have been highly critical of the range of the EPA's statutory authority under the Clean Air Act and have insisted that the EPA conduct sufficient analysis of the financial impacts before implementing any pollution-reducing regulation. This has been especially true with respect to the regulation of greenhouse gas emissions. The late Justice Scalia, a particularly scathing critic of EPA's regulation of greenhouse gas emissions, went so far as to state "[i]t's not the Atmospheric Protection Agency, it's the Environmental Protection Agency."

In 2007, the Supreme Court decided by a 5-4 vote in *Massachusetts v. EPA* that the state petitioner had standing to sue, given the potential damage to its coastline due to global warming. The Supreme Court required the EPA to determine whether greenhouse gas emissions contributed to global warming. On remand, the EPA issued its endangerment finding, noting that greenhouse gases "may reasonably be anticipated both to endanger public health and to endanger public welfare."¹¹ This case set the stage for the Obama Administration's comprehensive climate policy and the EPA's authority to regulate greenhouse gases under the Clean Air Act. The Supreme Court modified but largely upheld the EPA's authority to regulate greenhouse gases

¹⁰ http://www.supremecourt.gov/orders/courtorders/020916zr_21p3.pdf

¹¹ <https://www.federalregister.gov/articles/2009/12/15/E9-29537/endangerment-and-cause-or-contribute-findings-for-greenhouse-gases-under-section-202a-of-the-clean>.

from industrial facilities in another 5-4 vote in the 2014 *Utility Air Regulatory Group v. EPA* decision.¹² Yet, the Supreme Court noted its reluctance to uphold sweeping regulations issued under little-known statutory provisions. Justice Scalia, when discussing why he dissented to the *Massachusetts v. EPA* decision, noted that “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy’...we typically greet its announcement with a measure of skepticism.”

The Supreme Court’s recent ruling granting the stay of the CPP may have been encouraged by the Petitioners’ reference to the recent *Michigan v. EPA* ruling in 2015, which reversed the Mercury Air Toxics Standards (“MATS”) rule. The EPA itself acknowledged that the ruling had virtually no impact, as states had already largely complied with the regulation by the time the Court’s order was issued.¹³ Similarly, the EPA noted that the CPP is a historic and unprecedented program.

It is interesting to note that Justice Kennedy, typically the swing voter on the Supreme Court, voted in favor of the stay. He has historically voted in favor of the EPA’s authority under the Clean Air Act. In 2007, he was the key vote in both *Massachusetts v. EPA* and *Utility Air Regulatory Group v. EPA*. In 2011, Justice Kennedy joined a unanimous court in ruling that the EPA had the authority to regulate carbon pollution from power plants under Section 111(d) of the Clean Air Act, which is the section that the EPA relies upon to issue the CPP, in *American Electric Power v. Connecticut*.¹⁴ In 2014, Justice Kennedy joined a six member majority in upholding a similar market-based program to control the cross-state pollution of sulfur and nitrogen air pollution in *EPA v. EME Homer City*. Although Justice Kennedy voted with the majority in *Michigan v. EPA* last year, the majority opinion left open a way for the EPA to cure the identified problems with the rule. Two weeks ago, Justice Kennedy joined in a 6-2 majority in *FERC v. EPSA*¹⁵ upholding certain Federal Regulatory Commission regulations which, like the CPP, are premised on the idea that the electric sector is an interconnected grid. Given Justice Kennedy’s voting record it is possible that he would choose to vote in favor of upholding the CPP thereby shifting the majority of the court in favor of the CPP in the instance that a conservative justice replaces Justice Scalia or a vote is held with only eight justices prior to a replacement justice being confirmed.

¹² *Util. Air Regulatory Grp. v. EPA*, 2014 BL 172973, 78 ERC 1585, 134 S. Ct. 2427 (2014).

¹³ *State of West Virginia vs. EPA*, Application by 29 States and State Agencies for Immediate Stay of Final Agency Action during Pendency of Petitions for Review, 1-2 (noting that the “EPA boasted in an official blog post that the Court’s decision was effectively a nullity” referencing the blog post located here: <https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/>).

¹⁴ <https://www.law.cornell.edu/supct/html/10-174.ZS.html>

¹⁵ <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-840.htm>

IV. WHAT NOW?

Environmental and industry groups debate the significance of the Supreme Court stay. Regardless of the fact that the Supreme Court is now evenly split among conservative and liberal justices, the stay remains in effect.¹⁶ The impact of the stay and its delay on mandatory state adoption of any plans to reduce carbon emissions, coupled with unusually low oil and natural gas prices, could slow the country's transition to a clean energy economy. However, it is possible that the stay, and any possible future overturn of the CPP, would not slow this transition given the already significant momentum in the electric industry's transition toward renewable energy generation, improved energy efficiency and reduced greenhouse gas emissions. Many existing coal-fired power plants have closed as a result of cheap natural gas and increasingly competitive electricity production from renewable energy sources and, arguably, the early impacts of the CPP. Other plants have already taken significant action to reduce greenhouse gas emissions, especially in states, including California, Colorado and the states that participate in the Regional Greenhouse Gas Initiative (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont), which already regulate such emissions. Further, President Obama's recent 2016 budget proposal seeks to extend tax credits for wind and solar power. Solar and wind industry trade groups were disappointed in the delays in addressing climate change that the stay may signal, but are confident that utilities and states will move forward with plans for a clean energy economy.¹⁷

