May 30, 2017

Administrator E. Scott Pruitt
Office of the Administrator, Code 1101A
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Kevin S. Minoli
Acting General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
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Re: Administrator's March 30, 2017 Letter to Governors Regarding the Clean Power Plan

Dear Administrator Pruitt and Acting General Counsel Minoli:

The undersigned public health and environmental organizations write in response to Administrator Pruitt's March 30, 2017 letter to the governors of states covered by the Clean Power Plan.[1]

The March 30 letter does not purport to be a final agency action. However, it does suggest a position the EPA might take in the future concerning the tolling of Clean Power Plan deadlines. The letter states that "case law and past practice of the EPA supports the application of day-to-day tolling."

That is not an accurate summary of the legal and equitable principles governing tolling, whether applied to the Clean Power Plan or to any other regulation subject to a judicial stay. Therefore, neither states nor companies have grounds to rely on the March 30 letter's suggestions. We are providing a copy of this correspondence to the governors who received the March 30 letter.

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[1] *E.g.*, Letter from E. Scott Pruitt, EPA Administrator, to Hon. Matt Bevin, Governor of Kentucky (Mar. 30, 2017) ("March 30 Letter"), *available at https://www.epa.gov/sites/production/files/2017-03/documents/ky_bevin.pdf.* While we are responding to a letter signed by Administrator Pruitt, Administrator Pruitt has recused himself from the Clean Power Plan litigation, *West Virginia v. EPA*, D.C. Cir. Nos. 15-1363, *et al.*, and has also stated that previously he "has not participated in" any of these cases as Administrator. *See* Memorandum: My Ethical Obligations 3 (dated May 4, 2017) (available at https://www.eenews.net/assets /2017/05/05/ document_pm_06.pdf). Insofar as the March 30 letter addresses the effect of the Supreme Court's stay in the Clean Power Plan litigation, it appears to address a matter as to which the Administrator is recused. Accordingly, we also address this response to the Acting General Counsel.

"Day-to-day" tolling of compliance deadlines is not required by case law, past practice, or the terms of the Supreme Court's stay order. Indeed, the March 30 letter cites no precedent that would support such a result. Any tolling of deadlines would necessarily rest, instead, upon an equitable determination requiring consideration of all relevant factors, including those that weigh in favor of prompt implementation of Clean Air Act programs – such as the need to protect public health and welfare from harmful air pollution, the feasibility and cost of achieving compliance at the earliest reasonable date, and any applicable statutory deadlines. Thus, an automatic application of day-to-day tolling would be contrary to law. It would also be arbitrary in light of overwhelming scientific evidence concerning the unfolding disaster of climate change, and the eminent feasibility and cost-effectiveness of the emission reduction targets in the Clean Power Plan.

The Supreme Court stay order neither imposes nor justifies day-to-day tolling of out-year deadlines. In a brief Administrator Pruitt signed as Oklahoma Attorney General, the states challenging the Clean Power Plan sought only relief from deadlines "that will occur *during this litigation*."[2] EPA has previously noted the "equitable" nature of tolling and concluded that "it is not clear whether and to what extent [the Clean Power Plan] deadlines will necessarily be tolled once the stay is lifted."[3] As EPA has recognized, that question is to be decided by the court in light of the facts and circumstances at the relevant time.

Leading legal experts have pointed out that the relevant case law also does not support a blanket day-to-day tolling policy.[4] The D.C. Circuit did not apply day-to-day tolling when it dissolved its stay of the Cross-State Air Pollution Rule (CSAPR) in 2014.[5] Rather, after receiving briefing from all parties in the case, the D.C. Circuit granted EPA's motion to toll the CSAPR deadlines by three years. This tolling period was based on a consideration of equitable factors, including administrative simplicity and feasibility of compliance, not an arbitrary tolling rule.[6] And importantly, the reasonableness of tolling in CSAPR depended on the fact that there were pre-existing, enforceable regulations applicable to the same pollution (the Clean Air Interstate Rule) already in place.[7] Indeed, as Oklahoma Attorney General, Administrator Pruitt argued that the pre-existing regulations limiting emissions of the same pollution regulated by

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[2] Reply of 29 States and State Agencies in Support of Appl. For Immediate Stay, *West Virginia v. EPA*, No. 15A773 29-30 (S. Ct. Feb. 5, 2016) (emphasis added).

