



Supreme Court Blocks Clean Power Plan, But Scalia's Death Changes Outlook on Ultimate Fate

02.16.2016

The U.S. Supreme Court has blocked implementation of President Obama's signature plan to address climate change pending a decision by the D.C. Circuit Court of Appeals on the plan's legality. The Clean Power Plan is being challenged by 29 states and dozens of corporations and industry groups. The decision is a bit of a slap in the face to the D.C. Circuit, which denied the request to stay the regulation less than a month ago. The Supreme Court's action is unprecedented: It's the first time it has ever blocked implementation of an environmental regulation before the D.C. Circuit has had a chance to consider the regulation on its merits.

The Supreme Court's decision was widely seen as an indication it was likely to strike down the rule regardless of how the D.C. Circuit rules. That likelihood changed in an instant on February 13 with the death of Justice Scalia. The February 9 vote to block the rule was 5-4, with all the conservative justices (including Scalia) voting in favor of blocking the rule and all the liberal justices voting against it. Justice Kennedy, ever the swing vote, voted this time with the conservative justices. All indications are that the next justice appointed to the Supreme Court will be the deciding vote on whether the Clean Power Plan survives.

Under the Clean Power Plan, states are to put in place programs designed to reduce overall nationwide carbon emissions from existing power plants by 32% by 2030 compared to 2005 levels. Each state has been assigned individual interim and final CO₂ reduction goals and can choose among the programs and plans it will use to achieve them. States are required to submit their plans to EPA by September, 2016 (with the ability to obtain a two year extension), but that's now on hold until the D.C. Circuit, and ultimately the Supreme Court, rules on the merits of the case.

We noted in the August, 2015 edition of *Environmental Notes* that the odds were the Clean Power Plan will not survive. We pointed out that the Administration had no chance of getting Congress to pass legislation regulating greenhouse gas emissions, so it opted to proceed by issuing regulations based on existing authority. EPA says section 111(d) of the Clean Air Act gives it that authority, but our belief is that this "pushes the envelope" too far. If President Obama appoints the next justice, though, it seems

likely that argument will be accepted and the regulation will be upheld.

It will be a long time until there is a final decision – likely 2017 at the earliest – and how things play out from here is anyone's guess. In the meantime, the decision to stay the rule is welcome relief to those opposed to it.

Related People

- Channing J. Martin – 804.420.6422 – cmartin@williamsmullen.com

Related Services

- Environment & Natural Resources