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Committee on Environment
and Public Works Washington, D.C.

HEARING ON THE LEGAL IMPLICATIONS OF THE CLEAN POWER PLAN

Tuesday, May 5, 2015

United States Senate

Committee on Environment and Public Works

Subcommittee on Clean Air and Nuclear Safety

Washington, D.C.

The committee met, pursuant to notice, at 2:59 p.m. in room 406, Dirksen Senate Office Building, the Honorable Shelley Moore Capito [chairwoman of the committee] presiding.

Present: Senators Capito, Carper, Barrasso, Crapo, Inhofe, Cardin, Whitehouse, and Markey.

STATEMENT OF THE HONORABLE SHELLEY MOORE CAPITO, A UNITED STATES SENATOR FROM THE STATE OF WEST VIRGINIA

Senator Capito. I would like to thank everybody for being here today. This is our first Clean Air and Nuclear Safety Subcommittee hearing on the EPA's Clean Power Plan.

I would like to thank all the witnesses for appearing before us today and say a special thank you to my State's attorney general, Patrick Morrisey, who has been leading the national legal fight against this rule, which would have, we believe, a devastating impact in our home State of West Virginia. So thank you and thank you, Attorney General Morrisey, for traveling across the mountain. Appreciate it.

Back in February, in a full committee hearing in this room, I asked EPA Acting Assistant Administrator Janet McCabe to explain why the EPA did not hold a public hearing on its proposed Clean Power Plan in the State of West Virginia, one of those States very heavily impacted. Despite the large role that coal has in our economy, in our electricity generation, and despite the multiple invitations issued by me and many, many others, Federal and State legislators, to have them come to our State, she told me basically that public hearings were held where people were "comfortable." That response was unacceptable to me then and to the people of my State.

As Attorney General Morrisey will also point out in his

testimony, this rule will have a devastating impact on our State, other coal-producing States, electricity ratepayers across the Country, and the reliability of our grid.

We know from nearly five decades of experience that the Clean Air Act works best when implemented in the spirit of cooperative federalism. When the Federal Government works with the State as partners, we can and have improved our air quality, protected our economy and the electricity grid at the same time.

However, the Clean Power Plan does none of this, in my opinion. Instead, we have an EPA dictating to the States and effectively micro-managing interstate electricity policy decisions to a degree even the Agency admits is unprecedented. This raises a broad array of legal issues and is quite simply bad policy.

As a result, many States, including West Virginia and Oklahoma, whose attorneys general will be here today, have raised grave concerns about the legality of the rule and the implications for their citizens and ratepayers. In addition to significant constitutional and other legal questions, States have expressed concerns about the feasibility of EPA's proposed requirements and the likely impacts on electricity costs and reliability.

At risk is the ability the States have always had to make the decision about their electricity generation. West Virginia

has chosen to rely on coal to provide affordable and reliable electricity for our consumers and businesses. Other States have made different choices that best serve their citizens. But under the Clean Power Plan, each State's electricity plan will have to make EPA's criteria for reducing carbon dioxide emissions and be approved by the EPA.

Other EPA regulations like Utility MACT rule is already contributing to rising electricity rates and growing concerns about reliability. We have had testimony in this committee in other hearings. With the economy still far from fully recovered, the last thing job creators need is another expensive regulation likely to drive up our energy prices. And the last things our families and senior citizens need is to see their electric bills continue to go up.

Next week I will be introducing greenhouse gas legislation with my colleagues that will preserve the proper balance of State and Federal authority, help ensure reliable and affordable electricity, and protect jobs and our economy. I look forward to working with many colleagues on the committee to advance this bill.

I would also like to say anecdotally that throughout the State of West Virginia we have such uncertainty and such disappointment, I think, that our voices haven't been heard in our State with the EPA coming to the State to listen, and we

don’t feel that the calculation of the economic impact in our communities has been fully explored, nor even taken into consideration as we move forward with these rules.

With that, I would like to yield to the ranking member, Senator Carper, for an opening statement.

[The prepared statement of Senator Capito follows:]

STATEMENT OF THE HONORABLE TOM CARPER, A UNITED STATES SENATOR FROM THE STATE OF DELAWARE

Senator Carper. Thank you, Madam Chairman. Thanks so very much for holding our hearing today.

I want to welcome our witnesses. Nice to see you all today. And thanks for joining us for this important conversation.

Today's hearing will continue the discussion of the legal implications of EPA's proposed carbon regulations known as the Clean Power Plan. I was born, as some of you know, in Beckley, West Virginia, Raleigh County, West Virginia. One of the 15 founders of West Virginia, Raleigh County was my great-great-great-great-great-grandfather, Joseph Carper. And as a native of a county where coal mining was important, remains important, and now as a Senator, recovering governor, representing the lowest lying State in the Nation, I have a unique perspective on the balance that we must strike to make environmental regulation work; not just for my State, not just for your States, but for all of our States.

For those of us from States that are already being impacted by climate change, the EPA's Clean Power Plan to regulate our Nation's largest source of carbon pollution is not just important, but it is essential. Many States, such as Maryland, my home State of Delaware, have already taken action to reduce

lower power plant emissions. However, we need all States to do their fair share to protect the air that we breathe and stem the tide of climate change. In order for these standards to be effective, the EPA must ensure that all 50 States are capable of complying with these standards.

Today, the EPA has conducted an unprecedented level of State and local government outreach, not just to State and local governments, but to utilities, to businesses, in order to craft a comprehensive plan that works for each State. Under the Clean Power Plan, States can create their own plan for meeting their targets in a number of ways, including by increasing renewable energy, such as wind and solar, and increasing the efficiency of their electrical grid.

Unfortunately, since the day that EPA proposed the Clean Power Plan, it has been criticized as being outside the Agency's authority under the Clean Air Act and the U.S. Constitution. I believe these claims are without basis in fact.

In 2006, 10 States actually sued EPA to force it to regulate carbon pollution from power plants. Since then, the U.S. Supreme Court has ruled, not once, not twice, but three times in support of EPA's legal authority to control carbon pollution under existing law.

In 2007, the Supreme Court confirmed in Massachusetts v. EPA that, as passed by Congress, the Clean Air Act gave the EPA

the authority to regulate carbon pollution.

The legal precedent for the Clean Power Plan is, at least in my mind, clear; and attempts by Congress and other parties to challenge its legality are essentially an attempt to delay implementation of the Plan.

As we have seen in the past, litigation over carbon pollution regulations has the potential to be stuck in the courts for several years. The longer we wait to reduce our carbon output, the more severe and perhaps irreversible the effects of climate change will become; and, frankly, the more severe the changes that will have to be adopted to deal with this coming problem.

Meanwhile, public health and our economy will continue to be endangered by more frequent storms, intense droughts, and sea level rise.

Personally, I am committed to making sure Congress does all it can do to support the implementation of the Clean Power Plan, and I look forward to hearing from our witnesses today about our progress in doing so.

Let me just close with one thought. I was born in Beckley, West Virginia; family still in that area, all over the State, actually. I remember going as a little boy going to a little church, Grace Gospel Church just outside of Beckley in a town called Shady Springs, which you know, Madam Chairman. And at a

very early age I was told the Golden Rule: treat other people the way we want to be treated. I think the Golden Rule is probably the most important rule of all, and I think it should be apply here as well.

I want to make sure that we treat West Virginia fairly. I want to make sure that we treat Delaware fairly. I want to make sure that the States that are seeing sea level rise, which poses enormous threat to us -- the highest point in Delaware is a bridge; it is not a mountain. It is not a mountain, it is a bridge. We already see the effects of sea level rise in my State and we are concerned about it, and, frankly, so are a lot of other States. I want to make sure we are fair to us in the first State; I want to make sure that we are fair to the folks in the mountain State.

With that in mind, let's have a good hearing. Thank you.

[The prepared statement of Senator Carper follows:]

Senator Capito. Thank you.

I would like to tell the audience and the witnesses that we are scheduled to have a vote somewhere between 10:15 and 10:30, so my plan would be to try to get through opening statements and then adjourn quickly and let us go vote, make that one vote and come back to the question portion. I reserve the right to change my mind. I might say we will just rotate inside and out. That might be a better way to do it. But at that point I just wanted to put you on alert.

At this time, I would like to recognize the chairman of the full committee, Mr. Inhofe, from Oklahoma, for purposes of making some comments.

STATEMENT OF THE HONORABLE JAMES M. INHOFE, A UNITED STATES SENATOR FROM THE STATE OF OKLAHOMA

Senator Inhofe. I thought that was just my wife that made that statement, about changing her mind.

[Laughter.]

Senator Inhofe. I appreciate it very much, Senator Capito.

We have some people here today from Oklahoma; they came up here, the Rural Electric Coop. They are concerned. You know, in Oklahoma we get this question all the time. They say, now wait a minute. If we are reliant upon fossil fuel for 50 percent of the power to run this machine called America and they take that away, how do you run the machine called America? And I said, come up and find out, because I don't know either.

Three things real quickly. Cap-and-trade started, this was way back in 2002, and at that time they first said the world is coming to an end, all the global warming and all that stuff. Now, they tried to pass it legislatively from 2002 up until the current time, and they are unable to do that. So what we are looking at now is the Federal Government coming in under the Obama Administration, trying to do through regulation what they couldn't do through legislation.

Secondly, when Lisa Jackson was the Administrator of the EPA under Obama, I asked her the question, in this room, live on TV, I said, you know, if we were to pass, either through

regulation or through legislation, would this have the effect of reducing CO2 emissions worldwide? And she said, no, it wouldn't because this isn't where the problem is. So even if you are a believer in those things, it wouldn't work.

The last thing, I am not a lawyer, but I was on several radio shows this morning with Scott Pruitt, our attorney general, and I learned a lot, Scott, from you. But when the President's own law professor, Laurence Tribe, recently testified before the House, he said that the EPA was attempting an unconstitutional trifecta, usurping the prerogatives of the States, Congress, and the Federal Courts all at once. This was Barack Obama's Harvard Law professor.

