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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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June 9, 2016

The Honorable Jane McCabe
Acting Assistant Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Dear Acting Assistant Administrator McCabe:

On March 10, 2016, I requested that the U.S. Environmental Protection Agency (EPA) answer several important questions regarding the Supreme Court's February 9, 2016, stay against the Clean Power Plan (CPP). Today, I write in response to your April 18, 2016, correspondence on that matter. According to recent correspondence from the Attorneys General in West Virginia and Texas, the agency's response was based on an incorrect reading of their legal briefs.¹

In the agency's April 18 response, you assert that the effect of the stay on CPP deadlines has not been determined and is "ambiguous" given "different applicants requested different relief." To support this assertion you concluded that the stay applicant's reply brief should be read as conceding that the stay would not toll all the deadlines and that states "were only seeking a stay that would relieve States of the obligation to comply with CPP deadlines during the litigation."² However, according to a May 16, 2016, letter from Attorneys General Patrick Morrisey and Ken Paxton, the very authors of the reply brief you cited, informed you that this characterization is "incorrect." Attorneys General Morrisey and Paxton continued that 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."³

As I pointed out in my initial letter, numerous other applications for emergency relief that the Supreme Court's February 9 order granted also explicitly requested the extension of all CPP

¹ See May 16, 2016 Letter from Attorneys General Patrick Morrisey and Ken Paxton to Jane McCabe, Acting Asst. Adm. for Air and Radiation dated May 16, 2016, footnote 2, available at [http://www.ago.wv.gov/pressroom/2016/Documents/2016-05-16%20Letter%20to%20EPA%20responding%20to%2014%20States%20\(M0126714xCECC6\).pdf](http://www.ago.wv.gov/pressroom/2016/Documents/2016-05-16%20Letter%20to%20EPA%20responding%20to%2014%20States%20(M0126714xCECC6).pdf)

² See April 18, 2016 Letter from Janet McCabe, Acting Asst. Adm. to The Honorable Jim Inhofe available at <http://www.epw.senate.gov/public/cache/files/ca20cabb-4494-47af-822c-3e814707eb80/epa-response-to-tolling-letter-04-18-2016.pdf>

³ See May 16, 2016 Letter from Attorneys General Patrick Morrisey and Ken Paxton to Jane McCabe, Acting Assistant Administrator for Air and Radiation dated May 16, 2016, footnote 2.

compliance deadlines. To further highlight a few examples, the Utility and Allied Parties request stated:

“The Applicants therefore request an immediate stay of EPA’s rule, extending all compliance dates by the number of days between publication of the rule and a final decision by the courts, including this Court, relating to the rule’s validity.”⁴

The Coal Industry application stated:

“The Power Plan’s magnitude and scope are unprecedented. It should be stayed, and all deadlines in it suspended, pending the completion of all judicial review.”⁵

Furthermore, every brief opposing the three applications, including that of the Department of Justice (DOJ), acknowledged that the applications requested the extension of compliance deadlines.⁶ In response, the Supreme Court issued three separate orders, each granting the “application” without any limitation on the scope of requested relief.⁷ The Supreme Court orders not only spoke to the tolling of these deadlines, but did so in a manner that the attorneys representing your agency concurred.

The agency’s response also ignores existing law. The law is clear that the Supreme Court’s grant of a stay inherently extends the rule’s deadlines to preserve the “status quo,” which pauses implementation of the rule in its entirety until completion of judicial review. CPP litigation aside, EPA and DOJ have consistently held to this understanding including in 2014 when the Supreme Court remanded the Cross State Air Pollution Rule (CSAPR) case back to the

⁴ Application of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review, January 27, 2016, available at: http://www.eenews.net/assets/2016/01/27/document_pm_04.pdf

⁵ Coal Industry Application for Immediate Stay of Final Agency Action Pending Judicial Review, January 27, 2016, available at: <http://www.chamberlitigation.com/sites/default/files/scotus/files/2016/Coal%20Industry%20SCOTUS%20Stay%20Application%20--%20States%20of%20West%20Virginia%2C%20Texas%2C%20et%20al.%20v.%20EPA%20%28ESPS%29.pdf>

