

## List of cases General Pruitt joined, initiated, and amicus

- ***Alaska v. Jewel*, SCOTUS No. 13-562, 2013 WL 6493517,**
  - Filed December 6, 2013. Oklahoma was an amicus. 13 states and Arizona Dept of Water Resources involved.
- ***American Electric Power Co. v. Connecticut*, 2011 WL 465735**
  - Filed February 7, 2011; Oklahoma joined 23 other states as amici in support of Defendants/Petitioners
- ***American Farm Bureau Federation v. EPA*, (SCOTUS No. 15-599), 2015 WL 8758154**
  - Filed Dec. 9, 2015; Oklahoma was amicus along with 21 other states in support of certiorari.
  - Appeal of 3rd Circuit case above, *Am. Farm Bureau Fed. v. EPA*.
- ***American Farm Bureau Federation v. EPA*, (3rd Cir. Case No. 13-4079), 2014 WL 505475**
  - Filed February 3, 2014; Oklahoma and 21 other states were amici.
- ***American Nurses Ass'n v. Jackson, Utility Air Regulatory Group Defendant-Intervenor*, (D.D.C. Case No. 08-2198)**
  - Filed October 13, 2011. Oklahoma joined as Amici, 25 States and Guam Joined the Amicus Brief
- ***Aurora Energy Services, LLC v. Alaska Community Action*, 2015 WL 1501921**
  - Filed April 2, 2015. Oklahoma was an amici. Alaska and West Virginia also joined.
- ***Building Industry Assoc. Of the Bay Area v. United States*, 2016 WL 3136680**
  - Filed June 2, 2016; Oklahoma was one of 23 amici states supporting Petitioner and urging the court to hear the case
- ***Decker v. NW Enviro. Defense Center*, SCOTUS No. 11-338 (Cert)**
  - Filed October 14, 2011. State of Oklahoma joined as Amici, 26 States joined the Amici Brief in support of cert.
- ***Decker v. NW Environmental Defense Center*, Nos 11-338, 11-347 (Merits)**
  - Filed September 4, 2012; Oklahoma and 25 other states were amici.
- ***EME Homer City Generation v. EPA*, (D.C. Circuit) -- Challenging Cross State Air Pollution Rule**
  - Brief filed in DC Circuit on December 20, 2014. Oklahoma was a party with 12 other states.
- ***Florida et al v. EPA*, Case No. 15-1267 (D.C. Circuit)**
  - Filed August 11, 2015. Oklahoma is a party, Florida is lead State (17 States joined the case)
- ***Grocery Mfrs. of America v. EPA*, 2011 WL 2941301 (D.C. Circuit)**
  - Filed July 20, 2011. Oklahoma and three other states were amici. Corrected brief filed on 7/21/11
- ***Grocery Mfrs. Ass'n v. U.S. Environmental Protection Agency*, 2013 WL 1329310 (2013)**
  - Filed February 29, 2013. Oklahoma was an amicus. Alabama and Virginia also joined.
- ***In Re: Murray Energy Corporation*, 2014 WL 2885937 (2014)**
  - Filed June 25, 2014. Oklahoma was an amicus. Eight other states joined.
- ***Luminant Generation Co. v. EPA*, SCOTUS No. 12-1484**
  - Filed July 24, 2013. Oklahoma joined as Amici, 18 States Joined the Amicus Brief.
- ***Michigan v. Environmental Protection Agency*, 2015 WL 309090 (2015)**
  - Filed January 20, 2015. Oklahoma was a party. 21 States in total.
- ***Michigan, et al., Petitioners, v. Environmental Protection Agency*, 2016 WL 1043192**
  - Filed March 14, 2016. Oklahoma was a petitioner. 19 States in total.
- ***Mingo Logan Coal Co. v. EPA*, 2013 WL 6678603**
  - Filed December 16, 2013; Oklahoma was an amicus along with 26 other states in support of cert.

