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August 1, 2016

The Honorable Regina A. McCarthy
Administrator
U.S. Environment Protection Agency
1200 Pennsylvania Ave., N.W.
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Submitted electronically via Regulations.gov

Re: Request for extension of time to comment on the proposed rule, *Clean Energy Incentive Program Design Details*, 81 Fed. Reg. 42,940 (June 30, 2016), docket no. EPA-HQ-OAR-2016-0033, by the undersigned States and state agencies

Dear Administrator McCarthy:

As the chief legal officers and officials of the States and state agencies that obtained the stay of the "Clean Power Plan" from the United States Supreme Court, we urge you to immediately extend the comment period on the proposed rule titled, *Clean Energy Incentive Program Design Details*, 81 Fed. Reg. 42,940 (June 30, 2016) (the "CEIP"). The comment period should be extended for at least sixty days following the termination of the Power Plan stay. Of course, if the Power Plan does not survive judicial review, the CEIP should then simply be withdrawn. Several reasons support this extension request.

First, extending the comment deadline is required by the stay. Under established precedent, the stay order "halt[s] or postpone[s]" the Power Plan, including "by temporarily divesting [the Power Plan] of enforceability." *Nken v. Holder*, 556 U.S. 418, 428 (2009). In other words, the stay "suspend[s] the source of authority to act" by "hold[ing] [the Rule] in abeyance." *Id.* As the States have repeatedly explained since the stay was entered, that means EPA and its agents possess *no authority* to require States take action regarding the Power Plan.[1] Indeed, EPA

[1] The States of West Virginia and Texas sent a letter dated February 12, 2016, to the presidents of the National Association of Regulatory Utility Commissioners and the National Association of Clean Air Agencies that addresses the meaning of the Supreme Court stay, including EPA's authority to require States to take further action regarding the Power Plan. The letter is hereby incorporated by reference and may be found at this link:

officials have acknowledged—as they must—that the agency cannot require States to take any action related to the Power Plan during the stay.[2] Thus, EPA officials have expressed doubt that the agency may move forward formally with the pending model trading rule, which is the subject of a separate rulemaking but exists only because of the Power Plan.[3]

The stay "preserve[s] the status quo" pre-Power Plan. *Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006). That is why the United States Solicitor General, representing EPA in opposing the stay, acknowledged to the Supreme Court that "implementation of each sequential step mandated by the Rule *would be substantially delayed*" if the Power Plan were stayed but ultimately upheld. Memorandum for the Federal Respondents in Opposition 2-3, No. 15A773, et al. (U.S. Feb. 4, 2016) (emphasis added). "A request for [] tolling [Power Plan deadlines] is inherent even in the applications that do not explicitly address that subject," the Solicitor General explained, "as all of them rest on the premise that *a stay would forestall harms alleged to arise from future deadlines*." *Id.* at 3 (emphasis added). In short, a stay of the Power Plan "would have sweeping prospective consequences, extending far beyond the actual pendency of the relevant judicial proceedings." *Id.* at 4.

Yet, EPA is now attempting to force States to take action on a proposal that would not exist but for the Power Plan. *See* 81 Fed. Reg. at 42,940. Because "the CEIP was established in the Clean Power Plan," *id.*, the States have previously cautioned EPA against taking "any actions [regarding the CEIP] that trigger deadlines for notice-and-comment" because doing so "would improperly compel action by States."[4] But that is precisely the effect of the proposed CEIP under the current comment period, which concludes well before the stay order could conceivably

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http://www.ago.wv.gov/publicresources/epa/Documents/2016-02-12%20Letter%20to%20NARUC%20%20%20NACAA%20%28M0118772xCECC6%29.pdf.

[2] *See* Emily Holden, E&E News, *With climate rule on hold, should states worry about deadlines?* (Mar. 24, 2016), http://www.eenews.net/stories/1060034549 ("McCarthy has said that EPA is 'not dictating any implementation of this rule or telling any state they have to do anything.'"); Letter from Assistant Administrator McCabe to Senator Inhofe (Apr. 18, 2016), http://www.epw.senate.gov/public/_cache/files/ca20cabb-4494-47af-822c-3e814707cb80/epa-response-to-tolling-letter-04-18-2016.pdf ("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. . . .").

[3] *See* Elizabeth Harball, E&E News, *Advisor says EPA undecided whether to finish model carbon trading rule* (July 12, 2016), http://www.eenews.net/climatewire/stories/1060040084 (quoting Joe Goffman, senior counsel in EPA's Office of Air and Radiation, who stated, "At this point, we still have not made a decision, given the pendency of the stay, what our next step is going to be -- whether we are going to move from proposal to final rule *or whether we are going to devise some other, less formal instrument* to move the ball forward in terms of the issues that were raised in the model trading rule.") (emphasis added).

