

**Congress of the United States**  
**Washington, DC 20515**

June 23, 2016

The Honorable Gina McCarthy  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Dear Administrator McCarthy:

We write regarding the Supreme Court's orders granting applications from states and stakeholders to stay the "Clean Power Plan" (CPP) and your statements in a March 2016 congressional hearing on the implications of the Court's action. Specifically, we seek clarification to ensure that your statements do not result in states and other stakeholders expending scarce resources to unnecessarily comply with the CPP's deadlines. It is our belief that such actions would undermine the very purpose of the Court's orders.

As you know, five applications for relief were submitted to the Court, each requesting a stay of the CPP. One of those applications also explicitly requested "an immediate stay of EPA's rule, extending all compliance dates by the number of days between publication of the rule and a final decision by the courts, including this Court, relating to the rule's validity." Another asked that the CPP be "be stayed, and all deadlines in it suspended, pending the completion of all judicial review." Every brief opposing the applications acknowledged the requests to extend the compliance deadlines.

Moreover, long-held precedence recognizes that any request for stay carries with it the inherent tolling of all compliance deadlines if that stay were lifted. Thus, the Department of Justice stated in its brief, "In requesting a 'stay,' however, applicants . . . *explicitly or implicitly* ask this Court *to toll all of the relevant deadlines* set forth in the Rule, even those that would come due many years after the resolution of their challenge, for the period between the Rule's publication and the final disposition of their lawsuits" (emphasis added). In fact, the Department of Justice told the Court that granting the applications "would *necessarily and irrevocably* extend every deadline set forth in the Rule" (emphasis added).

On February 9, 2016 the Court issued five separate and virtually identical orders on the applications. Each order stated, "The application for a stay . . . is granted." We agree with the Department of Justice that in granting these applications without limitation, the Supreme Court both stayed the CPP and necessarily and irrevocably extended all related CPP compliance deadlines.

In a March 22, 2016 hearing before two House Energy and Commerce subcommittees, you were asked whether—if the CPP was upheld—the various compliance deadlines would also be extended by the amount of time equal to the completion of judicial review. In your response, you

stated, "Well that's not what the Supreme Court said, but we assume that the courts will make that judgement over time or will leave that to EPA to make their own judgement." When pressed further, you responded by saying, "... the Supreme Court didn't speak to that issue. The only thing they spoke to was the stay of the rule. They didn't speak to any tolling or what it meant in terms of compliance time."

As the Department of Justice's own conclusions make clear, the Court did speak to tolling when it granted the applications for relief that explicitly or implicitly requested the tolling of compliance deadlines. Those Court orders necessarily and irrevocably extended the CPP's deadlines, allowing states to hit "pause" on compliance measures during legal challenge of the CPP, so that states are not required to spend billions of dollars on immense, and in many cases irreversible, actions to implement a regulation that may never come. This harm is what drove petitioners to request relief from the Supreme Court in the first place.

We are concerned that your statements before Congress undermine the certainty that the American people deserve and the Supreme Court was seeking to provide when it granted applications to stay the CPP and toll its deadlines. If ambiguity here drives states and stakeholders to meet all CPP compliance deadlines anyway, then the Court's action will be meaningless.

In order to provide clarity to the states, utilities, and other critical stakeholders, we respectfully ask you to provide answers to the following questions:

1. Two of the applications for relief from the CPP submitted to the Supreme Court explicitly asked the Court to extend all CPP deadlines for a period equal to that of the stay. The Department of Justice concluded that all of the applications made the same request, if not explicitly, then implicitly. The Court granted these requests for relief without any limitation. How do you reconcile these facts with your claim that "the Court didn't speak to any tolling"?
2. Did any EPA official review the Department of Justice's brief in response to the applications before that brief was submitted to the Supreme Court?
3. At any point before the Supreme Court issued its orders on February 9, 2016, did any EPA official object to language in the Department of Justice's brief concluding that granting the stay "would necessarily and irrevocably extend every deadline set forth in the Rule"? Does EPA now disagree with that conclusion? If so, please provide EPA's official legal interpretation.
4. Is EPA relying on specific precedent to conclude the stay order does not toll all deadlines outlined in the final CPP rule? If so, include any such examples or case law in EPA's interpretive memo as requested in question 3 above.
5. If EPA does not disagree with the Department of Justice's conclusion that the relief requested and granted by the Court "necessarily and irrevocably" extends all CPP deadlines, then what steps is EPA taking to prepare to extend all CPP deadlines in the event the stay is lifted?