With that, I look forward to the opening statements.

[The prepared statement of Senator Inhofe follows:]

Senator Capito. Thank you.

I would like to recognize, we will go, from my view, left to right. Our first witness is the Honorable Patrick Morrisey, who is the Attorney General of the State of West Virginia. Welcome.

STATEMENT OF THE HONORABLE PATRICK MORRISEY, ATTORNEY GENERAL, STATE OF WEST VIRGINIA

Mr. Morrisey. Well, thank you very much, Chairman Capito, Ranking Member Carper, and all of the distinguished members of this subcommittee. I very much appreciate the opportunity to be here today to testify against the President's so-called Clean Power Plan.

I do want to say at the outset I feel good about this hearing because West Virginia seems to have some support, both from the Chair and the ranking member side. So, Senator Carper, you are always welcome to come back to the great State of your birth. Thank you.

Now, I am here today to talk about the legal problems in the Obama Administration's so-called Clean Power Plan, commonly known as the 111(d) Rule. This Rule seeks to require States to reduce emissions from existing coal-fired power plants by, on average, a staggering 30 percent over a 15-year period.

Now, 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 feel the negative impact of high electricity prices, lost jobs, and a potential lack of reliability in the power grid.

Now, West Virginia is one of the poorest States in the Country, and yet we are the second largest producer of coal. It

is a very important resource for us. This proposal would result in even greater economic dislocation in Appalachia at a time when we can least afford it.

Now, it is my duty as the chief legal officer of the State of West Virginia to fight against this unlawful power grab, which is hurting our citizens. West Virginia has already led a bipartisan coalition of 15 States before the U.S. Court of Appeals in D.C., and if this Administration elects to finalize this rule, West Virginia will challenge it in court, and we expect that the coalition of 15 States that we are currently working with will grow.

Today I would like to talk about just a few of the legal defects of this proposal.

Now, as you all know, the EPA bases its claim for legal authority to adopt this Rule entirely on Section 11(d) of the Clean Air Act. However, a nearby provision, Section 112 of the Clean Air Act, EPA prohibits the Agency from invoking Section 111(d) for any pollutant "emitted from a source category which is regulated under Section 112." We think that language is very clear.

And as EPA has repeatedly explained time after time, this text literally means that if EPA has already regulated a source category under Section 112, EPA may not then come in and require States to regulate any pollutants emitted from the same source

category under 111(d).

Now, this is where the EPA runs into some trouble because, as we know, in 2012 they already finalized a major rule affecting coal-fired power plants under Section 112.

Now, the EPA's legal argument for avoiding this 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, they actually made a mistake. It accidentally included two provisions in the statute at large, two amendments to the same exact text. One was a substantive amendment that replaced a cross-reference and exchanged the exclusion to its present form. The second was a conforming amendment, a technical amendment, if you will, that was made 107 pages later.

But once you actually applied the substantive amendment to the text, it made the conforming change wholly unnecessary, and that is why the technical error was never included in the U.S. Code.

Now, what happened there is actually consistent with the way Congress has always operated. To the extent that there are clerical errors in a text, when Congress goes back through the revisers to decide what goes in the Code, they analyze that and they apply traditional rules of statutory construction. And, in

fact, we have never seen a situation before where a Federal agency has literally tried to push such sweeping proposal on the basis of a typo. It is unprecedented.

But perhaps the most radical feature of Section 111(d) Rule is its sheer breadth. Rather than follow the traditional pathway of opposing an emission rule on a particular source category to make that source category more environmentally friendly, the Section 111(d) Rule requires States to replace coal-fired energy with other sources of energy, and even reduce consumer demand for energy. That means that the Section 111(d) Rule seeks not only to regulate power plant emissions, it is a mandate for States to fundamentally reorder their electricity sectors and pick winners and losers between those sectors. This Rule would regulate from power to plug.

Now, as Allison Wood, a well-respected attorney, recently indicated before the House Energy and Commerce Committee, the EPA's claim here is analogous to the Agency asserting that its authority to regulate automobile emissions provides it with the power to order citizens to take a bus to work or buy electric cars on the theory that the measures would reduce car emissions.

Section 111(d) simply does not grant the EPA such broad sweeping power.

Thank you very much.

[The prepared statement of Mr. Morrisey follows:]

Senator Capito. Thank you.

Now, I have just been informed that the vote has been called, so hold on here, let me see what we prefer to do.

[Pause.]

Senator Capito. Okay, we are going to go vote, so we will stand and recess and return. We should be here shortly. Thank you for your patience.

[Recess.]

Senator Capito. That was pretty quick, I think, and we will resume the hearing.

I would like to welcome the Honorable Scott Pruitt, who is the Attorney General from the State of Oklahoma. Welcome.

STATEMENT OF THE HONORABLE SCOTT PRUITT, ATTORNEY GENERAL, STATE OF OKLAHOMA

Mr. Pruitt. Good morning, Chairwoman Capito, Ranking Member Carper, Chairman Inhofe, and members of the subcommittee. It is a joy to be with you this morning. It is good to be with my dear colleague and friend from West Virginia. I appreciate the invitation to discuss the legal ramifications of the EPA's proposed Clean Power Plan.

This is an issue of major importance to States across the Country like Oklahoma.

Quite simply, Madam Chairwoman, the EPA does not possess the authority under the Clean Air Act to do what it is seeking to accomplish in the so-called Clean Power Plan.

The EPA, under this Administration, treats States like a vessel of Federal will. The EPA believes States exist to implement the policies the Administration sees fit, regardless of whether laws like the Clean air Act permit such action.

In their wisdom, Congress gave States a primary role in emissions regulation, noting in the statement of policy of the Clean Air Act that "air pollution control at its source is the primary responsibility of States and local governments."

That statement respects the constitutional limits on Federal regulation of air quality and the reality that States are best suited to develop and implement such policies.

States are able to engage in a cost-benefit analysis to strike the necessary balance between protecting and preserving the environment, while still creating a regulatory framework that does not stifle job growth and economic activity. The States are partners with the Federal Government, as the chairwoman noted in her comments, with the Federal Government regulating such matters.

Therefore, the Clean Air Act hinges on cooperative federalism by giving States the primary responsibility and role for regulation while providing a federal backstop if the States should fail to act.

When the EPA respects the role of the States, the cooperative relationship works well. When the EPA exceeds the constraints placed upon the Agency by Congress, the relationship is thrown out of balance and the rule of law and State sovereignty is affected adversely.

The Clean Power Plan proposal throws the cooperative relationship between the States and the Federal Government off balance.

The EPA claims the proposal gives States flexibility to develop their own plans to meet the national goals of reducing carbon dioxide emissions. In reality, the Clean Power Plan is nothing more than an attempt by the EPA to expand Federal agency power at the expense of States energy power generation.

The Plan requires each State to submit a plan to cut carbon dioxide emissions by a nationwide average, the attorney general indicated earlier, by 30 percent by the year 2030.

In Oklahoma, 40.5 percent of our energy production comes from coal-fired generation and 38 percent comes from natural gas. Oklahoma, notably, ranks fourth in the Country in generating electricity through wind.

This begs the question: How does the EPA expect States like Oklahoma, and the top four in the Country in generating electricity through renewables, to meet the goals of the Clean Power Plan? There are only so many ways Oklahoma can achieve a 30 percent reduction demanded by the EPA. The Plan, therefore, must be viewed as an attempt by the EPA to force States into shuttering coal generation and eventually other sources of fossil fuel generated electricity.

Additionally, the proposed Rule, through its building block four, would require States to use demand-side energy efficiency measures that would reduce the amount of generation required. However, States are limited to emission standards that actually can be achieved by existing industrial sources through source-level, inside-the-fence 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 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 existing power plants themselves, inside the fence.

EPA's approach converts the obscure, little-used Section 111(d) into a general enabling act, giving EPA power over the entire grid from generation to light switch. By going beyond source-level, inside-the-fence-line measures, EPA's proposal would expand 111(d), and specifically the underlying statutory term "best system of emission reduction" into a whole new regime of regulation, one that regulates not only pollutant emission by sources, but the State's entire resource and energy grid.

To meet the objectives of the EPA's proposed rule, States would be forced to rework their energy generation market. To account for the loss of coal-fired generation, States will be forced into changing their energy mix in favor of renewables. States will be also forced to alter existing regulatory framework which would threaten energy affordability and reliability for consumers, industry, and energy producers.

Finally, there is a substantial concern that the EPA, before the Clean Power Plan is even finalized, will issue a uniform Federal implementation plan that will be forced upon those States that don't acquiesce to the unlawful Clean Power Plan.

Such a move by the EPA would be the proverbial gun to the head of the States, demanding the States to act as the EPA sees fit or face punitive financial situations for their States.

Madam Chairwoman, I can say with great confidence that if the EPA does in fact move forward with the uniform FIP, the EPA will be challenged in court by Oklahoma and other like-minded States.

I am not one who believes the EPA has no role. The Agency has played a very important role historically in addressing water and air quality issues that traverse State lines. However, with this rule, the Agency is now being used to pick winners and losers in the energy market by elevating renewable power at the expense of fossil fuel generation.

No State should comply with the Clean Power Plan if it means surrendering decision-making authority to the EPA, a power that has not been granted to it by this Congress. States should be left to make decisions on the fuel diversity that best meets their generation needs.

States like Oklahoma care about these issues because we breathe the air, drink the water, and want to preserve the land for future generations, and we have developed a robust regulatory regime that has successfully struck a balance between maintaining and preserving air and water quality, while still considering the economic impact of such regulations.