- ***Murray Energy Corporation, Petitioner, v. United States Environmental Protection Agency and Regina A. McCarthy, Administrator, Respondents*, 2015 WL 1064058 (D.C. Cir. No. 14-1112) (Clean Power Plan Case)**
  - Filed March 9, 2015. Oklahoma intervened. 12 States in total.
- ***Murray Energy Corp. et al. v. EPA*, 2016 WL 6565997 (C.A.6) (WOTUS case)**
  - Filed September 9, 2016. Oklahoma was a party. 31 States in total.
- ***Murray Energy Corp. V. EPA*, (D.C. Circuit Case No. 15-1385 (consolidated with 15-1392, 15-1490, 15-1491 & 15-1494) (Challenge to the EPA NAAQS Ozone Rule)**
  - Filed October 27, 2015. Oklahoma is a party, Arizona is lead state (5 States joined the appeal)
- ***Murray Energy Corp. v. EPA*, (D.C. Cir. No. 16-1127) (Challenging limits on Mercury)**
  - Opening brief filed November 18, 2016. Oklahoma is a party.
- ***National Mining Ass'n v. Perciasepe*, (D.C. Circuit Nos. 12-5310, -5311)**
  - Filed July 22, 2013. Oklahoma joined as Amici, 11 States Joined.
- ***Oklahoma; Oklahoma Industrial Energy Consumers; Oklahoma Gas and Electric Company, Petitioners, v. United States Environmental Protection Agency; Sierra Club, Respondents*, 2014 WL 411561 (U.S.) (Regional Haze Case)**
  - Filed January 29, 2014. Oklahoma was a petitioner.
- ***Oklahoma ex rel. Pruitt v. EPA*, (10th Cir No. 15-cv-00381) (WOTUS case)**
  - Appeal Filed April 19, 2016. Oklahoma is a party; case is consolidated with US Chamber.
- ***Oklahoma ex rel. Pruitt v. McCarthy*, (N.D. Okla No. 15-cv-369) 2015 WL 4414384 (Clean Power Plan)**
  - Filed July 1, 2015. Oklahoma was the plaintiff.
- ***Oklahoma et al v EPA* (W.D. Okla. Case 13-cv-00726) (FOIA Case)**
  - Oklahoma was lead, 11 States joined.
- ***Sierra Club v. McCarthy*, 2015 WL 5076258 (Ninth Cir.)**
  - Filed August 17, 2015. Oklahoma was amicus; 17 other states joined.
- ***United States Army Corps of Engineers v. Hawkes*, 2016 WL 860553**
  - Filed March 2, 2016. Oklahoma was an amicus along with 22 other states.
- ***Utility Air Regulatory Group, et al v EPA* (SCOTUS Case No. 12-1146) (Greenhouse Gas Case)**
  - Oklahoma was a party, Texas was lead State (12 States and Louisiana DEQ joined)
- ***West Virginia, et al., Petitioners, v. United States Environmental Protection Agency, Respondent, City of New York, et al. Intervenors*, 2014 WL 6687575 (C.A.D.C.)**
  - Filed November 26, 2014. Oklahoma was a petitioner. 12 States in total.
- ***West Virginia et al v EPA*, (D.C. Cir. Case No. 15-1364) (consolidated) (111b Case)**
  - Filed November 3, 2015. Oklahoma is a party, cases were consolidated (23 States on the Petition for Review)
- ***White Stallion Energy Center, LLC, et al., Petitioners, v. United States Environmental Protection Agency, et al., Respondents*, 2012 WL 6762633 (C.A.D.C.) (Mercury/MATS case)**
  - Filed October 23, 2012. Oklahoma was a petitioner. 21 States in total.
- ***Wildearth Guardians v. Bidegian*, 2013 WL 1869747**
  - Filed April 23, 2013. Oklahoma joined 11 other states as amici.
- ***Wildearth Guardians v EPA*, (D.C. Colo. Case No. 13-cv-02748**
  - Filed February 5, 2014; (State of Oklahoma Intervened).
- ***Wyoming v. EPA*, 2015 WL 128482**
  - Filed January 5, 2015. Oklahoma and 9 other states filed as amici in support of Petitioners as to standard of review.

**Speeches or Presentations that included reference to any issue related to energy or the environment since 1998.**

General Pruitt did not keep records on speeches given during service in the State Legislature. The following are speeches where he referenced issues rather to energy and the environment. General Pruitt rarely prepared formal remarks for his speeches. However, when prepared remarks were prepared, those are attached. Further General Pruitt nor the OAG has records on the cost of commercial airfare or hotel accommodations as the inviting organizations covered those expenses.

OK State Chamber 2/15/11  
OK Railroad Association 3/21/11  
OK Corporation Commission Public Hearing 3/23/11  
OK Federation of Republican Women 3/29/11  
Stephens County GOP 4/5/11  
Tulsa Regional Day at the Capitol 4/6/11  
Farmers Insurance Legislative Conference 4/19/11  
Small Business Day at the Capitol 5/3/11  
OK GOP Convention 5/7/11  
OK Conservative PAC 5/11/11  
Tulsa Republican Club 6/14/11  
OK Cattlemen's Association 6/29/11  
Lions Club of Downtown OKC 6/26/11  
Tulsa Area Republican Assembly 8/16/11  
Ada-Seminole Tea Party 8/29/11  
Weatherford Rotary Club 10/18/11  
Grady County Tea Party 11/3/11  
OKC Republican Women 1/9/12  
Conference of Western Attorneys General 2/17/12 (commercial airfare and hotel reimbursed by organization)  
Senate Testimony 6/28/12  
National Policy Summit 8/20/12  
RNC Republican Attorneys General Assn Brunch 8/29/12 (commercial airfare and hotel reimbursed by organization)  
Heritage Foundation 9/14/12 (commercial airfare and hotel reimbursed by organization)  
OIPA Fall Conference 10/21/12  
Midcontinental Oil and Gas Assoc. 12/12/12  
Delaware County Republican Lincoln-Reagan Dinner 4/5/13  
Federalist Society Midwest Leaders 4/20/13 (commercial airfare and hotel reimbursed by organization)  
ALEC Energy Workshop 5/3/13 (commercial airfare and hotel reimbursed by organization)  
Tulsa Republican Club - 8/16/13  
Sons and Daughters of Liberty - 9/17/13  
OCPAC Meeting - 9/18/13  
OCPA Energy Panel - 9/25/13  
OCPA Energy Summit - 10/17/13  
IOGCC Annual Meeting - 11/5/13  
OG&E Annual Leadership Meeting - 12/11/13  
AFPM Speech  
CPAC Panel - 3/8/14