[3] Proposed Rule, Clean Energy Incentive Program Design Details, 81 Fed. Reg. 42,940, 42,945 (June 30, 2016).

[4] *See* Richard L. Revesz and Alexander Walker, *Understanding the Stay: Implications of the Supreme Court's Stay of the Clean Power Plan* (Apr. 2016), *available at* http://policyintegrity.org/documents/CPP_Stay_PolicyBrief.pdf.

[5] *EME Homer City Generation, L.P. v. EPA,* No. 11-1302 (D.C. Cir. Oct. 23, 2014) (order granting motion to lift the stay).

[6] Respondents' Motion to Lift the Stay Entered on December 30, 2011 at 15-16, *EME Homer City,* No. 11-1302 (D.C. Cir. June 26, 2014) (ECF No. 1499505).

[7] *See* Order Granting Stay, *EME Homer City Generation, LP v. EPA*, No. 11-1302, ECF No. 1350421, (Dec. 30, 2011) (granting stay and stating that "EPA is expected to continue administering the Clean Air Interstate Rule pending the court's resolution of these petitions for review."). *See also North Carolina v. E.P.A.*, 550 F.3d 1176, 1178 (D.C. Cir. 2008); *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 38 (D.C. Cir. 2012), *rev'd and remanded,* 134 S. Ct. 1584 (2014).

CSAPR were a factor in determining the appropriate length of the CSAPR stay.[8] There is no such backup federal regime in place here for carbon dioxide emissions from power plants.

The suggestion that every day a rule is stayed must automatically result in a day of delay after the stay is lifted—regardless of the facts on the ground and the impact on the parties and public of delay or compliance—is not only unreasonable and unsupported by precedent, but also incompatible with the protective values reflected in the Clean Air Act, which emphasizes the *timely* abatement of pollution. *See, e.g.*, 42 U.S.C. 7411(b)(1), (d)(1); *Sierra Club v. E.P.A.*, 294 F.3d 155, 161-62 (D.C. Cir. 2002); *see also Nken v. Holder*, 556 U.S. 418, 426-27 (2009) (in exercise of equitable power to stay agency action pending litigation, courts should give weight to public's interest on "prompt execution" of the law). Day-to-day tolling would be especially inapt given EPA's current position in the Clean Power Plan litigation that resolution of the case should be deferred indefinitely.

The emission reduction targets in the Clean Power Plan take effect in 2022, and phase in gradually through 2030. It would be premature, as well as inequitable and unlawful, to opine about any specific tolling of those deadlines without considering all the relevant factors, including the implications for time-sensitive environmental and public health benefits and the feasibility of compliance given the actual realities of the power sector.

In summary, the March 30 letter is inconsistent with the equitable standards courts apply in assessing whether tolling is appropriate. Furthermore, any agency action to modify the deadlines in the Clean Power Plan would have to follow proper statutory procedures, including publication of a proposal, opportunity for public comment, and an opportunity for judicial review. *See* 42 U.S.C. 7607(b), (d). It would be ill-advised for any state or regulated entity, in undertaking planning or investment decisions that might be affected by the Clean Power Plan, to rely on the inaccurate suggestions in the letter.

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[8] Joint Opposition of State and Local Petitioners to Motions to Lift the Stay, D.C. Cir. No. 11-1302 at 1 (filed July 31, 2014) (ECF No. 1505491).

Sincerely,

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cc: Hon. Kay Ivey, Governor of Alabama
Hon. Doug Ducey, Governor of Arizona
Hon. Asa Hutchinson, Governor of Arkansas
Hon. Jerry Brown, Governor of California
Hon. John Hickenlooper, Governor of Colorado
Hon. Dannel Malloy, Governor of Connecticut
Hon. John Carney, Governor of Delaware
Hon. Rick Scott, Governor of Florida
Hon. Nathan Deal, Governor of Georgia
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