New York, California, Hawaii, Iowa, Illinois, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, Washington, the District of Columbia, Boulder (CO), New York City, Broward County (FL), South Miami (FL)

December 28, 2016

Donald J. Trump
President-Elect of the United States
Trump Tower, 735 Fifth Avenue
New York, NY 10022

Dear President-Elect Trump:

Our states and local governments are on the front lines of climate change. We see firsthand the significant human and economic costs inflicted by unchecked carbon pollution: whether it is harms from severe drought in California, catastrophic storm surge in New York City, a record deluge on the Front Range in Colorado, routine high tide flooding in Hampton Roads, Virginia and in South Florida, or diminished shellfish harvest in Oregon and Washington state.

Therefore, we urge you to continue the federal government's defense of the Clean Power Plan, a well-considered and critical rule that reasonably limits emissions from fossil-fueled power plants, our nation's largest source of carbon pollution. We joined in EPA's defense of the Clean Power Plan in court mindful of the grave threats that carbon pollution poses to our residents, economies, infrastructure, and natural resources. The Clean Power Plan builds on successful strategies that states, local governments and the power sector have used to cost effectively cut greenhouse gas emissions from power plants, while at the same time creating jobs and growing our economies. It establishes a nationwide framework to achieve substantial reductions of carbon-dioxide emissions while providing states and power plants the flexibility to decide how best to achieve these reductions. The rule is expected to eliminate 870 million tons of greenhouse gases by 2030, equivalent to the annual emissions of about 160 million cars. And the rule satisfies EPA's legal obligation under the Clean Air Act to limit harmful pollution from power plants that endangers public health and welfare.

We also write in response to a December 14 letter from West Virginia and other states to Vice President-Elect Pence and congressional leaders urging that your incoming Administration unravel the Clean Power Plan by taking action in court to formally withdraw it and issuing a "day one" executive order declaring the rule to be unlawful and prohibiting EPA from enforcing it. Following such a course would be ill-conceived and contrary to law, for several reasons:

First, the bases for such action, which the December 14 letter erroneously presents as settled law, are wrong and in fact have been disputed at length by the U.S. Department of Justice, our states, and many of the nation's leading businesses, among others, in pending litigation. To be plain, disagreements over the legality of the Clean Power Plan (or any similar rule) will have to be resolved by the judiciary one way or another. As the Supreme Court said not so long after the founding of our Nation, it is the duty of the courts to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Here, the answer will likely come very soon. A federal court

of appeals is poised to resolve these legal questions. Indeed, on September 27, 2016, ten judges on the D.C. Circuit Court of Appeals heard nearly seven hours of oral argument from all sides. If the challengers are so confident in their oft-repeated claim that the Clean Power Plan is "unlawful," why not let the court decide the claims that they themselves brought? Be assured that we would vigorously oppose in court any attempt to remand the Clean Power Plan back to EPA so late in the litigation, and prior to a decision from the Court on the merits of the claims. In addition, power plants are not subject to any carbon pollution reduction requirements under the Rule until 2022, allowing plenty of time for review by the U.S. Supreme Court, if necessary.

Second, the December 14 letter recommends that you issue an executive order on day one of your Administration declaring "the Rule is unlawful and that EPA lacks the authority to enforce it," and instructing the agency "to take no further action to enforce or implement the Rule." History and legal precedent strongly suggest that such an action would not stand up in court. Most famously, when President Harry Truman issued an executive order directing his Secretary of Commerce to seize the country's steel mills to avert a labor strike, an action which was not authorized by statute or the Constitution, the Supreme Court invalidated the order. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). More recently, when President Obama's administration sought to halt work on statutorily-required reviews of the Yucca Mountain project, the court ordered the government to continue the work with available funds, regardless of the President's policy differences with the law. *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013). Similarly, an executive order purporting to nullify the Clean Power Plan would contravene EPA's statutory obligation under Section 111 of the Clean Air Act. *See American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("§ 7411(d) requires regulation of existing sources within the same category" being regulated under § 7411(b)). Further, EPA's compliance with such an order would violate the notice and comment rulemaking requirements for suspending or rescinding a final rule under the Administrative Procedure Act and the Clean Air Act. *See Environmental Defense Fund, Inc. v. EPA*, 713 F.2d 802, 816 (D.C. Cir. 1983). Thus, rather than take executive action that would only lead to new litigation, the far more efficient path is to let the present litigation run its course.

Finally, we urge you to consult various stakeholders prior to committing to a course of action on climate change, which is damaging every area of the country. *See* 80 Fed. Reg. 64,510, 64,517-22 (Oct. 23, 2015) (describing harms states are facing). That damage is a powerful motivator for our states, counties, and cities—as well as the many cities such as Houston, Miami, and Salt Lake City, which are located in states challenging the Clean Power Plan but nonetheless support the rule—to develop and share solutions with the federal government.[1] For this reason, it is crucial that we have a seat at the table for any such discussions, so that you may hear from those states, counties, and cities with a successful track record modernizing the electricity sector and using innovative—and often market-oriented—solutions for cost-effectively reducing carbon pollution.

[1] *See* Brief of Amici Curiae the National League of Cities, U.S. Conference of Mayors, and 54 Cities, Counties, and Mayors in Support of the U.S. Environmental Protection Agency, in *West Virginia v. EPA* (D.C. Cir. No. 15-1363), Doc. No. 1606708 (filed Apr. 1, 2016).

In summary, we advocate that you reject misguided advice that the Clean Power Plan be discarded; advice that, if followed, would assuredly lead to more litigation. Instead, we urge you to support the defense of this critically-important rule and the implementation of its carefully-constructed strategies to reduce emissions from the nation's largest sources.

Sincerely,

Eric T. Schneiderman
Attorney General of New York

Kamala D. Harris
Attorney General of California

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cc: Hon. Mike Pence, Vice President-Elect
Hon. Mitch McConnell, Senate Majority Leader
Hon. Charles Schumer, Senate Minority Leader
Hon. Paul Ryan, Speaker of the House
Hon. Nancy Pelosi, House Minority Leader