

Attorneys General of New York, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota (by and through the Minnesota Pollution Control Agency), New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia, and the City Attorneys of Boulder (CO), Chicago, Los Angeles, New York, Philadelphia, and South Miami, and the County Attorney of Broward County (FL)

September 11, 2018 (corrected)

Via Electronic Mail and First Class Mail

Andrew K. Wheeler
Acting Administrator
Environmental Protection Agency
Office of the Administrator Code 1101A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Request for Extension of Comment Period Regarding Proposed Rule to Replace the Clean Power Plan, 83 Fed. Reg. 44,746 (Aug. 31, 2018)

Dear Acting Administrator Wheeler:

The undersigned State Attorneys General, City Attorneys, and County Attorney (together “States and Cities”) respectfully request that the Environmental Protection Agency (EPA) extend the comment period for the proposed rule to replace the Clean Power Plan by 60 days, to a total of 121 days from the date of publication in the Federal Register. In *West Virginia v. EPA* (D.C. Cir. No. 15-1363), EPA recognized that “[n]o serious effort to address the monumental problem of climate change can succeed without meaningfully limiting [power] plants’ CO₂ emissions.”¹ Given the importance of this matter, the complexity of the proposal and its potentially significant impacts on public health and the environment, the requested extension is necessary to afford the States and Cities sufficient time to comment on the proposal. We also request that EPA hold additional public hearings from the one hearing it has scheduled to enable our residents to attend in person to weigh in on this urgent issue.

The current 61-day comment period² is inadequate because the proposal is effectively three rules in one. As EPA states, the proposed rule is comprised of “three discrete sections.” 83 Fed. Reg. at 44,748. One aspect of the proposal consists of the agency’s revised determination

¹ EPA Final Brief in *West Virginia v. EPA*, D.C. Cir. No. 15-1363, Doc. #1609995 (filed April 22, 2016), at 61.

² EPA recently extended the public comment period by one day, from October 30 to October 31, to account for the one public hearing it has scheduled. *See* 83 Fed. Reg. 45,588 (Sept. 10, 2018).

of the “best system of emissions reduction” that has been “adequately demonstrated.” This critical determination, which under the Clean Air Act drives the required pollution reductions, requires consideration of multiple factors, including level of emissions reduction, cost, non-air quality health and environmental impacts, and energy requirements. *See* 42 U.S.C. § 7411(a)(1). The States and Cities need sufficient time to evaluate the agency’s consideration of these factors and to assess EPA’s modeling of public health, environmental, and economic impacts of the proposed rule under several different scenarios identified in EPA’s regulatory impact analysis.

The second aspect of the proposal would call for a fundamental restructuring of the agency’s longtime implementing regulations regarding state plans under section 111(d), a change that would have ramifications well beyond controlling carbon pollution from power plants. In essence, EPA proposes to abdicate its role under the Clean Air Act’s cooperative federalism scheme to set a baseline level of emission reductions to ensure that existing sources address their emission of pollutants that endanger public health and welfare. A careful consideration of this radical change in federal and state roles and its implications for public health and the environment is warranted.

The third section of the proposal would carve out a loophole enabling fossil-fueled power plants to avoid their obligations under the Act’s New Source Review (NSR) program to limit their emissions of carbon dioxide and other harmful pollutants. This “NSR reform,” which the agency tried unsuccessfully to implement during the George W. Bush Administration, is of questionable legality, as evidenced by the preamble discussion of the adverse D.C. Circuit and Supreme Court precedent the agency apparently will seek to distinguish. *See* 83 Fed. Reg. at 44,779-80. EPA abandoned previous similar proposals after States and EPA’s own enforcement office expressed concerns that such a change is inconsistent with the Clean Air Act and would result in greater air pollution. EPA’s failure to sufficiently evaluate the public health and environmental impacts of weakening NSR requirements for power plants is a critical flaw in the proposal that deprives the States and Cities and the general public of the information necessary to evaluate it. If EPA is unwilling to conduct this analysis and supplement its proposal, it should at a minimum provide additional time for interested parties to assess the proposed NSR changes.

Each of the three proposals within a proposal has features that would alone justify lengthening the public comment period beyond 60 days. It is unfair and unreasonable to assume that the States and Cities and the general public could provide informed comments on all three aspects within 60 days.

Another important part of the rulemaking process is the ability of people most directly impacted by a proposed rulemaking to share their concerns in person with EPA. As you recognized recently in the “fishbowl memo” you issued to EPA staff shortly after becoming Acting Administrator, “EPA must provide for the fullest possible public participation in [its] decision making” and must “take affirmative steps to seek out the views of those who will be affected by the decisions, including ... the governments of states, cities and towns.”³

³ *See* <https://www.epa.gov/sites/production/files/2018-08/documents/wheeler-messageontransparency-august022018.pdf>, last visited August 15, 2018.

Despite that statement, and the significant ramifications of the proposal outlined above, EPA has decided to schedule only *one* public hearing. *See* 83 Fed. Reg. at 45,588. In light of the numerous impacts our States and Cities are facing from climate change, from lengthy droughts and huge wildfires to record-setting rainfalls and scorching temperatures, each of which in turn directly affects our residents, *see* Comments of New York, et al. on EPA’s Proposed Repeal of the Clean Power Plan (Apr. 26, 2018) at 6-9 and Appendix A (EPA-HQ-OAR-2017-0355-20778), providing only one opportunity for their voices to be heard is not good enough. Therefore, we request that EPA hold additional hearings in other major geographic areas of the country. Regarding our States and Cities, we request that, in addition to the Chicago hearing, at least one public hearing be held in each of the following areas: California (Sacramento or Los Angeles); Denver, Colorado; the Mid-Atlantic (Baltimore, Richmond, or Washington); the Northeast (Boston, New York City, or the Philadelphia metro region); North Carolina, the Pacific Northwest (Portland or Seattle), and Southern Florida. Consistent with the requirements of the Clean Air Act, we request that the record for public comments be held open for 30 days after the conclusion of any such hearing. 42 U.S.C. § 7607(d)(5)(iv).