Concord 51 - 3/12/14  
George Mason University School of Law Panel - 4/7/14  
CWAG Panel: Role of AGs between Local/State/Federal Regulators - 4/16/14 (commercial airfare and hotel reimbursed by organization)  
American Tort Reform Association - 7/10/14  
ALEC Annual Meeting - 7/31/14  
ALEC Panel - 7/31/14  
AFP Oklahoma Dinner - 8/29/14  
AFP Panel - 8/22/14  
Dallas Conservatives Luncheon - 12/15/14  
Cooperating Oil and Gas Associations - 1/9/15  
Kentucky Environmental Conference - 2/10/15 (commercial airfare and hotel reimbursed by organization)  
Tulsa Republican Club - 2/20/15  
CPAC 10th Amendment Panel - 2/28/15  
Oklahoma City Republican Women - 3/2/15  
Tulsa 912 Club - 4/9/15  
RAGA Law & Liberty Dinner - 4/13/15 (commercial airfare and hotel reimbursed by organization)  
EPW Testimony - 5/5/15  
Heritage Foundation Panel - 5/6/15  
New Horizon Council - 5/13/15  
Southern Republican Leadership Convention - 5/22/15  
SRLC Panel - 5/22/15  
Western District Federalist Society - 6/6/16 (commercial airfare and hotel reimbursed by organization)  
OKC Downtown Club - 6/16/15  
Faith and Freedom Coalition - 6/19/15  
FreedomWorks Restore Liberty - 6/26/15  
RAGA Clean Power Plan Panel - 8/3/15  
Heartland Republican Women - 8/20/15  
Muskogee Chamber - 8/26/15  
Great Plains Republican Women - 9/16/15  
Western Farmers "Emerging Technology" Conference - 9/22/15  
Broken Arrow Chamber - 10/22/15  
Federalist Society - 1/30/16 (commercial airfare and hotel reimbursed by organization)  
CPAC Energy Panel - 3/3/16  
CPAC 10th Amendment Panel - 3/3/16  
OK Farm Bureau Conference - 3/7/16  
OU Law Lunch & Learn - 3/9/16  
Bartlesville Day at the Capitol - 4/13/16  
Piedmont Chamber Legislative Update - 4/14/16  
OIPA Wildcatter Luncheon - 5/4/16  
FreedomWorks Facebook Livestream - 6/30/16  
Hillsdale College - 6/30/16 (commercial airfare and hotel reimbursed by organization)  
Tulsa Federalist Society - 7/1/16  
Tulsa Medical Society Board - 7/13/16  
Edmond Republican Women - 9/19/16  
State Policy Network Energy Panel - 10/3/16  
State Policy Network Federalism Panel - 10/3/16

Noble County Republicans - 10/25/16

Kiwanis Club of Tulsa - 11/7/16

OK Farm Bureau Convention - 11/11/16

Cozen O'Connor and Assoc. for Corporate Counsel - 11/17/16 (commercial airfare and hotel reimbursed by organization)

Bartlesville Chamber Eggs & Issues - 12/8/16

## Oklahoma Environmental Cases

### Cases Initiated by AG Drew Edmondson but continued under AG Scott Pruitt

State of Oklahoma v. Tronox -

State Of Oklahoma v Kelco Manufacturing

State of Oklahoma & EPA v. Apco -

State of Oklahoma v. Michelin/BFG -

State of Oklahoma & ODEQ v Blackwell Zinc

State of Oklahoma & NRC v. Fansteel

State of Oklahoma & Cherokee Nation v. Sequoyah Fuels Corp

EPA, State of Oklahoma v. Doe Run Mining et al. Tar Creek -

ODWC v. Kent Feeds El Reno Fish Kill:

State of Oklahoma v Tulsa Fuels -

State of Oklahoma v Tyson Foods et al,

### Cases or Investigations initiated by AG Scott Pruitt

EPA, States of Oklahoma & Texas v Mahard Egg Farm (AG Pruitt filed the case and Consent Decree)

Plains & Eastern Clean Line

FEMA Flood Zone

ODWC v. Southern Towing

State of Oklahoma v Conoco Phillips

State of Oklahoma v BP

Scenic Rivers Joint Study Committee -

Tulsa County Smelter Complex -

Handled numerous citizen complaints regarding environmental and pollution issues

## Oklahoma Environmental Cases

### Mahard Egg Farm - Oklahoma Concentrated Animal Feeding Operation Act Claims

Joint case with Oklahoma, Texas and EPA to clean up a large laying hen operation that was over applying poultry waste to land and failing to follow both State and Federal CAFO anti-pollution laws. Case is now closed other than continued monitoring for Mahard's compliance with the Consent Decree. Case resulted in a \$1.9 million dollar penalty and lagoon closures, better carcass management, ground water monitoring and restricted grazing and field testing at numerous Mahard sites.