6. Why is it necessary for the Court's orders staying the CPP to "speak to any tolling" if, by the Department of Justice's own admission, those orders "implicitly," "necessarily," and "irrevocably" "extend every deadline set forth in the Rule"?
7. The Supreme Court stayed the CPP to prevent states and stakeholders from being irreparably harmed by the rule's deadlines during the judicial challenge. How would the Court's order protect states and stakeholders from irreparable harm if, upon reinstatement of the rule, those states and stakeholders did not receive an equivalent length of time to comply with the CPP?
8. EPA officials have stated the agency is developing regulations expressly related to and arising out of the final CPP, specifically the Clean Energy Incentive Plan (CEIP). The program is intrinsically linked to the implementation of the CPP and a public request for comment through issuing a proposed rule would effectively obligate stakeholders to the current CPP litigation to dedicate resources to study and comment on the proposed regulation. Given that the CEIP's fate is directly tied to the CPP litigation, what authority is the EPA relying on to conclude these actions do not contravene the Supreme Court's stay of CPP?

We look forward to your response on this matter.

Sincerely,

  
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Member of Congress

  
MIMI WALTERS  
Member of Congress

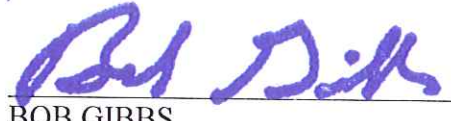
  
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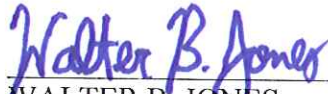
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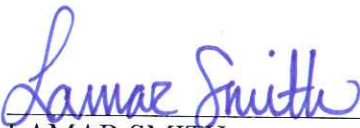
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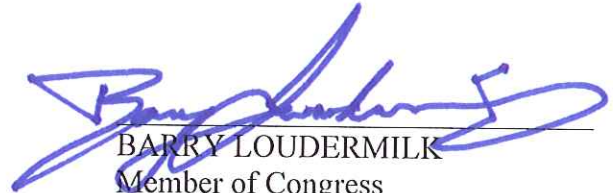
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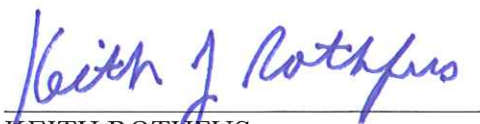
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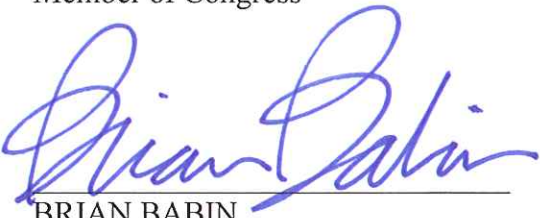
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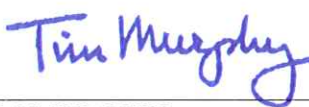
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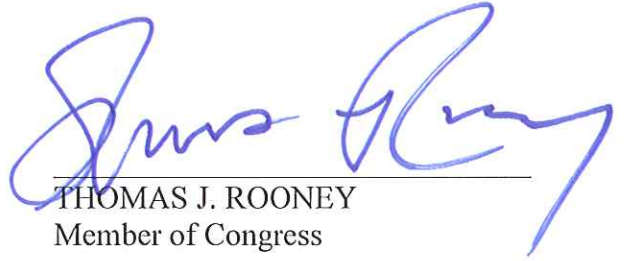
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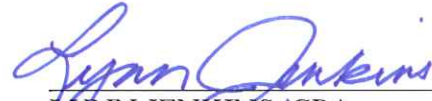
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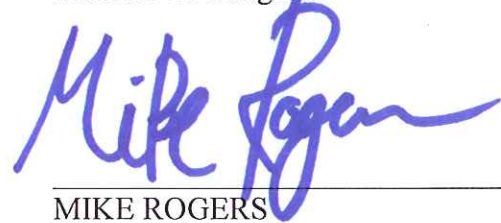
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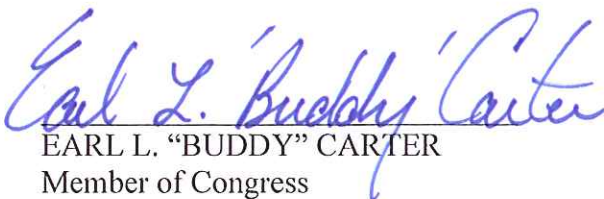
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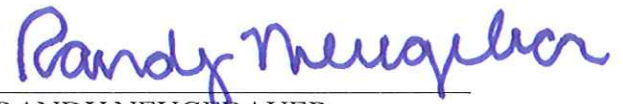
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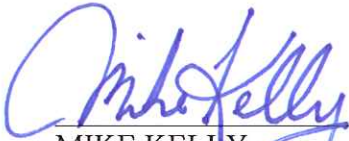
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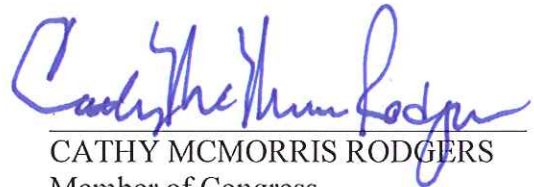
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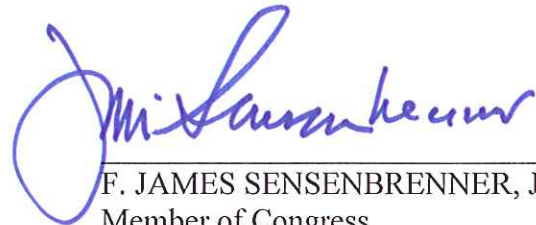
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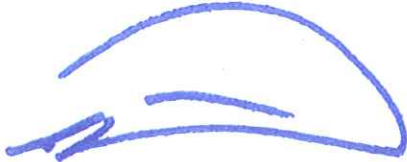


