

# The Effect of Challenges to the US Clean Power Plan on the Paris Climate Agreement

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## Introduction

Ongoing legal challenges to the US Clean Power Plan (CPP) have led some to question whether the United States can meet its greenhouse gas (GHG) emissions reduction targets pledged pursuant to the recent United Nations Framework Convention on Climate Change (UNFCCC) Paris Agreement. In particular, the US Supreme Court's February 9, 2016 decision to stay implementation of the CPP means that the implementation of the plan will at least be delayed, and there is significant risk that it will be rejected by the courts. It is our view, however, that the stay decision should not significantly detract from global efforts to address climate change pursuant to the Paris Agreement, and will not affect the ability of the US to meet its initial targets for reductions in GHG emissions. If the CPP is struck down by the courts in a final order, that could impede the ability of the United States to meet its longer term targets.

## US Commitments Under the Paris Agreement

The UNFCCC's Paris Agreement sets an international goal to hold the increase in the global average temperature to "well below" 2 °C above pre-industrial levels (see The Paris Agreement: The Impact on the United States and the EU).<sup>1</sup> This global goal is intended to be achieved primarily by reductions in GHG emissions by member nations as pledged in each nation's Nationally Determined Contribution (NDC). NDCs are to be achieved individually by each country, including the US, which published its NDC on March 31, 2015.<sup>2</sup> Domestic activity that reduces emissions can assist a country in achieving its NDC.

In the US, one of the main elements of the Obama administration's plan to address climate change is the CPP. The CPP requires states to reduce carbon dioxide emissions from existing power plants by 32 percent below 2005 levels by 2030, with states making meaningful progress toward emissions reductions by 2020. The CPP primarily impacts existing coal-fired power plants and applies to existing power plants only, while other EPA regulations address carbon dioxide emissions from other sources, such as vehicles, refineries, and power plants to be constructed in the future. The CPP was finalized by the EPA in August 2015 and published in the Federal Register in October 2015.

<sup>1</sup> See Conference of the Parties, Paris, Fr., Nov. 30-Dec. 11, 2015, Draft Decision -/CP.21, *Annex: Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015), available at <http://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf>.

<sup>2</sup> Intended Nationally Determined Contribution of the United States of America (published Mar. 31, 2015), available at <http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/US%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf>.

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## Legal Challenges to the CPP

The CPP is opposed by approximately 29 individual states and several industry groups. Opponents of the CPP promptly filed a challenge in the US Court of Appeals for the District of Columbia Circuit after the EPA finalized the CPP. Opponents filed their initial briefs in February 2016, and oral argument is scheduled for June 2, 2016. The D.C. Circuit has no timetable for issuing a decision on the merits, but one could be issued later in 2016 or in 2017. Once the D.C. Circuit issues a final decision, then the losing parties can seek certiorari review in the US Supreme Court. A final decision on the challenges to the CPP therefore will not be issued for at least a year from now.

Opponents sought a stay of the CPP while the courts hear their legal challenges. Rules such as the CPP are not automatically stayed during the pendency of a legal challenge, and issuance of a stay is discretionary with the courts. In January 2016, the DC Circuit denied the opponents' request for a stay and scheduled a hearing on the merits for June 2, 2016. The opponents then sought a stay from the US Supreme Court on January 27.<sup>3</sup>

On February 9, 2016, in a rare move, the Supreme Court granted the opponents' request in a 5-to-4 decision, staying the CPP. The stay is to remain in effect until after the D.C. Circuit rules on the legality of the CPP and until the Supreme Court denies any petition for writ of certiorari sought or, if the Supreme Court grants certiorari, until the Supreme Court enters its judgment. The operative language of the Supreme Court's Stay Order is as follows:

The Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Other EPA regulations addressing carbon dioxide emissions from non-power plant sources are not subject to the stay.

The significance of the stay on the courts' ultimate decision on the merits of the challenges to the CPP is complicated by the February 13, 2016 death of Associate Justice Antonin Scalia. Justice Scalia was a member of the 5-4 majority that granted the opponents' application for a stay, and was considered by many to be a reliable vote against the CPP. If the five justice majority who voted for the stay is indicative of how the Supreme Court would rule if certiorari were granted, then, provided no successor to Justice Scalia is confirmed, the Supreme Court would be deadlocked on the merits of the opponents' challenge. In this case, the decision of the DC Circuit would stand. As a result, the outcome of the D.C. Circuit June 2, 2016 hearing may be the final word on the CPP.

## Effect of the Stay on the US Commitments under the Paris Agreement

Several commentators have speculated as to the impact of the stay on the implementation of the UNFCCC Paris Agreement in the US, and in particular how the stay—or a ruling striking down the CPP altogether—might affect the ability of the US to meet the goals set out in its NDC. The US NDC sets a two-part goal for reducing emissions: (1) a 2020 target of reducing emissions "in the range" of 17 percent below 2005 levels and (2) a 2025 target of "further emission reduction" up to 26-28 percent of total reductions below 2005 levels.<sup>4</sup>

While the effect of a stay of the CPP or an adverse ruling on the implementation of the Paris Agreement depends on a number of factors, broadly, a stay presents fewer risks that the US will be unable to meet its NDC than an adverse ruling against the CPP.