Madam Chairwoman, States like Oklahoma are simply opposed to the Clean Power Plan because it is outside the authority granted to the EPA by the law. We only ask that the state authority under the Clean Air Act be respected and preserved, and the decisions on power generation and how to achieve emissions reductions be made at the local level rather than at the Federal level.

I again appreciate the opportunity to speak with you today and discuss these important matters. Thank you.

[The prepared statement of Mr. Pruitt follows:]

Senator Capito. Thank you.

Our next witness is Mr. Roger Martella. He is a Partner at Sidley Austin and he was formally the General Counsel at the USEPA. Welcome.

STATEMENT OF ROGER MARTELLA, JR., PARTNER, SIDLEY AUSTIN, LLP

Mr. Martella. Thank you, Madam Chair, Ranking Member Carper, Chairman Inhofe. Thank you for the opportunity to appear before this committee once again. It is a great honor.

EPA has yet to finalize the Existing Source Performance Standard, but that hasn't stopped the lawyers from submitting thousands of pages of legal arguments to the Agency, both in passionate support of the rulemaking and in vehement opposition of it. I have added to that mix a little bit today with some written testimony that I shared with you, but what I thought I would do is digest those scores of arguments into what I think are going to be the two overarching issues that the court is going to consider when it ultimately reviews the final rule.

The first is picking up on a point from Senator Carper in his introduction, that if we look at how the courts have responded to climate change issues since 2007, since Massachusetts v. EPA, we have had a lot of direction in the last few years from the Supreme Court, the D.C. Circuit, the Ninth Circuit; and what the courts have told us is that they take climate change extremely seriously. Regardless of what I might think about it, what anyone here might think about it, the courts have expressed that they view climate change as a paramount policy concern and they have been highly deferential not only to EPA, but to the States, when they have engaged in

creative mechanisms to use old and outdated tools to address the modern challenge of climate change. So I agree with that proposition. The courts have been recognizing that and they won't look at this in a political vacuum or a policy vacuum; the courts will consider that when they review the rule and the goal of what the EPA is trying to do here.

Now, having said that, the other countervailing consideration from the other side will be the unprecedented nature of what EPA is trying to do with its existing authority under the Clean Air Act, and what I am talking about specifically, of the many legal issues, the one that I think is going to get the most attention from the court is something you have probably heard about several times by now, EPA's approach to regulate sources beyond the fence line of those sources, and it basically works like this: if my pen here is my coal-fired power plant, for the 45 years in the history of the Clean Air Act, the EPA has always set a standard for this coal-fired power plant based on the technology that could be achieved at this source, on what this coal-fired power plant could do.

But now EPA is saying in order to address climate change, that is going to limit us. We can only get so many emissions from the coal-fired power plant, so we have to look beyond the fence line; we have to look at natural gas facilities, we have to look at renewable energy, nuclear energy, the energy

efficiency of buildings like this. And that will enable us, for the first time, to achieve greater reductions in greenhouse gases than what we can get from this coal-fired power plant.

Now, back to my first point. The court may think that is a noble goal, but at the same time it is going to be thinking also about the legal precedent of this beyond-the-fence-line approach for the first time in 45 years of the Clean Air Act; and it has really three precedential ramifications. The first is the practical ramification. As the two generals have spoken today, is the enormous expansion of authority to make EPA not only a regulator of the environment, but really the most significant regulator of energy at the national level. In order to get those greenhouse reductions, it has to include in its regulatory authority nuclear facilities, renewable energy facilities, energy efficiency in countless buildings. So it is expanding its authority to the entire energy market in a way that really Congress should be speaking to and Congress should be authorizing, as opposed to looking at inherent authority.

The second ramification is a legal one, and the courts are going to be concerned about the legal precedent here, that this is a departure from the Clean Air Act's historic approach focusing on sources, on the case law that has been consistent in EPA's past application. Never before in 45 years has EPA gone beyond a source and gone beyond the fence line. In the case law

and the couple times it has tried to do so has shut that down.

And then the third concern for the courts is going to be the precedential nature of this on other sectors. If EPA is affirmed with this approach, this beyond-the-fence-line approach here, as it starts to regulate greenhouse gases from other sectors down the road, there is really going to be almost no limit to how it can look beyond an individual source to bring in other sources and, by the way, also hold other sources that are not currently subject to Clean Air Act regulation, like a nuclear facility, like this building and energy efficiency, bring them into EPA's regulatory regime.

While I have said the Supreme Court has endorsed EPA's climate change rules, there is an asterisk there. Less than a year ago, the Supreme Court did say, in partially affirming EPA, but partially reversing EPA, that EPA cannot look to the Clean Air Act to engage in sector-wide economic regulation; and that came out just four days after this Rule that the Supreme Court said we will not allow EPA to use the Clean Air Act to regulate lots of small sources and engage in sector-wide regulation of the economy. It is unfathomable how the justices that were concerned in that instance with EPA regulation wouldn't be concerned with this regulation.

The last thing I just wanted to mention briefly is the harm that we are going to see in the interim, during judicial review.

It takes about four years for courts to review cases like this if it goes to the Supreme Court, and, again, the generals have spoken to some of the harms going to the State. I do want to point out, any single rule, everybody is always going to allege harm. But this is fundamentally distinctive because of the ways I think Attorney General Pruitt and Morrisey have talked about, the ways States have to fundamentally restructure and reorganize their entire system of regulating energy, creating energy infrastructure, and also developing laws, enacting laws that promote renewable portfolio standards, energy efficiency programs, and so on. So this is fundamentally distinct in terms of the harm that is going to be realized in the short-term from other environmental rulemakings.

Thank you again for this opportunity.

[The prepared statement of Mr. Martella follows:]

Senator Capito. Thank you very much.

Our next witness is Ms. Kelly Speakes-Backman. She is a member of the Maryland Public Service Commission and she is also the Co-Chair of the Regional Greenhouse Gas Initiative. Welcome.

STATEMENT OF KELLY SPEAKES-BACKMAN, MARYLAND PUBLIC SERVICE COMMISSIONER, CHAIR, BOARD OF DIRECTORS, RGGI

Ms. Speakes-Backman. Thank you. Good morning. Thank you for inviting me speak today. It is truly an honor.

Since the issuance of the Clean Power Plan, proponents and opponents alike have been engaged in many discussions about what the next steps are. Reiterating a sentiment expressed by one of my dear fellow panelists, one of the most significant questions for States right now is how do I comply.

I respectfully submit to you, from the perspective of a State that already has boots on the ground on this issue, not only can States comply with the Clean Power Plan, but we can do so in a way that generates economic benefits and supports grid reliability.

Furthermore, I ask in return can we, as States, afford not to comply with the Plan?

Rather than looking at this in the contexts of a Federal implementation plan and what that would mean look like, I encourage the legal experts and legislators to view this situation from a State regulator's perspective.

As noted in the recently released Quadrennial Energy Review, severe weather is the leading cause of power disruptions, costing the U.S. economy from $18 billion to $33 billion a year. And as a rate utility regulator, I have the

statutory obligation to ensure reliable and affordable electricity. In a restructured market I need more tools at my disposal than what is available to me from within the fence line of a power plant in order to meet those requirements.

Modernizing the electricity grid is critical and it requires multi-State collaboration to implement cost-effective infrastructure improvements. The proposed Plan is an impetus for us States to access our grid and to face the reality of an already shifting fuel mix. Adding carbon pollution reductions is a metric for States to consider.

The RGGI States have continued for seven years now, and coming up on 28 auctions, to successfully implement the Nation's first fully operational carbon market. The RGGI program, initiated by a bipartisan group of governors and developed collaboratively by economic and environmental regulatory bodies, caps emissions by first determining a regional budget of carbon dioxide allowances and then distributing a majority of those allowances through the regional auctions at market prices, and finally capturing that value for reinvestment into strategic energy programs.

Although we have collaborated for the better part of a decade, the region remains surprisingly diverse. We comprise three different separate electricity regions, different political and economic landscapes, and dissimilar generation

profiles. Maryland, for example, is 44 percent coal.

It is a little bit surprising for those who look into the RGGI region and think of us all as northeastern States. But we have learned to balance that and we have learned to diversify our fuel mix. We have gone, from 2005 to 2013, from 56 to 44 percent coal, demonstrating that it is actually possible for a State with a significant coal generation profile to reduce our carbon dioxide emissions. The carbon intensity of the whole RGGI region's power sector has decreased at twice the rate of the rest of the Country.

So you will find more statistics in my written testimony that attest to the economic and environmental benefits for our region and for my State. The benefits informed our perspective of the RGGI States as we voiced support for the framework of the Clean Power Plan and recommended revisions to ensure that early action is recognized and that State targets are verifiable, transparent, equitable, and enforceable.

Regional mass-based programs like RGGI are advantageous in part because they closely align with the nature of the grid already and they allow for transparent and verifiable tracking and compliance systems. Recent analysis even from our own regional transmission organization, PJM, calculated higher compliance costs for States that go it alone, underscoring the cost-effectiveness of regional plans. States that work together

can implement a regional emission budget across a larger geographic boundary and they can find the least cost solutions across a larger selection of options.

To add some perspective on the timing, just a really quick one on that. The power sector has already responded effectively in the RGGI region to environmental regulations in less time than the EPA provides the rest of the Country as part of the Clean Power Plan. In fact, measures supported by RGGI investments have advanced reliability goals in the region in just seven years. In contrast, States have 15 years to meet the final compliance goals. We have reduced our carbon dioxide emissions from power plants by 40 percent, while our region's economy grew by 8 percent over that same time frame.

Finally, we have accumulated some pretty good lessons as a participant in RGGI that we hope will be instructive to other States. Number one, we formed intra- and interagency relationships through cooperative effort, which allows us to do a lot more for a lot less. The regional mechanism has stimulated quite some good stakeholder engagements as many of the compliance entities span multiple jurisdiction and appreciate the regional consistency. The third is that consistency doesn't mean that we have to have identical programs. Each State has its own programs based on its own policy and needs.