### Tronox - \_\_\_\_\_

Large multi-state environmental Bankruptcy Case

Numerous Environmental Statutes involved

Natural Resource Damage Claims on behalf of State and Secretary of Environment arising from legacy contamination from Kerr McGee at

5 Sites in Oklahoma and numerous old service station sites  
Resulted in approximately \$17,000,000 payout to the State of Oklahoma for Natural Resource Damages.

Kelco Manufacturing : Represented ODWC for mussel kill in the Deep Fork River related to pollution released into the river by Kelco in its manufacturing process. Title 27A O.S. § 1-3-101 (H)(1) and 29 O.S. § 7-401a, \$30,000 payout to the State of Oklahoma and requires Kelco to restock approximately 15,000 freshwater mussels.

#### Plains & Eastern Clean Line

700 mile wind transmission line from Oklahoma Panhandle to Tennessee. Research and meetings with Clean Line and citizens to discover potential environmental and other issues regarding the proposed project

Kent Feeds El Reno Fish Kill: Represented ODWC for fish kill caused by waste grain discharge into North Canadian River \$5000 payout to the State of Oklahoma

FEMA Flood Zone - Research and meet with citizens regarding issues regarding FEMA flood zone redistricting

Southern Towing - Port of Catoosa Fish Kill: Represent ODWC for fish kill (37,000 pounds of fish) that occurred from a chemical leak from a barge in the Port of Catoosa. Resulted in a payment to the ODWC for the fish killed

State of Oklahoma v Tyson Foods et al: Poultry litigation case filed and tried before Judge Frizzell by former AG Drew Edmondson. Have continued to monitor the case and meet with the parties throughout AG Pruitts tenure.

#### Apco -CERCLA Superfund Cleanup Case

Represented ODEQ & Sec of Environment for response costs & NRD for the cleanup of a shuttered oil refinery. Cleanup included removing the refinery structure and the remediation of oil waste pits and other contaminants. Case is now closed, resulted in a \$700,000 settlement with the State of Oklahoma for Natural Resource damages and \$900,000 to the State of Oklahoma and ODEQ for response costs settlement.

Michelin/BFG - Environmental clean up case RCRA & CERCLA, represent ODEQ and Sec of Environment in ongoing remediation efforts to clean up contamination and benzene plume at the closed BFG tire plant in Miami, OK. Also working with the City of Miami. (Case is ongoing, demolition of many structures is complete, Michelin agreed under a Consent Decree and Tolling Agreement to clean up the site, work is ongoing.)

Blackwell Zinc - Represented and worked with ODEQ and Secretary of Environment in cleanup of Blackwell Zinc smelter site. (Resulted in remediation of affected soils and yards in Blackwell, also blood lead level testing of children in Blackwell.)

Fansteel: Represented the State in cleanup of Fansteel site along the Arkansas River near Muskogee. Also worked with Nuclear Regulatory Comm. In 2012/2013, Fansteel continued to have difficulty meeting its obligations to FMRI. In order to facilitate ongoing remediation, beginning in 2014, the NRC, DOJ, and Oklahoma DEQ entered into a series of Forbearance Agreements with Fansteel and FMRI that detailed financial and technical expectations while offering Fansteel temporary financial relief. Despite these and other actions taken by Fansteel, in September 2016 Fansteel again filed for bankruptcy protection under Chapter 11.

Sequoyah Fuels Corp. - Ongoing remediation efforts in conjunction with the Nuclear Regulatory Commission. Represent ODEQ and Sec of Environment in implementing site restoration plan and cleanup of radioactive materials at former fuel plant. Ongoing efforts to either remove or dispose on site raffinate sludge material and then closure of the disposal cell.

Tulsa Fuels - CERCLA Superfund Site, Collinsville, OK Cleanup of former zinc smelter site, hazardous chemicals in soil, sediment and surface water. A zinc smelter operated at the site from 1914 to 1925. Historical smelting operations contaminated soil, sediment and surface water with hazardous chemicals. EPA selected a cleanup plan for the site. Construction of the remedy began in August 2014 and was completed in September 2016.

State of Oklahoma v Conoco Phillips

State of Oklahoma v BP

Underground storage tank indemnity fund cases. Resulted in a settlement with Conoco Phillips

Tar Creek - CERCLA Superfund Case, NRD Claim, represent ODEQ & OSE

Member/Legal Representation of Tar Creek Trustee Counsel & Tri-State Counsel

Ongoing negotiations with mining companies on response costs settlement and drafting NRD restoration plan. Also represent the State in the Peabody Energy Bankruptcy for claims arising at the Tar Creek site. Large Superfund site contaminated with lead, zinc from an old mining district. Ongoing

Scenic Rivers Joint Study Committee - Drafted the 2nd Statement of Joint Principles and Actions Agreement with the State of Arkansas to conduct an independent stressor response study of phosphorus levels in Oklahoma's Scenic Rivers. Represent the Oklahoma members of the Joint Study Committee. The study is complete and final recommendations are set to be made in December 2016. The study supports Oklahoma's contention that its .037 mg/L phosphorous standard in its scenic rivers is supported by the best available science.

