



Testimony before the House Committee on Science, Space and Technology

Subcommittee on Environment

Impact of the EPA's Clean Power Plan on States

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State of Oklahoma

Good morning, Chairman Bridenstine, Ranking Member Bonamici, and Members of the Subcommittee,

Thank you for the invitation to discuss the legality of the EPA's Clean Power Plan. The Clean Power Plan represents an extraordinary moment in our constitutional history. Extraordinary in scope, extraordinary in costs, and extraordinary in its intrusion into the sovereignty of the States. And all done not by this body, but by nameless, faceless, and politically unaccountable bureaucrats.

Those of you that know me well, however, know that I believe the EPA has a role to play in our republican form of government. Air and water quality issues can cross state lines, and can sometimes require federal intervention. At the same time, the EPA was never intended to be our Nation's frontline environmental regulator. The States were to have regulatory primacy. The EPA was to be a regulator of last resort. That construct, a construct put in place by this body, has been turned upside down by the current Administration.

That is why I am here today, and I'd like to start by explaining to you why I so jealously guard Oklahoma's sovereign prerogative to regulate in a way that is both sensible and sensitive to local concerns.

In Oklahoma, our air is clean, our electricity is cheap, and our unemployment rate is low. We are proud of these things. We are proud of our nation-leading innovation in wind energy and our thoughtful regulation of the energy industry, regulation that the independent reviews have described as both "well-managed" and "professional."<sup>1</sup>

We produce more wind energy than all but three states, with 17% of our electricity generated by wind, while 7.4% of the clean-burning natural gas produced in the United States comes from Oklahoma. Indeed, we are a leading innovator in natural gas production through hydraulic fracking, a technological innovation that has done more to reduce carbon emissions in this country than any other technological advancement of our time.

Just this month, the federal Energy Information Administration announced that as of 2015, the power generation industry has reduced carbon dioxide emissions to 1993 levels, 21 percent

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<sup>1</sup> See, e.g., "Oklahoma Hydraulic Fracturing State Review," available at: <http://www.occeweb.com/STRONGER%20REVIEW-OK-201-19-2011.pdf>

below 2005 levels. As EIA has concluded, it was “a shift in the electricity generation mix” away from coal and toward natural gas that drove the reductions in emissions.

This didn’t happen as a result of the heavy hand of the EPA. Rather, it happened because of fracking and the positive market forces that those sorts of Oklahoma innovations create. As natural gas becomes increasingly affordable, it becomes an increasingly attractive alternative to coal.<sup>2</sup> And because coal still accounts for 34 percent of power generation, we will continue to see market driven emissions reductions for years to come.

I tell you all this to help you understand Oklahoma’s objection to the Clean Power Plan. In all candor, of course we think the policy justifications for the plan are unpersuasive. We don’t think that government regulators should be in the business of picking winners and losers in the energy sector. But all of that is for you to decide. And therein lies our objection to the Plan: this body did not decide.

So to the members of this committee who strongly support the Clean Power Plan as a matter of policy, I say to you: pass a bill. Let democracy decide whether the Clean Power Plan is right for America. But we didn’t get democracy, we got a regulatory cramdown-- a cramdown done over the objection of no less than 29 States who believe the Plan is unlawful.

And to those who claim that the Clean Air Act unambiguously authorizes the EPA to enact the Clean Power Plan, I say to you this: if that were so, how do you explain the extraordinary, unprecedented step the United States Supreme Court took to stay the implementation of the plan? That stay was entered because five members of that court thought it likely that the Plan was unlawful.

And those five members of the Court were correct. Although this body has debated a number of bills designed to achieve the “decarbonization” policy goals of the Clean Power Plan, it has never adopted any such legislation. Frustrated with Congress, EPA now purports to have

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<sup>2</sup> Indeed, Oklahoma’s second largest utility plans to retire its last coal fired plant within 10 years, while our largest utility anticipates 30% reductions in carbon emissions as it continues to convert to natural gas.

discovered sweeping authority in section 111(d) of the Clean Air Act—an obscure provision that has been used only five times in 45 years.<sup>3</sup>

EPA’s audacious assertion of authority in this Rule is more far-reaching than any previous effort by the agency. According to EPA, section 111(d) authorizes it to use the States to impose on power plants emission reduction requirements that are premised not on pollution control measures at the regulated plants, but on reducing or eliminating operations at those plants and shifting their electricity generation to competitors--something the EPA euphemistically calls “generation shifting.”

None of this can be reconciled with the words this body enacted in section 111. Section 111(d) authorizes EPA to establish “procedure[s]” under which States set “standards of performance for any existing source.”<sup>4</sup> Those standards must reflect the “application of the best system of emission reduction” to that “source,” i.e., to a “building, structure, facility, or installation.”<sup>5</sup> In other words, EPA may seek to reduce emissions only through measures that can be implemented by individual facilities. Indeed, for 45 years, EPA has consistently interpreted section 111 standards of performance in this way—not only in the five instances in which it has addressed existing sources, but also in the more than one hundred rulemakings in which it has adopted standards for new sources.

The Rule is further barred by the fact that coal-fired electric generating units are already regulated under section 112 of the Clean Air Act. This body expressly prohibited EPA’s use of 111(d) to require States to regulate “any air pollutant ... emitted from a source category which is regulated under section [1]12.”<sup>6</sup>

Finally, the Rule violates the Constitution. Cooperative federalism programs must provide States with a meaningful opportunity to decline implementation. But the Rule does not do so; States

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<sup>3</sup> But as the Supreme Court recently said, courts should “greet ... with a measure of skepticism” claims by EPA to have “discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the American economy” and make “decisions of vast economic and political significance.” *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). That skepticism is doubly warranted here where EPA’s Rule intrudes on an “area[] of traditional state responsibility.” *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014).

<sup>4</sup> CAA § 111(a)(1), (d)(1).

<sup>5</sup> CAA § 111(a)(1), (3).

<sup>6</sup> CAA § 111(d)(1)(A).

that decline to take legislative or regulatory action to ensure increased generation by EPA's preferred power sources face the threat of insufficient electricity to meet demand. The Rule is thus an act of commandeering that leaves States no choice but to alter their laws and programs governing electricity generation and delivery to accord with federal policy.

If EPA gets its way, Section 111(d) will be transformed from a limited provision into the most powerful part of the Clean Air Act, making the EPA a central planner for every single industry that emits carbon dioxide. Congress did not intend and could not have imagined such a result when it passed the provision more than 45 years ago.

Finally, there are some who wish to create a false dichotomy between those who are "for clean power" and those who are "against clean power." I urge this Committee to resist such rhetoric. We are all for clean power. And no one, no bureaucrat in DC, no environmentalist in California, has a stronger interest in clean air and clean water in Oklahoma than we do. That is the air that our children breathe and the water that our grandchildren swim in. And that is why I jealously guard my state's prerogative to craft regulations that make sense for Oklahoma. And more importantly, that is why I vigorously advocate for the rule of law, for the democratic process, and for respect for the Constitution's separation of powers between the federal government and the States.

Mr. Chairman, I again appreciate the opportunity to discuss these issues with you, and I look forward to answering any questions from the Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Scott Pruitt". The signature is stylized with a large, sweeping initial "E" and a long horizontal stroke extending to the right.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA