United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

March 10, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Administrator McCarthy:

I am concerned the U.S. Environmental Protection Agency (EPA) is not being forthright with states on their obligations under the Clean Power Plan (CPP) following the U.S. Supreme Court's unprecedented stay of the rule. Notably, at a March 9, 2016, U.S. Senate Committee on Environment and Public Works' hearing with state regulators, Secretary Steve Pirner of the South Dakota Department on Environment and Natural Resources explained his department "expected those deadlines [under the CPP] will be adjusted by the courts once the [final] decision is made."[1] In response, I advised, "Expecting that and knowing that are two different things."[2] Accordingly, I write to seek clarity from the EPA on critical issues related to the rule post-stay, to ensure states are no longer in the dark and know what is required of them moving forward.

Since February 9, 2016, when the Supreme Court issued the stay order, the agency's public response has ranged between muddled reticence and outright defiance, leaving impacted stakeholders and resource-strapped states confused and in limbo. For instance, at a February 24, 2016, event, you stated, "I have every respect for the Supreme Court and their decision, and we will keep abiding by that faithfully, but we will keep moving the Clean Power Plan forward."[3] [Emphasis added.] Days later, you declared that the stay "didn't mean that anything on the ground had really changed," adding that the CPP is "alive and well" and that "life is continuing [in] the exact same direction it was before the Stay."[4] Other reports indicate that EPA may not abide by compliance deadline tolling requirements that were part of the stay request granted by the Supreme Court. On a recent conference call with states, EPA's Acting Assistant

[1] *Hearing: Cooperative Federalism: State Perspectives on EPA Regulatory Actions and the Role of States as Co-Regulators, before the S. Comm. on Env't & Pub. Works,* 114th Cong. (Mar. 9, 2016).
[2] Id
[3] Remarks to IHS Cera Conference, available at https://www.youtube.com/watch?v=knIDVXS2n2A
[4] E&E News, February 29, 2016. Rule 'alive and well' – McCarthy. Available at http://www.eenews.net/eenewspm/2016/02/29/stories/1060033195

Administrator for the Office of Air and Radiation, Janet McCabe, reportedly "left open that the compliance deadline of 2022 would not be slipping."[5]

These reports are very troubling. The purpose of the stay is to maintain the status quo, pausing implementation of the rule in its entirety until completion of judicial review. It is highly inappropriate for EPA to use the fear of potential deadline truncation to coerce states and stakeholders into continuing their resource-draining planning activities, particularly if those activities drive investment and planning decisions that lead to irreversible impacts on affected power plants and ratepayers alike, in direct contravention of the Supreme Court's stay order.

Possibly the EPA is attempting to intimidate states into continuing their CPP planning process to show the international community progress on President Obama's pledge to the United Nations Framework Convention on Climate Change to reduce greenhouse gas (GHG) emissions by 26 to 28 percent by 2025. Even with the CPP, 45 percent of the promised reductions are unaccounted for.[6] If the courts were to strike down the CPP, or if the next President were to decide not to implement the rule, this gap increases to 60 percent.[7] It is no surprise this shortfall has prompted policy experts in India and China to question the Obama Administration's pledge, which could encourage other countries to further weaken their already less stringent commitments.[8]

I believe that you and the Administration are painfully aware of the challenges to fulfilling this pledge following the Supreme Court CPP stay. Regardless of this, EPA's methods to intimidate and confuse states into continuing implementation are inappropriate. The law, longstanding precedent, and EPA's own words and actions support the tolling of all compliance deadlines as a result of the stay. The need to extend and prioritize compliance planning and implementation timelines received widespread support during the CPP comment phase. In fact, upon finalization of the rule, EPA agreed, stating:

> "We carefully reviewed information submitted to us regarding the feasible timing of various measures and identifying concerns that the required CO2 emission reductions could not be achieved as early as 2020 without compromising electric system reliability, imposing unnecessary costs on ratepayers, and requiring investments in more carbon-intensive generation, while diverting investment in cleaner technologies. The record is compelling. To respond to these concerns and to reflect the period of time required for state plan development and submittal by states, review and approval by the EPA, and implementation of approved plans by states and affected EGUs, the EPA is determining in this final rule that affected EGUs will be required to begin to make reductions by 2022, instead of 2020, as proposed, and meet the final CO2 emission performance rates or equivalent statewide goals by no later than 2030."[9] [Emphasis added.]

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[5] InsideEPA, February 17, 2016. EPA Reportedly Hints ESPS Compliance Date Could Remain Despite Stay. Available at http://insideepaclimate.com/daily-news/epa-reportedly-hints-esps-compliance-date-could-remain-despite-Stay

[6] http://www.energyxxi.org/mind-gap-obama-administrations-international-climate-pledge-doesnt-add

[7] Id

[8] New York Times, February 10, 2016. Supreme Court's Blow to Emissions Efforts May Imperil Paris Climate Accord. Available at http://www.nytimes.com/2016/02/11/us/politics/carbon-emissions-paris-climate-accord.html?_r=0

[9] http://www.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule.pdf

Numerous stay applications granted by the Supreme Court explicitly state that tolling compliance deadlines was a fundamental and necessary part of the relief sought. For example, the *first sentence* of the stay application sought by Basin Electric Cooperative stated:

> "This Court should Stay the effective date of EPA's Final Rule ("the Rule") pending judicial review and should extend all compliance dates by the number of days between publication of the Rule and a final decision in this consolidated appeal."[10] [Emphasis added]

There should be no doubt that the granting of this and similar requests in other stay applications makes clear that all CPP deadlines should be tolled even if the rule ultimately survives judicial review. If the rule is ultimately upheld by the courts, the time necessary to plan, design, permit, construct, and initiate major changes to state (and interstate) electricity systems does not suddenly get shorter. Further, if planning and investment were to proceed during the stay, any such actions could subject those pursuing CPP compliance to prudency challenges in the event that the rule is modified or overturned during judicial review.

Accordingly, any change to EPA's conclusion that states need two years of additional compliance time in order to avoid compromising electricity reliability and unnecessarily burdening taxpayers cannot be justified simply because the rule has been delayed by the Supreme Court. In fact, the Supreme Court's stay is intended to minimize the irreversible compliance activities that otherwise would have been pursued absent such action by the Court.

Whatever legal and policy differences we have on this rule, I hope we can agree that states deserve clarity from EPA on its plans and expectations following the stay. With this concern in mind, please provide complete and thorough responses to the following requests by no later than March 31, 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?
    a. If so, will EPA commit to provide all states proper notification?

2. Describe clearly and in detail what CPP planning efforts continue and what work has been halted by the EPA, including:
    a. Those related to finalizing the proposed CPP model federal plan;
    b. Those related to the proposed Clean Energy Incentive Program;
    c. Those related to proposed guidance on the rule's evaluation, measurement and verification requirements; and
    d. Those related to review of state plans or requests for extension that may be submitted to EPA during the stay.

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[10] http://www.chamberlitigation.com/sites/default/files/cases/files/2015/Basin%20Electric%20Motion%20for%20Stay%20--%20States%20of%20West%20Virginia%2C%20Texas%2C%20et%20al.%20v.%20EPA%20%28ESPS%29.pdf

3. How much funding is currently being allocated to CPP implementation-related activities, and how many full-time equivalents (FTEs) are working on these activities? How does this current resource allocation compare to allocations prior to the stay, and how does the Agency plan to adjust projected fiscal year 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