"CLIMATE CHANGE: THE NEED TO ACT NOW"
SENATE COMMITTEE ON ENVIRONMENT & PUBLIC WORKS
SUBCOMMITTEE ON CLEAN AIR AND NUCLEAR SAFETY
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Testimony of Alabama Attorney General Luther Strange

Good morning, Chairwoman Boxer, Ranking Member Vitter, Subcommittee Chairman Whitehouse, Ranking Member Sessions, and Members of the Committee. Thank you inviting me to testify here today. My name is Luther Strange, and I am the Attorney General of Alabama. As Attorney General, my sworn duty is to uphold the rule of law for the 4.8 million hardworking men and women in my state. That duty includes enforcing the environmental laws which help protect our natural resources and the health of our citizens. My comments today reflect a continuing concern with this Administration's approach to environmental regulation. EPA's proposed guidelines for existing power plant performance standards under Clean Air Act section 111(d) are simply the most recent example of the Federal Government usurping authorities properly delegated to the States.

Like electric suppliers all over the country, municipalities, cooperatives and investor-owned utilities in Alabama are trying to come to grips with what this proposal will mean to families and businesses in my state. Ultimately, someone has to pay for changing the way we produce and use energy. If anyone suggests that these costs are minimal or worth it because of the example that the United States will set, I would point out that setting an example in this instance cannot by definition be free or cheap. On its face, the Administration's proposal would force electric suppliers to: 1) spend more for efficiency projects that are not economic, 2) deploy renewable energy projects that do not meet normal cost-benefit standards, 3) limit the amount of electricity used by customers through demand management efforts that do not meet standard cost tests, 4) operate gas plants out of economic order in a way that was never envisioned before the proposal, and 5) deny consumers access to lower cost coal plants—that were paid for through current low rates—in ways that no one ever envisioned before the proposal.

The proposal goes to great lengths to disguise or minimize the negative economic, social, and reliability impacts that it will have. Even the Administration's own estimates, however, are shocking—65,000 megawatts of generation will be closed prematurely; 6,000 megawatts will close in my region; annual compliance costs will be between $7.5 billion and $9 billion and rising; southern region electric prices will increase by 3.4 percent by 2020 and nationwide by 6.5 percent. Recent history, moreover, has shown that EPA is likely to have underestimated these already severe impacts. During the MATS rulemaking, for instance, EPA told the nation that only 5,000 megawatts of coal-fired electric generation would be retired. Ten times that amount has been announced—some 50,000 megawatts. To put this in perspective, between the MATS actual impact and EPA's low ball assessment of this proposal, America will shutter generation resources that exceed the electricity output of the entire nation of Spain. Early forced closure of existing generation has to have cost impacts—low-cost generation is closed, more costly generation remains, and customers must pay more for electricity. The result is inescapable and intended. Even the President acknowledged that electricity prices must "skyrocket" in order to implement his climate policies. I believe the President. I disagree with his policies.

The defense of this proposal will be that the States have "flexibility," but providing the States with a narrow range of costly policy choices, which most of the States did not choose for themselves, does not provide any actual flexibility and still produces the same outcome—higher electricity prices and decreased generation. Repeating over and over the word "flexibility" is not an adequate defense or adequate answer to the low-income consumers in my state, or any other state, who will ask why they must pay more to reduce CO_2 emissions when those reductions cannot and will not impact the global climate.

In reaching this conclusion, I have given the President's proposal the benefit of its own analysis. The U.S. Chamber of Commerce, however, may be closer to the mark when it predicted that the compliance costs for these regulations will be nearly $480 billion by 2030, or $28 billion a year by 2030. That is three times the EPA estimates. Electricity is a force multiplier, rising electric costs damage Gross Domestic Product. The Chamber says the loss will be $50 billion a year, peaking at over $100 billion in 2025. This would mean a typical family in my State would lose approximately $3,400 in disposable income, which would affect poor families disproportionately. I am unwilling to transfer to a federal environmental agency the indirect, but undeniable, power to reshape my State's energy portfolio and choices at the expense of the hardworking families of Alabama.