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<sup>3</sup> Application of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review, *Basin Elec. Power Coop. v. EPA*, Case No. 15A776 (Jan. 27, 2016), available at <http://www.scotusblog.com/wp-content/uploads/2016/01/15A776-utilities-stay-application.pdf>.

<sup>4</sup> *Supra* note 2, at 1, 3.

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If the CPP is upheld, then the effect of the stay would be to delay the implementation of the CPP. This would likely not have a significant impact on the ability of the US to meet its NDC, as the CPP is not intended to assist the US in meeting the NDC's 2020 target, and a stay is unlikely to delay the CPP long enough to endanger the 2025 target. While the CPP intends that individual states will make some meaningful progress toward emissions reduction by 2020,<sup>5</sup> the CPP itself will not be implemented and significant work to achieve emissions reduction goals will not begin until 2022.<sup>6</sup> Indeed, full compliance with the CPP is not expected until 2030, which is long after the NDC's 2020 target date.

If the CPP is ultimately struck down, however, then the ability of the US to meet its 2025 goal of reducing its emissions by 26-28 percent reduction below 2005 levels is less certain. At this early stage, it is not possible to predict whether the US would be able to achieve its NDC in the absence of the CPP, as the US may reduce emissions through a number of alternative actions. In addition, the mismatch between the 2022 earliest expected date of implementation for the CPP (prior to the stay) and the first NDC target date of 2020 is a strong indication that the US did not expect the CPP to contribute to the 2020 goal. Even so, the impact of striking down the CPP on the ultimate achievement of the US NDC (and, by extension, the Paris Agreement), depends on the willingness or ability of the US to achieve emissions reductions through alternative actions, which include:

- **Other actions listed in the US NDC.** The NDC submitted by the United States lists a number of actions the US plans to take apart from regulating emissions by existing coal fired power plants, which are the primary focus of the CPP. In its NDC, the US also relies on: (i) reduction of GHG emissions from federal operations; (ii) more stringent fuel economy standards for cars and trucks; (iii) energy conservation standards for the buildings sector; (iv) energy conservation standards for appliances and equipment; (v) the phase-out of hydrofluorocarbons with high global warming potential; (vi) the adoption of regulations to reduce methane emissions from landfills and the oil and gas sector; and (vii) regulations to reduce carbon dioxide emissions from newly-constructed fossil fuel power plants. Although many of these efforts are—or will—be subject to legal challenge in the courts, as the CPP has been, none to date have been stayed and they all may still be implemented.<sup>7</sup>
- **Impact of regional emissions-reductions programs.** Some states, such as California, and the group of northeastern states that are members of the Regional Greenhouse Gas Initiative, have already undertaken emissions reduction measures, including market-based efforts such as carbon-trading. Reductions under these initiatives could assist the US in satisfying its obligations set out in its NDC, but it is not clear whether these initiatives would (or could) make up for the absence of a national effort to reduce emissions, like CPP.
- **Retirement of older facilities.** Other recently-adopted regulations requiring the reduction of pollutants other than carbon dioxide, coupled with low natural gas prices, will likely result in the continued retirement of many older, less efficient coal plants. While not the product of direct government action, this phenomenon would assist the US in achieving its NDC through reducing overall emissions, which would be recognized under the UNFCCC Paris Agreement.
- **Growth of renewable energy.** Renewable energy tax credits adopted in December 2015 and available over the next five years will likely spur the growth of renewable energy, which may reduce emissions through reduced reliance on emissions-intensive energy sources.

The US identified additional measures that can be used to meet its NDC in its recent Biennial Report, submitted in connection with the UNFCCC process. These measures include (i) reductions in industrial energy demand, (ii) additional state actions in the electricity sector, (iii) greater efficiencies in industry and

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<sup>5</sup> US ENVTL. PROTECTION AGENCY, EPA FACT SHEET: CLEAN POWER PLAN, FLEXIBLE APPROACH TO CUTTING CARBON POLLUTION (June 2, 2014), available at <http://www.epa.gov/sites/production/files/2014-05/documents/20140602fs-plan-flexibility.pdf>.

<sup>6</sup> US DEP'T OF STATE, 2016: SECOND BIENNIAL REPORT OF THE UNITED STATES OF AMERICA UNDER THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (the "Biennial Report"), at 67 (2016), available at [https://unfccc.int/files/national\\_reports/biennial\\_reports\\_and\\_iar/submitted\\_biennial\\_reports/application/pdf/2016\\_sec\\_02\\_biennial\\_report\\_of\\_the\\_united\\_states.pdf](https://unfccc.int/files/national_reports/biennial_reports_and_iar/submitted_biennial_reports/application/pdf/2016_sec_02_biennial_report_of_the_united_states.pdf).

<sup>7</sup> See *supra* note 2, at 4-5 ("Domestic laws, regulations, and measures relevant to implementation").

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transportation, (iv) more efficient nutrient application techniques that reduce nitrous oxide emissions, and (v) the ability of forests and other vegetated areas to absorb GHGs.<sup>8</sup>

In the meantime, White House officials have announced that they do not expect that the stay will undermine the signing of the Paris Agreement on April 22, 2016. The EPA and the Obama Administration have also publicly reassured the international community that the US will be able to meet its obligations under the Paris Agreement.

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<sup>8</sup> *Supra* note 6, at 35-39.