Representation of the Environmental Quality Board, the rulemaking body for the Oklahoma Department of Environmental Quality

Tulsa County Smelter Complex - Recently entered into a joint MOU with US DOI and the Cherokee Nation to begin a Natural Resource Damage Assessment and Restoration Plan for

the Tulsa County Smelter Complex -Also represent the State in the Trustee Council for the site.  
Ongoing

Handled numerous citizen complaints regarding environmental and pollution issues



E. SCOTT PRUITT  
ATTORNEY GENERAL

2015 APR 16 PM 2:27

April 9, 2015

The Honorable James Inhofe  
Chair, Committee on Environment and Public Works  
410 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Barbara Boxer  
Ranking Member, Committee on Environment and Public Works  
456 Dirksen Senate Office Building  
Washington, DC 20510

Re: Support for the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act

Dear Chairman Inhofe and Ranking Member Boxer:

On March 17, 2015, several attorneys general wrote to express their support for S. 697, The Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (the "Act"). This Act will reform the Toxic Substances Control Act ("TSCA"). The TSCA has not been substantively amended since its passage in 1976. I write to you today to echo their sentiments and share my thoughts on the measure.

This Act proposes significant changes to the TSCA by giving EPA tools to ensure the safety of chemicals used in U.S. commerce and enhancing the protection of public health and the environment. Though I have challenged the EPA on various issues, I believe the agency, within the boundaries of its authorities provided by Congress, serves a valuable mission to protect human health and preserve the environment.

The Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act is a bipartisan approach that will address issues within our national chemical management system. The Act will ensure that new and existing chemicals, including those grandfathered under TSCA, receive an EPA safety review. Such review will strengthen the standard for the public health and our environment. S. 697 guarantees protection of the most vulnerable by placing emphasis on the effects of exposure to chemicals on infants, children, pregnant women, workers, and the elderly.

Public dissemination of information about chemicals is critical to ensure public health and safety is upheld. S. 697 clarifies the restrictions on public dissemination by establishing a common sense balance

between a company's confidential business information (CBI) claim and informing the public about a particular chemical's risks.

As a defender of the primary role given to states under environmental law, I commend Senators David Vitter and Tom Udall for ensuring states have a voice at the table. We cannot allow for a one-size fits all approach on this matter, as each state has a variety of factors that make their environmental regulations unique. Giving states the ability to preemptively apply for a waiver in order to address local conditions, even when the EPA has already made a determination on a chemical, is essential. In addition, when EPA has not provided review to certain chemicals, it is vital that states retain the authority to regulate, as needed.

All of these changes will guarantee that EPA is balancing the interests of multiple stakeholders while making significant improvements to chemicals management and regulation. S. 697 will help EPA establish a consistent, national chemical regulatory program, while still preserving Oklahoma's ability to address local and pressing concerns.

As Oklahoma's Attorney General, I am responsible for protecting the welfare of Oklahoma citizens. This Act will give my constituents and Oklahoma businesses confidence that the chemicals used throughout our society are safe.

I encourage your committee to quickly consider the measure.

Sincerely,



E. Scott Pruitt  
Attorney General of Oklahoma

Cc: Senator Tom Udall  
Senator David Vitter



# OKLAHOMA ETHICS COMMISSION

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January 23, 2017

Glenn Coffee & Associates  
Attn: Ms. Denise Lawson  
*Via Email:* denise@glenncoffee.com

**Re: Open Records Request – Scott Pruitt 1998 Campaign**

Dear Ms. Lawson:

We received your open records request this morning for all reports filed with the Oklahoma Ethics Commission by Scott Pruitt's 1998 campaign. Files from those years are stored in off-site storage with limited hours of access. Because of this, we are unable to fulfill your request immediately. I appreciate your patience as we process your request.

Kind regards,

Geoffrey D. Long  
GENERAL COUNSEL

Testimony before the Subcommittee on Technology, Information Policy,  
Intergovernmental Relations and Procurement Reform of the House  
Committee on Oversight and Government Reform

“Mandate Madness: When Sue and Settle Just Isn’t Enough”

June 28, 2012

E. Scott Pruitt  
Attorney General  
State of Oklahoma

Dear Chairman Lankford, Ranking Member Connolly, and Members of the Subcommittee,

