



Testimony before the Senate Environmental and Public Works Subcommittee
on Clean Air and Nuclear Safety

“Legal Implications of the Clean Power Plan”

May 5, 2015

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Attorney General

State of Oklahoma

Chairwoman Capito, Ranking Member Carper, Chairman Inhofe, and Members of the Subcommittee,

Thank you for the invitation to discuss the legal ramifications of the EPA's proposed Clean Power Plan.

This is an issue of major importance to states like Oklahoma.

Quite simply, Madam Chairwoman, the EPA does not possess the authority under the Clean Air Act to do what it is seeking to accomplish in the so-called Clean Power Plan.

The EPA, under this administration, treats states like a vessel of federal will. The EPA believes the states exist to implement the policies the Administration sees fit, regardless of whether laws like the Clean Air Act permit such action.

In their wisdom, Congress gave states a primary role in emissions regulation, noting in the statement of policy of the Clean Air Act that "air pollution control at its source is the primary responsibility of states and local governments."

That statement respects the constitutional limits on federal regulation of air quality, and the reality that states are best suited to develop and implement such policies.

States are able to engage in a cost-benefit analysis to strike the necessary balance between protecting and preserving the environment, while still creating a regulatory framework that does not stifle job growth and economic activity. The states are partners with the federal government in regulating such matters.

Therefore, the Clean Air Act hinges on "cooperative federalism" by giving states the primary responsibility and role for regulation while providing a federal backstop if the states should fail to act.

When the EPA respects the role of the states, the cooperative relationship works well. When the EPA exceeds the constraints placed upon the agency by Congress, the relationship is thrown out of balance and the rule of law and state sovereignty both suffer.

The Clean Power Plan proposal throws the cooperative relationship between the states and the Federal government off balance.

The EPA claims the proposal gives states flexibility to develop their own plans to meet the national goals of reducing carbon dioxide emissions. In reality, the Clean Power Plan is nothing more than an attempt by the EPA to expand federal bureaucrats' authority over states' energy power generation mixes.

The plan requires each state to submit a plan to cut carbon-dioxide emissions by a nationwide average of 30 percent by 2030.

In Oklahoma, 40.5 percent of energy generation comes from coal-fired power plants while 38.1 percent comes from natural gas. Oklahoma ranks fourth in the nation with 15 percent of power generation coming from wind.

This begs the question, how does the EPA expect states like Oklahoma to meet the goals of the Clean Power Plan? There are only so many ways Oklahoma can achieve the 30 percent reduction demanded by the EPA. The plan, therefore, must be viewed as an attempt by the EPA to force states into shuttering coal-fired power plants and eventually other sources of fossil-fuel-generated electricity.

Additionally, the proposed rule, through its building block four, would require states to use demand-side energy efficiency measures that would reduce the amount of generation required. However, states are limited to emission standards that can actually be achieved by existing industrial sources through source-level, "inside-the-fence-line" measures.

The proposal's attempt to force states to regulate energy consumption and generation throughout their jurisdictions, in the guise of reducing emissions from fossil fuel-fired power plants, violates Section 111(d)'s plain-text requirement that the performance standards established for existing sources by the states must be limited to measures that apply at existing power plants themselves.

EPA's approach converts the obscure, little-used Section 111(d) into a general enabling act, giving EPA power over the entire grid from generation to light switch. By going beyond source-level, "inside-the-fence-line" measures, EPA's proposal would expand 111(d), and specifically the underlying statutory term "best system of emission reduction," into "a whole new regime of regulation": one that regulates not only pollutant emission by sources, but a state's entire resource and energy sectors.

To meet the objectives of the EPA's proposed rule, states will be forced to rework their energy generation market. To account for the loss of coal-fired generation, states will be forced into changing their energy mix in favor of renewables. States would also be forced to alter existing regulatory framework which would threaten energy affordability and reliability for consumers, industry and energy producers.

Finally, there is substantial concern that the EPA – before the Clean Power Plan rule is even finalized – will issue a uniform federal implementation plan that will be forced upon those states that don't acquiesce to the unlawful Clean Power Plan.

Such a move by the EPA would be the proverbial "gun to the head" of the states, demanding the states to act as the EPA sees fit or face punitive financial sanctions.

Madam Chairwoman, I can say with great confidence that if the EPA does in fact move forward with the "uniform FIP," the EPA will be challenged in court by Oklahoma and like-minded states.

Madam Chairwoman, I am not one who believes the EPA has no role. The agency has played an important role historically in addressing water and air quality issues that traverse state lines.

However, with this rule, the agency is now being used to pick winners and losers in the energy context, by elevating renewable power generation at the expense of fossil-fuel fired generation.

No state should comply with the Clean Power Plan if it means surrendering decision-making authority to the EPA, a power that has not been granted to the agency. States should be left to make decisions on the fuel diversity that best meets their power generation needs.

States like Oklahoma care about these issues because we breathe the air, drink the water, and want to preserve the land for future generations.

And we have developed a robust regulatory regime that has successfully struck a balance between maintaining and preserving air and water quality, while still considering the economic impact of such regulations.

Madam Chairwoman, states like Oklahoma are simply opposed to the Clean Power Plan because it is outside the authority granted to the EPA by the law. We only ask that state authority under the Clean Air Act be respected and preserved and that decisions on power generation and how to achieve emissions reductions be made at the local level rather than at the federal level.

I again appreciate the opportunity to discuss these issues with you.

Sincerely,

A handwritten signature in black ink, appearing to read "E. SCOTT PRUITT".

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA