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Presentation on EPA's Proposed Clean Power Plan (Clean Air Act § 111(d))
Presented to the House Energy and Environment Committee
By Chief Deputy Attorney General Jeff Chanay and
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Chairman Hedke and members of the Committee, thank you for this opportunity to discuss the current legal status of the Clean Power Plan, which the Environmental Protection Agency ("EPA") announced on August 3, 2015.

Immediately after the Clean Power Plan was announced in August 2015, Kansas and fourteen other States[1] filed an Emergency Petition for Extraordinary Writ in the D.C. Circuit asking the Court to stay the Rule because the announced Rule set dates for the submission of State Plans that were not tied to the date of publication. The case was captioned *In re West Virginia, et al.*, Case No. 15-1277. On September 9, 2015, a panel of the D.C. Circuit, without comment, denied the Petition on the grounds that "petitioners ha[d] not satisfied the stringent standards that apply to petitions for extraordinary writs that seek to stay agency action."

On October 23, 2015, the Rule implementing the Plan was published in the Federal Register and became ripe for legal challenge. The State of Kansas immediately challenged the Rule as part of a coalition of 25 States and state agencies.[2] A total of 30 States and state agencies have challenged the Rule.[3]

I will now turn to the legal problems with the Rule that are of such concern to Kansas and many of our sister States. Based upon an obscure and rarely used provision of the Clean Air Act, Section 111(d) (42 U.S.C. § 7411(d)), the final Rule issued by the EPA on August 3, 2015, is designed to "transfor[m] . . . the domestic energy industry." The Section 111(d) Rule manifests EPA's policy judgment—never enacted or authorized by

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[1] Alabama, Arkansas, Indiana, Florida, Kentucky, Louisiana, Michigan, Nebraska, Ohio, Oklahoma, South Dakota, West Virginia, Wisconsin, and Wyoming.

[2] West Virginia, Texas, Alabama, Arizona Corporation Commission, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Louisiana Department of Environmental Quality, Attorney General Bill Schuette of Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina Department of Environmental Quality, Ohio, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming.

[3] Mississippi, Mississippi Department of Environmental Quality, Mississippi Public Service Commission, North Dakota, and Oklahoma, in addition to the States and state agencies listed above.

Congress—that coal-fired power generation should be systematically disfavored in this country. Even though the Rule was not published until October 23, 2015, and did not become effective until December 22, 2015, the clock began ticking on States in August 2015 to design, draft, and submit an initial State Plan by September 6, 2016. That Plan must demonstrate how the State will replace substantial amounts of coal-fired generation with entirely different sources such as natural gas, wind power, and solar power. The CPP requires a 29% reduction in CO_2 emissions by 2022 and 44% by 2030.

The Section 111(d) Rule requires the States to fundamentally reorganize how they generate energy in order to reduce reliance on coal-fired power plants. EPA has mandated that the States design State Plans to achieve carbon dioxide emissions targets that EPA calculated based on three "building blocks": (1) altering coal-fired power plants to increase their efficiency; (2) shifting reliance on coal-fired power to natural gas; and (3) shifting reliance on coal-fired power to low or zero-carbon energy generation like wind and solar. Only the first building block involves regulating the way existing power plants operate or perform. The remaining two blocks represent across-the-board energy policy changes, aimed explicitly at reducing reliance on coal-fired energy. EPA's legal justification for this approach is its assertion that Section 111(d) authorizes the agency to base a rule on any measure that "shifts generation from dirtier to cleaner sources." Put another way, EPA believes that if the agency has legal authority to *regulate* a source category under Section 111(d), it may force States to design plans that will *retire* the sources in that category and *replace* those sources in the State's energy portfolio with different, "cleaner" sources.

It is the view of the Office of Attorney General that the Clean Power Plan unlawfully exceeds EPA's authority and contains multiple legal defects, each of which provides an independent basis to invalidate the rule in its entirety.

First, Section 111(d) is a narrow, rarely used program, invoked by EPA only five times in 35 years and only once since the program was restructured more than 25 years ago. In those few instances, EPA aimed its regulations at pollutants from specialized industries, like acid mist emitted from sulfuric acid plants, and in each instance EPA provided guidelines to States to impose traditional pollution control devices at those existing sources. The primary reason Section 111(d) has been so rarely used is what is known as the "Section 112 exclusion." After the 1990 Amendments to the CAA, this exclusion prohibits EPA from invoking Section 111(d) for "any air pollutant . . . emitted from a source category which is regulated under [Section 112 of the CAA]." 42 U.S.C. § 7411(d)(1). Of course, the coal-fired sources EPA seeks to retire are already regulated under Section 112.

Second, in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445-46 (2014) ("*UARG*"), the Supreme Court held that Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" 134 S. Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); *accord King v. Burwell*, 135 S. Ct. 2480 (2015). The Court rejected EPA's attempt to"bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." 134 S. Ct. at 2444. "[W]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" the Court stressed, "[courts should] greet its announcement with a measure of skepticism." *Id.* (quoting *Brown*, 529 U.S. at 159).

