



State of West Virginia
Office of the Attorney General

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December 14, 2016

Governor Michael Pence
Vice President-Elect
Donald J. Trump Presidential Transition Team
1717 Pennsylvania Ave N.W.
Washington, DC 20006

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Paul Ryan
Speaker
United States House of Representatives
H-232, US Capitol
Washington, DC 20515

**RE: A Communication From 24 States And State Agencies Regarding
Withdrawal Of The Unlawful Clean Power Plan**

Dear Vice President-Elect Pence, Majority Leader McConnell, and Speaker Ryan:

As the chief legal officers for our States and state agencies, we write to suggest steps that the incoming Trump Administration and Congress can take to withdraw the Environmental Protection Agency ("EPA") rule that is commonly referred to as the Clean Power Plan, and more formally titled "Carbon Pollution Emission Guidelines for Existing Stationary Sources; Electric Utility Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Rule"). The Clean Power Plan is an unlawful attempt to force States to fundamentally alter electricity generation in their States by shifting from existing fossil-fueled power plants to other methods of generation preferred by EPA. The Rule does so by requiring States to impose emission reduction requirements premised not on pollution control but rather on eliminating operations at fossil-fueled power plants and replacing that lost electricity with generation from newly constructed renewable energy facilities.

Since the day this unlawful Rule was finalized, our States and state agencies have opposed it. In February of this year, we obtained an unprecedented stay of the Clean Power Plan from the United States Supreme Court.¹ In September, we presented oral argument on the merits of the Rule before the full U.S. Court of Appeals for the D.C. Circuit.

As we have explained in these proceedings, the Rule is unlawful under the Clean Air Act, unconstitutional, and directly intrudes on policy prerogatives that traditionally lie with the States.

First, the Rule is at odds with section 111 of the Clean Air Act, the provision on which EPA relied as support for the Rule. That provision does not permit EPA to mandate that States implement emission reductions that assume the reduction or elimination of operations at a regulated source, as the Clean Power Plan does. The Rule is also barred by the fact that section 111(d) prohibits EPA from using that section to regulate source categories, like coal-fired power plants, that are already regulated under section 112 of the Clean Air Act. *Id.* § 7411(d)(1)(A).

Second, the Rule directly intrudes on each State's traditional prerogative over its mix of electricity generation. As the Supreme Court has long recognized, the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). But the Rule sets emission reductions that would require States to change their energy generation mixes.

Third, the Rule unconstitutionally commandeers the States. The Constitution preserves the sovereignty of the States by prohibiting the federal government from compelling them to implement federal policies. The Rule violates this principle by forcing the States to play at least some part in implementing the Clean Power Plan. Even if a State chooses to allow the federal government to put in place a federal plan, it will still have to assist because the federal government lacks the power to take certain actions, such as licensing of new power plants and transmission facilities that will be critical to avoiding electrical grid failure.

The incoming Administration and Congress now have the opportunity to withdraw this unlawful rule and prevent adoption of a similar rule in the future. We urge the Administration and Congress to work together with the States on four actions to achieve that goal: (1) an executive order on day one rescinding President Obama's Presidential Memorandum directing EPA to issue the Rule² and instructing EPA to take no further action to enforce or implement the Rule; (2) formal administrative action to withdraw the Rule and related actions in court; (3) review of existing litigation; and (4) longer-term legislative action.

An executive order on day one is critical. The order should explain that it is the Administration's view that the Rule is unlawful and that EPA lacks authority to enforce it. The

¹ Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016); *see also* Nos. 15A776, 15A778, 15A787, 15A793.

² The President, Memorandum of June 25, 2013—Power Sector Carbon Pollution Standards, 78 Fed. Reg. 39,535 (July 1, 2013).

executive order is necessary to send an immediate and strong message to States and regulated entities that the Administration will not enforce the Rule.

To actually withdraw the Rule, there will need to be formal administrative action consistent with the Administrative Procedure Act and the Clean Air Act. As the States and state agencies that have been and are still litigating against this Rule, we welcome the opportunity to discuss with you in greater detail the steps that will be required. We believe that our experience with the Rule and our role in the pending litigation, which will be affected by any action withdrawing the Rule, will be beneficial to your planning as you contemplate your next steps.

Relatedly, the Administration should, in cooperation with the States, review pending cases relating to the Clean Power Plan to determine whether it may be appropriate to seek to stay or resolve those cases in light of the administrative resolutions proposed above.

Finally, we recommend that Congress and the Administration work together to consider adopting legislation to address the issues giving rise to the Rule. We believe it is important to provide a longer-term legislative response to the Rule to ensure that similar or more extreme unlawful steps are not attempted by a future EPA. Any such legislation should recognize the rights of States to develop their own energy strategies, so that energy can be generated in a cost-effective and environmentally responsible manner.

We appreciate your consideration and prompt attention to this critical matter, and look forward to working with you.

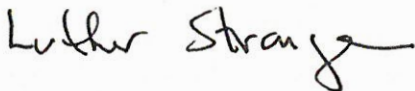
Very respectfully yours,



Patrick Morrissey
West Virginia Attorney General



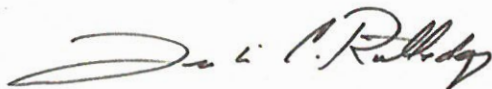
Ken Paxton
Texas Attorney General



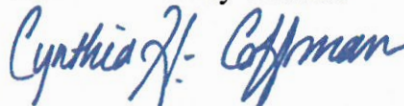
Luther Strange
Alabama Attorney General



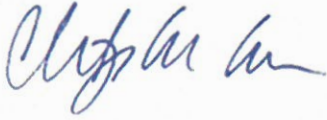
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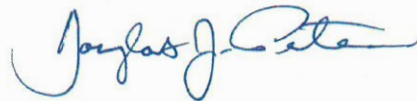
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cc: Mr. Myron Ebell, EPA Transition Team Leader