State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

November 1, 2016

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

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]

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[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.

[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.

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[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.

Dated: November 1, 2016

Respectfully submitted,

/s/ Scott A. Keller
Ken Paxton
ATTORNEY GENERAL OF TEXAS
Jeffrey C. Mateer
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
Erica N. Peterson
Assistant Attorney General
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Tel: (304) 558-2021
Fax: (304) 558-0140
elbert.lin@wvago.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

/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
Cynthia H. Coffman
ATTORNEY GENERAL OF COLORADO
Frederick Yarger
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
Pamela Jo Bondi
ATTORNEY GENERAL OF FLORIDA
Jonathan L. Williams
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
Christopher M. Carr
ATTORNEY GENERAL OF GEORGIA
Britt C. Grant
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

/s/ Timothy Junk
Gregory F. Zoeller
ATTORNEY GENERAL OF INDIANA
Timothy Junk
Deputy Attorney General
Indiana Government Ctr. South
Fifth Floor
302 West Washington Street
Indianapolis, IN 46205
Tel: (317) 232-6247
tim.junk@atg.in.gov

Counsel for State of Indiana

/s/ Jeffrey A. Chanay
Derek Schmidt
ATTORNEY GENERAL OF KANSAS
Jeffrey A. Chanay
Chief Deputy Attorney General
Bryan C. Clark
Assistant Solicitor General
120 S.W. 10th Avenue, 3rd Floor
Topeka, KS 66612
Tel: (785) 368-8435
Fax: (785) 291-3767
jeff.chanay@ag.ks.gov

Counsel for State of Kansas

/s/ Joe Newberg
Andy Beshear
ATTORNEY GENERAL OF KENTUCKY
Mitchel T. Denham
Assistant Deputy Attorney General
Joseph A. Newberg, II
Assistant Attorney General
700 Capital Avenue
Suite 118
Frankfort, KY 40601
Tel: (502) 696-5611
joe.newberg@ky.gov

Counsel for Commonwealth of Kentucky

/s/ Steven B. "Beaux" Jones
Jeff Landry
ATTORNEY GENERAL OF LOUISIANA
Steven B. "Beaux" Jones
Duncan S. Kemp, IV
Assistant Attorneys General
Environmental Section – Civil Division
1885 N. Third Street
Baton Rouge, LA 70804
Tel: (225) 326-6085
Fax: (225) 326-6099
jonesst@ag.state.la.us

Counsel for State of Louisiana

/s/ Donald Trahan
Herman Robinson
Executive Counsel
Donald Trahan
Elliott Vega
LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
Legal Division
P.O. Box 4302
Baton Rouge, LA 70821-4302
Tel: (225) 219-3985
Fax: (225) 219-4068
donald.trahan@la.gov

Counsel for State of Louisiana Department of Environmental Quality

/s/ Monica Derbes Gibson
Monica Derbes Gibson
Lesley Foxhall Pietras
LISKOW & LEWIS, P.L.C.
701 Poydras Street, Suite 5000
New Orleans, LA 70139
Tel: (504) 556-4010
Fax: (504) 556-4108
mdgibson@liskow.com
lfpietras@liskow.com

Counsel for Louisiana Public Service Commission

/s/ Aaron D. Lindstrom
Bill Schuette
ATTORNEY GENERAL FOR THE PEOPLE OF MICHIGAN
Aaron D. Lindstrom
Michigan Solicitor General
P.O. Box 30212
Lansing, MI 48909
Tel: (515) 373-1124
Fax: (517) 373-3042
lindstroma@michigan.gov

Counsel for People of the State of Michigan

/s/ Harold E. Pizzetta, III
Jim Hood
ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI
Harold E. Pizzetta
Assistant Attorney General
Civil Litigation Division
Office of the Attorney General
Post Office Box 220
Jackson, MS 39205
Tel: (601) 359-3816
Fax: (601) 359-2003
hpizz@ago.state.ms.us

Counsel for State of Mississippi

/s/ Donna J. Hodges
Donna J. Hodges
Senior Counsel
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
P.O. Box 2261
Jackson, MS 39225-2261
Tel: (601) 961-5369
Fax: (601) 961-5349
donna_hodges@deq.state.ms.us

Counsel for Mississippi Department of Environmental Quality

/s/ Todd E. Palmer
Todd E. Palmer
Valerie L. Green
MICHAEL, BEST & FRIEDRICH LLP
601 Pennsylvania Ave., N.W., Suite 700
Washington, D.C. 20004-2601
Tel: (202) 747-9560
Fax: (202) 347-1819
tepalmer@michaelbest.com
vlgreen@michaelbest.com

Counsel for Mississippi Public Service Commission

/s/ James R. Layton
Chris Koster
ATTORNEY GENERAL OF MISSOURI
James R. Layton
Solicitor General
P.O. Box 899
207 W. High Street
Jefferson City, MO 65102
Tel: (573) 751-1800
Fax: (573) 751-0774
james.layton@ago.mo.gov

Counsel for State of Missouri

/s/ Dale Schowengerdt
Timothy C. Fox
ATTORNEY GENERAL OF MONTANA
Alan Joscelyn
Chief Deputy Attorney General
Dale Schowengerdt
Solicitor General
215 North Sanders
Helena, MT 59620-1401
Tel: (406) 444-7008
dales@mt.gov

Counsel for State of Montana

/s/ Justin W. Kraske
Justin W. Kraske
Chief Legal Counsel
MONTANA PUBLIC SERVICE COMMISSION
1701 Prospect Avenue
Helena, MT 59601
Tel: (406) 444-6199
Fax: (406) 444-7618
jkraske@mt.gov

Counsel for Montana Public Service Commission

/s/ Justin D. Lavene
Douglas J. Peterson
ATTORNEY GENERAL OF NEBRASKA
Dave Bydalek
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
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

/s/ Sam M. Hayes
Sam M. Hayes
General Counsel
Craig Bromby
Deputy General Counsel
Andrew Norton
Deputy General Counsel
NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY
1601 Mail Service Center
Raleigh, NC 27699-1601
Tel: (919) 707-8616
sam.hayes@ncdenr.gov

Counsel for North Carolina Department of Environmental Quality

/s/ Eric E. Murphy
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

/s/ David B. Rivkin, Jr.
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
fc.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
drivkin@bakerlaw.com

Counsel for State of Oklahoma and Oklahoma Department of Environmental Quality

/s/ James Emory Smith, Jr.
Alan Wilson
ATTORNEY GENERAL OF SOUTH CAROLINA
Robert D. Cook
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

/s/ Steven R. Blair
Marty 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

/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
Delanie 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