

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,



JOHN RATCLIFFE
Member of Congress



BRUCE WESTERMAN
Member of Congress



MIMI WALTERS
Member of Congress



CYNTHIA M. LUMMIS
Member of Congress



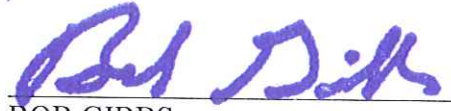
DAVID B. MCKINLEY, P.E.
Member of Congress



KEVIN CRAMER
Member of Congress



STEVE STIVERS
Member of Congress



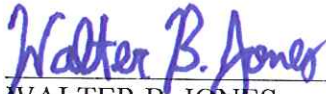
BOB GIBBS
Member of Congress



LOUIE GOHMERT
Member of Congress



PETE SESSIONS
Member of Congress



WALTER B. JONES
Member of Congress



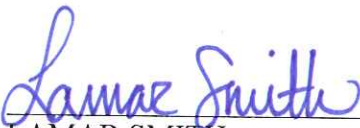
STEVE RUSSELL
Member of Congress



DAVE BRAT
Member of Congress



TRENT FRANKS
Member of Congress



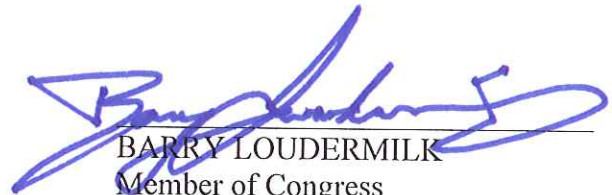
LAMAR SMITH
Member of Congress



SEAN P. DUFFY
Member of Congress



BRADLEY BYRNE
Member of Congress



BARRY LOUDERMILK
Member of Congress



COLLIN C. PETERSON
Member of Congress



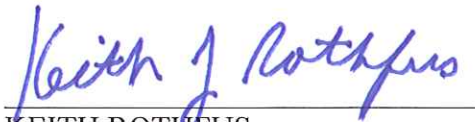
TOM GRAVES
Member of Congress



PAUL A. GOSAR
Member of Congress



MARTHA MCSALLY
Member of Congress



KEITH ROTHFUS
Member of Congress



DAVE TROTT
Member of Congress



STEVE PEARCE
Member of Congress



RYAN ZINKE
Member of Congress



DAVID SCHWEIKERT
Member of Congress



EVAN H. JENKINS
Member of Congress



RALPH ABRAHAM, M.D.
Member of Congress



BILLY LONG
Member of Congress



MO BROOKS
Member of Congress



RANDY WEBER
Member of Congress



ANDY BARR
Member of Congress



TRENT KELLY
Member of Congress



H. MORGAN GRIFFITH
Member of Congress



GLENN GROTHMAN
Member of Congress



FRANK LUCAS
Member of Congress



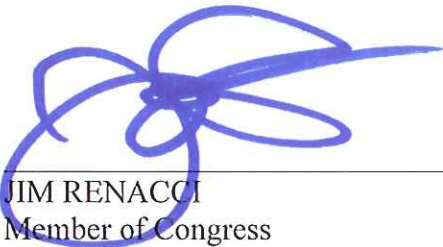
JIM BRIDENSTINE
Member of Congress



DIANE BLACK
Member of Congress



JEFF DUNCAN
Member of Congress




JIM RENACCI
Member of Congress



STEVE KING
Member of Congress



JOE BARTON
Member of Congress



BRIAN BABIN