More than thirty states are currently on pace to be halfway to reaching their CPP emission reduction targets in five years, with twenty-one states on target to exceed their emission reduction goals.¹⁸ If the D.C. Circuit chooses to uphold the CPP on the merits and the Supreme Court denies *certiorari*, a reprieve from the EPA's regulations would have lasted less than a year. Is this risk low enough for states and utilities already implementing carbon-reducing measures to change course? While states such as Texas and Alabama have already confirmed their intention not to move forward with any carbon-reducing plan, many other states will continue with their planned climate policies, noting the cost of delaying the CPP's implementation, should the original compliance deadlines be upheld. The stay and any future overturn of the CPP brings added uncertainty for Regional Transmission Organizations and Independent System Operators, among others, as many utilities had begun preparing for grid modifications and supporting state CPP implementation efforts.

¹⁶ Although the Solicitor General can request the Supreme Court to reconsider its grant of the stay, this appears unlikely. A decision to lift the stay would require a majority, and, even after Scalia's passing, only four of the eight sitting justices voted against the stay.

¹⁷ See <http://www.seia.org/news/seia-statement-temporary-stay-clean-power-plan>; <http://www.awea.org/MediaCenter/pressrelease.aspx?ItemNumber=8372>.

¹⁸ <http://www.ucsusa.org/global-warming/reduce-emissions/clean-power-plan-states-of-progress#.VrvU79srLIV>.

By granting the stay, the Supreme Court has already more broadly impacted the Administration's climate agenda. The CPP was critical to projecting U.S. leadership in addressing climate change and achieving the commitments of 195 nations, most notably China and India, in the December 2015 Paris Agreement under the United Nations Framework Convention on Climate Change. The United States is seen as a world leader in clean energy development and former Secretary of State Madeleine Albright expects that a court's ruling that the CPP is unconstitutional would have "serious adverse foreign policy consequences."¹⁹ Germany, France and other key nations in the Paris Climate Agreement have been closely monitoring the CPP's progression through the court system.

The Obama Administration issued a statement disagreeing with the Supreme Court decision, and vowing to continue to defend the CPP from industry challenges and take "aggressive steps" to move forward on climate policy.²⁰ Expressing frustration at the Court's stay, EPA spokeswoman Melissa Harrison noted that "you can't stay climate change and you can't stay climate action." EPA Administrator McCarthy addressed numerous state agencies and the National Association of Regulatory Utility Commissioners on February 11, 2016, stating that the EPA would continue to move forward and support those states complying with the CPP voluntarily. In addition, many states will continue to move forward with plans for implementation of the CPP requirements. For example, California intends to submit a CPP plan prior to the original deadline for the submission of state plans to set an example and encourages other states to do the same.

The ongoing legal challenge to the CPP and related political repercussions of the stay are now even more in flux given the sudden vacancy on the Supreme Court. Some would argue that Justice Scalia's passing changed everything and would "save" the CPP. However, the future make-up of the Supreme Court, the timing of any replacement, the views of any future justice and any action before a new justice is added to the Supreme Court are extremely difficult, at best, to predict. Here are some possible scenarios:

- Decision before Replacement. If a decision with respect to the CPP is required before a Justice Scalia's vacancy is filled, the Supreme Court would only have eight justices. This could lead to a decision that fails to achieve a majority on either side. In the event of a 4-4 vote on whether to uphold the CPP, any decision by the D.C. Circuit Court would stand.

¹⁹ http://www.huffingtonpost.com/david-doniger/polluters-last-ditch-bid_b_9139858.html.

²⁰ <https://www.whitehouse.gov/the-press-office/2016/02/09/press-secretary-josh-earnest-supreme-courts-decision-stay-clean-power>.

- Liberal Majority. If there is a liberal leaning majority, a decision appears most likely to be in favor of supporting the CPP if it is appealed to the Supreme Court. However, given the Republican majority in the Senate and since some Senate Republicans have threatened to reject all Supreme Court nominees for the Supreme Court until after the November elections in the fall, the possibility of a liberal majority on the Supreme Court may depend on whether the next President will be a Democrat or Republican and whether the Senate will have a Democratic or Republican majority.
- Conservative Majority. If there is a conservative leaning majority, a decision appears less likely to be in favor of supporting the CPP if it is appealed to the Supreme Court. However, since President Obama is unlikely to appoint a conservative justice, the possibility of a new conservative majority on the Supreme Court may also depend on the election.
- Moderate Replacement Justice. If the new justice has more moderate views, either because President Obama seeks a compromise in order to obtain Senate approval or if appointed by the new President after the election, the new justice's views on the CPP could tip the balance of any future action by the Supreme Court with respect to the CPP.

Given that this is an election year and depending how the D.C. Circuit and Supreme Court ultimately rules with respect to the merits of the CPP, the next administration could seek to alter, cease or continue efforts to implement the existing CPP. Should a Republican reach the Oval Office, this could result in a permanent halt of the EPA's implementation the plan altogether, or a significant departure from current emission reduction targets. Yet, should a Democrat be elected, the new administration could push forward with the CPP while exploring additional provisions of the Clean Air Act, for example Section 115 which addresses international air pollution, to further its carbon-reducing climate goals.

Given the unprecedented nature of the CPP itself, and the stay of a federal regulation pending outcome of the litigation, there are sure to be many new developments on the horizon this year with far reaching implications for companies across the energy sector.

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