Congress did not intend for Clean Air Act section 111(d) to have such far-reaching consequences for the American people. Indeed, to prevent impacts such as those that will flow from EPA's proposed emission guidelines, Congress took care to limit EPA's authority under section 111(d). Given the enormous burdens that would be imposed by EPA's proposed guidelines, however, it may be obvious that EPA has simply disregarded the limits of the law. These limits, moreover, are not questionable or controversial; they are express and clear elements of the Clean Air Act. As I will explain, the Clean Air Act forbids regulating sources under section 111(d) if they are regulated under section 112 of the Act. Existing electric utility generating units are regulated under section 112. The Clean Air Act also forbids section 111(d) regulations that are based on emission reductions that cannot be achieved at individual facilities but that instead rely on reductions that require actions by an entire system, including facilities acting in tandem, state governments, and even electricity consumers. EPA's proposed emission guidelines fully embrace a system-wide approach to regulation. EPA has also improperly attempted to limit section 111(d)'s express statutory delegation of authority to the States, and, in doing so, EPA's proposal not only rejects state discretion under the Clean Air Act but jettisons decades of unquestioned precedent establishing state jurisdiction over electricity markets. For each of these reasons, EPA's proposed emission guidelines must be stopped before they do lasting damage to the Clean Air Act, the States, and the Nation.

The Clean Air Act Prohibits Regulation of Electric Generating Units Under Section 111(d)

As a threshold matter, the Clean Air Act is abundantly clear that EPA has no authority to issue this proposal. As explained in a June 6, 2014 letter from West Virginia Attorney General

Patrick Morrisey to EPA Administrator Gina McCarthy,[1] section 111(d) expressly states that EPA is prohibited from regulating any air pollutant emitted from an existing source category that is regulated under section 112 of the Clean Air Act.[2] EPA has imposed extensive regulations on existing coal- and natural gas-fired power plants pursuant to section 112, thereby precluding regulation of these sources under section 111(d). EPA itself has conceded that "a literal reading" of section 111(d) prohibits its proposed 111(d) guidelines for existing electric generating units, but claims an ill-defined right to fundamentally reinterpret the statute.[3] As a state Attorney General, I believe the law is what the law says, and I am troubled by EPA's belief that it can "fill in the blanks" in a statute when there are no blanks to fill.

The Clean Air Act Does Not Allow 111(d) Standards That Apply "Beyond the Fence-line"

Even if EPA had the authority to issue this proposal, EPA's proposed emission guidelines flout fundamental statutory requirements in section 111(d). At the most basic level, the Clean Air Act demands that any standards of performance issued by States pursuant to section 111(d)—and any emission guidelines that EPA issues to inform the development of state standards—represent emission limits reflecting "best system of emission reduction" ("BSER") that has been adequately demonstrated for the existing source.[4]

Specifically, section 111(d) plainly states that the EPA Administrator is to establish a procedure, including emission guidelines, under which each State prepares and submits "a plan which establishes standards of performance *for any existing source* for any air pollutant."[5] Further, the Act defines "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant."[6] The clear import of these provisions is that 111(d) standards must be based on the emission reductions that individual sources can achieve by controlling their own emissions.

The U.S. Court of Appeals for the District of Columbia Circuit has confirmed that 111(d) standards must be emission control obligations that can be applied to "a single building, structure, facility, or installation—the unit prescribed in the statute" and that EPA cannot re-write the Clean Air Act to apply a 111(d) standard to "a combination of such units."[7]

Accordingly, a 111(d) standard of performance can only be based on emissions reductions that are demonstrated and achievable at individual emitting facilities—here, CO_2 reductions that can be achieved at existing coal- and natural gas-fired electric generating units. In other words, a standard of performance must be based on emission reductions "inside the

[1] Letter from Hon. Patrick Morrisey, Attorney General of the State of West Virginia to Hon. Gina McCarthy, Administrator, U.S. Environmental Protection Agency, Re: EPA's Asserted Authority Under Section 111(d) Of The Clean Air Act To Regulate CO_2 Emissions From Existing Coal-Fired Power Plants (June 6, 2014).

[2] Clean Air Act § 111(d)(1)(A)(i).

[3] Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units at 26.

[4] Clean Air Act § 111(a)(1).

[5] Clean Air Act § 111(d)(1) (emphasis added).

[6] Clean Air Act § 111(a)(3).

[7] *ASARCO v. EPA*, 578 F.2d 319, 327-328 (D.C. Cir. 1978).

fence-line" of a facility. EPA's proposed 111(d) guidelines are based on reductions achievable "beyond the fence-line" and are, therefore, inconsistent with the Clean Air Act.