[4] This letter, dated May 16, 2016, is hereby incorporated by reference and may be found at this link: http://www.ago.wv.gov/publicresources/epa/Documents/2016-05-16%20Letter%20to%20EPA%20responding%20to%2014%20States%20%28M0126714xCECC6%29.pdf.

terminate.[5] EPA has put the States to a Hobson's Choice while the Supreme Court's stay is in effect, requiring that States either: 1) expend resources analyzing, drafting, and filing comments with the agency; *or* 2) do nothing and forgo their right to raise objections to the CEIP immediately upon judicial review. *See* 42 U.S.C. § 7607(d)(7)(B) ("Only an objection to a rule . . . which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review.").[6] The proposed CEIP is thus guaranteed to have irrevocable consequences for the States during the stay. And because the CEIP derives solely and directly from the Power Plan, EPA is and will continue to be in violation of the stay, unless it extends the comment period as requested.

Second, although the stay alone mandates an extension, granting an extension would also be consistent with the practice followed by other federal agencies that have promulgated rules potentially affected by pending litigation. For example, the Occupational Safety and Health Administration ("OSHA") indefinitely extended the comment period for a proposal on exposure limits for toxic substances following a court decision that vacated a different final rule that was similar to OSHA's proposal. *See* Dep't of Labor, Occupational Safety and Health Admin., *Proposed Rule; Extension of Comment Period and Postponement of Hearings*, 57 Fed. Reg. 37,126 (Aug. 18, 1992) (indefinitely extending comment period "while future actions in response to the [court] decision are implemented"). Rather than simply forging ahead with the rulemaking process of a rule with apparent legal issues, OSHA took the reasonable step of delaying the closure of public comment to assess the implications of the court's decision. Similarly, the Minerals Management Service once postponed the comment period for an environmental impact statement until the agency could implement a court order entered in litigation over a separate but related issue concerning outer continental shelf lease suspensions. *See* Dep't of Interior, Minerals Management Serv., *Notice of Postponement of Public Hearings and Extension of the Public Comment Period for the Draft Environmental Impact Statement for Delineation Drilling Activities in Federal Waters Offshore Santa Barbara County, California*, 66 Fed. Reg. 35,809 (July 9, 2001). And more recently, the Obama Administration delayed agency review of comments on State Department approval of the Keystone XL pipeline due to uncertainty caused by a pending Nebraska Supreme Court decision. *See* Dep't of State, *Keystone XL Pipeline Project Review Process: Provision of More Time for Submission of Agency Views* (Press Release), Apr. 18, 2014.

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[5] *See* 81 Fed. Reg. at 81 Fed. Reg. at 42,940 (establishing 60-day comment period, closing August 29, 2016); 81 Fed. Reg. 47,325, 47,325 (July 21, 2016) (extending proposed CEIP comment period four days, until September 2, 2016, to align the comment period with the public hearing submittal time frame).

[6] It is no answer to suggest that the States *might* be able to file objections to the proposed CEIP at a later date in a petition for reconsideration. *See* 42 U.S.C. § 7607(d)(7)(B). Reconsideration is available only for objections that were "impracticable to raise" during the comment period or "if the grounds for such objection arose after the period for public comment." *Id.* And even assuming such objections would be proper subjects for reconsideration, the Act provides no deadline by which EPA must act on a reconsideration petition. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015).

Finally, extending the comment period through sixty days after the end of the stay would also be consistent with the purpose of notice and comment. In reliance on the Supreme Court's stay order, obtained over EPA's vigorous opposition, many States may reasonably choose not to participate in the comment process. But "[t]he essential purpose of according . . . notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980); *see also Sprint Corp. v. F.C.C.*, 315 F.3d 369, 373 (D.C. Cir. 2003) ("[T]he notice requirement improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review.") (quotations omitted). An extension of the comment deadline would be fairer to all States and ensure the States' full and robust participation. And because the Power Plan is stayed, the extension would not harm EPA or the public interest. Indeed, the extension could save significant public resources by postponing any further work on the CEIP until it is clear whether the Power Plan has survived judicial review.

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In sum, the comment period for the proposed CEIP should be extended at least sixty days after the Supreme Court's stay is lifted. By failing to do so, EPA would continue to violate the stay, contravene past practice by other federal agencies, and run afoul of the purposes of notice and comment rulemaking. An extension would also ensure that work is not wasted on the CEIP, which would have to be withdrawn should the Power Plan ultimately be vacated as unlawful, as we expect.

Dated: August 1, 2016

Respectfully submitted,

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