Thank you for allowing me to present my concerns on the legal and policy implications of the U.S. Environmental Protection Agency's actions regarding Regional Haze Regulations ("RHR"). There are three main points that cause concern among members of my staff, state leadership and Oklahoma stakeholders in relation to the EPA's actions: (1) the arbitrary and capricious nature of the EPA's preemption and disapproval of the Oklahoma State Implementation Plan ("SIP"); (2) the EPA's abrogation of notice and comment requirements when it imposes Federal Implementation Plans ("FIP") under the Regional Haze Regulations; and (3) the economic cost to states, industry and utility customers from the EPA's illegal actions under the Regional Haze Regulations. The EPA's refusal to follow its own rules has denied states due process and ignored the foundation of cooperative federalism set forth by Congress under the Clean Air Act. With the backing of the Obama Administration, the EPA is engaging in super legislative activity that Congress has not authorized, resulting in unchecked rule-making through questionable consent decrees. These issues are of great importance to the State of Oklahoma because Oklahomans value our state's natural resources, which provide sustenance to Oklahoma citizens and fuel our economic development. We take seriously our responsibility to preserve and protect these valuable natural assets so they may be enjoyed by future generations. This responsibility requires a delicate balance between environmental and economic interests. We must craft our environmental protection objectives with due consideration of the burden those objectives place on our economic development and overall well-being. With these considerations in mind, the State of Oklahoma submits that Oklahoma stakeholders, not the federal agency, should make decisions where outcomes directly affect Oklahomans.

## **Background on Oklahoma’s Battle against the EPA and the Agency’s Abuse of Regional Haze Regulations**

In Section 169A of the 1977 Amendments to the Clean Air Act (CAA), Congress created a program for protecting visibility in the nation’s national parks and wilderness areas. This section establishes as a national goal the “prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I federal areas which impairment results from manmade air pollution.” 42 U.S.C. § 7491(a)(1). Congress recognized that this program requires a delicate balance that considers the timing, cost and economic impact of alternative methods to achieve such goals. 42 U.S.C. § 7491(g)(1) (“In determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance . . .”).

Congress added Section 169B to the Act in 1990 to address regional haze issues, and in 1999, EPA promulgated regulations addressing regional haze, 70 Fed. Reg. 39,104 (July 6, 2005), codified at 40 C.F.R. part 51, subpart P (“Regional Haze Regulations” or “RHR”). In Section 169B, Congress made clear its intent to delegate significant power to States to develop, review, approve, and implement site-specific implementation plans designed to make reasonable progress in achieving regional haze goals while balancing each State’s unique economic and power needs. *See, e.g.*, 123 Cong. Rec. 13,696, 13,709 (1977). EPA has recognized that, because the issues to be balanced are uniquely State and source specific, “the State must determine the appropriate level of BART (best available retrofit technology) control for each source subject to BART.” 70 Fed. Reg. at 39,107.

Ultimately, the CAA requires deference to State decision-making. The structure of CAA and RHR create distinct and defined duties of the State and EPA. The EPA is, for instance,

charged with promulgating general regulations designed to "assure ... reasonable progress toward meeting the national goal." *Id.* § 7491(a)(4). The EPA must also promulgate the list of "mandatory Class I Federal areas" which are to receive visibility protection under the Act. *Id.* § 7491(a)(2). Further, the statute tasks the EPA with providing support to the states by, for instance, studying methods for redressing visibility impairment and then providing "guidelines" to the states suggesting such appropriate methods. Similarly, under section 169B of the Act, the EPA is tasked with studying regional visibility impairment, and convening regional commissions comprised of state authorities. *Id.* § 7492(a)(1), (c). The CAA does not give the EPA authority to question the wisdom of a state's choices of emission limitations if they are part of a plan that satisfies the standards of the Act.

For more than a decade, Oklahoma Gas & Electric (OG&E) has voluntarily burned low sulfur coal with the electrical generating units ("EGUs") at the Muskogee and Sooner Generating Stations ("OG&E Units") in order to limit sulfur dioxide emissions (SO<sub>2</sub>). OG&E is Oklahoma's largest electricity provider and serves approximately 789,000 customers in 268 communities in Oklahoma and western Arkansas. Oklahoma Industrial Energy Consumers (OIEC) is a non-partisan, unincorporated association of large consumers of energy with facilities located in the State of Oklahoma. OIEC members are engaged in energy price-sensitive industries such as pulp and paper, cement, refining, glass, industrial gases, plastic, film, and food processing. OIEC members employ thousands of Oklahomans.

On February 17, 2010, the State of Oklahoma submitted to EPA its regional haze revisions to the Oklahoma State Implementation Plan ("Oklahoma SIP"). *See* Oklahoma SIP, Doc. ID No. EPA-R06-OAR-2010-0190-0002 (relevant portions attached hereto as Exhibit 3). After properly balancing the statutory factors related to regional haze, Oklahoma determined that

low sulfur coal constituted BART for SO<sub>2</sub> emissions from the OG&E Units and proposed a SIP that would have made OG&E's continued use of that low sulfur coal a mandatory condition of operation. In balancing the BART factors, Oklahoma had before it both a 2008 cost analysis for the OG&E Units — one that both the EPA and the Oklahoma Department of Environmental Quality (“ODEQ”) had stated was prepared in conformity with the EPA Air Pollution Control Cost Manual (“CCM”) — and a 2009 cost analysis prepared at ODEQ's and EPA's request that was more robust and site-specific than the 2008 cost estimate. *See id.* Both the 2008 Cost Analysis and the 2009 Cost Analysis were prepared with the assistance of OG&E's engineering consultant, Sargent & Lundy LLC (“S&L”). Oklahoma concluded, based on this and other information, that scrubbers were not cost effective for the OG&E Units.