EPA has proposed to conclude that four "building blocks" of measures are the "best system of emission reduction" for controlling CO_2 at existing electric generating units. Those four categories, which EPA calls "building blocks," are:

> (1) Efficiency requirements at coal and natural gas fired electric generating units;
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> (2) Substituting generation from the most carbon intensive electric generating units with generation from less carbon intensive units;
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> (3) Substituting generating from coal and natural gas-fired electric generating units with generation from zero-carbon renewable generation; and
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> (4) Using demand-side efficiency measures to reduce the total amount of generation that its needed by consumers.

Building blocks 2, 3, and 4 all depend on CO_2 emission reductions that can only be achieved when multiple facilities are operated as a coordinated system. CO_2 emission reductions would be achieved under these building blocks, for instance, though emission averaging, allowance trading, demand-side reductions, and re-dispatching generation from one facility to another. This approach would effectively regulate the entire category of existing electric generating units as a single source and base the "standards of performance" on the emission reductions that arguably might be achievable by the category as a whole, rather than basing standards on reductions demonstrated and achievable at individual sources. This "beyond the fence-line" approach to setting 111(d) standards is inconsistent with the Clean Air Act and is in direct violation of D.C. Circuit's holding in *ASARCO v. EPA*.

Further, even building block 1—imposing efficiency improvement requirements at coal- and natural gas-fired electric generating units—violates Clean Air Act requirements. The Clean Air Act requires that "standards of performance" be "achievable" on a continuous basis by the facilities regulated under section 111(d). Standards of performance for existing electric generators based on one-size-fits-all efficiency improvements cannot be "achievable." The results possible at individual sources differ wildly: some units may be able to achieve meaningful efficiency gains; others that are already highly efficient will not be able to further enhance their efficiency. Even at individual sources, measures to improve efficiency often degrade over time, so that the source may not be able to demonstrate the same emission levels continuously. Moreover, the emission impacts of efficiency improvements are exceedingly difficult to measure, and if a source is used to its full capacity, there will by definition be no absolute reduction in emissions. Thus, it is not feasible or consistent with the Clean Air Act to prescribe or enforce a "standard of performance" based on efficiency improvements for existing electric generating units.

Additionally, undertaking efficiency improvements at a power plant could potentially incite other regulatory requirements. In the past, EPA and environmental groups have filed lawsuits alleging that power plant efficiency improvements triggered additional obligations under the Act's onerous "New Source Review" program. The potential for additional liability will have a chilling effect, reducing the availability of compliance options.[8]

EPA's building block approach to establishing 111(d) guidelines is not only unlawful, it is inscrutable and onerous. EPA has an obligation to promulgate its guidelines through an open and transparent process. Unfortunately, EPA has failed to meet that obligation, as this complicated building block analysis results in complex calculations based on unfounded technical assumptions that are not adequately explained anywhere in the record. Although my staff and I are still in the process of unpacking this byzantine analysis, even a cursory review of the measures required to meet my state's emissions target is shocking. According to EPA's model, by 2030 Alabama would need to eliminate over 20% of its affordable and reliable coal-fired generation; increase generation from more intermittent renewable energy sources over five-fold; and expand nuclear generation by over 2.3 million megawatt-hours. These draconian requirements, built on such a flimsy legal foundation, are a grave abuse of regulatory authority.

The Proposed 111(d) Guidelines Unlawfully Disregard State Authority

The proposed 111(d) guidelines' substantive shortcomings are compounded by significant procedural failures that undermine the role of the States under the Clean Air Act. However, as noted in an analysis sent to EPA from a bipartisan group of 17 Attorneys General, including myself, the proposal would, in fact, upend the Act's deliberate division of regulatory authority between the States and the Federal Government.[9]

At its heart, the Act relies on the principle of "cooperative federalism" and establishes clearly defined roles for both EPA and the States that recognize that "air pollution control at its source is the primary responsibility of States and local governments."[10] Cooperative federalism embodies the values enshrined in the Tenth Amendment to the U.S. Constitution, which declares that those powers "not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It also reflects the inherent wisdom of entrusting authority to the level of government that is closest to regulated sources, is most familiar with local operating conditions, and is most sensitive to local costs and impacts to consumers and businesses. Yet EPA's proposed emission guidelines depart radically from this fundamental principle and, if finalized, would expand EPA's authority far beyond the bounds of the Clean Air Act.

Section 111(d) unambiguously grants States the sole authority to decide what standards will apply to existing sources and only provides a limited role for EPA – a role the Agency has

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[8] *See* Pennsylvania Department of Environmental Protection, *Recommended Framework for the Section 111(d) Emissions Guidelines Addressing Carbon Dioxide Standards for Existing Fossil Fuel-Fired Power Plants*, Apr. 10, 2014.