And, lastly, I think the most important lesson is that participation in a mass-based regional compliance effort will likely provide our States the most flexibility moving forward. Using this mass-based construct, the cap is the only enforceable mechanism, and that cap is enforced by our individual State regulators. So States retain jurisdiction over their individual energy efficiency and renewable energy programs; they are not subject to the Federal implementation. And we can continue to offer these initiatives to mitigate the cost of compliance for ratepayers.

So thank you. We look forward to working with you and answering questions.

[The prepared statement of Ms. Speakes-Backman follows:]

Senator Capito. Thank you.

And our final witness is Ms. Lisa Heinzerling, who is a Professor at Georgetown University. Welcome.

STATEMENT OF LISA HEINZERLING, PROFESSOR, GEORGETOWN UNIVERSITY

Ms. Heinzerling. Thank you and thank you for inviting me to appear before you today to discuss the legal implications of EPA's carbon dioxide rule.

Many dramatic legal arguments have been raised against EPA's proposal. Opponents of EPA's proposal have claimed that the proposal is unconstitutional under any one of a number of novel theories. They have also argued that the whole proposal, or significant aspects of it, are unlawful under the Clean Air Act. We have heard several such arguments already this morning.

In my view, the constitutional and statutory arguments that have been raised against EPA's proposed rule collapse upon close inspection.

For example, constitutional principles of federalism are not violated by EPA's proposal. Under EPA's proposal, States have a choice. They may devise their own plans to meet the State-specific targets EPA will set or they may let EPA devise a plan for them. This is the very same choice States have had for 45 years under the Air Quality Standards Program of the Clean Air Act. It is not an unconstitutional choice.

Nor does EPA's proposal violate the doctrine forbidding delegations of legislative authority to the Executive. EPA is interpreting statutory provisions of less than ideal clarity, using its best judgment to offer an interpretation that gives

some force to the provisions enacted by Congress. The opponents of EPA's rule argue that if EPA interprets the statute the right way, the way they favor, it raises no non-delegation issue. But, they say, if EPA interprets the statute the wrong way, the way they don't like, this violates the non-delegation doctrine.

In 2001, in a case called Whitman v. American Trucking Association, Justice Scalia, writing for a unanimous Supreme Court, rejected this exact theory, the theory that an agency can cure or create a non-delegation problem by adopting a particular interpretation of a statute.

If the Clean Air Act presents EPA with an unconstitutional choice between apparently conflicting provisions, which it does not, the remedy would be to strike those provisions down, not to require the adoption of the interpretation that opponents of this rule prefer.

EPA's proposal also does not violate the Clean Air Act. Much has been made of the two different 1990 amendments to Section 111(d), both passed by Congress and both signed into law by President George H.W. Bush. EPA has long offered an interpretation of Section 111(d) that aims to take something from each of these amendments.

Under EPA's construction of the amendments, EPA may not, under Section 111, regulate the same hazardous air pollutants from the same sources under both that section, Section 111, and

Section 112. This interpretation makes perfect sense and respects the larger structure of the Clean Air Act, which pervasively leaves room for regulation in the event new threats from air pollution come to the fore.

EPA's proposed consideration of a wide range of emissions reduction measures and setting State targets, including renewable portfolio standards and demand-side energy efficiency, is also consistent with the broad authority given to it by Section 111(d). In contrast to what we have heard this morning already, this kind of approach is not unprecedented. EPA has long, for conventional air pollutants, allowed compliance via renewable energy standards and energy efficiency programs.

And here it is worth thinking about what the claim is. The claim is that, in essence, there is too much flexibility afforded by the Plan. It is worth noting here the Office of Management and Budget of the White House, in 2003, noted that the Clean Air Act had the largest quantified health benefits of any Federal regulatory program. The latest EPA study of costs and benefits of the Clean Air Act found in a central estimate that the Clean Air produces $30 worth of benefits for every $ worth of costs. The ratio is 30 to 1 under a central estimate. Under a high estimate of benefits, it is 90 to 1.

This doesn't happen by accident. This kind of program, this kind of statutory implementation happens as a result of

firm, but sensible interpretation of broad statutory provisions. It is mystifying to me that opponents of the Clean Power Plan are criticizing EPA for exhibiting the same good sense and flexibility that has served the Clean Air Act and this Country so well for 45 years.

[The prepared statement of Ms. Heinzerling follows:]

Senator Capito. Thank you.

Appreciate everybody's testimony, and I will begin with questions.

Attorney General Morrisey, let me ask you a question. We obviously have a difference of opinion here. The Supreme Court recently said that it is skeptical "when an agency claims to discover in a long extant statute an unheralded power to regulate a significant portion of the American economy."

I guess my question is how long has 111(d) existed and has it ever been used outside the fence line to overhaul an entire sector?

Mr. Morrisey. Ms. Chairman, this actually is literally an unprecedented effort on the part of the EPA to regulate, and we have looked very closely and we have never seen a proposal quite like this both in terms of its scope and its willingness to regulate outside the fence, but also the legal theory that is being advanced here by the Administration. If you go back to 1970 and then you go up all the way to modern day, to today, you are looking at nothing that has ever occurred quite like this. Now, there have been some select efforts to rely on 111(d) in very limited circumstances, but nothing ever approaching this magnitude.

And the other critical point is that from 1990 no Federal agency, no one has ever questioned that if you were to regulate

under 112, that the literal text would ultimately preclude the State-by-State emission targets that are being set under 111(d). So we think that this is really an unprecedented approach.

And we would also add that what the Administration is trying to do here is rely on a typo, a conforming error, if you will, in order to breathe life into one of the most sweeping regulations in our Country's history. If you look to advance something that has this great an impact on the American economy, at a minimum, there should be clear authority and not a reliance on this typo.

Senator Capito. Mr. Martella, you mentioned in your statement, I believe, that EPA had never gone that far in terms of this fence line issue. Could you respond to that question as well?

Mr. Martella. Thank you, Madam Chair. That is correct. There have been a number of occasions where EPA, in the past, has looked at something called a bubble concept, and that sounds like exactly what it is, that you can sometimes bring in the notion that something is more than just a stack, and you bring in other sources of that bubble. There are two cases that address that, and both rejected the bubble concept, and those weren't even in the Section 111(d) context. So the little bit we have seen of this in the courts has been negative and pessimistic on that.

In terms of your question on Section 111(d), EPA has engaged in five Section 111(d) rulemakings since 1990. In each single case it has always stayed strictly within the fence line, the analogous fence line, it has never gone outside of it. So there is a lack of precedent from the Agency and a consistent source of case law that would suggest that everything has to be within the fence, and, frankly, that is the clear reading of the statute as well.

Senator Capito. Thank you.

Attorney General Pruitt, the proposed rule is clearly on shaky grounds, and I believe Mr. Martella said four years before we would actually maybe get a firm legal interpretation of it being finalized. So what happens if States start implementing the final rule, only to have the courts strike the rule down? What do they do? Are people going to start signing contracts and breaking ground? What kind of scenario does that present in your mind?

Mr. Pruitt. Madam Chairwoman, I think it is a great question, because what has not been discussed this morning is the short time line that the EPA is likely going to propose when they finalize the rule next month. It is our understanding that it is going to be a one year compliance period for States to submit a State implementation plan, and by any estimation that is a very ambitious time line. As such, I think what is

happening across the Country is respective Departments of Environmental Quality at the State level feel as though they are being pressured, intimidated to comply with a rule that perhaps is not consistent with the statutory construction, which is the purpose of our discussion here today. I am very concerned about the time line.

And I would add, to Roger's comment earlier, you know, we have to keep in mind, in fact, one of my fellow panelists is a public utility corporation; she regulates this at the State level. The regulation of energy generation is a police power of the States that has historically been recognized as such through court cases, and for there to be any intervention into that police power, there is a rule of statutory construction that Congress speak explicitly, clearly, unambiguously to the authority of the Agency to invade that police power that has been recognized under the law. And I think by virtue of the discussion here today even among the panelists there is disagreement about whether this statute clearly provides that type of authority.

Senator Capito. Another quick question. And I think your governor has said that she will not be doing a State implementation plan, is that correct?

Mr. Pruitt. There was an executive order recently issued by the governor indicating that the DEQ is not empowered to

submit an invalid plan to the EPA.

Senator Capito. And I believe in West Virginia, Mr. Attorney General, that the State legislature weighed in on this. Could you talk about that just for a minute?

Mr. Morrisey. Yes. Just recently, a couple months ago, the State legislature changed the law so that for the State of West Virginia to submit a State implementation plan the legislation would have to ratify it. That is different from the previous law, which would leave all that authority to the governor.

Senator Capito. All right. Thank you.

Senator Carper?

Senator Carper. Thank you, Madam Chair.

Senator Inhofe may recall me telling this story before, but it bears, I think, repeating. Ten or so years ago I was involved in an effort with Senator George Voinovich and others to try to find agreement on multi-pollutant legislations dealing with sulfur dioxide and mercury and CO2, and as part of that process I remember meeting with a bunch of utility CEOs from all the Country and we spent about an hour or so together talking about how we might proceed. And at the end of the conversation this one old fellow who was with a utility from someplace down South, I don't remember just where, but he said to me these words, he said, look, Senator, here is what you need to do. You

need to tell us what the rules are going to be. You need to give us some flexibility and a reasonable amount of time and get out of the way. That is what he said. Tell us what the rules are going to be, give us some flexibility, a reasonable amount of time, and get out of the way.

And I would just say, if I could, for Ms. Heinzerling, think about that conversation and what that fellow said to me that day. How does it relate to what we are looking at here that the EPA is trying to accomplish?

