New York, California, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Virginia, Washington, the District of Columbia, Boulder (CO), Chicago, New York City, Philadelphia, Broward County (FL), and South Miami (FL)

August 30, 2017

Kevin S. Minoli
Acting General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW (2310A)
Washington, D.C. 20460

Re: Letter from Administrator Pruitt Advising Governors on Legal Effect of Stay of Clean Power Plan

Dear Acting General Counsel Minoli:

We write to express our strong disagreement with the unsolicited legal advice that Scott Pruitt, the EPA Administrator, provided to the Governors of 47 states in letters dated March 30, 2017, concerning the effect of the Supreme Court's stay of the Clean Power Plan on the rule's compliance deadlines (see attached example, sent to the Governor of New York). Although the letters do not purport to take final agency action, we are nonetheless concerned that because the EPA Administrator authored the letters, states and power companies may mistakenly believe they can rely on Mr. Pruitt's views. The D.C. Circuit's recent decision on August 8, 2017 granting an abeyance of the litigation for an additional 60 days compels us to weigh in on the issue at this time.[1] Until and unless EPA lawfully replaces the Clean Power Plan, it remains the law of the land, despite the current stay of its compliance deadlines. Because the letters are both premature and legally incorrect, and also improper in light of Mr. Pruitt's agreement to recuse himself from litigation over the Clean Power Plan, EPA should retract the letters.

As you are aware, prior to Mr. Pruitt becoming EPA Administrator, he sued EPA on multiple occasions challenging the proposed and final Clean Power Plan, including *West Virginia et al. v. EPA* (D.C. Cir. No. 15-1363 and consolidated cases). Our states and local governments have intervened in support of the Clean Power Plan in that litigation. Last February, the Supreme Court stayed the Clean Power Plan pending merits review by the D.C. Circuit. The parties proceeded with expedited briefing, and argument was held before an *en banc* panel in late September. The decision remains pending. The

[1] Several non-governmental organizations who are intervenor-respondents in the Clean Power Plan litigation previously wrote you about this same topic by letter dated May 30, 2017. *See* Letter from Environmental Defense Fund, et al. to Administrator Pruitt and Acting General Counsel Minoli re. Administrator's March 30, 2017 Letter to Governors Regarding the Clean Power Plan (May 30, 2017).

court's August 8 order continuing the case in abeyance means that the stay will remain in effect for at least another 60 days from the date of the order.

Mr. Pruitt's March 30 letters to Governors opined on a controversial question regarding this litigation: If the Clean Power Plan is eventually upheld by the courts (if, for example, EPA's attempt to rescind or replace it is struck down as unlawful), should the rule's deadlines for states to submit plans (September 2018) and for power plants to reduce their carbon dioxide emissions (beginning in 2022) be adjusted?[2] His letters assert that "case law and past practice of the EPA supports the application of day-to-day tolling" of the rule's "compliance dates" for every day that the litigation remains pending. But there are two significant problems with this statement.

First, when, as here, a compliance deadline is established by a duly promulgated rule, any modification of that deadline can only be accomplished by court order at the conclusion of merits review, or by a revised rulemaking that goes through the familiar notice-and-comment process. Thus, even if the letters had purported to take final agency action (which, as noted above, they did not), there would be no legal support for the unilateral extension of regulatory deadlines through a letter from the EPA Administrator.

Second, there is likewise no legal basis to automatically extend the Clean Power Plan's compliance deadlines for every day that this litigation remains pending, especially given that the compliance deadlines are many months or even years away. The Supreme Court's stay order is silent on this issue, despite the fact that at least one of the stay applicants, Basin Electric Power, explicitly requested such relief.

Mr. Pruitt also fails to identify any specific "case law" supporting such "day-to-day tolling" of the Clean Power Plan's deadlines. And contrary to Mr. Pruitt's view of EPA's "past practice," the agency explained just last year that "the legal effect of the stay on the Clean Power Plan's deadlines is ambiguous, and the question of whether and to what extent tolling is appropriate will need to be resolved once the validity of the Clean Power Plan is finally adjudicated. At that point, the effect of the stay will be able to be assessed in light of all relevant circumstances." 81 Fed. Reg. 42,940, 42,946 (June 30, 2016). That position is fully consistent with a reviewing court's exercise of equitable discretion as well as an agency's obligation to consider all relevant evidence in the rulemaking record. In either situation, one of the "relevant circumstances" that must be considered is whether states and power companies can feasibly comply with their emission reduction obligations under the rule's original deadlines. On that score, EPA

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[2] This question has been the subject of scholarly articles, *see*, *e.g.*, Richard L. Revesz and Alexander Walker, *Understanding the Stay: The Implications of the Supreme Court's Stay of the Clean Power Plan* (Apr. 2016), available at: http://policyintegrity.org/files/publications/CPP_Stay_PolicyBrief.pdf, as well as discussion at a hearing of the Senate Environment and Public Works Committee last June. *See* https://www.epw.senate.gov/public/index.cfm/2016/6/implications-of-the-supreme-court-stay-of-the-clean-power-plan.

noted earlier this year that carbon pollution from power plants has continued to decline since the rule was finalized, putting power plants well on their way to meeting their compliance obligations.[3]

In addition to being legally erroneous, Mr. Pruitt's opining in the letters on a particular issue concerning the Clean Power Plan litigation is inconsistent with his agreement not to participate in the litigation in light of his representation of Oklahoma in the case. Given his recognition in the May 4, 2017 ethics memorandum that his recusal for one year is appropriate to prevent "any appearance of impropriety," the same underlying concern would apply to the letters, in which he seeks to persuade the Governors of his view of how a stay issued in the course of the litigation should affect parties' future compliance responsibilities.

In summary, Mr. Pruitt's erroneous view of the effect of the Supreme Court's stay on the Clean Power Plan's deadlines does not provide a reasonable basis for states or power companies to delay compliance if the rule is eventually upheld. And the letter is also inappropriate in light of his recusal from participating in the litigation. We therefore respectfully request that the agency notify the Governors that it is retracting the letters.

Sincerely,

FOR THE STATE OF NEW YORK

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[3] *See* Basis for Denial of Petition to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions (Jan. 11, 2017), at 22-26, *available at* https://www.epa.gov/sites/production/files/2017-01/documents/basis_for_denial_of_petitions_to_reconsider_and_petitions_to_stay_the_final_cpp.pdf

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Enclosure
cc: Eric Grant, Deputy Assistant Attorney General, USDOJ ENRD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

March 30, 2017

The Honorable Andrew Cuomo
Governor of New York
State Capitol
Albany, New York 12224

Dear Governor Cuomo:

On February 9, 2016, the Supreme Court of the United States stayed implementation of the Clean Power Plan (CPP) effectively "suspend[ing] administrative alteration of the status quo." *Nken v. Holder,* 556 U.S. 418, 428 n.1 (2009). Further, pursuant to the Administrative Procedure Act, the Supreme Court has authority to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

Under that precedent, States and other interested parties have neither been required nor expected to work towards meeting the compliance dates set in the CPP. It is the policy of the Environmental Protection Agency (EPA) that States have no obligation to spend resources to comply with a Rule that has been stayed by the Supreme Court of the United States. To the extent any deadlines become relevant in the future, case law and past practice of the EPA supports the application of day-to-day tolling.

The days of coercive federalism are over. Accordingly, I look forward to working with you, your state experts and local communities as we develop a path forward to improve our environment and bolster the economy in a manner that is respectful of and consistent with the rule of law.

Respectfully yours,

E. Scott Pruitt