TESTIMONY OF PATRICK MORRISEY, ATTORNEY GENERAL, STATE OF WEST VIRGINIA

BEFORE THE

SUBCOMMITTEE ON CLEAN AIR AND NUCLEAR SAFETY
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

HEARING ON

"LEGAL IMPLICATIONS OF THE CLEAN POWER PLAN"

PRESENTED ON

MAY 5, 2015

Thank you Senator Capito, Ranking Member Carper, and all the distinguished members of this subcommittee. I appreciate the opportunity to testify about the Administration's widely publicized effort to severely limit the use of coal in the United States.

When President Obama was running for President in 2008, he told *The San Francisco Chronicle* that his vision of environmental and energy policy included "bankrupt[ing]" coal-fired power plants.[1] In the last two years, the President's EPA has made it a top priority to carry out this threat, by proposing several interlocking regulations that are specifically designed to put many existing coal-fired power plants out of business, and to make building new coal-fired power plants virtually impossible.

I am here today to talk about the central component in the Obama Administration's so-called Clean Power Plan, commonly known as the Section 111(d) Rule. This Rule seeks to require States to reduce emissions from existing coal-fired power plants by—on average—a staggering 30% in just 15 years. The method the Rule uses to achieve this reduction has been widely described as radical and plainly illegal. Rather than merely setting a structure for States to reduce emissions from these plants, EPA has taken the view that it can force States to reduce the *use* of—including demand for—coal-based energy.

EPA has made very clear that it intends to finalize the Section 111(d) Rule this summer. The impacts of the Rule will be devastating in West Virginia and throughout the United States. Because coal-fired power currently constitutes approximately 40% of the total energy generated in the United States, the Rule will likely result in reductions in the use of coal and will necessitate the building of many new non-coal-fired power plants—an expense that will be borne

[1] http://www.weeklystandard.com/blogs/obama-warned-his-policies-would-bankrupt-coal-power-plant-owners_644384.html.

by ratepayers in the form of higher electricity prices.[2] It will also further undermine the coal market, which provides numerous well-paying jobs to working men and women in some our most economically depressed communities. Make no mistake about it—finalizing this proposal would have a devastating impact on my State, other coal-producing States, and citizens from across the country, who will feel the negative economic impact of high electricity prices and reduced reliability of the power grid. West Virginia is one of the poorest States in the country and yet is the second largest producer of coal. This proposal will result in even greater economic displacement for Appalachia—at a time when we can least afford it.

It is my duty as the chief legal officer for the State of West Virginia to fight against this unlawful power grab, which is harming our citizens. West Virginia has already led a bipartisan coalition of 15 States in a lawsuit before the U.S. Court of Appeals for the D.C. Circuit, which targets EPA's authority to issue *any* rule regulating existing power plants under Section 111(d) when EPA has already regulated the same source category under Section 112 of the Act. The D.C. Circuit held oral argument in our case on April 16, 2015, and a decision is expected sometime this summer. In that litigation, the Department of Justice has claimed that EPA still might not issue the Rule, but outside the courthouse walls, EPA has promised everyone from Main Street to the United Nations that it will finalize the Section 111(d) Rule this summer. If the D.C. Circuit has not already stopped the Rule by then, the finalized Section 111(d) Rule will raise a host of additional legal issues that we plan to bring to the D.C. Circuit as well. West Virginia would challenge a final Rule in court, and we expect that the coalition of 15 States we have gathered for our first D.C. Circuit lawsuit will only grow.

Given the entirely unprecedented and unlawful nature of the Section 111(d) Rule, the States and other interested parties will have no shortage of legal defects to bring to the D.C. Circuit. Today, I will discuss just three issues, which will be part of that litigation:

(1) <u>The Section 112 Exclusion Prohibits The Section 111(d) Rule</u>

EPA bases its claim for legal authority to adopt this Rule entirely upon Section 111(d) of the Clean Air Act.[3] First enacted in 1970, Section 111(d) authorized EPA to establish guidelines for States to follow in regulating a limited category of emissions from certain existing sources. In the first twenty years of the Clean Air Act, EPA invoked this provision only 4 times, all for narrow, localized pollutants emitted from specialized industries, such as acid mist from sulfuric acid plants. *See* 79 Fed. Reg. 34,830, 34,844 n.43 (June 18, 2014).

In 1990, Congress substantially revised the Clean Air Act, drastically expanding the program for regulating hazardous air pollutants under Section 112. As part of that revision, Congress narrowed the already-minor Section 111(d) program even further, providing a statutory Section 112 Exclusion that prohibits EPA from invoking Section 111(d) for any pollutant "emitted from a source category which is regulated under section [112]."[4] As EPA has

---

[2] http://www.nera.com/content/dam/nera/publications/2014/NERA_ACCCE_CPP_Final_10.17.2014.pdf.