⁶ Memorandum for the Federal Respondents in Opposition 2, *West Virginia v. EPA*, No. 15A773, et al. (U.S. Feb. 4, 2016) (“[Applicants] explicitly or implicitly ask this Court to toll all of the relevant deadlines set forth in the Rule . . .”) (hereinafter, the “DOJ Memo”); Opposition of States of New York, California, Connecticut, Delaware, Hawai’i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, Virginia, Washington, the District of Columbia, the Cities of Boulder, Chicago, New York, Philadelphia, and South Miami, and Broward County, Florida 11, *West Virginia v. EPA*, No. 15A773, et al. (U.S. Feb. 4, 2016) (“In their applications, several petitioners expressly seek a stay that extends the compliance dates of the Rule.”); Non-State Respondent-Intervenors’ Opposition to Applications for Stay of Final Agency Action Pending Appellate Review 24, *West Virginia v. EPA*, No. 15A773, et al. (U.S. Feb. 4, 2016) (“Applicants[] request[] to delay the Rule’s deadlines, both for state planning and for power plant compliance . . .”).

⁷ See e.g. Order, No. 15A773, *State of West Virginia, et al. v. EPA, et al.* (U.S. Feb. 9, 2016).

D.C. Circuit, EPA and DOJ requested the court extend CSAPR's compliance deadlines by three years, which was "a few months longer than the stay" in order "to truly preserve the status quo."⁸

I remain concerned that your response to my letter and EPA's continued public statements refusing to acknowledge the clear impact of the Supreme Court's stay are not helpful to states, and erroneously encourages the spending of limited state resources to devise compliance strategies for a rule whose deadlines are tolled, and very likely will be overturned. Moreover, given the legal precedence and the positions of EPA and DOJ in numerous legal briefs that preservation of the status quo requires that a stay order also extend that regulation's compliance deadline, as well as the recent correspondence from Attorneys General Morrissey and Paxton, I request complete and thorough responses to the following requests no later than June 21, 2016:

1. In the event that the CPP is upheld, will EPA abide by the tolling requirements inherent in the Supreme Court's Stay decision, thereby extending all compliance dates by the number of days between the CPP's October 18, 2015 federal register publication date and the eventual lifting of the Stay by the Supreme Court?
2. In your April 18 letter you stated the following:

"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."

On April 27, 2016, EPA sent its Clean Energy Incentive Program (CEIP) over to the Office of Management and Budget for interagency review and in preparation for publication in the federal register. EPA has also made clear its intent to continue work and finalize its model trading rules. These EPA actions compel states to spend their resources reviewing, preparing and filing comments on the CEIP or reviewing and preparing judicial challenges to the federal plan, otherwise states would lose important legal rights. How does forcing states to conduct such activity comport with your statement that EPA is not taking any action or imposing any obligation on states?

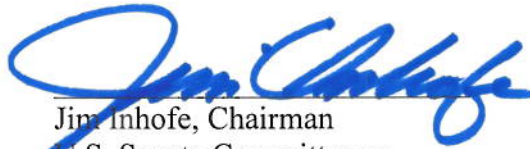
3. Additionally, describe clearly and in detail what CPP planning efforts continue, and what work has been halted, including:
 - a. Does the agency plan to continue work on and finalize the proposed CPP model rule and the proposed Clean Energy Incentive Program? If so, why and by what authority?

⁸ Respondents Motion to Lift the Stay Entered on December 30, 2011 14-16, *EME Homer City Generation v. E.P.A.*, (June 24, 2014).

- b. How much funding is currently being allocated to CPP implementation-related activities, and how many full-time equivalents (FTEs) are working on the Rule? How does this current resource allocation compare to allocations prior to the Stay, and how does the agency plan to adjust projected FY 2017 funding and activities in light of the Stay?

Thank you for your attention to this request.

Sincerely,



Jim Inhofe, Chairman
U.S. Senate Committee on
Environment and Public Works