August 1, 2016

The Honorable Regina A. McCarthy  
Administrator  
U.S. Environment Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460  

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 Of course, if the Power Plan does not survive judicial review, the CEIP should then simply be withdrawn.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: State Capitol Building 1, Room L-26, 1900 Kanawha Boulevard East, Charleston, WV 25305
officials have acknowledged—as they must—that the agency cannot require States to take any action related to the Power Plan during the stay. 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.

The stay “preserve[s] the status quo” pro-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.” But that is precisely the effect of the proposed CEIP under the current comment period, which concludes well before the stay order could conceivably

---

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 that they have to do anything’”); Letter from Assistant Administrator McCabe to Senator Inhofe (Apr. 18, 2016), http://www.epw.senate.gov/public/_cache/files/7a20cabb-4494-47af-e22c-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 Harboll, 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%20States%20%28M0126714xCECC6%29.pdf.
terminate. 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."). 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.

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, 790 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 welldeserved 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.

* * *

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,

/s/ Scott A. Keller
Ken Paxton
ATTORNEY GENERAL OF TEXAS
Jeffrey C. Matyer
First Assistant Attorney General
Scott A. Keller
Solicitor General
P.O. Box 12548
Austin, TX 78711-2548
Tel: (512) 936-1700
scott.keller@texasattorneygeneral.gov
Counsel for State of Texas

/s/ Elbert Lin
Patrick Morrisey
ATTORNEY GENERAL OF WEST VIRGINIA
Elbert Lin
Solicitor General
J. Zak Ritchie
Assistant Attorney General
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Tel: (304) 558-2021
Fax: (304) 558-0140
elbert.lingwvago.gov
Counsel for State of West Virginia

/s/ Andrew Brasher
Luther Strange
ATTORNEY GENERAL OF ALABAMA
Andrew Brasher
Solicitor General
501 Washington Avenue
Montgomery, AL 36130
Tel: (334) 353-2609
abrasher@ago.state.al.us
Counsel for State of Alabama

/s/ John R. Lopez IV
Mark Brnovich
ATTORNEY GENERAL OF ARIZONA
John R. Lopez IV
Dominic E. Draye
Keith J. Miller
Assistant Attorneys General
Maureen Scott
Janet Wagner
Janice Alward
Arizona Corp. Commission,
Staff Attorneys
1275 West Washington
Phoenix, AZ 85007
Tel: (602) 542-5025
john.lopez@azag.gov
dominic.draye@azag.gov
keith.miller@azag.gov
Counsel for Arizona Corporation Commission
Hon. Regina A. McCarthy
August 1, 2016
Page 6

/s/ Lee Rudofsky
Leslie Rutledge
ATTORNEY GENERAL OF ARKANSAS
Lee Rudofsky
Solicitor General
Jamie L. Ewing
Assistant Attorney General
323 Center Street, Suite 400
Little Rock, AR 72201
Tel: (501) 682-5310
lee.rudofsky@arkansasag.gov

Counsel for State of Arkansas

/s/ Frederick Yarger
Frederick Yarger
ATTORNEY GENERAL OF COLORADO
Solicitor General
1300 Broadway, 10th Floor
Denver, CO 80203
Tel: (720) 508-6168
fred.yarger@state.co.us

Counsel for State of Colorado

/s/ Jonathan L. Williams
Jonathan L. Williams
ATTORNEY GENERAL OF FLORIDA
Deputy Solicitor General
Jonathan A. Glogau
Special Counsel
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Tel: (850) 414-3818
Fax: (850) 410-2672
jonathan.williams@myfloridalegal.com
jonathan.glogau@myfloridalegal.com

Counsel for State of Florida

/s/ Britt C. Grant
Britt C. Grant
ATTORNEY GENERAL OF GEORGIA
Solicitor General
40 Capitol Square S.W.
Atlanta, GA 30334
Tel: (404) 656-3300
Fax: (404) 463-9453
bgrant@law.ga.gov