Ms. Heinzerling. I think it fits it exactly, Senator; that is, this Plan sets out what States are to do, gives them targets to meet, gives them the flexibility to choose the way they want to meet those targets. In this respect, it is strange and surprising to me that States are already saying that they would prefer to have the Federal Government set their plans. But it gives them that kind of flexibility to set their own plans to meet the targets, and then it gives them the times to do it. The time lines in this rule are notably long. We are looking out to 2030 for a final compliance with the structure of this Plan. So I think your story fits this rule perfectly.

Senator Carper. Good.

Ms. Backman, I think you were saying that Maryland has had a fairly heavy reliance on coal in the generation of electricity, and I think what you said was that you reduced

over, I don't know, over the last seven or eight years, your two emissions by roughly 40 percent?

Ms. Speakes-Backman. Yes, sir.

Senator Carper. And you are part of this regional coalition with Delaware and a bunch of other States. In my last job that I had as governor, I loved the idea of having flexibility. If the Feds wanted me to do something, I would say give me a menu of options that I would have. I understand there are, like, at least four options here that States can use, and this term of beyond-the-fence-line is an option that is sort of unprecedented. As I recall working on multi-pollutant legislation a number of years ago, we were anxious to see what kind of options that were outside the fence line.

How could we help it with respect to CO2? How could we help by going to no-till? How could we help with respect to encouraging folks to plan switch class and other crops like that, so the idea of going out of the fence line, it just seems to me, as my dad would say, that just seems like common sense.

Ms. Backman, talk to us about this flexibility, the idea of actually more flexibility not just by going out of the fence line, but actually by doing these regional solutions. How is having a regional solution helped Maryland? And we have Oklahoma, a producer of wind. God bless you. We are doing that. But if they were in a regional compact of some kind,

could they actually get some help, as I am sure Maryland and Delaware have?

Ms. Speakes-Backman. Absolutely. And thank you for the question. I will step back just a second and say that EPA has made unprecedented outreach to the utility regulators of the Nation through the National Association of Regulatory Utility Commissioners, and three things that we asked for across the board and three things we could all agree on, even if the NARU commissioners don't agree on everything. My good friend, Chairman McKinney, at the time, these were the things that we agreed on: that we wanted flexibility, that we wanted affordability, and that we wanted reliability. And I think the EPA's Clean Power Plan gives us all of those.

Now, we have chosen to use all four of these building blocks in reducing carbon emissions from our RGGI region, but it is not necessarily necessary to do all four of those building blocks. And you are not limited to those four building blocks. The EPA has clearly set out a plan in setting up the goal, very separately from what the compliance plans will be, that you may use outside-the-fence-line solutions, and that includes energy efficiency and demand response that has actually helped us with reliability. It includes changing fuel sources from 56 percent coal to a much wider mix of fuel availability for our generation, which actually helps with reliability. So we have

been able to meet multiple policy goals for our States that include reliability, affordability, and reducing carbon by reaching outside the fence.

Now, that said, we still only regulate State-by-State we regulate in our RGGI construct at the power plant line. We are not going in and regulating through RGGI the energy efficiency programs of each State. Each State regulates their own. I, as a utility regulator, actually help to make those decisions.

Senator Carper. Thank you.

Ms. Speakes-Backman. Thank you.

Senator Carper. My time has expired.

Madam Chair, we have a simultaneous meeting going on in Finance on tax reform. I need to slip over there for a while. I will be back, though. This is a great hearing. Thank you.

Senator Capito. Thank you.

Senator Carper. Thank you all.

Senator Capito. Senator Inhofe.

Senator Inhofe. Thank you, Madam Chair.

I listened to different people here and I get different ideas, and since I am a rare thing, I am not an attorney -- most of the members of the Senate are -- it seems to me that the practical application of EPA's proposal would require the States to pass new laws to revise existing regulatory systems, and I think of this and I think what is wrong with this picture.

Should it be the role of an administrative agency to be forcing States to take this kind of action?

And then, secondly, General Pruitt, is this consistent with the Clean Air Act, or how does that factor into it?

Mr. Pruitt. Well, thank you, Mr. Chairman. I think, as we have discussed today, there is a question that keeps coming up in my mind. If this is such a flexible arrangement that is offered the States, if this is really within the bounds of cooperative federalism, why is it that the EPA presently is in the process of developing a uniform Federal implementation plan that they are going to put on the shelf to then say to the States unless you act a particular way, unless you act a particular way, unless you act consistent with the Rule, this is what you are going to get.

That, to me, does not sound like cooperation. That does not sound like partnership. That sounds like the proverbial gun to the head of making States act a particular way, and it is consistent with the comments, Mr. Chairman, that I offered in my opening statement.

This EPA looks at State implementation plans and says you can introduce and adopt a State plan so long as it embodies Federal will, so long as it embodies that which we want to happen on a State-by-State basis. And when States disagree, that is when these Federal implementation plans are forced upon

the States. I don't think there is much discretion to the State of Oklahoma. As I indicated in my comments, we are already in the top four States in the Country in generating electricity through renewables and wind. But yet this EPA is expecting the State of Oklahoma to reduce their CO2 footprint by over 30 percent. The question is how, but for shuttering coal generation in the State of Oklahoma. That is a concern practically and it is a concern legally.

Senator Inhofe. Well, looking at it as a non-attorney, you look at the Tenth Amendment, which refers to reserving power to the States. Do you think this is consistent with the Tenth Amendment?

Mr. Pruitt. Well, I think this case, and I would add this to the comments earlier from the fellow panelists. I don't think it is terribly novel for us to have a dispute or a case about statutory construction. I indicated that it is a traditional police power to regulate power generation. And for the Federal Government to intervene or to invade that, the statute has to be explicit and clear and unambiguous; and I think by virtue of our discussion today it is demonstrative that that is not the case.

So, Senator, I think it is less about the Tenth Amendment, less about States' rights under the Tenth Amendment, and more about statutory construction and whether the EPA possesses the

authority that you gave it to regulate in this area.

Senator Inhofe. Mr. Martella, do you have any comments about that?

Mr. Martella. I would agree with that. If I could mention this theme of flexibility that has come up during our discussion, I don't think there is anybody who would dispute flexibility is a good thing. We all want flexibility. But I think there is a little bit of an apples to oranges situation going on. I apologize, but I have to go back to my pen.

So if this is my coal-fired power plant, and if you are staying inside the fence line, EPA may say for coal-fired power plant you are currently emitting 2100 tons of CO2 per megawatt hour. We are going to reduce you to 2,000 tons. That is inside the fence line. What EPA is saying, though, is we are going to look at nuclear and renewable and energy efficiency and these other things, and because we are looking outside the fence line, we are going to bring you down to 1200 pounds of CO2 per megawatt hour, to the point this coal-fired power plant has to shut down.

What we are saying or what I am saying is EPA has to set the standard. Set the standard inside the fence line. If there is flexibility on how you meet that standard, that is fine, but you can't look outside the fence in setting the standard. So we don't dispute, I don't dispute that flexibility is a good thing,

but the distinction is the flexibility doesn't come in in setting the standard, it comes in on the compliance side.

Senator Inhofe. Okay, that is a good comment.

General Morrisey, we will probably have another round of questions and I might get to that building block 3 question that I want to pose to you, but I know people in West Virginia and I know what is happening there right now. Even though this Rule has not gone into effect, what has happened to some of your coal plants, some of your utilities in your State already as a result of the threat?

Mr. Morrisey. Well, Mr. Chairman, it is clear in West Virginia that the harm is already occurring. In fact, as we were preparing for the lawsuit that we filed last year against the EPA, one of the principal arguments that we made is that, unlike many of the other traditional rules that are subject to notice and comment, this proposed rule is actually causing real tangible harm in the States and also it is affecting power plant operations currently. If you go and look at our litigation, we have at least eight declarations from very experienced environmental regulators who talk about the cost of trying to comply with this rule.

The other point that I would raise is that the time frames associated with this proposal are hyperaggressive. You had a proposed rule that was issued June of 2014, a final rule

scheduled to be issued sometime this summer, and then while the regulators are suggesting that they may need many years in order to try to even come up with a plan, they have been given one year. That is a very real problem.

But there are real costs being expended by the States and also I believe that this Administration is not particularly interested in whether the rule is finalized so long as the marketplace actually moves away for them. If coal-fired power plants have to be retired much quicker than baseline, then they are going to accomplish their goal even if this regulation never is upheld in the courts.

Senator Inhofe. Thank you, General Morrisey. I do want to follow up on this. I will wait until the second round.

Senator Capito. Senator Markey.

Senator Markey. Thank you, Madam Chair. Madam Chair, I would ask that two articles by Jody Friedman and Richard Lazarus be included in the record. They provide a very clear and thorough explanation of the constitutionality of the EPA's Clean Power Rule.

Senator Capito. Without objection.

Senator Markey. Thank you so much.

[The referenced documents follow:]

Senator Markey. We are in a big moment. Pope Francis is about to issue an encyclical on climate change. The College of Cardinals did a very dangerous things, they named a Jesuit who taught chemistry as the Pope. So Pope Francis believes, actually, that science is the answer to our prayers and we have to look at the smartest ways that we can deal with this to reduce the danger that growing greenhouse gases is going to pose to God's creation, the planet. And I think it is important for us, then, to find ways to accomplish that goal.

So back in 1990 we worked on the Clean Air Act. I was on the committee to draft it and put that law on the books, and I added, actually, an energy efficiency section to the Clean Air Act to give more flexibility to the administrator at the EPA, George Bush's EPA administrator. And there were ways that utilities could comply with their acid rain requirements by undertaking activities beyond what was occurring at their power plants, and I can assure you that my intent and that of my congressional colleagues was to encourage utilities to look at the energy system in total to find ways of reducing sulfur pollution in the air.