[9] *Perspective of 18 States on Greenhouse Gas Emission Performance Standards for Existing Sources under § 111(d) of the Clean Air Act*, Sep. 11, 2013.

[10] Clean Air Act § 101(a)(3).

plainly overstepped here. The Act merely authorizes EPA to "establish a *procedure*" for States to submit plans establishing standards of performance for existing sources.[11] Clearly, EPA's role in regulating existing sources is purely procedural: the Agency has no authority to establish the substantive requirements to be imposed. It is States that establish the applicable emission standards. EPA's implementing regulations allow the Agency to promulgate an "emission guideline" setting forth "criteria for judging the adequacy" of state plans, but these guidelines do not impose any substantive obligations on States or existing sources.[12]

Section 111(d) requires that the procedure for submitting these state plans must be similar to section 110's procedure for submitting state implementation plans, or "SIPs," implementing the National Ambient Air Quality Standards. It is important that Congress used this analogy, because it highlights the substantial discretion States can exercise in designing their plans for existing sources and EPA's limited ability to second-guess that discretion. Nearly 40 years ago, the U.S. Supreme Court held in *Union Electric Co. v. EPA* that the Agency *must* approve a SIP if the State has accounted for all of the relevant statutory requirements, even if EPA disagrees with the State's choice of emission limits.[13] More recently, the Fifth Circuit repeated that "the Act confines the EPA to the ministerial function of reviewing SIPs for consistency with the Act's requirements."[14]

In that vein, section 111(d) limits EPA to the "ministerial function" of approving state plans for existing sources as long as the State has considered the appropriate statutory requirements—in this case, the factors listed in section 111(a)(1) to set its "standards of performance." That provision states that standards of performance must be "achievable" for individual sources through the application of the "best system of emission reduction" that has been adequately demonstrated, and must account for costs, energy requirements, and other environmental impacts.[15] Under 111(d), it is the States—not EPA—that are authorized to establish emission standards; therefore it is the States—and not EPA—that weigh these statutory factors to determine what standard is appropriate for existing sources. As with the SIPs, EPA cannot use its emission guidelines to dictate the substance of the standards in state plans; it can only require that States adopt performance standards that are based on the application of the statutory factors.

EPA's proposed emission guidelines for greenhouse gases bear no resemblance to the CAA's legal framework or to any of EPA's previous 111(d) rulemakings. Instead of recognizing State authority and expertise, EPA has relegated States to implementing a federal mandate handed down from Washington, regardless of its costs, effectiveness, or achievability in light of local circumstances. Despite the Agency's numerous public claims to have incorporated "flexibility" into its unprecedented approach, EPA's proposal actually *denies* States the flexibility that section 111(d) mandates and that the States have historically exercised.

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[11] Clean Air Act § 111(d)(1) (emphasis added).

[12] 40 C.F.R. § 60.22(b)(5); 40 Fed. Reg. 53,341 (Nov. 17, 1975).

[13] 427 U.S. 246 (1976).

[14] *Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012).

[15] Clean Air Act §111(a)(1).

For example, the Clean Air Act explicitly allows States to consider "the remaining useful life" and "other factors" within the State's discretion in order to tailor standards to individual sources.[16] Likewise, States are free to determine that a specific source or group of sources should be subject to a less stringent standard or longer compliance schedule because of costs, physical limitations on installing control equipment, or any other factor making a less stringent standard more reasonable.[17]

But under the proposed emission guidelines, EPA is attempting to strip that discretion from the States. The Agency makes clear that under its approach, any State plan that does not match the target emission rate chosen by EPA will be rejected. And because the target rates rely on the exercise of all the State's tools, no discretion remains. Putting aside the lack of any language in the Clean Air Act authorizing EPA to establish mandatory emission guidelines, by proposing a single state-wide emission rate for existing sources, the Agency is eliminating States' inherent ability to adjust their plans to account for costs, achievability, aging sources, or any of the other myriad factors a state may rely on to perform its statutory role of establishing emission standards. Each State's proposed target subsumes all existing sources under one emission rate, preventing any meaningful sub-categorization or individualization of standards: a State cannot reduce the burden on one source (as section 111(d) allows it to do) without increasing the burden on others. Given that EPA's proposed targets appear to be unachievably high at the outset, depriving States of their ability to account for local impacts will only exacerbate the destructive consequences of EPA's guidelines for consumers and for the economy. EPA should abandon its attempt to usurp the role of the States.

