



# Kansas Attorney General

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### TESTIMONY BEFORE SENATE UTILITIES COMMITTEE

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**TO: MEMBERS OF THE SENATE UTILITIES COMMITTEE**  
**FROM: JEFF CHANAY, DEPUTY ATTORNEY GENERAL, CIVIL LITIGATION DIVISION**  
**DATE: JANUARY 12, 2012**  
**RE: STATUS OF CROSS-STATE AIR POLLUTION RULE LITIGATION**

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Chairman Apple and Members of the Committee:

My name is Jeff Chanay, and I am the Deputy Attorney General for Civil Litigation in the Office of Attorney General Derek Schmidt. I am here today to offer testimony and answer questions about the State's involvement in litigation over the EPA's Cross-State Air Pollution Rule (CSAPR).

On August 2, 2010, EPA published a Proposed Rule intended to limit interstate transport of nitrogen oxides (NO<sub>x</sub>), sulfur dioxide (SO<sub>2</sub>), and fine particulate matter (PM<sub>2.5</sub>) emissions from electrical generating units (EGUs). "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone," 75 Fed. Reg. 45210 (August 2, 2010). The Final Rule (CSAPR) was promulgated on August 8, 2011. "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, Final Rule," 76 Fed. Reg. 48208 (August 8, 2011). CSAPR is the EPA's response to the D.C. Circuit's invalidation of the Clean Air Interstate Rule (CAIR). Kansas was not subject to CAIR; however, in the final Cross-State Rule, EPA announced that Kansas was significantly contributing to nonattainment of the 2006 24-Hour PM<sub>2.5</sub> National Ambient Air Quality Standards (NAAQS) in Madison County, Illinois, and was interfering with maintenance of the same NAAQS in Cook County, Illinois and Milwaukee County, Wisconsin. CSAPR places strict emission limits on Kansas with virtually no time to achieve compliance.

CSAPR is a federal implementation plan (FIP) that establishes emissions budgets for 27 states in the eastern half of the United States. Rather than issuing a SIP (state implementation plan) Call, as the EPA is required to do when existing SIPs are inadequate to meet the requirements of the

Clean Air Act, EPA has taken the unprecedented approach of simultaneously establishing state emission reductions and directing the states by which means they are to be achieved. This represents yet another instance in which EPA is overreaching and infringing upon the authority of the states to develop their own mix of emission controls that suit their particular needs and values.

The states' emission budgets are not based on their individual contributions to downwind non-attainment, but rather on uniformly-applied cost thresholds established by EPA. The mandated reductions do not merely bring the upwind states emissions below the threshold of "significant contribution" but instead seek to achieve total attainment and maintenance of National Ambient Air Quality Standards in downwind areas.

The Attorney General became aware of the threatened harm to Kansas associated with the implementation of the final rule during the summer of 2011. After meetings with representatives of KDHE and industry regarding the effects of the final rule, the Attorney General filed suit against EPA on September 19, 2011 in the United States Court of Appeals for the District of Columbia Circuit seeking to permanently block implementation of the final rule. (*State of Kansas v. United States Environmental Protection Agency*, Docket No. 11-1329). Kansas was the first state to file suit against EPA challenging the rule. Several other "upwind" states filed suit shortly thereafter. Kansas' suit challenges both the substantive and procedural aspects of the final rule. The implementation of CSAPR spawned so many legal challenges that 44 cases, including Kansas's, have been consolidated and are generally captioned *EME Homer City Generation, L.P. v. EPA*, Docket No. 11-1302.

On October 5, 2011, Kansas filed a Motion for Stay with the D.C. Circuit Court of Appeals seeking to stay the implementation of CSAPR on its January 1, 2012 effective date. Kansas argued in its motion that the state would be irreparably harmed if the stay was not granted. On December 30, 2011, the D.C. Circuit granted a Stay of CSAPR with the caveat that the Court wanted the legal challenges placed on a fast track, with oral arguments to take place in April 2012.

Although a scheduling order has yet to be entered by the Court, it is probable that the Kansas will be asked to file a consolidated brief together with several other states around the middle of February. Oral arguments are expected in April with a final ruling anticipated in August or September. One part of Kansas's suit, the challenge to EPA's denial of the Kansas SIP, has been severed from the initial litigation and has been separately docketed as Docket No. 12-1019.

The Attorney General is committed to working with the Department of Health and Environment and Kansas utilities to protect the rights of the state and to prevent the crippling effects of the rule on Kansas electrical producers and consumers.