As we reported last week, on January 21st, a D.C. Circuit panel denied Clean Power Plan opponents' request for a "stay"—or temporary suspension—of the rule pending judicial review. **Read the court order here.**

We have discussed the Clean Power Plan litigation at length on Legal Planet. As a quick refresher, the Clean Power Plan is EPA's rule to control greenhouse-gas emissions from existing fossil-fuel-fired power plants under Clean Air Act § 111(d). I described the basics of the rule in prior posts. In short, the rule assigns an emission-reduction target to each state based on application of national performance rates. By 2016 (or 2018, with an extension), each state must develop an implementation plan for how to reach its assigned target. Subject to EPA's approval, state plans can include a wide variety of flexible compliance measures, such as power-plant efficiency improvements, new renewable energy generation, demand-side energy efficiency programs, and emission trading. EPA projects the Clean Power Plan will reduce carbon pollution from the power sector 32 percent below 2005 levels.

Immediately following the Clean Power Plan's publication in October, twenty-seven states and dozens of industry groups filed lawsuits challenging the rule's legality. (*See* my overview of the litigation and parties here.) More than a dozen other states and a coalition of environmental, public health, and renewable energy organizations have intervened in support of EPA. The D.C. Circuit has consolidated the various challenges under *West Virginia et al. v. EPA* (No. 15-1363).

Here, I highlight what last week's court order—the first substantive order in this case—means for parties and next steps.

The Clean Power Plan Remains in Effect…For Now

Even though the stay battle is merely the first stage in what legal experts predict will be

lengthy and complex litigation, dodging a stay is a major win for EPA and its allies. Given the Clean Power Plan's carefully defined compliance timelines, and the criticality of the Clean Power Plan to meeting the United States' international emission-reduction commitments, a stay would have been significantly disruptive. Additionally, an order granting a stay would have been a bad sign for EPA about how the panel might rule on the merits of the case. For now, the Clean Power Plan remains in effect, bolstering the Obama Administration's political commitments, sending market signals, and most importantly, obliging states to continue preparing implementation plans.

Might this be a short-lived victory for EPA, though? Over the past two days, state petitioners, business groups, utilities, and coal industry groups have filed a series of petitions to the U.S. Supreme Court to reverse the D.C. Circuit's order and grant an emergency stay of the Clean Power Plan. Under 5 U.S.C. § 705, the Supreme Court has authority "to postpone the effective date of an agency action" if "necessary to prevent irreparable injury." Petitioners argue that without a stay, the Clean Power Plan "will continue to unlawfully impose massive and irreparable harms upon the sovereign States, as well as irreversible changes in the energy markets" (State Petition at p. 4).

Interestingly, the states' petition refers to the Supreme Court's decision last year in *Michigan v. EPA*:

> The day after this Court ruled in *Michigan* that EPA had violated the Clean Air Act ("CAA") in enacting its rule regulating fossil fuel-fired power plants under Section 112 of the CAA . . . EPA boasted in an official blog post that the Court's decision was effectively a nullity. Because the rule had not been stayed during the years of litigation, EPA assured its supporters that "the majority of power plants are already in compliance or well on their way to compliance." Then, in reliance on EPA's representation that most power plants had already fully complied, the D.C. Circuit responded to this Court's remand by declining to vacate the rule . . . . **In the present case, EPA is seeking to similarly circumvent judicial review, but on an even larger scale and this time directly targeting the States.**

Given that the Supreme Court purposefully left the Mercury and Air Toxics Standard in effect pending further proceedings in the lower court, it is unclear whether these facts will get the justices' blood boiling.

In any case, it is highly unusual for a party in pending federal litigation to seek, let alone obtain, a stay of a regulation from the Supreme Court. As NRDC attorney David Doniger told Greenwire, "It's extraordinary to get a stay from the D.C. Circuit. It's extra, extra extraordinary to get one from the Supreme Court." For this reason, many legal experts expect the petition will not succeed.

As with all matters involving the High Court, however, the outcome is unpredictable. Chief Justice Roberts is charged with considering emergency actions related to D.C. Circuit Court cases. He could render a solo decision on the petitions, or confer with other members of the Court. He may also request a response from EPA and its allies.