The Proposed 111(d) Guidelines Would Displace Traditional State Control of Electricity Markets

The proposed 111(d) guidelines also undermine State roles in policy areas well outside the Clean Air Act. For nearly a century, States have enjoyed substantial flexibility to oversee the generation and distribution of electricity within their borders. This autonomy flows from the Federal Power Act's recognition that State and federal authorities occupy distinct and separate spheres with regard to the regulation of electricity. Specifically, the Federal Power Act broadly limits federal regulations "only to those matters which are not subject to regulation by the States." Thus, the Federal Government may exercise jurisdiction over the transmission of electricity in interstate commerce, as well as wholesale sales of electricity in interstate commerce.[18] As recently as last month, the U.S. Court of Appeals for the District of Columbia Circuit reaffirmed that, absent a "clear and specific grant of jurisdiction," the Federal Government cannot regulate areas of the electricity market left by the Federal Power Act to the States.[19]

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[16] Clean Air Act § 111(d)(1)(B).

[17] 40 C.F.R. § 60.24(f).

[18] 16 U.S.C. § 824(a) and (b). Consistent with the scope of this express statutory authorization, it has been recognized that the Federal Power Act permits regulation of unbundled sales of transmission in a state, even when such sales are at retail. *See New York v. FERC*, 535 U.S. 1 (2002).

[19] *Electric Power Supply Association v. FERC*, No. 11-1486 at 9 (D.C. Cir. May 23, 2014).

EPA claims its outside the fence-line approach offers States flexible options to implement the proposed 111(d) guidelines. What EPA calls "flexibilities"—changing dispatch rules, mandating efficiency, utilizing other generation sources—are, in fact, the very intrastate generation, transmission, and distribution matters explicitly reserved by the Federal Power Act for the States. By requiring States to meet standards based on these outside the fence-line actions, the 111(d) guidelines effectively upend the Federal Power Act's careful balance between State and federal authority, subverting traditional State control of retail electricity matters with a federal mandate to overhaul virtually every aspect of the intrastate electricity system. Thus, the proposed 111(d) guidelines effectively replace the Federal Power Act's co-regulatory model with federal regulations, in EPA's own words, "from plant to plug"[20]—granting the Federal Government powers denied it for nearly the entire history of the electricity grid. Since 1915, the Alabama Public Service Commission has guided intrastate electricity development so as to protect rate-payers and ensure reliability. Under EPA's proposed 111(d) guidelines, however, the Commission could continue these efforts only in so much as they comport with EPA's greenhouse gas agenda.

Congress surely did not intend to undermine the entire Federal Power Act structure by authorizing such expansive powers under the Clean Air Act—particularly under section 111(d), where, as explained above, State and federal powers are so carefully tailored. Rather, this provision can only be coherently read, both internally and externally, as contemplating measures solely inside the fence-line of a designated facility. Indeed, while the proposed 111(d) guidelines quote analysis questioning whether the division between inside and outside the fence-line measures "arguably becomes irrelevant—at least from a legal perspective[,]"[21] the Federal Power Act's express limitations make clear that this distinction is not without cause. By limiting 111(d) to only those measures inside the fence-line of a designated facility, Congress constrained EPA to the role of environmental protection and prevented the Agency from impinging on outside policy matters like traditional electricity regulation. Ultimately, limits on federal power in both the Federal Power Act and Clean Air Act section 111(d) are not legally irrelevant, but instead reflect Congressional assent to the Tenth Amendment's exhortation that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Conclusion

The State of Alabama vigorously opposes EPA's proposed mandate to effectively restructure the electric sector, as it would have disastrous consequences for electric reliability and the economy. Those consequences, moreover, would all stem from a patently unlawful application of the Clean Air Act. EPA's proposal seeks to expand the scope of section 111(d) in an unprecedented manner. It would do so at the expense of State authority that is expressly identified and preserved in the Clean Air Act and in the unquestionable jurisdiction of States over intrastate electricity markets. And it would do all of these things for no discernible benefit, given the increasing emissions of China and other developing economies. There is no rationale that can support such a regulation, and this Committee should ensure that it is halted.

[20] EPA Administrator Gina McCarthy, *Remarks Announcing Clean Power Plan, As Prepared*, June 2, 2014.

[21] Proposed 111(d) Guidelines at 312-313, FN 237.