



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 18 2016

OFFICE OF
AIR AND RADIATION

The Honorable James Inhofe
U.S. Senate
Washington, D.C. 20510

Dear Senator Inhofe:

Thank you for your letter of March 10, 2016, to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the recent Supreme Court decision to stay the Clean Power Plan (CPP). The Administrator asked that I respond on her behalf.

On February 9, 2016, the Supreme Court stayed the CPP pending judicial review before the U.S. Court of Appeals for the D.C. Circuit and any subsequent proceedings in the Supreme Court. The EPA firmly believes the Clean Power Plan will be upheld when the courts address its merits because the Clean Power Plan rests on strong scientific and legal foundations. During the stay, the EPA has made clear that implementation and enforcement of the Clean Power Plan are on hold. This means that during the pendency of the stay, states are not required to submit anything to EPA, and EPA will not take any action to impose or enforce any such obligations. For example, we have clearly communicated to states that they are not required to make initial submittals on September 6, 2016.

The ultimate effect of the stay on CPP deadlines will be determined when the stay is lifted. The Court's orders are ambiguous because different applicants requested different relief. The government interpreted the stay applicants' opening briefs as requesting that all CPP deadlines be tolled, and it opposed the stay in part on the grounds that such relief would be extraordinary and unprecedented. In their reply brief, however, the States clarified that they were only seeking a stay that would relieve States of the obligation to comply with CPP deadlines during the litigation and that the stay would not necessarily provide for day-for-day tolling of the deadlines. The Supreme Court's orders granting the stay did not discuss the parties' differing views of whether and how the stay would affect the CPP's compliance deadlines, and they did not expressly resolve that issue. In this context, the question of whether and to what extent tolling is appropriate will need to be resolved once the validity of the CPP is finally adjudicated.

States may regulate greenhouse gases under their own authorities whether or not the CPP is in effect. Since the stay was issued, many states have said they intend to move forward *voluntarily* to continue to work to cut carbon pollution from power plants and are seeking the Agency's guidance and assistance. The Agency will be providing such assistance, which is not precluded by the stay. In particular, they have asked us to move forward with our outreach and to continue providing support and developing tools, including the Clean Energy Incentive Program (CEIP), the proposed model rules, and the proposed evaluation, measurement and verification (EM&V) guidance. The EPA has received significant feedback on the CEIP and comment on the proposed model rules and EM&V guidance. We will move forward developing these actions in a way that is consistent with the stay while providing states the tools they have asked for to help address carbon pollution from power plants.

The EPA has in the past moved forward with preparing for the potential implementation of a rule while it has been stayed, in anticipation of the possibility that the stay could be lifted. Such actions are unaffected by a stay. *See Nken v. Holder*, 556 U.S. 418, 428 (2009). They do not impose any requirements on regulated units or on states. Furthermore, addressing carbon pollution is a part of the Agency's obligations under the Clean Air Act. It is undisputed that carbon dioxide, as a greenhouse gas, is an air pollutant under the Clean Air Act. *See Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 122 (D.C. Cir. 2012). *See also Massachusetts v. EPA*, 549 U.S. 497 (2007); *AEP v. Connecticut*, 564 U.S. 410 (2011); *UARG v. EPA*, 134 S. Ct. 2427 (2014). Further, the Clean Air Act directs the agency to engage with states and other stakeholders and to provide technical and financial assistance on all aspects of air pollution prevention and control. *E.g.*, 42 U.S.C. §§ 7402, 7403. Therefore, the EPA expects to continue to use Agency funds to protect human health and the environment consistent with its authorities under the Act.

Again, thank you for your letter. If you have further questions, please contact me, or your staff may contact Kevin Bailey in the EPA's Office of Congressional and Intergovernmental Relations at bailey.kevinj@epa.gov or (202) 564-2998.

Sincerely,

A handwritten signature in blue ink, appearing to read "J.G. McCabe".

Janet G. McCabe
Acting Assistant Administrator