In determining whether to grant an emergency stay, Roberts has ample discretion to make guesses about judicial outcomes and balance equities. He must consider whether the petition demonstrates:

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases . . . the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010). How these factors will shake out in Roberts' judgment is anyone's guess. It is certainly helpful to EPA that the Supreme Court rarely grants emergency stays of regulations. Petitioners' arguments about irreparable harm notwithstanding, the Clean Power Plan does not require states to begin reducing power-sector carbon emissions until 2022, and the D.C. Circuit has already expedited its review of the rule (*see* below). Nonetheless, the fact that the Clean Power Plan is an EPA climate rulemaking, and disfavored by a majority of states, suggests that extraordinary outcomes cannot be ruled out. Roberts has indicated that he is unlikely to look kindly upon the Clean Power Plan. He may already have an opinion as to the likelihood of whether a majority of the justices will strike down the rule when it reaches the Supreme Court—as it almost surely will, following in the footsteps of every other recent and innovative Clean Air Act rulemaking.

Bottom line: Regardless of what the Supreme Court decides, opponents succeeded through these petitions in bringing their key arguments about the merits of the case to the Chief Justice's attention. Petitioners surely believe that this will benefit them down the road when

the case comes before the Supreme Court. A decision by Roberts to deny the stay request would not be telling; but a decision to stay the rule would not be a good omen for EPA.

Another Victory for EPA—The Court Did Not Sever the Issues

In addition to denying petitioners' request for a stay, the order denied LG&E/KU Energy's motion to sever, and temporarily suspend consideration of, issues related to whether the final Clean Power Plan is a "logical outgrowth" of the proposed rulemaking. LG&E/KU Energy has petitioned EPA for administrative reconsideration of the methodology and analysis supporting the Clean Power Plan, claiming that the final rule differs dramatically from the proposed rulemaking, thus warranting supplemental public comment. The D.C. Circuit panel's denial of the motion to sever is to EPA's benefit.

Expedited Merits Review to Come

The court granted state petitioners' motion for expedited consideration of the Clean Power Plan, calling for initial briefs on all issues by April 15th and scheduling oral argument for June 2-3.

The parties filed proposed briefing schedules today (*see* EPA & allies' proposal; petitioners' proposal). The schedules are tight—attorneys will be working at rapid pace through spring. The oral argument date means we could expect a decision from the D.C. Circuit on the Clean Power Plan in late summer or early fall.

A Lucky Panel for EPA

The court order also announced the three members of the D.C. Circuit panel that will be reviewing the legality of the Clean Power Plan: Karen Henderson, Judith Rogers, and Sri Srinivasan. This panel is a lucky draw for EPA and its allies.

As you may recall, opponents were unsuccessful in their attempts to persuade the D.C. Circuit to take the unusual action of hearing pre-publication challenges to the Clean Power Plan. And opponents were further unsuccessful in their attempts to retain the same panel of conservative judges that denied pre-publication review—Henderson, Kavanaugh, and Griffith—to hear this case. The current panel is widely considered to be much more favorable to EPA and more likely to uphold the Clean Power Plan than the panel that considered the pre-publication challenge.

Rogers is a major score for EPA. She is a Clinton-appointee and EPA champion. You may

recall, for instance, that Rogers sided with EPA in another important climate change case, *Coalition for Responsible Regulation v. EPA*, which confirmed EPA's authority to regulate greenhouse-gas emissions under several Clean Air Act programs.

Srinivasan is a moderate Obama-appointee and presumptive name on the shortlist of U.S. Supreme Court nominees. Because he is relatively new to the court, he is less predictable—but still more likely to side with EPA than his more conservative benchmates.

Henderson is a George H.W. Bush-appointee, and notable as the only member of the current panel to consider the pre-publication challenges to the Clean Power Plan. There is nothing of consequence to draw from her opinion denying pre-publication review; but of the current panel, she is the judge most likely to be favorable to petitioners. That said, in her long tenure on the bench, she has sided with EPA on several occasions.

Stay tuned as this epic litigation continues to unfold.