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Presentation on EPA's Proposed Clean Power Plan (CAA §111(d))
Presented to the Senate Utilities Committee
By Chief Deputy Attorney General Jeff Chanay
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Chairman Olson and members of the Committee, thank you for this opportunity to discuss the Attorney General's role in the Kansas response to EPA's proposed Clean Power Plan.

On June 18, 2014, EPA proposed emission guidelines for carbon dioxide emissions from existing fossil fuel-fired power plants, invoking its authority under Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d). *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014). EPA's proposal attempts to use the Clean Air Act to override states' energy policies and impose a national energy and resource-planning policy that picks winners and losers based solely on EPA's policy choices, and forces states to favor renewable energy sources and demand-reduction measures over fossil fuel-fired electric production. But the Clean Air Act generally, and Section 111(d) specifically, do not give EPA such broad authority to reorganize states' economies. Under the proposed regulations, states would be required to submit enforceable State Implementation Plans (SIPs) by June 2016, and the SIPs must demonstrate considerable carbon reductions by 2020.

It should also be noted that EPA is simultaneously working on a proposal to set carbon pollution standards for new power plants under Clean Air Act Section 111(b). The comment periods for both proposals have now ended. EPA has stated its intent to issue final rules on the Clean Power Plan for existing power plants and Carbon Pollution Standards for new power plants sometime during the summer of 2015.

The genesis of the Clean Power Plan proposal was a 2011 settlement agreement entered into between EPA, ten states, and several environmental organizations. Under the agreement, EPA committed to proposing standards of performance under Section 111 of the CAA for new, modified, and existing power plants that include emission standards for carbon dioxide, including an agreement that EPA "will" issue a "proposed rule under Section 111(d) that includes emissions guidelines for [carbon dioxide]," and "will"—after adopting Section 111(b) standards for new power plants—"transmit . . . a final rule that takes action with respect to" existing power plants.

This agreement is an example of the "sue and settle" practice of EPA wherein the administration seeks to do by litigation settlement what it cannot do by existing law. The Office of Attorney General has consistently opposed this approach to rulemaking as it systematically excludes Kansas consumers and citizens from having a meaningful voice in the process.

Let me turn specifically to the proposal that has the most immediate impact on Kansas, the Clean Power Plan, or what most of us know as the 111(d) proposal. It is our view that the proposed rule has numerous legal defects, each of which provides an independent basis to invalidate the rule in its entirety. I will briefly mention six concerns.

First, the proposed rule is unlawful because EPA has chosen to regulate coal-fired power plants under Section 112 of the Clean Air Act, 42 U.S.C. § 7412. Section 111(d) specifically prohibits EPA from invoking Section 111(d) where the "source category . . . is regulated under section [112]. . . ." 42 U.S.C. § 7411(d). In 2011, the United States Supreme Court held that "EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program, [Section 112]." *Am. Elec. Power, Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011). On February 16, 2012, EPA finalized Section 112 regulations on "stationary sources" that included coal-fired power plants. *See* 77 Fed. Reg. 9,304 (Feb. 16, 2012). In spite of this clear proscription, EPA still proceeded with its plans to additionally regulate under Section 111(d).

Second, the proposed rule is unlawful because EPA has not finalized any "new source" regulation of carbon dioxide emission from coal-fired power plants, which is a legally necessary predicate for any Section 111(d) regulation of those plants. And given that the merely *proposed* Section 111(b) new source standards appear unlawful, no such predicate is likely forthcoming.

Third, the proposed rule impermissibly expands EPA's authority into the management of states' energy generation and usage. Rather than limiting itself to EPA's narrow mandate of air pollution control, the proposed rule sets out a national energy consumption policy, and then requires states to abandon their own sovereign rights in favor of a national energy consumption policy.

Fourth, the proposed rule includes inflexible mandates that each state *must* achieve, rather than the guidelines and appropriate procedures for states to use in establishing standards of performance for sources under their jurisdiction that are actually authorized by Section 111(d). This attempt to federalize areas of energy policy improperly proposes to negate states' authority to determine that EPA's guidelines are inconsistent with factors such as consideration of costs, physical impossibility, energy needs, and the "remaining useful life of the existing source."

Fifth, in applying these standards of performance, states are limited to emission standards that can actually be achieved by existing industrial sources through source-level, inside-the-fenceline 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 the existing power plants themselves.

Sixth, even assuming *arguendo* that EPA has authority to impact energy policy decisions under Section 111(d), the proposed rule's attempt to federalize control over state energy policy is inconsistent with the Federal Power Act. It is unreasonable for EPA to propose regulation under Section 111(d) that would allow precisely the type of federal control over state decision-making that Congress denied to the federal government in the context of the Federal Power Act.

Should EPA's proposed rule become finalized, Kansas is committed to challenging the rule in the United States Court of Appeals for the D.C. Circuit. Last November, Attorney General Schmidt, along with sixteen other state attorneys general, filed comments with the EPA in opposition to the proposed Section 111(d) rule. It is likely that these same states and perhaps a few others will jointly challenge the rule, principally on the grounds that I have already discussed.

Nevertheless, Kansas has chosen to be proactive in response to the Section 111(d) proposal. On August 1, 2014, Kansas and eleven other states[1] filed a Petition for Review in the United States Court of Appeals for the D.C. Circuit of the final settlement that led to the creation of the Section 111(d) proposal. The case is captioned *State of West Virginia, et al., v. United States Environmental Protection Agency*, Case No. 14-1146. The petitioning states have asked the Court to hold the settlement agreement unlawful to the extent that the settlement commits EPA to finalize a coal-fired power plant rule under Section 111(d), to enjoin EPA from complying with the settlement agreement by finalizing a coal-fired power plants rule under Section 111(d), and to vacate the settlement agreement in relevant part. The parties to the settlement agreement have intervened in the litigation on the side of EPA.[2]

The same twelve petitioning states have also intervened in a private preemptory challenge to the Section 111(d) rule, *In re Murray Energy Corporation*, in the United States Court of Appeals for the D.C. Circuit, Case Nos. 14-1112 and 14-1151. The *West Virginia* and *Murray Energy* cases have now been consolidated and final briefing is due on February 24. Oral argument has been scheduled for April 16, 2015 in Washington, D.C.

The Office of Attorney General is committed to working with the legislature, the Department of Health and Environment, and the Kansas Corporation Commission to protect the sovereign and economic interests of Kansas by opposing the Section 111(d) proposal.

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[1] Alabama, Indiana, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, West Virginia, and Wyoming.

[2] Maine, New York, Connecticut, Vermont, Washington, Rhode Island, California, New Mexico, Delaware, Oregon, the City of New York, The District of Columbia, Sierra Club, Natural Resources Defense Council, and Environmental Defense Fund.