An extended public comment period and additional hearings are further warranted by the fact that the proposal would replace a rule, the Clean Power Plan, that itself was “the result of unprecedented outreach and engagement with states, tribes, utilities, and other stakeholders.” 80 Fed. Reg. 64,662, 64,663 (Oct. 23, 2015). In developing the Clean Power Plan, EPA initially provided a 120-day public comment period on its proposed rulemaking and announced four hearings in regions across the country (in Atlanta, GA, Denver, CO, Pittsburgh, PA, and Washington, DC). *See* 79 Fed. Reg. 34,830 (June 18, 2014). EPA subsequently extended that comment period, and ultimately provided a comment period of 167 days. Residents of our States and Cities should at least be afforded equivalent opportunities to evaluate and weigh in on EPA’s proposal to replace the Clean Power Plan as EPA initially provided on the Plan itself.

If we can provide additional information that would be helpful in considering this request, or if you wish to discuss this request with us, please contact the New York Attorney General’s Office.

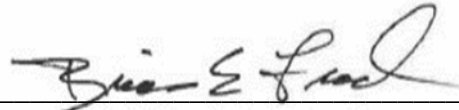
Sincerely,

A handwritten signature in black ink that reads "Barbara D. Underwood". The signature is written in a cursive, flowing style with a long horizontal line extending to the right.

BARBARA D. UNDERWOOD
Attorney General of New York



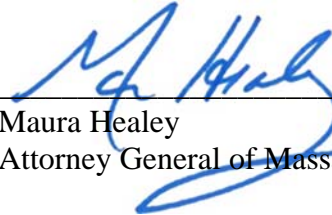
Xavier Becerra
Attorney General for California



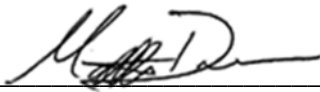
Brian Frosh
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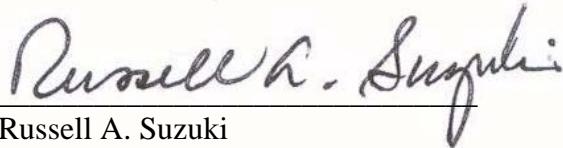
Maura Healey
Attorney General of Massachusetts



Matthew Denn
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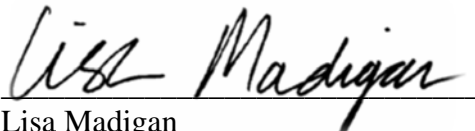
Lori Swanson
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For the State of Minnesota, by and through
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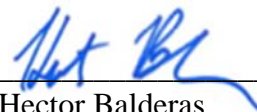
Russell A. Suzuki
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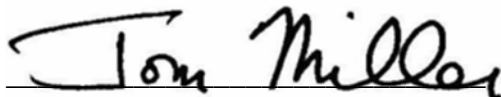
Gurbir S. Grewal
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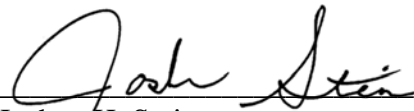
Lisa Madigan
Attorney General of Illinois



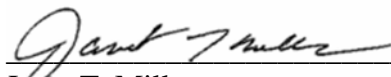
Hector Balderas
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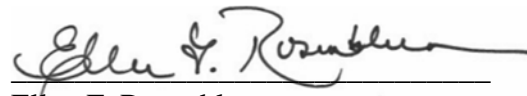
Tom Miller
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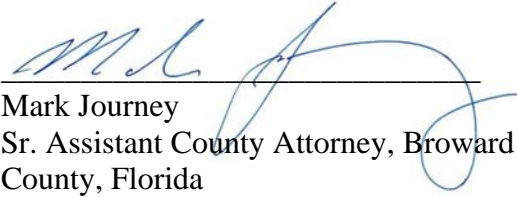
Janet T. Mills
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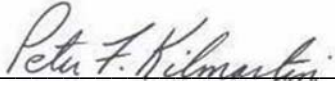
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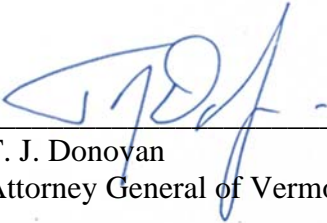
Mark Journey
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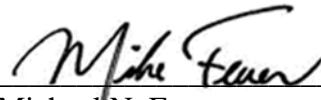
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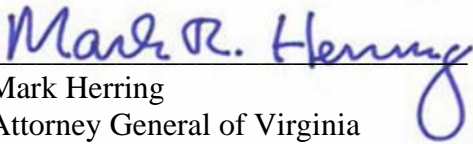
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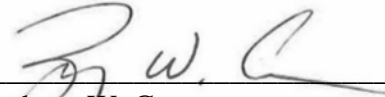
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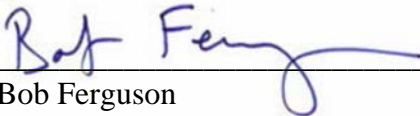
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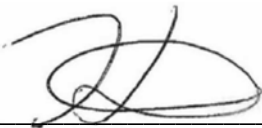
Zachary W. Carter
New York City Corporation Counsel



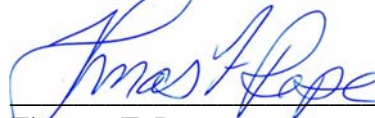
Bob Ferguson
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