On March 22, 2011, more than one year after Oklahoma submitted its SIP to the EPA, EPA published a proposed rule in the Federal Register proposing to approve in part and disapprove in part the Oklahoma SIP. *See Proposed Rule, 76 Fed. Reg. 16,168.* In the same notice, and without waiting for its proposed disapproval of parts of the Oklahoma SIP to become final — i.e., without waiting for and considering public comments on its proposed disapproval of portions of the Oklahoma SIP — EPA proposed a FIP to substitute its judgment for the judgment of Oklahoma on certain key issues statutorily delegated to Oklahoma, including the BART determinations for the OG&E Units.

On May 23, 2011, the State of Oklahoma, OIEC, and OG&E (among others) separately submitted extensive legal, policy, and technical comments to EPA opposing its proposed action and arguing that, for numerous reasons, the EPA's proposed action was contrary to the CAA and RHR and was otherwise arbitrary and capricious. Despite these comments, EPA published the Final Rule with respect to the Oklahoma SIP on December 28, 2011, disapproving the State's

SO<sub>2</sub> BART determinations for the OG&E Units and for two units at another facility in the State. *See* 76 Fed. Reg. 81,728. EPA then simultaneously finalized the Oklahoma FIP that imposed an SO<sub>2</sub> emission limit of 0.06 lbs/MMBtu for each OG&E Unit, which would require the installation of a scrubber at each affected unit by January 27, 2017. Moreover, in support of the FIP, EPA adopted entirely new approaches not contained within its proposed rule without proper notice and the opportunity to comment, in violation of APA requirements.

On December 28, 2011, EPA published a final rule with respect to the Oklahoma SIP, disapproving the State's SO<sub>2</sub> BART determinations for the four OG&E units and for two units at another facility in the State based on EPA's own balancing of the five statutory factors. *See* Partial Approval of Oklahoma SIP and Promulgation of FIP, 76 Fed. Reg. 81,728 (Dec. 28, 2011) ("Final Rule"), JA 23. Petitioners filed requests for reconsideration with EPA in February 2012, but no action has been taken on those requests. The Final Rule both disapproved the Oklahoma SIP provisions that set out BART for the OG&E Units and promulgated a FIP, substituting EPA's own BART determination in place of the State's.

On February 24, 2012, the State of Oklahoma filed its Petition for Review in the Tenth Circuit Court of Appeals. On April 4, 2012, the State of Oklahoma filed a Joint Motion for a Stay of the Final Rule.

On June 15, 2012, Oklahoma filed its Joint Opening Brief in the Tenth Circuit Court of Appeals to resolve the pressing issues surrounding the EPA's abuse of the RHR, CAA, and rulemaking procedures. On June 22, 2012, the Tenth Circuit Court of Appeals granted the Petitioners Joint Motion for Stay of the Final Rule, concluding that the stay factors had been

met.<sup>1</sup> The stay was granted pending a hearing by the Tenth Circuit Court of Appeals merits panel.

**a. The Role of the States**

The role of the states under the CAA's visibility program is unique, as provided by sections 169A and 169B of the CAA. Unlike other programs where the states' role is to implement federally established standards, under the visibility program, the states have primary responsibility for establishing standards. In particular, the states are charged with developing emissions limitations after balancing a number of factors. The EPA's role under this program is simply one of support. Accordingly, the EPA must treat with special deference the determinations of a state, as embodied in a state's proposed Regional Haze SIP. States also are tasked with determining "such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal ...." *Id.* § 7491(b)(2). States are responsible for determining best available retrofit technology for BART-eligible facilities. *Id.* § 7491(b)(2)(A). The states define the long-term strategy for making reasonable progress toward the national visibility goal. *Id.* § 7491(b)(2)(B). And it is the states, in consultation with one another, who are directed to assess the interstate transport of visibility impairing emissions and to decide what measures are necessary to address regional haze. *Id.* § 7492(d). Congress believed it important that states retain wide latitude in choosing how best to achieve national standards, given local needs and conditions. In addition to plain statutory language and the case law interpreting this language, the legislative history behind the Regional Haze Rule also is clear that Congress intended to vest individual states with broad authority to make BART determinations. For example, the following exchange occurred during the U.S.

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<sup>1</sup> The stay factors are" I. Petitioners Are Likely To Succeed on the Merits II. Petitioners Will Suffer Irreparable Harm Absent a Stay III. The Balance of Equities Favors Granting Petitioner' Stay Request, and Granting a Stay is in the Public Interest.

Senate debate preceding adoption of the Conference Agreement behind Section 169A of the CAA:

*Mr. McClure:* Under the conference agreement, does the state retain the sole authority for identification of sources for the purpose of visibility issues under this section?

*Mr. Muskie:* Yes; the State, not the Administrator, identifies a source that may impair visibility and thereby falls within the requirement of section 128.

*Mr. McClure:* And does this also hold true for determination of “Best Available Retrofit Technology?”

*Mr. Muskie:* Yes; here again it is the State which determines what constitutes “Best Available Retrofit Technology,” as defined in section 128. . . .

