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November 1, 2016

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

Re: Comments 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:

The undersigned States and state agencies appreciate the opportunity to submit the following comments on the Environmental Protection Agency's ("EPA") proposed *Clean Energy Incentive Program Design Details* ("CEIP").¹ Since the day it was finalized, the undersigned States and state agencies have opposed EPA's unlawful "Clean Power Plan." And a number of the undersigned States and state agencies obtained an unprecedented stay of the Power Plan from the United States Supreme Court.² Two months ago, that same group of States requested that EPA extend the comment period for the proposed CEIP until at least sixty days following termination of that stay, explaining that a failure to do so would continue to violate the stay, contravene past practice by other federal agencies, and run afoul of the purposes of notice-and-comment rulemaking. Unfortunately, EPA has refused that request.³ As a result, the undersigned States and state agencies must now file these comments under protest to formally register their continued belief that this rulemaking—which would not exist *but for* the Power Plan—violates the Supreme Court's stay. Under the law governing the Supreme Court's stay, the undersigned

¹ 81 Fed. Reg. 42,940 (June 30, 2016).

² Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016); *see also* Nos. 15A776, 15A778, 15A787, 15A793.

³ Letter from EPA Acting Assistant Administrator Janet G. McCabe to state Attorneys General (October 27, 2016).

States and state agencies reserve their right to comment on the substance of the CEIP in the event that the Power Plan is upheld.

It is beyond debate that EPA lacks authority to administer or enforce the Power Plan now or at any time while the stay remains in effect. As case law makes clear, 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.*

Put another way, 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).

Indeed, both the States and EPA have explained the legal effect of the stay in these terms. States have time and again warned EPA that the stay means that the agency has *no authority* to require States to take any action regarding the Power Plan.⁴ And EPA officials have conceded that the agency cannot force States to take any action related to the Power Plan during the stay.⁵ Thus, for example, EPA officials have expressed doubt that the agency may formally move forward with the pending model trading rule, which exists only because of the Power Plan.⁶

⁴ 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: <http://www.ago.wv.gov/publicresources/epa/Documents/2016-02-12%20Letter%20to%20NARUC%20%20%20NACAA%20%28M0118772xCECC6%29.pdf>; see also Multistate Letter to EPA Administrator McCarthy Requesting Extension of CEIP Comment Period (Aug. 1, 2016), [http://www.ago.wv.gov/publicresources/epa/Documents/2016-08-01%20CEIP%20Extension%20Letter%20-%20FINAL%20\(M0131933xCECC6\).pdf](http://www.ago.wv.gov/publicresources/epa/Documents/2016-08-01%20CEIP%20Extension%20Letter%20-%20FINAL%20(M0131933xCECC6).pdf).

⁵ 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-3e814707eb80/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. . .”).

⁶ 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).

Like the pending model trading rule, the CEIP has no legal existence separate from the Power Plan. As the proposal expressly acknowledges, “the CEIP was established in the Clean Power Plan,” 81 Fed. Reg. at 42,940, is a “component” of the Power Plan, *id.* at 42,942, and had its “rationale and legal authority . . . set forth in the final Clean Power Plan,” *id.* at 42,944. In other words, the proposal would not exist but for the Power Plan. EPA asserts that the CEIP is severable from the Power Plan, *id.* at 42,944, n.11, but that does not change that the CEIP would not exist but for the Power Plan.

As a result, EPA lacks authority to move forward with the CEIP just as it lacks authority to administer or enforce the Power Plan. But that is precisely what the proposed rule does. Because the comment period closes well before the stay order could possibly terminate,⁷ EPA has forced the States to either: 1) expend resources analyzing, drafting, and filing comments with the agency; or 2) forgo their right to immediate judicial review of the CEIP. *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.”).⁸ As States have cautioned EPA before, “any actions [regarding the CEIP] that trigger deadlines for notice-and-comment . . . would improperly compel action by States.”⁹ The proposed rule will have irrevocable consequences for the States during the stay and is therefore clearly a violation of the Supreme Court’s stay.

⁷ *See* 81 Fed. Reg. 42,940 (establishing 60-day comment period, closing August 29, 2016); 81 Fed. Reg. 47,325 (July 21, 2016) (extending comment period four days, until September 2, 2016); 81 Fed. Reg. 59,950 (Aug. 31, 2016) (extending comment period sixty days, until November 1, 2016).

⁸ It is no answer that the States might be able to file objection 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 where an objection was “unpracticable to raise” during the comment period or “arose after the period for public comment.” *Id.* And even if those objections would be proper subjects for reconsideration, the Act provides no deadline by which EPA must act on a petition for reconsideration. *Mexican Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015).

⁹ Letter to EPA Acting Assistant Administrator Janet McCabe in response to request by fourteen state officials for additional information and technical assistance related to the Clean Power Plan (May 16, 2016), [http://www.ago.wv.gov/publicresources/epa/Documents/2016-05-16%20Letter%20to%20EPA%20responding%20to%2014%20States%20\(M0126714xCECC6\).pdf](http://www.ago.wv.gov/publicresources/epa/Documents/2016-05-16%20Letter%20to%20EPA%20responding%20to%2014%20States%20(M0126714xCECC6).pdf).

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