Counsel for State of Georgia
Hon. Regina A. McCarthy  
August 1, 2016  
Page 10

/s/ Justin D. Lavene  
Douglas J. Peterson  
ATTORNEY GENERAL OF NEBRASKA  
Dave Bydlack  
Chief Deputy Attorney General  
Justin D. Lavene  
Assistant Attorney General  
2115 State Capitol  
Lincoln, NE 68509  
Tel: (402) 471-2834  
justin.lavene@nebraska.gov

Counsel for State of Nebraska

/s/ John R. Renella  
Christopher S. Porrino  
ACTING ATTORNEY GENERAL OF NEW JERSEY  
David C. Apy  
Assistant Attorney General  
John R. Renella  
Deputy Attorney General  
Division of Law  
R.J. Hughes Justice Complex  
P.O. Box 093  
25 Market Street  
Trenton, NJ 08625-0093  
Tel. (609) 292-6945  
Fax (609)341-5030  
john.renella@dol.lps.state.nj.us

Counsel for State of New Jersey
Michael DeWine  
ATTORNEY GENERAL OF OHIO  
Eric E. Murphy  
State Solicitor  
30 E. Broad Street, 17th Floor  
Columbus, OH 43215  
Tel: (614) 466-8980  
eric.murphy@ohioattorneygeneral.gov  
Counsel for State of Ohio

E. Scott Pruitt  
ATTORNEY GENERAL OF OKLAHOMA  
Patrick R. Wyrick  
Solicitor General of Oklahoma  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
Tel: (405) 521-4396  
Fax: (405) 522-0669  
fcc.docket@oag.state.ok.us  
scott.pruitt@oag.ok.gov  
David B. Rivkin, Jr.  
Mark W. DeLaquil  
Andrew M. Grossman  
BAKER & HOSTETLER LLP  
Washington Square, Suite 1100  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036  
Tel: (202) 861-1731  
Fax: (202) 861-1783  
дривкін@bakerlaw.com  
Counsel for State of Oklahoma and Oklahoma Department of Environmental Quality

James Emory Smith, Jr.  
Alan Wilson  
ATTORNEY GENERAL OF SOUTH CAROLINA  
Robert D. Cock  
Solicitor General  
James Emory Smith, Jr.  
Deputy Solicitor General  
P.O. Box 11549  
Columbia, SC 29211  
Tel: (803) 734-3680  
Fax: (803) 734-3677  
esmith@scag.gov  
Counsel for State of South Carolina

Steven R. Blair  
Mary J. Jackley  
ATTORNEY GENERAL OF SOUTH DAKOTA  
Steven R. Blair  
Assistant Attorney General  
1302 E. Highway 14, Suite 1  
Pierre, SD 57501  
Tel: (605) 773-3215  
steven.blair@state.sd.us  
Counsel for State of South Dakota
Hon. Regina A. McCarthy  
August 1, 2016  
Page 13

/s/ Tyler R. Green  
Sean Reyes  
ATTORNEY GENERAL OF UTAH

Tyler R. Green  
Solicitor General

Parker Douglas  
Federal Solicitor

Utah State Capitol Complex  
350 North State Street, Suite 230  
Salt Lake City, UT  84114-2320  
pdouglas@utah.gov

Counsel for State of Utah

/s/ Misha Tseytlin  
Brad D. Schimel  
ATTORNEY GENERAL OF WISCONSIN

Misha Tseytlin  
Solicitor General

Andrew Cook  
Deputy Attorney General

Dolanie M. Breuer  
Assistant Deputy Attorney General

Wisconsin Department of Justice  
17 West Main Street  
Madison, WI  53707  
Tel: (608) 267-9323  
tseytlinm@doj.state.wi.us

Counsel for State of Wisconsin

/s/ James Kaste  
Peter K. Michael  
ATTORNEY GENERAL OF WYOMING

James Kaste  
Deputy Attorney General

Michael J. McGrady  
Erik Petersen  
Senior Assistant Attorneys General

Elizabeth Morrisseau  
Assistant Attorney General

2320 Capitol Avenue  
Cheyenne, WY  82002  
Tel: (307) 777-6946  
Fax: (307) 777-3542  
james.kaste@wyo.gov

Counsel for State of Wyoming