

# CLIENT ALERT

## VIDEO: Clean Power Plan

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The Obama administration's aggressive Clean Power Plan climate change initiative, which seeks to regulate emissions from existing fossil fuel fire power plants, has the potential to fundamentally transform energy generation in the United States. However, due to a recent Supreme Court stay, the status of the rule is now uncertain. The recent death of Justice Scalia further amplifies the uncertainty.

In this two-part video alert series, Crowell & Moring Partner Thomas Lorenzen provides an update on the current status of the rule, touching on recent Supreme Court actions and upcoming litigation. He discusses what kind of companies need to be paying attention to these proceedings and the issues they need to be aware of, no matter the outcome of the rule's eventual status.

### Part 1: What Energy Companies Should Do Right Now

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### Part 2: Impact of Supreme Court Stay

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### Transcript

#### What is the Clean Power Plan?

The Clean Power Plan is part of President Obama's climate change initiative. It seeks to regulate emissions from existing fossil fuel fire power plants to achieve a 32 percent reduction in those emissions from 2005 levels by 2030. It's a very aggressive rule that seeks to transform energy generation in the United States.

#### What's the status of the rule given the litigation?

The status of the rule is very uncertain right now. We've had some major developments in this rule since the beginning February 2016. On February 9th the Supreme Court granted an extraordinary stay in this rule, in a 5-4 split decision. This has never happened before. Never before has the Supreme Court intervened in an ongoing lower court proceeding to stay a rule making that is currently under review. So, the status of the rule is somewhat unclear. Interestingly, just five days after that order was issued from that Supreme Court, one of the five justices who entered it, Justice Scalia, passed away. This cast further uncertainty on the status of the rule.

#### What happens next in the D.C. Circuit with the Rule?

The litigation over the rule continues in the D.C. Circuit. Briefs are being filed in the spring of 2016 with oral arguments scheduled for June 2, and probably June 3 as well. We expect a decision on the rule this fall. And then we're off to the Supreme Court again.

### **What types of companies really need to be paying attention to what happens with the Rule?**

The rule most directly impacts those obviously who are in the energy production sector. If you are the owner or operator of a utility, this rule impacts you directly. If you are a significant user of electricity, obviously it impacts you, as well. But those who also need to be focusing on this rule are those who come next in EPA's view. That is the refining sector, the oil and gas sector, and major manufacturing industries.

### **Does the Supreme Court stay mean companies don't need to do anything now about the Clean Power Plan?**

Businesses have some questions that they need to think through. One is, because the rule is stayed, do they continue to work towards possible implementation of the rule? My recommendation is that they talk with their states. Different states are taking different approaches on the rule. Some have put down their pens in light of the Supreme Court's stay. Others are continuing a pace to plan for eventual implementation. One thing that one needs to remember is that while the stay prohibits EPA from enforcing the rule, it does not prohibit states from doing what they wish to try to implement the rule under either federal law or their own state law.

### **What are you recommending companies think about doing right now?**

Right now, you need to be thinking about all eventualities. With the passing of Judge Scalia, the chances that the rule might survive judicial review increase. That means there's a possibility this rule or something very much like it will be implemented at some point. You need to be preparing for that.

### **What can happen if the Rule does not survive?**

If the rule does not survive, the EPA is going to be looking at alternative authorities to accomplish the same goals. So, one thing you need to be thinking about is what portions of the Clean Air Act might be most advantageous to you, if the EPA starts looking elsewhere. We can help you as you think those things through. There might be a legislative effort to provide an alternative to the Clean Air Act. You should begin thinking about what that alternative might look like.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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