

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL
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FOR IMMEDIATE RELEASE: Friday, September 1, 2017



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Attorney General Racine Joins Coalition Urging EPA to Retract Erroneous and Inappropriate Clean Power Plan Guidance

Coalition Says Guidance to Governors Provides Incorrect Legal Advice

WASHINGTON, D. C. – Attorney General Karl A. Racine joined a coalition of 20 states and localities in urging the retraction of the Environmental Protection Agency’s “legally incorrect” guidance to States regarding Clean Power Plan implementation—which was not just legally erroneous, but also flies in the face of Administrator Scott Pruitt’s subsequent agreement to recuse himself from the Clean Power Plan litigation given his conflicts of interest.

In March, Administrator Pruitt sent unsolicited letters to the Governors of 47 states asserting that the Supreme Court’s stay of the Clean Power Plan pending the conclusion of litigation provides states and power companies with “day-to-day tolling” of the rule’s compliance deadlines.

In a new letter sent to EPA Acting General Counsel Kevin Minoli, the coalition of states and localities makes clear that “until and unless EPA lawfully replaces the Clean Power Plan, it remains the law of the land, despite the current stay of its compliance deadlines. Because the letters are both premature and legally incorrect, and also improper in light of Mr. Pruitt’s agreement to recuse himself from litigation over the Clean Power Plan, EPA should retract the letters.” The AGs’ letter explains that, as EPA itself said last year, the proper time to decide whether it’s necessary to adjust compliance deadlines is at the conclusion of the litigation—not prejudging the question now. If the Trump Administration’s efforts to scuttle the Clean Power Plan fail, the Plan—and its deadlines—will be back in effect.

In addition to the District, the letter, led by New York Attorney General Eric Schneiderman, was also signed by the attorneys general or chief legal officers of New York, California, Delaware, Illinois, Iowa, Maine, Maryland,

Massachusetts, New Mexico, Oregon, Rhode Island, Virginia, Washington, Boulder (CO), Chicago (IL), New York City (NY), Philadelphia (PA), Broward County (FL), and South Miami (FL).

Attorney General Racine is part of the coalition of states, cities, and counties that intervened in defense of the Clean Power Plan against legal challenges in the D.C. Circuit Court of Appeals. The court heard oral argument en banc in September 2016 and has issued two temporary pauses in litigation—the most recent of which compelled the coalition to weigh in on Administrator Pruitt’s legal guidance.

The coalition’s letter notes that there are two significant problems with Administrator Pruitt’s legal guidance to Governors: one, there is no legal support for a unilateral extension of regulatory deadlines through a letter from the EPA administrator; and, two, there is no legal basis to automatically extend the Clean Power Plan’s compliance deadlines—which are months or even years away—for every day that the litigation remains pending. In fact, EPA itself found earlier this year that power plants are well on their way to meeting their compliance obligations.

“In addition to being legally erroneous, Mr. Pruitt’s opining in the letters on a particular issue concerning the Clean Power Plan litigation is inconsistent with his agreement not to participate in the litigation in light of his representation of Oklahoma in the case. Given his recognition in the May 4, 2017 ethics memorandum that his recusal for one year is appropriate to prevent “any appearance of impropriety,” the same underlying concern would apply to the letters, in which he seeks to persuade the Governors of his view of how a stay issued in the course of the litigation should affect parties’ future compliance responsibilities,” the coalition writes.

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