[3] 42 U.S.C. § 7411(d).

[4] 42 U.S.C. § 7411(d)(1).

repeatedly explained—starting with the Clinton Administration in 1995, and continuing through the Obama Administration—this text literally means that if EPA has already regulated a source category under Section 112, EPA may not require States to regulate any pollutants emitted from that source category under Section 111(d).[5] Consistent with this clear textual prohibition, in the 25 years since Congress enacted the 1990 Amendments to the Clean Air Act, EPA has never once sought to adopt a regulation of a source category under Section 111(d), where that source category was already regulated under Section 112.

In the Clean Power Plan, EPA seeks to break entirely new ground by effectively nullifying the prohibition on regulating under both Section 111 and 112 of the Clean Air Act. In 2012, EPA imposed extremely costly regulations on power plants under Section 112, which by EPA's own estimation will require compliance costs for those plants of more than $9 billion per year.[6] As such, under the plain terms of the Clean Air Act and EPA's uniform practice since 1990, EPA's proposed Section 111(d) Rule, requiring States to regulate those same power plants, is unlawful.

EPA's legal argument for avoiding the Section 112 Exclusion is not credible and defies all traditional rules of administrative law and statutory construction. Let me explain. When Congress enacted the present version of the Section 112 Exclusion in 1990, it accidentally included in the Statutes at Large two amendments to the same text: a substantive amendment that replaced a cross-reference to Section 112 and changed the Exclusion to its present form, and a conforming amendment 107 pages later that made a clerical update to the same cross-reference. Once the substantive amendment was applied, it made the conforming change wholly unnecessary, so the conforming amendment was not included in the U.S. Code. This is the uniform way the codifiers employed by Congress have always dealt with such clear drafting errors.[7] In 1995, the Clinton EPA acknowledged that the conforming amendment was a simple

[5] EPA, Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines, Pub. No. EPA-453/R-94-021, 1-6 (1995); 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004); 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005); Brief of EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494 (D.C. Cir. July 23, 2007); EPA, Legal Memorandum, at 26 (June 2014), EPA-HQ-OAR- 2013-0602-0419.

[6] 77 Fed. Reg. 9,304 (Feb. 16, 2012).

[7] See, e.g., Revisor's Note, 7 U.S.C. § 2018; Revisor's Note, 10 U.S.C. § 869; Revisor's Note, 10 U.S.C. § 1407; Revisor's Note, 10 U.S.C. § 2306a; Revisor's Note, 10 U.S.C. § 2533b; Revisor's Note, 12 U.S.C. § 1787; Revisor's Note, 14 U.S.C. ch. 17 Front Matter; Revisor's Note, 15 U.S.C. § 2081; Revisor's Note, 16 U.S.C. § 230f; Revisor's Note, 20 U.S.C. § 1226c; Revisor's Note, 20 U.S.C. § 1232; Revisor's Note, 20 U.S.C. § 4014; Revisor's Note, 22 U.S.C. § 3651; Revisor's Note, 22 U.S.C. § 3723; Revisor's Note, 26 U.S.C. § 105; Revisor's Note, 26 U.S.C. § 219; Revisor's Note, 26 U.S.C. § 4973; Revisor's Note, 29 U.S.C. § 1053; Revisor's Note, 33 U.S.C. § 2736; Revisor's Note, 37 U.S.C. § 414; Revisor's Note, 38 U.S.C. § 3015; Revisor's Note, 40 U.S.C. § 11501; Revisor's Note, 42 U.S.C. § 218; Revisor's Note, 42 U.S.C. § 290bb–25; Revisor's Note, 42 U.S.C. § 300ff–28; Revisor's Note, 42 U.S.C. § 1395x; Revisor's Note, 42 U.S.C. § 1396a; Revisor's Note, 42 U.S.C. § 1396r; Revisor's Note, 42 U.S.C. § 5776; Revisor's Note, 42 U.S.C. § 9601; Revisor's Note, 49 U.S.C. § 47115.

mistake, which should be given no meaning.[8] Yet, EPA now claims that the conforming amendment causes confusion as to the meaning of the Section 112 Exclusion, such that EPA can effectively disregard that Exclusion. This unprecedented argument should be offensive to every Senator, no matter his or her politics: under EPA's theory of statutory construction, if your staffers ever make an inadvertent error putting together conforming amendments, an agency will later be able to use that clerical error not only to disregard the substance of your legislative work and clear meaning but also to take over a purely legislative function and change congressional intent.