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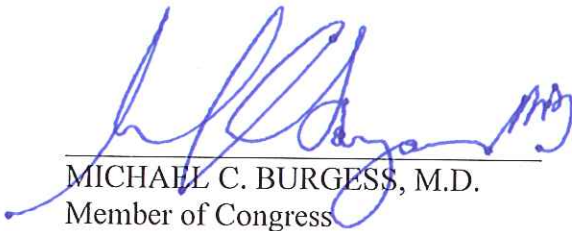




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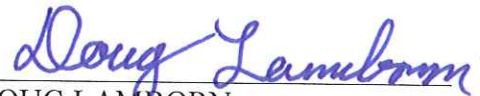
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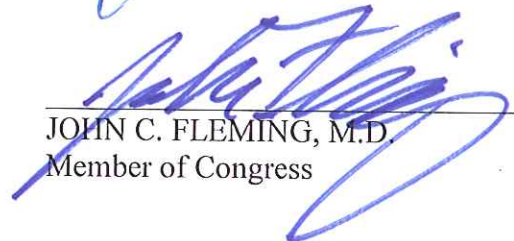
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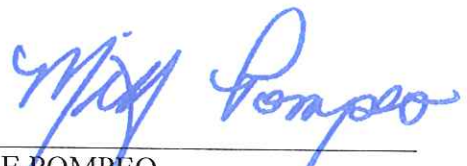
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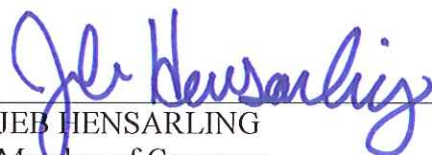
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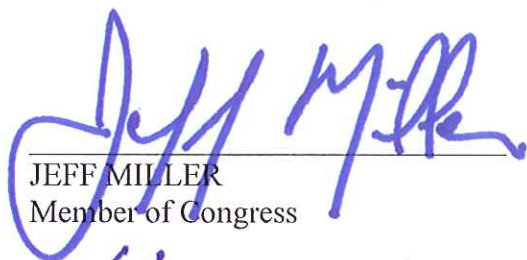
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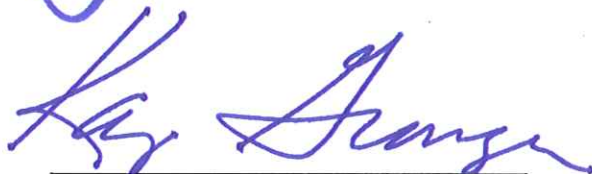
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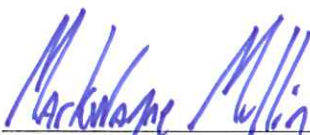
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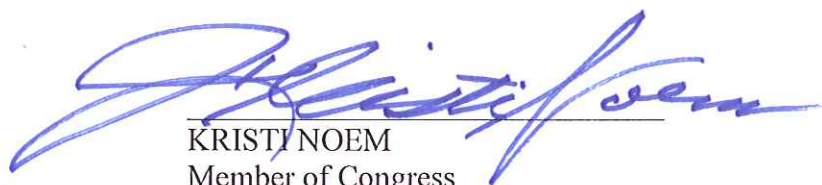
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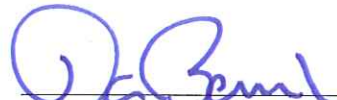
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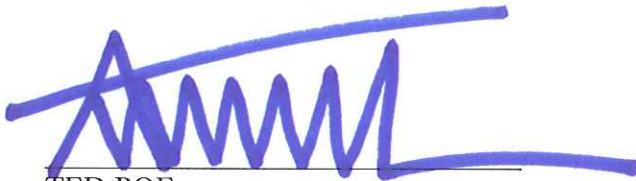
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