US Supreme Court puts Clean Power Plan on hold

In August 2015, the Obama administration promulgated a landmark regulation known as the Clean Power Plan (CPP), to reduce greenhouse gas (GHG) emissions from fossil-fuelled power plants. Soon after the publication of the CPP in the Federal Register, state and industry petitioners contended that the administration had exceeded its authority under the Clean Air Act (CAA), violated the historic and legal authority of the states, and imposed unmanageable restructuring of the power sector. In February 2016, the US Supreme Court – the highest US court with unique authority over constitutional and federal affairs – temporarily suspended President Barack Obama's landmark carbon-emissions regulation for existing stationary sources.

What is the Clean Power Plan?

In the context of US action to address climate change and move towards low-carbon sources of energy, President Obama announced a number of executive actions to reduce carbon pollution. Reducing GHG emissions is both one of the Obama administration's priorities, considering that carbon dioxide (CO₂) accounts for 82% of US GHG emissions, as well as a priority set by the December 2015 Paris Climate Agreement. To a certain extent, the US judiciary has helped to shape current US climate policy too. Suffice to mention that in 2007, in the case Massachusetts v Environmental Protection Agency (EPA), the Supreme Court ruled that, under the Clean Air Act (CAA), the EPA had the authority to regulate GHGs as air pollutants. To achieve climate goals, President Obama released a Climate Action Plan as well as a Presidential Memorandum relating to carbon pollution in 2013. The latter instructed the EPA to set carbon pollution standards for the power sector, the nation's largest source of carbon pollution (representing around 40% of US CO₂ emissions). Previously, the administration had already adopted some measures with regard to carbon pollution, for instance from the transport sector, issuing standards which limit the greenhouse gas emissions of new cars and light trucks up to 2025, and heavy duty trucks up to 2018. The President instructed the administration to use its authority under Sections 111(b) and (d) of the CAA, to 'issue standards, regulations, or guidelines, that address carbon pollution from modified, reconstructed, and existing power plants and build on State efforts to move toward a cleaner power sector'.

Consequently in August 2015, with the Clean Power Plan (CPP), the EPA determined emission-performance rates; issued guidelines for reduction of carbon pollution from existing power plants, and requested state governors to submit state-specific implementation plans by September 2016. The EPA expects state plans to explain how power plants will meet the interim CO₂ emissions performance rates over the period from 2022 to 2029, and the final CO₂ emission rates by 2030. The overall objective being that the US power sector cuts carbon emissions by 32% by 2030, from 2005 levels. The CPP allows a state to request a two-year extension from the EPA if it cannot submit a final plan by the set deadline. Although the final plan must be submitted by 2018 at the latest, the compliance period will start only in 2022.

Reactions in Congress to CPP

Opposition to the CPP in Congress started in 2015 with several bills introduced to block or revise EPA Clean Power Plan rules. These included House bills H.R. 2042 – which would have allowed states to opt out or delay compliance with the regulation; H.R. 2637 – which would have prevented the EPA from issuing targets for reducing CO₂ until the US Department of Labor certifies that this would not result in job losses; and Senate bill S. 1324. Moreover, the legislative branch may 'disapprove' an executive action by passing a joint resolution of disapproval. Once passed by both chambers in Congress, a prospective resolution is sent to the President for signature or veto. In the specific case of CPP for existing power plants, joint resolutions were passed by Congress, but vetoed by President Obama in December 2015.
What did the Supreme Court say?

Since Obama’s Clean Power Plan was released in August 2015, a coalition of multiple US states, corporations, and industry groups filed petitions in the US Court of Appeals for the District of Columbia (DC) Circuit to review the plan. At the same time, 18 states, several US cities, and multiple environmental groups also filed motions in support of the CPP. The case ended up in the US Supreme Court after the DC Circuit Court refused to put the plan on hold because petitioners ‘have not satisfied the stringent requirements for a stay pending court review’. States such as West Virginia, with a significant coal industry and Republican-dominated government, argued that the regulation would have imposed overly stringent obligations that would have violated state sovereignty. The state governments’ official application to the Supreme Court highlighted that 'numerous state regulators describe the Plan as the most far reaching and burdensome rule EPA has ever forced onto the States'. The states' arguments revolved around their view that the EPA misinterpreted an unclear provision of the CAA in order to fundamentally restructure energy production. They emphasise that the CAA gives the EPA authority mainly to regulate new stationary energy sources, but little power to institute new guidelines on existing sources. The states claim that by distorting the law in this way the EPA is actually imposing more stringent restrictions on old plants compared to new ones, as existing sources will need to focus on shifting production entirely. The states also highlight that the new EPA emissions standards are scheduled too early, in a way which will force many coal plants to close. The states use the specific example of West Virginia, which currently draws 95% of its electricity from coal and would be expected to make huge efforts to meet the objectives fixed by the EPA.

In their own application to the Supreme Court, electricity-generation and coal-mining companies expressed the view that the regulation would:

- require ‘immediate investment of billions of dollars in technically unneeded – but now mandated – electrical generation infrastructure’;
- precipitate the 'premature closure' of coal plants and mines;
- contribute in part to the bankruptcy of large coal companies; and
- prompt restructuring of the entire electricity sector, as opposed to creating unit-specific emissions guidelines for states to follow.

The industry stated in its declaration to the court that ‘the nation's entire energy supply cannot be fundamentally restructured in six years without enormous cost being incurred immediately’, as the industry needs 3-17 years to retire old coal-fired plants and replace them with renewable and gas-powered generation. Taking these arguments into account, on 9 February 2016, five of the nine justices of the US Supreme Court stayed implementation of the Clean Power Act pending judicial review. The stay means that the requirement for states to submit compliance plans by September 2016 is currently on hold.

Reactions to the Supreme Court ruling

Opponents of the rules, including states and power companies, were obviously pleased with the stay and its immediate effect. While in the House of Representatives the Energy and Commerce Committee welcomed the Supreme Court ruling, the Obama administration has officially stated its disagreement with the Court’s decision to hold CPP implementation while litigation proceeds. The White House believes that the EPA rule is based on strong scientific and legal foundations, and reaffirmed its willingness to take 'aggressive steps to make forward progress to reduce carbon emissions'. Equally, the administration confirmed its intention to keep working with those states that want to implement the plan, pending the judicial review. US media largely emphasised the potential effects of the stay, with some claiming that although the Court’s action was not a ruling on the merits of the case, it has somehow confirmed that the US Supreme Court is knee-deep in partisan politics.

What next?

The CPP is now under review by the US Court of Appeals for the DC Circuit, in expedited schedule with a hearing fixed for 2 June 2016. First a three-judge panel will review the plan, but once that panel has ruled, the case could be debated before the full Court of Appeals, and then either side might try to move the case to the US Supreme Court. It seems very unlikely that all these different steps could be completed by the time President Obama’s term ends in January 2017. Thus, implementation of the CPP will likely pass to the next US president, whose ideological stance may not reflect that of the current administration.