EPA also now claims that the text of the Section 112 Exclusion, as it appears in the U.S. Code, is ambiguous and thus the agency is entitled to deference. But never once in the 25 years since the 1990 Amendments has EPA ever made that claim or professed any inability to decipher the plain meaning of the text. The numerous alleged interpretations that EPA now offers for the first time are purely made-for-litigation attempts to torture ambiguity from the statute. As the D.C. Circuit has observed on numerous occasions, the mere possibility of multiple readings does not make a statute ambiguous for purposes of agency deference—*i.e.*, *Chevron* deference. In the court's words: "The existence of ambiguity is not enough per se to warrant deference to the agency's interpretation. The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity." *Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 504 (D.C. Cir. 2013). Put more simply, "the sort of ambiguity giving rise to *Chevron* deference" is not simply a question of "definitional possibilities." *Id.* As we have explained in our briefs, none of the multiple newfound readings advanced by EPA is proof of actual ambiguity.

(2) The Section 111(d) Rule Is Illegal Because It Seeks To Transform The States' Energy Economies, Rather Than Just Regulating Particular Sources

Perhaps the most radical feature of the Section 111(d) Rule is its sheer breadth. Rather than following the well-established practice of imposing an emission rule on a certain source category, to make that source category's operations more environmentally friendly, the Section 111(d) Rule seeks to require States to replace coal-fired energy with other sources of energy and even generally reduce consumer *demand* for energy. Make no mistake, the Section 111(d) Rule is not merely a regulation of power plant emissions, it is a mandate that the States fundamentally reorder their entire electricity sectors and pick winners and losers between sectors. As Allison D. Wood, a well-respected attorney observed in a hearing before the House Committee on Energy and Commerce, EPA's claim here is analogous to the agency asserting that its authority to regulate automobile emissions gives it the power to order citizens to take the bus to work and to buy more electric cars, on the theory that such measures would reduce car emissions.[9]

Section 111(d) simply does not authorize EPA to assert such broad power. In fact, EPA's Section 111(d) authority extends only to performance standards for *individual sources*. That

[8] EPA, Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines, Pub. No. EPA-453/R-94-021, 1-6 (1995).

[9] http://docs.house.gov/meetings/IF/IF03/20150317/103073/HHRG-114-IF03-Transcript-20150317.pdf.

Section expressly limits EPA to setting guidelines for States, who then set "standards of performance for [] *existing source[s]*," in certain limited circumstances.[10] Furthermore, any EPA rules under Section 111(d) must "permit the State in applying a standard of performance *to any particular source* under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the *existing source* to which such standard applies."[11] The language could not be more clear: EPA's authority is limited to the existing source only.

EPA's assertion of such unprecedented authority—including the power to lower consumer demand for energy—is all the more illegal because it is based upon such a rarely used statutory provision. As the Supreme Court admonished EPA just last Term: "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism."[12] This principle applies directly to the Section 111(d) Rule, where EPA is attempting to impose the single-most meaningful, far-reaching regulation in the agency's history, based upon an obscure, decidedly narrow provision of the Clean Air Act.

(3) The Section 111(d) Rule Illegally Commandeers The States

Harvard Law Professor Laurence H. Tribe, a celebrated liberal icon and noted environmental lawyer, has forcefully explained that the Section 111(d) Rule raises a number of serious constitutional concerns, including that it seeks to unlawfully commandeer the States, in violation of the States' Tenth Amendment rights.[13] As Congress designed Section 111(d), that Section is intended to permit EPA merely to establish a "procedure" under which States set "standards of performance" for a limited category of sources. Only if the States fail to submit a state plan that complies with EPA's "procedure" can EPA substitute its own plan to regulate emissions from that source category.[14]

The Section 111(d) Rule does not accord with this congressional regime of cooperative federalism. Instead, it creates a punitive system that seeks to coerce the States, in violation of their Tenth Amendment rights. Specifically, EPA has threatened that if States do not submit state plans that fundamentally reorder their energy economies in the way EPA dictates, EPA will impose upon the States some yet-unannounced federal plan, which may well take the form of EPA taking over the States' entire electricity sector. The Supreme Court has held that the Federal Government simply has no legal authority to coerce and threaten the States with such drastic consequences, simply for failing to do the Federal Government's bidding. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

* * *

[10] 42 U.S.C. § 7411(d)(1).

[11] *Id.*

[12] *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) (citation and quotation omitted).

[13] http://docs.house.gov/meetings/IF/IF03/20150317/103073/HHRG-114-IF03-Wstate-TribeL-20150317-U1.pdf

[14] 42 U.S.C. § 7411(d)(1), (d)(2).

Regardless of your position on the underlying merits of severely limiting the use of coal, it is critical for this body to exercise oversight over a federal agency that is radically seeking to reinvent American energy policy in an unlawful manner. The repudiation of greenhouse gases should not be advanced by executive fiat on the basis of a clerical error. I urge this Committee to ensure that, when and if EPA acts, it does so after express authority has been delegated to it by Congress.