Member of Congress



ALEX MOONEY
Member of Congress



JACKIE WALORSKI
Member of Congress



PETER T. KING
Member of Congress



TIM MURPHY
Member of Congress



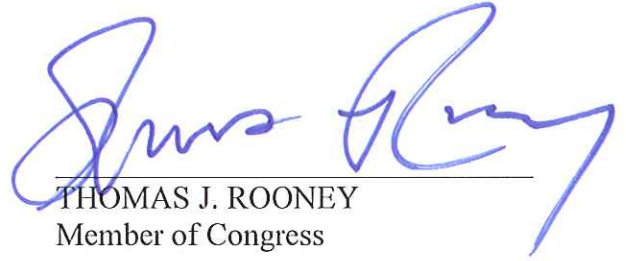
STEVE CHABOT
Member of Congress



KEVIN YODER
Member of Congress



JOHN CULBERSON
Member of Congress



THOMAS J. ROONEY
Member of Congress



MICK MULVANEY
Member of Congress



MIKE BISHOP
Member of Congress



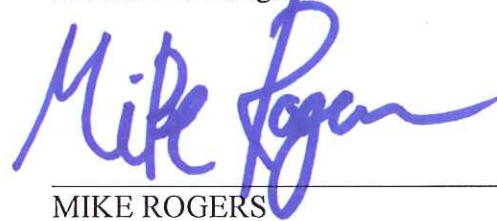
GARY PALMER
Member of Congress



LYNN JENKINS, CPA
Member of Congress



SAM JOHNSON
Member of Congress



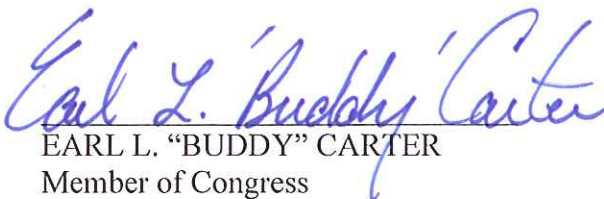
MIKE ROGERS
Member of Congress



HAROLD ROGERS
Member of Congress



LUKE MESSER
Member of Congress



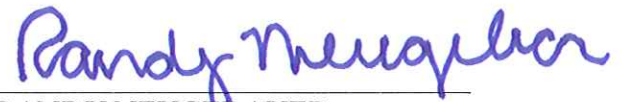
EARL L. "BUDDY" CARTER
Member of Congress



SCOTT TIPTON
Member of Congress




BOB GOODLATTE
Member of Congress



RANDY NEUGEBAUER
Member of Congress



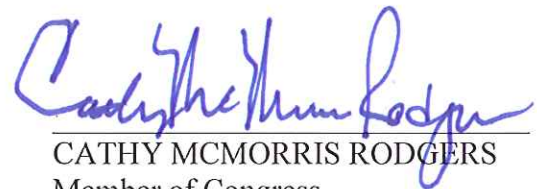
MIKE KELLY
Member of Congress



TIM HUELSKAMP
Member of Congress



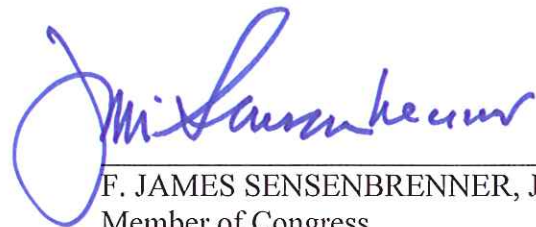
MICHAEL T. MCCAUL
Member of Congress



CATHY MCMORRIS RODGERS
Member of Congress



DAN NEWHOUSE
Member of Congress



F. JAMES SENSENBRENNER, JR.
Member of Congress



TOM EMMER
Member of Congress



DAVID P. JOYCE
Member of Congress



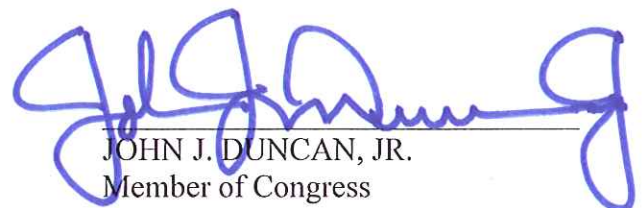
MARSHA BLACKBURN
Member of Congress



TOM COLE
Member of Congress



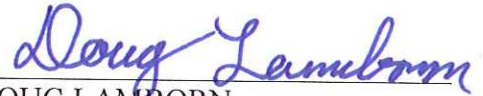
TOM MCCLINTOCK
Member of Congress



JOHN J. DUNCAN, JR.
Member of Congress



WILL HURD
Member of Congress



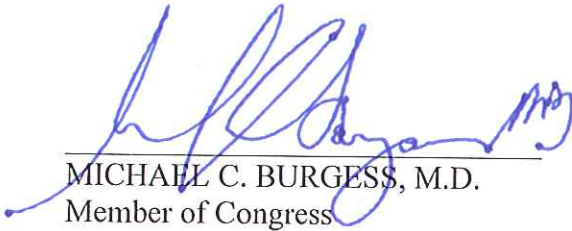
DOUG LAMBORN
Member of Congress



SCOTT DESJARLAIS, M.D.
Member of Congress



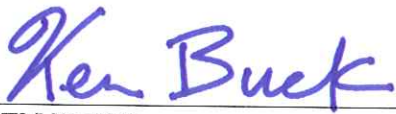
K. MICHAEL CONAWAY
Member of Congress



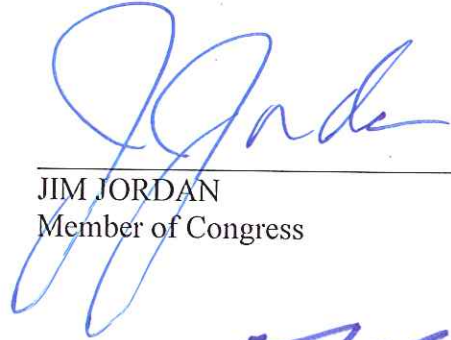
MICHAEL C. BURGESS, M.D.
Member of Congress