We believe that this lack of specific authority is fatal to the Section 111(d) Rule. Invoking authority under a statutory provision that it has utilized on only five previous occasions, EPA has purported to grant itself the power to "drive a more aggressive transformation in the domestic energy industry" in order to replace America's most common energy source—coal—with natural gas and renewable sources. This is a broad-based energy policy typically left to Congress to enact, not environmental regulation. EPA claims to have "discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *UARG*, 134 S. Ct. at 2444 (internal quotation marks omitted). But there is no evidence that Congress "clearly" assigned to EPA the authority to make these energy policy decisions of "vast economic and political significance." *Id.*

Third, we also believe that EPA's claim that Section 111(d) permits the agency to reorganize the nation's energy economy through the States must also be rejected because it violates the States' Tenth Amendment rights. For example, the Clean Power Plan violates the anti-commandeering and anti-coercion Tenth Amendment principles. *See New York v. United States*, 505 U.S. 144, 161 (1992) (holding that the Tenth Amendment prohibits the federal government from "us[ing] the States as implements of regulation"); *see also NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J.) (noting that that a federal threat that overrides a State's policymaking discretion "violates the Tenth Amendment by coercing them into complying" with federal prerogatives); *Printz v. United* States, 521 U.S. 898 (1997) (reaffirming and extending *New York* to the commandeering of state officials). Contrary to these principles, the Clean Power Plan effectively forces States to implement EPA's policy preferences, either through a State or Federal Plan, requiring States to bear the practical and political consequences of this enormously flawed and unpopular plan.

Moreover, States' authority over the intrastate generation and consumption of electricity is "one of the most important functions traditionally associated with the police powers of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Congress recognized this State authority in the Federal Power Act ("FPA"), which confines the federal authority over electricity markets to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." Regulation of the *intra*state consumer market remains where it constitutionally belongs: in the hands of the States. 16 U.S.C. § 824(a). The FPA and other federal energy statutes respect the States' "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983).

As mentioned at the outset, Kansas has joined a coalition of States challenging EPA's Section 111(d) rule. On October 23, 2015, Kansas filed a Petition for Review of the final Rule in the D.C. Circuit. The case is captioned *West Virginia, et al. v. U.S. Environmental Protection Agency, et al.*, No. 15-1363. As we expected, numerous private power companies, labor unions, trade associations, and others also filed petitions for review in the D.C. Circuit. In all, more than 70 petitioners have filed more than a dozen petitions for review, which have been consolidated with ours for briefing and oral argument. In addition, numerous others have moved to intervene and others have sought permission to participate as *amici curiae*.

Given the present and ongoing harm to Kansas of having to comply with the Rule, Kansas filed a Motion for Stay and for Expedited Consideration of Petition for Review with the D.C. Circuit. Our motion asked the court to put the Rule on hold while the case is litigated and to impose briefing deadlines that would allow the case to be argued before the court takes its summer recess. By filing the motion we hoped to avoid what happened in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), in which EPA lost a challenge to its final rule setting standards for regulating hazardous air pollutants, but following the loss boasted that the regulated parties are "already in compliance or well on their way to compliance" because the rule remained in effect throughout the litigation.

On January 22, 2016, a panel of the D.C. Circuit denied all motions for stay, but set the case for expedited briefing. In response, on January 26, Kansas, along with 28 other States and state agencies filed an Application for a Stay with the Chief Justice of the United States Supreme Court, John Roberts. Chief Justice Roberts referred the application to the entire Court for resolution. On February 9, the Supreme Court, on a 5-4 vote, stayed the Clean Power Plan until the merits of the litigation are finally resolved, either by the D.C. Circuit or by the Supreme Court itself upon a Petition for Writ of Certiorari.

Meanwhile, the underlying case on the merits remains on a fast track. All briefing in the case is to be completed by April 22, 2016, and oral argument has been scheduled for June 2, 2016. Based on the D.C. Circuit's usual practice, we expect a ruling by that court by the fall. But regardless of how the D.C. Circuit rules in this case, it now seems a near-certainty that this dispute will ultimately be resolved by the United States Supreme Court, most likely in 2017.

One final matter that I would like to bring to the Committee's attention is that on October 23, 2015, EPA issued a proposed *Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations*, 80 Fed. Reg. 64,966 (Oct. 23, 2015). The Proposal establishes the requirements that EPA will impose on any State that "fails to submit a satisfactory [state] plan" implementing the final Section 111(d) Rule. 42 U.S.C. § 7411(d). Most notably, the proposed Federal Plan effectively imposes a carbon trading regime on states that fail to submit a timely and approved State Plan that implements the requirements of the Clean Power Plan. KDHE, KCC, and the Office of Attorney General have all filed comments in opposition to the proposed Federal Plan. The comments offered by the Attorney General emphasize that the plain language of Section 111(d) does not authorize EPA to force a CO_2 emission trading program on States that do not submit an EPA-approved State Plan. There are a variety of reasons why we believe that the proposed Federal Plan is unlawful, including that it represents an unlawful commandeering in violation of the Tenth Amendment. While the stay entered by the United States Supreme Court obviates the need for the state to move forward with the preparation of a SIP at this time, it is likely that EPA will continue to proceed with its development of its FIP.

The Office of Attorney General remains committed to opposing the Clean Power Plan as being clearly unprecedented and unlawful.