



State of West Virginia  
Office of the Attorney General

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May 16, 2016

Janet McCabe  
Acting Assistant Administrator  
Office of Air and Radiation  
Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Re: Response to request by fourteen state officials for additional information and technical assistance related to the Clean Power Plan

Dear Acting Assistant Administrator McCabe:

As the chief legal officers in West Virginia and Texas—the co-leaders of the 27-State coalition that obtained a stay of the so-called Clean Power Plan—we write in response to the April 28, 2016, letter from a group of fourteen state environmental agency officials requesting “additional information and technical assistance related to the final Clean Power Plan.” The officials recognize that your agency “must respect the stay of the Clean Power Plan,” but they nevertheless ask the Environmental Protection Agency (“EPA”) to continue to spend federal taxpayer dollars to help with “planning for compliance with the Clean Power Plan.” Their efforts and those of your agency to try to make the Power Plan a *fait accompli* fail to accord proper respect for the Supreme Court’s unprecedented decision to halt the Power Plan—a decision that divests this agency of authority to enforce the rule and calls into serious question the rule’s legality.

As you know, the Supreme Court’s stay order “suspend[ed] administrative alteration of the status quo.” *Nken v. Holder*, 556 U.S. 418, 428 n.1 (2009). Thus, in a letter sent after the stay order to several national organizations for state clean air agencies and utility commissioners, Texas Attorney General Ken Paxton and I explained that any obligations under the Power Plan are effectively void during the litigation over the Power Plan’s legality.<sup>1</sup> *See id.* at 428. We also

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<sup>1</sup> Our letter is available here: [http://www.ago.wv.gov/pressroom/2016/Documents/2016-02-12%20Letter%20to%20NARUC%20%20%20NACAA%20\(M0118772xCECC6\).pdf](http://www.ago.wv.gov/pressroom/2016/Documents/2016-02-12%20Letter%20to%20NARUC%20%20%20NACAA%20(M0118772xCECC6).pdf).

explained that in the unlikely event that the Power Plan is sustained, EPA would be forced to completely reset all Power Plan deadlines. That is what has happened with previous stays of EPA regulations, including the Transport Rule discussed in the state environmental agency officials' letter, and as the United States Solicitor General admitted to the Supreme Court, a request for a reset of the Power Plan's deadlines was "inherent" in the stay applications.<sup>2</sup> Finally, though we acknowledged that States may take voluntary steps to reduce emissions, we cautioned that EPA may not require States to take action in any way concerning the Power Plan. To do otherwise would plainly violate the Supreme Court's order.

Consistent with the stay, EPA should decline the invitation from the state environmental agency officials to continue to spend federal taxpayer dollars to help with "planning for compliance with the Clean Power Plan"—in particular, by continuing work on the so-called "Clean Energy Incentive Program" ("CEIP") and the non-final carbon trading rules. Any effort to force States to take actions on the CEIP or the carbon trading rules—for example, by setting deadlines for state action while the stay is in place—would clearly violate the Supreme Court's order. Indeed, we believe any actions that trigger deadlines for notice-and-comment or petitions for review would improperly compel action by States.

Moreover, even absent such compulsion, continued work on these programs during the stay calls into question your agency's commitment to the Supreme Court's stay order. Because the CEIP and the carbon trading rules have no legal significance without a legally effective Power Plan, efforts to push these programs forward at this time can only be understood as an attempt to make the Power Plan a *fait accompli* and to undermine the Supreme Court's order. We remind you that EPA's previous attempt to circumvent the Supreme Court in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), almost certainly contributed to the Supreme Court's unprecedented decision here to stay the Power Plan.

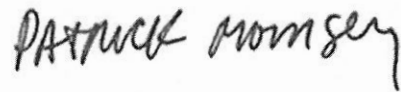
At a minimum, we urge you to consider that you are spending scarce resources on a rule that the Supreme Court has indicated raises serious legal questions. For that reason, if no other, numerous States have put their pencils down following the stay order. See E&E Publishing, Power Plan Hub, Supreme Court Stay Response, [http://www.eenews.net/interactive/clean\\_power\\_plan](http://www.eenews.net/interactive/clean_power_plan) (noting that 20 States have decided to suspend planning efforts).

The entire point of the Supreme Court's extraordinary action in putting a stop to the Power Plan was to preserve the status quo pending the outcome of the litigation. EPA should respect that action by leaving things the way they are until the courts have had their say.

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<sup>2</sup> Your recent assertion in a letter to Senator Jim Inhofe that the States who sought the stay conceded that the stay would not toll all deadlines, Letter from Acting Assistant Administrator McCabe to Senator Inhofe (Apr. 18, 2016), is incorrect. The States' expressly argued that "[i]n the unlikely event the [Power] Plan survives judicial review . . . , tolling would be appropriate as a matter of basic fairness." See State Applicants' Reply 30, *West Virginia et al. v. EPA, et al.*, No. 15A773 (U.S. Feb. 5, 2016). In support, the States cited specifically to the D.C. Circuit order in *Michigan v. EPA* that extended the state implementation plan deadlines in that case for a day-for-day period equal to the period of the stay on that rule. See *id.* at 30.

Sincerely,



Patrick Morrissey  
West Virginia Attorney General



Ken Paxton  
Texas Attorney General

cc:

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United States Senate EPW Chairman  
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The Honorable Shelley Moore Capito  
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The Honorable Fred Upton  
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