BRETT GUTHRIE
Member of Congress



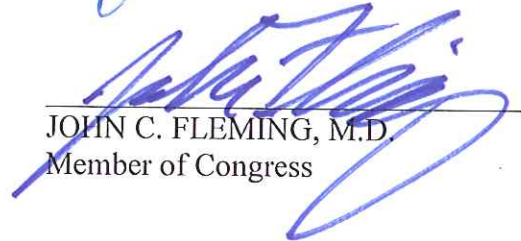
KEN BUCK
Member of Congress



JIM JORDAN
Member of Congress



MATT SALMON
Member of Congress



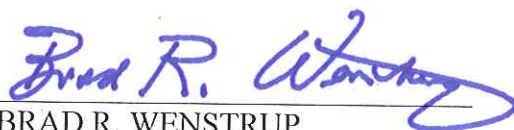
JOHN C. FLEMING, M.D.
Member of Congress



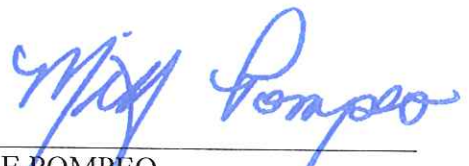
STEVE WOMACK
Member of Congress



RICHARD HUDSON
Member of Congress



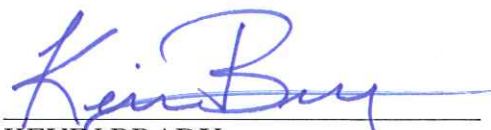
BRAD R. WENSTRUP
Member of Congress



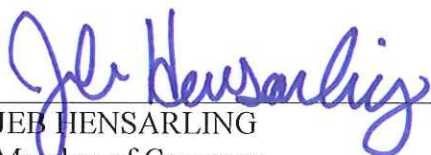
MIKE POMPEO
Member of Congress



JASON CHAFFETZ
Member of Congress



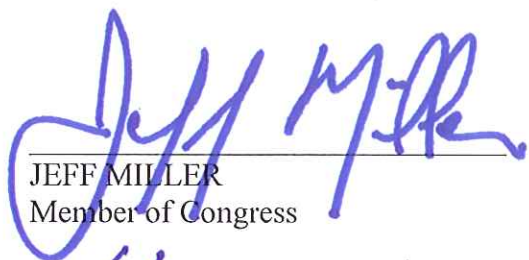
KEVIN BRADY
Member of Congress



JEB HENSARLING
Member of Congress



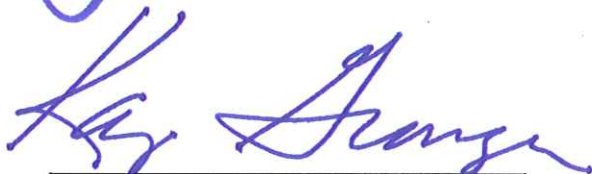
VICKY HARTZLER
Member of Congress



JEFF MILLER
Member of Congress



DANA ROHRABACHER
Member of Congress



KAY GRANGER
Member of Congress



BLAKE FARENTHOLD
Member of Congress



ROBERT E. LATTA
Member of Congress



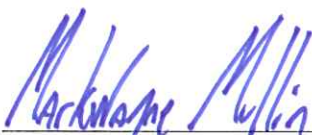
SAM GRAVES
Member of Congress



AUSTIN SCOTT
Member of Congress



RANDY HULTGREN
Member of Congress



MARKWAYNE MULLIN
Member of Congress



KRISTI NOEM
Member of Congress




DANIEL WEBSTER
Member of Congress



BLAINE LUETKEMEYER
Member of Congress



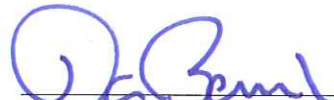
THOMAS MASSIE
Member of Congress



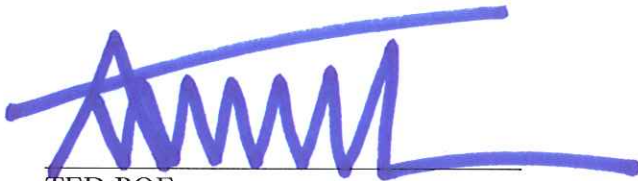
ADRIAN SMITH
Member of Congress



BILL FLORES
Member of Congress



DAN BENISHEK M.D.
Member of Congress



TED POE
Member of Congress



DARIN LAHOOD
Member of Congress