So Ms. Heinzerling, one objection that has been raised about the Clean Power Plan is that utilities might have to go beyond the fence of their power plants to achieve their emission targets. In addition to the acid rain program that I just

mentioned, are there other examples of using energy efficiency renewables or other beyond-the-fence activities under the Clean Air Act?

Ms. Heinzerling. Yes. Very early on, something like 35 years ago, EPA issued a rule that included washing of coal before it was burned as a compliance mechanism for dealing with the Clean Air Act. It was something that wasn't within the source, it wasn't a typical end-of-the-pipe kind of measure. In regulating interstate pollution or interstate conventional air pollutant under the Clean Air Act, EPA has for many years included renewables in energy efficiency as potential compliance mechanisms.

If I may just extend this example just a bit further afield, but I think it illustrates that you are talking about, if you look at the program under the Clean Air Act, under Section 202 to regulate mobile sources, you might, if you looked at that quickly, you might think that is the classic end-of-the-pipe measure. And yet if you look at EPA's most recent rules on greenhouse gas emissions for mobile sources, EPA has, in the terms used today, gone beyond the fence line. They included flexibilities in their rules that made the rule, I think, a marvel of modern regulation. They included consideration of the footprint of the vehicle and the air conditioning refrigerants used in the vehicle, and flex fuel vehicles. So if you look not

just at the pollution regulation that we have been talking about, of stationary sources, but beyond that under the Clean Air Act, it has, I think, become standard to look for flexibilities.

Senator Markey. I agree with you, and that was the intent of the 1990 Act, it was to give more flexibility, it was to use a different model; and I think that is what this proposed Rule is going to do as well, it is going to say to each State, move in a way that accomplishes the goal, but we are going to be very flexible.

Let me ask you this question. The constitutionality of EPA's approach to setting public health standards has been challenged before. The Supreme Court upheld EPA's approach in a 9-to-nothing opinion in Whitman v. American Trucking in 2001. In 2011, the Supreme Court ruled that EPA has the authority to set standards for carbon pollution under Section 111(d) in an 8-to-nothing opinion in American Electric Power v. Connecticut. And during the oral arguments in that case the counsel argued, on behalf of AEP, said to the Court we believe that the EPA can consider, as it is undertaking to do, regulating existing, non-modified sources under Section 111 of the Clean Air Act.

Ms. Heinzerling, is there really any constitutional question about EPA's approach or their legal authority to regulate carbon pollution under Section 111 of the Clean Air

Act?

Ms. Heinzerling. No, I don't think so. I think the constitutional issues have been a distraction. I think they have been used to make people worry that maybe there is lurking a real constitutional issue, so we better interpret this statute narrowly. But the constitutional arguments, I think, are flimsy. And the statutory authority under the Clean Air Act, as I have said, I think is clear.

Senator Markey. Beautiful. Thank you.

Thank you, Madam Chair.

Senator Capito. Thank you.

Senator Barrasso?

Senator Barrasso. Thank you very much, Madam Chairman.

Attorney General Pruitt, good to see you again. Oklahoma is a fossil fuel producing energy State. Attorney General Morrisey, the State of West Virginia, like the State of Wyoming, is a coal State. All of our States are particularly hit by the slew of proposed EPA rules aimed squarely at the fossil fuel industry and the folks that work in that industry.

I would like to highlight a letter from the governor of my home State of Wyoming, Governor Matt Mead, to EPA Administrator Gina McCarthy on April 28th of this year, and I ask that the governor's letter be entered into the record, Madam Chairman.

Senator Capito. Without objection.

Senator Barrasso. Thank you.

[The referenced documents follow:]

Senator Barrasso. In this letter, the governor highlights a recent study by the Center for Energy Economics and Public Policy at the University of Wyoming entitled, The Impact of the Coal Economy on Wyoming. It was published in February of this year.

I would ask also that this study be entered into the record.

Senator Capito. Without objection.

Senator Barrasso. Thank you.

[The referenced documents follow:]

Senator Barrasso. The governor states about the study that the study determined the single largest threat to Wyoming's coal industry is EPA's Clean Power Rule. In fact, the study says that 111(d) climate regulation has the potential to drastically decrease Wyoming coal production. Production coal output under the most favorable production circumstances decreases by 32 percent of the 2012 production by the year 2025.

The study goes on to say even the best case impact modeling of the 111(d) scenario suggests a loss of over 7,000 jobs across the State by 2025 relative to the employment in 2012. It also says overall proposed carbon regulations result in a predicted decline in the State's combined coal and natural gas revenues of between 36 percent and 46 percent by 2030.

So our State is finding that this Rule will cost thousands of good paying jobs, will drastically slash State revenue that pays for college scholarships, schools, medical emergency services, road safety programs, environmental protection programs, water quality services, veteran services, other vital services. Wyoming children, seniors, veterans, fish and wildlife, they don't deserve, I believe, this dramatic cut in revenue by the EPA.

So I find this is recklessly irresponsible, where the costs are so clear and devastating, and the benefits are theoretical or unknown. So my question to the two of you is this: Are

these statistics and findings similar to what you are seeing and you are concerned about in your States? And how will essential services, State services for children, seniors, as well as the environment, be impacted both in Oklahoma, as well as in West Virginia?

Mr. Morrisey. Sure. So I think you raise a number of very important issues. We have obviously received a great deal of feedback from coal operators, from power plants, from coal miners in the State of West Virginia about the devastating impact of these rules. But there are a couple other implications as well.

For instance, West Virginia, as its tax base, relies very heavily on coal severance revenues. If you were to look at a chart and examine some of the revenues that come into each of the counties from 2011 to now, you will start to see a very rapid decline. Just recently we have seen news publications about a number of people that were laid off in the counties because the coal severance tax revenue had declined.

The regulations here have far-reaching implications well beyond coal operators. The fact is for every job that you have related to coal directly in West Virginia, there are probably seven jobs that tie in indirectly. It has a fundamental impact on our economy, and that is just one of the many reasons why our office has been focused so much on this, because it would be an

absolute travesty to finalize a rule that ultimately has a real likelihood of being struck down in the courts.

Senator Barrasso. So the regulations have a direct impact on the people and the quality of life of the people in your State.

Mr. Morrisey. Without a doubt. I mean, as you are looking at these issues, there are always a wide variety of reasons that give rise to a particular decision by a power plant operator or a mine operators to change employment status, but regulatory burdens is always very high on that list.

Mr. Pruitt. And, Senator, if I could add to General Morrisey's comments. Though we do not have a robust coal economy, we do actually have coal in the State of Oklahoma, we are vertical in our energy diversity, I think what is lost in the debate at times is the impact on consumers, those that will be consuming electricity in the future. In the State of Oklahoma, between coal and natural gas, 78 percent of our electricity is generated. As I indicated in my opening comment, 15 percent of our electricity is generated through the wind.

The choices available to the State of Oklahoma to comply with this mandate from the EPA of reducing CO2 by over 30 percent, it puts us in the position of having to make decisions about the shuttering of coal generation, which, as I indicated, makes up over 40 percent of our electricity generation. That is

going to increase costs substantially to consumers; this one rule.

To give you an example, in the Clean Air Act there is something called the regional haze statute, as you know, section of the Clean Air Act. That one rule alone, between PSO, Public Service Company of Oklahoma, and OG&E in the State of Oklahoma have seen 15 to 20 percent increases in their generation of electricity with just one rule. When we combine all these others, it is going to be, obviously, substantially more than that in the future for consumers in the State of Oklahoma.

Senator Barrasso. So these regulations would directly hurt, hurt the people of Oklahoma.

Mr. Morrisey. Some of the folks that can least afford it.

Senator Barrasso. Thank you.

Thank you, Madam Chairman.

Senator Capito. Thank you.

Senator Whitehouse.

Senator Whitehouse. Thank you very much, Madam Chairman. This is an interesting hearing because the questioners on the Republican side and the attorneys general who are present are all from States that have the characteristic that Attorney General Pruitt just described, i.e., they have a robust coal economy. And clearly we have a practical problem in that the burning of coal for electric generation creates some very, very

dangerous consequences; but they are not fairly distributed. So where there is a robust coal economy, this creates one kind of problem.

In Rhode Island, where our oceans are up 10 inches against the shore where our fishermen are seeing fisheries disappear, where houses that have been there for generations are falling into the ocean, we have a very different set of problems. And I think it is important, if we are going to address this, that we, on the one hand, recognize that there may very well be economic effects within coal economies from trying to unburden ourselves of the environmental consequences of coal burning; and we are, I think, very willing to work with you to mitigate those consequences.

But we can't allow those consequences to take us to a point where we deny that the problem exists. That is just irresponsible and factually wrong, and ultimately, I think, potentially really quite disgraceful to the institutions that we all serve.

So let me ask you first, Attorney General Pruitt, you said that one of the problems with the EPA regulation was that this issue should be left to the local level. Please tell me what Oklahoma is doing at the local level to address carbon pollution and climate change.

Mr. Pruitt. Senator, if I could, in response to your

question, also say that I did not make a reference to the coal economy in the State of Oklahoma. We do not have a robust coal economy. In fact, our percentage of generation of electricity attributable to coal is 40 percent, which is less, I think, than perhaps Maryland, as it was referenced earlier.

Senator Whitehouse. Well, I wrote it down as you said it, and it was robust coal economy. But if that wasn't correct, then I apologize and I stand corrected. The record will be what the record is.

Mr. Pruitt. But I think what Oklahoma has done is engage in a very much a balancing effort between diverse fuel sources, from renewables at 15 percent of generated electricity to 40 percent in coal.

Senator Whitehouse. Why? How does climate change roll into that calculation?

Mr. Pruitt. Well, our focus through public utility corporation decision-making, as well as my focus as attorney general, is not to engage in policy debate about whether climate action is occurring or not.

Senator Whitehouse. Why not?

Mr. Pruitt. It is to look at the statute to determine whether the EPA is engaging in a process that is consistent with the authority that you have given the EPA.

