



Protecting Public Health and the Environment from Carbon Pollution *After the Supreme Court's Unexplained and Unprecedented Order*

The Supreme Court's decision is not a judgment on the merits

The [Supreme Court's decision](#) on February 9th to temporarily stay implementation of the Clean Power Plan was unexpected, and the ruling is, as counsel for one of the lead challengers acknowledged, “unprecedented.”ⁱ

The Court overruled a unanimous decision of the U.S. Court of Appeals for the D.C. Circuit, which [denied](#) motions to stay the Clean Power Plan based on two months of briefing and weeks of careful review of over 2,500 pages of expert witness statements and evidentiary submissions. The Supreme Court's decision, which was issued just days after a short period of briefing, does *not* reflect judgment on the legal merits of the Clean Power Plan.

Litigation on the Clean Power Plan will proceed expeditiously, with a judgment on the merits expected well before the compliance deadlines

The [Supreme Court's decision](#) means the plan will be “paused” while litigation on the merits of the Clean Power Plan proceeds on an expedited basis. The D.C. Circuit has ordered briefing on the merits of the Clean Power Plan to conclude by April 15 – just nine weeks from now – and has scheduled oral argument for June 2, 2016.

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This schedule allows for the merits review (in both the D.C. Circuit and the Supreme Court) to be completed before the 2018 state plan submission deadline, and certainly long before the 2022-2030 compliance period begins.

The Clean Power Plan rests on a strong legal foundation and technical record

As [a number of legal experts](#), state attorneys general, leading power companies, and former state & federal air pollution control officials (including [two former Republican Administrators](#) of the Environmental Protection Agency (EPA)) have recognized, the Clean Power Plan rests on a solid legal foundation and reflects common-sense, cost-effective approaches to reducing carbon pollution.

The Clean Power Plan is based on proven technologies and strategies for reducing carbon pollution that have been successfully deployed by power companies for decades. It incorporates flexible, cost-effective compliance frameworks that have a long tradition under the Clean Air Act and are virtually identical to those upheld by the Supreme Court in a 2014 decision affirming the Cross State Air Pollution Rule.ⁱⁱ

And it reflects the reality of the “interconnected power grid” which the Supreme Court recognized in a landmark January 2016 decision upholding a Federal Energy Regulatory Commission clean energy program for the nation’s competitive wholesale electricity markets. We are confident that when the court actually examines the merits of the Clean Power Plan — with full briefing and oral argument, rather than a brief look over a few days — it will uphold these critical protections for climate and public health, and they will go into effect as scheduled in 2022.

States and power companies that do not prepare for compliance with the Clean Power Plan do so at their own risk



When a court stays a challenged regulation, the parties requesting a stay assume the risk that they may lose on the merits and the regulation will take effect. While the stay will excuse parties from having to comply with any deadlines as long as the stay is in place, emission reduction obligations for power plants under the Clean Power Plan do not go into effect until years after the litigation is expected to resolve.

To not adequately prepare for the Clean Power Plan to go into effect as originally scheduled would be taking an **unnecessary and high risk**—not just for companies with compliance obligations, but for their customers.ⁱⁱⁱ Recognizing this, some states and power companies are already expressing their intent to continue developing state plans so that they can be well-positioned to comply in the event the Clean Power Plan is upheld.^{iv}

The EPA has an obligation to address carbon pollution, and states and power companies should fully prepare for and expect that obligation to be realized

The Supreme Court has affirmed three times – in *Massachusetts v. EPA* (2007), *AEP v. Connecticut* (2011), and *UARG v. EPA* (2014) - that the Clean Air Act authorizes EPA to address climate-destabilizing carbon pollution.

Moreover, the Supreme Court held in *AEP v. Connecticut* (2011) that the regulation of carbon pollution from existing power plants is squarely within EPA’s authority under section 111(d) of the Clean Air Act – the provision that underlies the Clean Power Plan. At oral argument in *AEP*, even counsel for the power companies acknowledged that “we do believe that [EPA has] the authority to consider standards” for existing sources under section 111.

“Our nation has a long time tested history of making continuous progress in reducing dangerous pollution – driving the increasingly rapid deployment of cost-effective pollution free energy solutions.”

Clean energy progress is moving full steam ahead, generating significant economic and public health benefits for forward-looking states and power companies

Across the country, low-carbon, low-cost energy resources are already coming online at historic rates, with more than 75% of new generating capacity in 2016 expected to come from zero-carbon renewable power. The recent extension of the federal tax credits for renewables will be a further catalyst for zero carbon generation - [expected](#) to bring more than 100GW of new renewables onto the grid from 2016 through 2021,^v which would offset generation from more than 80 coal plants. At the same time, we're cleaning up the soot and smog emissions from our power system, providing healthier longer lives and cleaner power for millions of Americans.

Our nation has a long time tested history of making continuous progress in reducing dangerous pollution – driving the increasingly rapid deployment of cost-effective pollution free energy solutions. The Court's actions will not slow down America's race to protect our communities, our children and our economic well-being from climate-destabilizing climate pollution. That race is driven by developments far broader and deeper than a temporary procedural hurdle in litigation.



States and power companies that move ahead to reduce carbon pollution and make clean energy investments will be better-prepared for our low-carbon future and will secure significant economic benefits

Pausing progress in preparation for enforceable limits on carbon pollution—ignoring the intensifying need to overlay resource planning with an overarching obligation to drive the power sector towards a low-carbon future—would be a profound

mistake, particularly at such a moment of incredible dynamism in the power sector when the dramatic opportunities for low cost investment in the technologies of the future are intersecting with *trillions of dollars* of planned investments to modernize & strengthen our aging electricity infrastructure for the 21st century.

Power companies are expected to invest up to **\$2 trillion** in new generation, transmission, and distribution infrastructure between 2010 and 2030 in order to modernize aging generating facilities and grid systems. Smart states and power companies will continue to take this opportunity to make forward-looking investments that harness our dynamic clean energy economy, cut carbon pollution, and avoid the risk that comes from doubling-down on outdated, dirty technologies that will become stranded investments in the near future.

America is securing healthier air, a safer climate, and a more resilient and affordable electricity grid – while growing our economy. There's no reason to expect any of this will stop now; on the contrary, all evidence points to the race only accelerating and states and companies achieving and exceeding our nation's limits on carbon pollution. And despite the legal wrangling by big polluters and their allies, the race is on to protect our public health, our climate security and our economy.

ⁱ <http://www.reuters.com/article/us-usa-court-carbon-idUSKCN0V12A0> (reporting comments of West Virginia Attorney General Patrick Morrisey).

ⁱⁱ See Ricky L. Revesz, Denise A. Grab, and Jack Lienke, *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan* (Dec. 2015), <http://policyintegrity.org/files/publications/FamiliarTerritory.pdf>.

ⁱⁱⁱ *Cf. Train v. NRDC*, 421 U.S. 60, 92 (1975) (litigation challenging EPA’s refusal to grant waivers from Clean Air Act compliance is “carried out on the polluter’s time, not the public’s”).

^{iv} See Colorado Department of Public Health and Environment, “Colorado to keep working while courts consider Clean Power Plan,” <https://www.colorado.gov/pacific/cdphe/cdphenews>; Emily Holden, Elizabeth Harball & Ellen M. Gilmer, *SCOTUS halts Clean Power Plan, stuns states planning carbon cuts*, E&E News (Feb. 10, 2016) (reporting statement by Arkansas Department of Environmental Quality and Arkansas Public Service Commission recognizing “obligation to be fully prepared should the Supreme Court ultimately uphold the plan.”); *U.S. Supreme Court stops Clean Power Plan while Ohio, other states challenge constitutionality*, Cleveland Plain Dealer (Feb. 10, 2016) http://www.cleveland.com/business/index.ssf/2016/02/us_supreme_court_stops_clean_p.html (reporting FirstEnergy pledge to “work with our states if they chose to continue development of their compliance plans”).

^v <http://about.bnef.com/white-papers/impact-of-tax-credit-extensions-for-wind-and-solar/>