Senator Whitehouse. But why would you be willing to look

at the consequences of the regulation on, for instance, the coal economy, but not be willing to look at the consequences of this regulation on environmental protection? Why is that the debate that you think you need to stay out of when you are willing actively to get into the debate on the other side? That doesn't seem balanced.

Mr. Pruitt. Again, Senator, I think my comments were referring to the decision-making, the discretion that the State is engaged in as far as balancing generation of electricity between coal and fossil fuels.

I would also say to you it is Congress that should be jealous about protecting its role and what it has told agencies what they can and cannot do. It is Congress that has set up the framework that we are talking about this morning between 111 and Section 112.

Senator Whitehouse. Well, we passed the statute that it is following, and I am comfortable that they are following it. So I am not actually jealous at all; I think they are doing exactly what Congress intended. So I am very comfortable with that.

What I am concerned about, we heard from Senator Barrasso here, from Wyoming, a very important coal State, that the benefits of this rule are theoretical or unknown. They are not theoretical or unknown. They are very clear. They are very specific. And there are people who are very knowledgeable about

it.

If I could use the remainder of my time to quote one very well known scientist on this who says, "We know precisely how fast CO2 is going up in the atmosphere. We have made a daily measurement of it since 1957. We have ice core data before that. We know without any question that it has increased by almost 40 percent since the industrial revolution, and that that increase is due to human activity, primarily fossil fuel burning and, secondarily, bad use in agriculture. There is no debate about that."

He continues, "There are lots of scientific uncertainties, but the fact that the planet's warming and the fact that CO2 is a greenhouse gas, and the fact that is increasing in the atmosphere and that it increased in the atmosphere due to humans, about those things there is no debate."

And that is a statement of Dr. Berrien Moore III, who is the Dean of the University of Oklahoma's College of Atmospheric and Geographic Sciences. And I think we need to be a little bit fairer about these hearings if we are going to get to a suitable result.

My time has expired and I yield back.

Senator Capito. Thank you.

I think I would like to ask another question, make another statement. I believe the chairman of the full committee and

Senate, certainly, if you are here still, we will go through another round.

I would just react a little bit to some of the comments that were made in terms of the constitutionality and the legal authority that we are looking at here. I think we all need to be mindful that this can swing both ways in different administrations. Just because this time I think the constitutional overreach is too much and is something that bears terrific scrutiny, it is not to say that in another 10 years another administration, that Senator Whitehouse would be thinking the same thing because of the direction it is going. So I think this is extremely important to look at the legal implications.

Also, the comment was made that there was tremendous outreach to the State regulators, and I would reinforce what I said in my opening statement, and that I have said before this committee before and actually testimony was in front of the committee, that the primary administrator in charge of this at the EPA wouldn't even come in to the State, our State, to hear about the seniors whose prices of electricity are going out, the miners who have lost their jobs, the manufacturers who are going out of business who are concerned about the price. So I think maybe there has been outreach, but there hasn't been enough outreach, in my opinion, to the regular folks that are really

being heavily impacted in those States, where I live.

I am going to ask really quickly a question to Mr. Martella. We have heard a lot about whether the -- I am getting back into the legal authority on the four building blocks. What legal authority, if any, does the EPA have under the Clean Air Act to impose disposal requirements on natural gas-fired power plants? Because that is one of their building blocks.

Mr. Martella. So thank you for asking that question, and the question about the building blocks two, three, and four, the dispatching the renewable energy, the energy efficiency.

Senator Capito. I am going to ask the same question about all of them, so just wrap it in there.

Mr. Martella. Okay, maybe I can give you the same answer to all of them. They sync up with your question about constitutionality, cooperative federalism in this relationship we are hearing from all the witnesses on the relationship between the Federal Government and the States. I would like to answer it in this one way, and it is something that Professor Heinzerling said in her written testimony. A lot of people make analogies to the ESPS and the NAX program, which is something this committee is very familiar with. People say, well, EPA has always been able to implement the NAX program; the Supreme Court has endorsed it. Professor Heinzerling said this is not materially different than that.

But it is materially different, and I think this is the answer to your question. In the NAX program, Congress has specifically authorized EPA to regulate NAX pollutants, and it has authorized EPA to delegate that authority to the States. So there are two things that are different there. At the outset, there is no doubt that Congress has delegated this authority to EPA, and Congress has said you can give this authority to the States or you can take it back.

The fundamental distinction with the Clean Power Plan, when we talk about blocks two, three, and four, is EPA saying we now want States to implement a renewable portfolio standard, or dispatching system, or an energy efficiency system; and the distinction here is there is no debate that Congress has never authorized EPA itself to run a renewable portfolio standard in West Virginia, or a dispatching system in Oklahoma, or an energy efficiency program in Rhode Island. So Congress itself has never given that authority to EPA. EPA cannot, therefore, delegate that authority further to the States.

That is just kind of a summary way that I think brings together these themes of cooperative federalism, constitutional issues, and the flexibility questions that have come up so far today.

Senator Capito. So just so I understand specifically, you are saying that in the area of NAX, that there is specific

legislative authority for the EPA to go into the direction that they have gone.

Mr. Martella. That is correct. That has been well settled; the Supreme Court has addressed that several times and it is very clear what Congress set up this cooperative federalism system there. Again, if a State decides, if my colleague here from Oklahoma decides not to implement the EPA NAX, Congress has specifically said, well, EPA has the authority in the first instance. If Oklahoma decides not to implement a renewable portfolio standard, Congress has never authorized EPA to implement that renewable portfolio standard.

Senator Capito. Thank you.

Attorney General Morrisey, how many States did you say joined in the case that you just recently brought?

Mr. Morrisey. Well, right now we have 15 States, which includes both attorneys general and governors; and obviously in the D.C. Circuit there were three cases that came together and were consolidated. We led the State effort and then there were other industry efforts as well.

Senator Capito. Would you characterize the 18 States as ones similar to West Virginia, Wyoming, Oklahoma, energy producing States, or are they just heavily reliant on coal, or is it all over the board?

Mr. Morrisey. My sense is that these are strong energy

producing States, but I would note that this is a bipartisan coalition. The State of Kentucky is also on board with our lawsuit as well, so we have obviously been reaching out to more and more States because we believe that even non-coal producing States or energy producing States should care fundamentally about whether this 111(d) Rule gets finalized because of some of the legal implications.

Senator Capito. Thank you.

Senator Whitehouse?

Senator Whitehouse. Thank you very much, Chairman.

Attorney General Morrisey, is climate change a problem anywhere in the world?

Mr. Morrisey. Well, Senator, my role is to serve as the chief legal officer of the State of West Virginia.

Senator Whitehouse. That is a pretty simple question.

Mr. Morrisey. So I am not going to make an argument today about climate change and whether the temperature is evolving, because regardless of the policy merits of anyone's proposal, policies have to be implemented in a lawful manner, and that is one of my main obligations as the attorney general of the State of West Virginia.

Senator Whitehouse. Well, let me just ask Attorney General Pruitt, is climate change a problem anywhere in the world?

Mr. Pruitt. Senator, I think that the process matters that

the EPA engages in to address these issues.

Senator Whitehouse. I get that. But I didn't ask you a process question; I asked you a question about whether climate change is a real problem anywhere in the world.

Mr. Pruitt. I think the question about climate action plan of the President, climate change, is something that is a policy consideration of this Congress. If you want EPA to address that in a direct way, you can amend the Clean Air Act to provide that authority and the statutory power to do so, so that the States can know how to conduct themselves in a way that is consistent with statutory construction.

Senator Whitehouse. So, to be clear, neither of the attorneys general present will concede that climate change is a real problem anywhere in the world.

Mr. Pruitt. Senator, I think it is immaterial to discussions about the legal framework of the Clean Air Act.

Senator Whitehouse. Immaterial or not, I get to ask the questions, so it is material to my question.

All right, let's go on to something else.

We have talked a lot about kilowatt hour cost, and I would like to make a point, which is that the price of electricity in Rhode Island, my home State, was 15.2 cents per kilowatt hour. That compares to 9.67 cents per kilowatt hour in Oklahoma and it compares to 9.52 cents per kilowatt hour in West Virginia.

However, because of Rhode Island's investment in efficiency and a whole variety of programs particularly through RGGI, which has been mentioned earlier, that have been able to bring our usage down, Rhode Islanders paid only $91.48 per month for electricity, compared to $110.47 in Oklahoma and $106.44 in West Virginia.

Will both of the attorneys general from West Virginia and Oklahoma concede that the real impact to a consumer is the dollar amount that they have to write on the check that pays the bill?

Mr. Morrisey. Well, Senator, I think where you are going right now, some of the details in terms of how electricity prices may vary across the State is a policy question. In West Virginia we have heard deep concern from power plant operators, from coal operators about what the impact will be on electricity prices, so we have seen that in the context of other proposed regulations that have gone through.

But I think it is important to reiterate right now to choose a policy objective and try to advance it through unlawful means is something that everyone in this body should reject.

Senator Whitehouse. Can I go back to the question that I actually asked? Isn't the economic effect of a policy made real in a consumer's life by the amount of the check that they actually write, rather than a per kilowatt hour cost?

Mr. Morrisey. I think Senator, most people look at the amount that they are paying when they get in the bill; they don't analyze the economic effect.

Senator Whitehouse. That is right.

Attorney General Pruitt, you agree?

Mr. Pruitt. I think, Senator, that what is important for utility companies across the Country is to have choices, flexibility in the diversity of the portfolio to generate electricity.

Senator Whitehouse. I agree with all that, but my question was quite specific, and that is when you are a utility consumer, in terms of the economic effect on you, what really matters is the amount of the check you write, correct?

Mr. Pruitt. And the long-term economic effect of shuttering coal generation or fossil fuel generation in this Country, long-term, will be substantial on consumers.

Senator Whitehouse. Well, you didn't answer my question; you segued into your lobbying on behalf of coal. But the answer to the question is yes or is it no, that the real difference is made by what the bill is?

Mr. Pruitt. Senator, I maintain that the State of Oklahoma is experiencing an increase in cost to consumers because of the EPA's heavy hand of eliminating fossil fuels from the energy mix.

Senator Whitehouse. Well, I would suggest to you that you try what Rhode Island did, because our costs are higher than you, but our bills are lower than yours because we actually took the trouble to invest in a significant way in energy reduction and efficiency.

With that, my time has expired.

Senator Capito. Senator Inhofe.

Senator Inhofe. Thank you, Madam Chairman.

We have been talking about this since 2002, and I can remember down on the Senate floor they tried to pass a similar thing that this regulation would do, but pass it by legislation; and I saw what happened. In fact, that first bill was the McCain-Lieberman bill; and McCain was a Republican. We decisively defeated that bill and every bill since that time. Senator Markey is not here now. He actually had a bill up also. Now, that has happened.

This discussion about the science is settled, the science is settled, the science is settled, every time something comes up where the science isn't settled, all they talk about is that science is settled because they don't want to elaborate on that. I want to make a part of the record an article a couple weeks ago in The Wall Street Journal called The Myth of Climate Change 97 Percent.

This whole thing, they keep saying 97 percent of the

scientists. This totally diffuses that. It would take me too long to read it, so I will put it into the record without objection.

Senator Capito. Without objection.

[The referenced documents follow:]

Senator Inhofe. Talk about some of the scientists. I know Richard Lindzen. I have talked to him. He was quite upset back when then-Vice President Al Gore was using this politically for his career. Richard Lindzen is an MIT professor who is recognized as being one of the top professors around in the climate and the very thing that we are talking now, and people ask him the question why is it that people are so concerned about regulating CO2. He said it is a power grab. He said, and these are his words, regulation of carbon is a bureaucrat's dream. If you regulate carbon, you regulate life.

So this whole idea that the science is settled, the science is settled is just flat not true.

Now, I know that people have 12 years of their life wrapped up in this issue as the only issue of our time; they don't like to recognize this fact, but, nonetheless, this is a problem. In fact, I will do this from memory because I have said it so many times. You go back and you see these cycles that take place in the world. In 1895 we went into the first cold spell that has been really talked about, it was about a 30-year cold spell; and that's when they first said another ice age is coming and all of that, trying to get people alarmed. Because the world is always coming to an end when this happens.

Then in 1918 we went into a warm spell that lasted about 30 years, and that was the first time you heard global warming.

That was 1918. That was a long time ago.

Then 1945 they changed and it started going into a cold spell.

Now, this is the interesting thing about these 30-year cycles; and it goes right up until today: the year that we had the greatest surge in emissions of CO2 was right after the second World War, you guys know this, it was 1945; and that precipitated not a warming period, but a cooling period.

These are realities. I can remember speeches I made on the floor in response to things that my good friend from Rhode Island has said when I talk about what is the reality of what is going on today.

So we are going to hear more of this and I know that there is an effort now to have this bureaucratic thing that, in my opinion, it doesn't have what it is supposed to have. The only thing I want to get back in and get the response from both attorneys general is a matter of what we have been talking about, flexibility. Senator Markey talked about it, Ms. Heinzerling talked about it. The EPA often talks about the flexibility and would say that the EPA simply is hiding behind the flexibility while, in reality, forcing States to figure out how to make the least economically devastated decisions.

So I would just ask the two of you does the Clean Power Plan provide States with any real flexibility? Every witness

has talked about flexibility.

Mr. Morrisey. I think if you look at this concept of flexibility, it is a false concept. The reality is that States are having an enormous amount of pressure applied to them to develop a State implementation plan within one year. Based upon the declarations that we receive from many of the States, people really don't think that is possible; that the goals of this proposal are so severe that States are not going to be able to come into compliance. So when you look at the proposal the way it is constituted, I don't think it is fair to say that it is flexible.

But our argument has always been regardless of whether people think that is desirable from a policy perspective, the law actually doesn't even allow the EPA to go outside the fence to develop that kind of flexible approach.

The final point I would also make is that if you look at the predicate rule that is required before finalizing the 111(d) Rule that is for new source performance standards, that obviously does not rely on outside-the-fence technology. When they develop their best system of emission reductions, it is much more narrow.

Senator Inhofe. General Pruitt?

Mr. Pruitt. I think that my colleague, my fellow panelist here, Roger, addressed it well earlier. Flexibility with

respect to how plans are adopted is something the States endeavor to possess and have, but flexibility with respect to performance standards, inside-the-fence versus outside-the-fence, that is what we are really facing here. The EPA has taken an approach of forcing performance standards upon the State of Oklahoma that outside-the-fence, they are providing less options in the future as far as how to comply.

Senator Inhofe. Thank you, Madam Chairman.

Senator Capito. Thank you.

Senator Carper?

Senator Carper. Thanks much.

If I could, I am not a lawyer either. I studied economics, got an MBA, but I am not a lawyer, and I don't understand some of this discussion when we get into these technicalities. But I do know this: I have seen us pass legislation when I was in the House with Senator Inhofe and in the Senate where we were putting the same bill, conflicting approaches to the same issue. In some cases we were just unable to resolve our differences, so we put both in and say somebody else will figure this out. I think, in a way, when I saw this discussion around Section 111(d) of the Clean Air Act, it reminded me of that kind of behavior.

I am looking at your testimony, Lisa, where you say based on the text of Section 111(d) alone, EPA has persuasively

defended its proposed view that the statute is ambiguous and that its interpretation is reasonable. These are the criterion for the Chevron deference and EPA has met them.

Explain this so I can explain. I think I do, but we have these two amendments, one dropped out of the Code, but now I am told it still is in another life. Explain this to us, please.

Ms. Heinzerling. So, Congress, in 1990, passed two different amendments to Section 111(d). One seemed to look to pollutants; one seemed to look to sources. But as EPA has explained, as I note there, they are not entirely clear, either one of them standing alone, and the combination is not entirely clear coming together. So what EPA has tried to do is try to take from each amendment something, and what it said is you cannot regulate the same pollutants from the same sources under both programs, Section 111 and 112.

That is the kind of judgment, as you are suggesting, that agencies make all the time. There are many times when statutes aren't entirely clear. They may contain provisions that are in contention with each other, and agencies resolve them. And this usually is a straightforward application of what I call there as Chevron deference, which is a case in which the Supreme Court said that if a statute is not clear, if policy judgments are left to the agency to make, then the agency gets deference to a reasonable interpretation of the statute.

And here I think the text allows EPA's interpretation. I would also say, in light of the comments earlier about the problem of global warming, just image if the EPA said, no, we will take the interpretation that does not allow us to regulate the sources of greenhouse gases that emit the most greenhouse gases in this Country, and to attack the problem of climate change by doing that; we are going to pick the interpretation that does not permit us to do that. That would be quite strange.

Senator Carper. Yes, I would.

Question if I could, Ms. Backman, please. I want to go back to the issue of whether the science of climate change is settled law. Just very briefly, do you think it is or do you think it is not?

Ms. Speakes-Backman. I am sorry, could you repeat that?

Senator Carper. The question on whether the science of climate change is indeed settled law. Do you believe it is? Do you believe it is not?

Ms. Speakes-Backman. Well, Senator, I am also not a lawyer, and I am not a climate scientist, but I do choose to believe the overwhelming majority of climate scientists who say it is real and say it is caused by humans. So now we need to act. And I can tell you also that there is a cost to action, but there is also a cost to inaction. And I can tell you, as

one who is responsible for consumers, electricity consumers who depend on reliable, affordable energy, that certain ways to help the system include renewable energy, include energy efficiency, include demand reduction to help with those reliability issues and to help with the resiliency of our system.

Senator Carper. Okay, that is fine. Just hold it right there.

One last question, if I could, for Lisa. Are EPA's proposed carbon standards supported by the three Supreme Court decisions in Massachusetts v. EPA and American Electric Power v. Connecticut and Utility Air Regulatory Group v. EPA? Thanks very much.

Ms. Heinzerling. Yes.

Senator Carper. Tell us more.

Ms. Heinzerling. Yes. Massachusetts v. EPA, of course, held that greenhouse gases are air pollutants within the meaning of the Clean Air Act. I think much of what we hear against EPA's Clean Power Plan is an attempt to re-litigate that case, to tell us that carbon dioxide is not really an air pollutant, it is not dirty somehow, so, therefore, it is not regulable under the Clean Air Act. That case clearly holds that these pollutants are regulable under the Clean Air Act.

American Electric Power is interesting because it relied on regulation under Section 111(d) in holding that there was no so-

called Federal common law, court made law of global warming pollution. That is significant because if this regulation goes by the boards, then all the reasons for that common law come back to force.

And the last, the Utility Air Regulatory Group, it seems to me that case can be understood most generally first as a victory for most of EPA's greenhouse gas program that was at issue there and, secondly, it asked EPA to look section-by-section and make sure that regulation under a particular provision of the Clean Air Act made sense for particular pollutants. That is exactly what EPA has done here.

Senator Carper. Madam Chair, I would just say this is a good panel, and I commend you and our staffs for pulling them together.

Thank you all for coming. If I ever go to law school, I would like you to be my professor.

Senator Capito. Thank you very much. I would like to thank the panel and thank the Senators.

Senator Whitehouse. Will there be questions for the record allowed?

Senator Capito. Yes. We will leave the record open for two weeks and you can submit questions for the record.

Senator Whitehouse. Very well. We will do that.

Senator Capito. Thank you all very much. Appreciate it.

Appreciate your patience when we had to leave.

This hearing is adjourned.

[Whereupon, at 11:52 a.m. the committee was adjourned.]