123 CONG. REC. S13696, S13709 (1977).

Consistent with this legislative intent, EPA itself has explained that “the State must determine the appropriate level of BART control for each source subject to BART.” 70 Fed. Reg. at 39, 107. The EPA has even acknowledged that “[i]n some cases, the State may determine that a source has already installed sufficiently stringent emission controls for compliance with other programs . . . such that no additional controls would be needed for compliance with the BART requirement.” *Regional Haze Regulations*, 64 Fed. Reg. 35,714, 35,740 (July 1, 1999). The EPA also has acknowledged that “the State retains the primary responsibility of developing a viable visibility program” consistent with the goal established in section 169 A (a). This responsibility includes “final authority for the development of the SIP, BART determinations, and implementation of the visibility program” in light of the goals of the Act. *See Am. Corn Growers Ass’n v. E.P.A.*, 291 F.3d 1 (D.C. Cir. 2002).

**b. Limitations on EPA's authority**

The content of the EPA's regulations and guidance and their deference to State decision-making is no accident. These rules stem from the 2002 opinion of the D.C. Circuit in *American Corn Growers*. That case involved a challenge to EPA's 1999 regional haze rules. See 64 Fed. Reg. 35714 (July 1, 1999). The court confirmed the primacy of the states by invalidating EPA's rule on the grounds that it impermissibly constrained state authority. See *Am. Corn Growers Ass'n*, 291 F.3d at 8 (EPA's rule is invalid because it is "inconsistent with the Act's provisions giving the states broad authority over BART determinations"). The D.C. Circuit relied on, in part, the legislative history of the CAA's visibility provisions in reaching this conclusion. Summarizing H.R. CONF. REP. NO. 95-564, the court stated:

The Conference Report thus confirms that *Congress intended the states to decide* which sources impair visibility and *what BART controls should apply to those sources*. The Haze Rule attempts to deprive the states of some of this statutory authority, in contravention of the Act. *Id.* (emphasis added).

The EPA therefore, cannot, through either approving or disapproving a SIP, interfere with the state's primary role in determining how national ambient air quality standards should be met under the CAA. 42 U.S.C.A. §§ 7401 et seq. As long as the ultimate effect of a state's choice of emission limitations is compliant with the national standards for ambient air, the state is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation. Reviewing the history of section 110, and judicial interpretations of it, the court in *Commonwealth of Virginia v. Environmental Protection Agency*, noted that as section 110 stood in 1975, and as it stood after the 1977 and 1990 amendments, the provision did not confer upon the EPA authority to condition approval of a state implementation plan on the state's adoption of specific control measures. See 108 F.3d 1397(D.C. Cir. 1997). Although the EPA has the authority to determine whether a state's plan meets the Act's requirements for approval (42

U.S.C.A. § 110(a)(2)), courts have held that the agency cannot tell the states what measures they should employ in meeting the requirements. (42 U.S.C.A. § 7410)

In *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975) the U.S. Supreme Court found that although the CAA plainly charges the EPA with the responsibility for setting the national ambient air quality standards, the Act, just as plainly, relegates the EPA to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations that are necessary if the national standards are to be met. According to the Court, the Act gives the agency no authority to question the wisdom of a state's choices of emission limitations if they are part of a plan that satisfies the standards of §110(a)(2), and the agency may devise and promulgate a specific plan of its own only if a state fails to submit an implementation plan that satisfies those standards. The Court stated;

“So long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.”

*Id* at 79.

The CAA then “establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals.” *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). “Air pollution prevention . . . at its source is the primary responsibility of States and local governments. . . .” 42 U.S.C. § 7401(a)(3). Congress “carefully balanced State and national interests by providing for a fair and open process in which State and local governments, and the people they represent, will be free to carry out the reasoned weighing of environmental and economic goals and needs.”

The CAA specifically vests states with the primary authority to determine BART by weighing the five statutory criteria set forth in 42 U.S.C., section 7491(g)(2). CAA Section

169A provides that “in determining [BART] the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration [the five BART factors].” 42 U.S.C. § 7491 (g)(2). Section 169A also provides that sources subject to BART “shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the [BART], as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) . . . .” 42 U.S.C. §§ 7491(b)(2)(A). The EPA may disapprove a SIP and issue a FIP under section 7410(c) only where the State's SIP fails to meet minimum CAA requirements. 42 U.S.C. § 7410(k)(3). In the case of regional haze, the CAA requires only that States weigh the five statutory factors and arrive at a reasonable understanding of BART requirements. 42 U.S.C. § 7491 (g)(2).

As stated above, the U.S. Court of Appeals for the D.C. Circuit has reviewed the EPA's authority under the Regional Haze program and agreed that the CAA “calls for states to play the lead role in designing and implementing regional haze programs.” *Am. Corn Growers Ass'n*, 291 F.3d 1, at 2. In 2002, the court reversed a portion of the EPA's original Regional Haze Rule that required states to analyze visibility improvements from multiple sources, rather than on a source-by-source basis, when determining BART requirements. The court held that the EPA could not require the states to evaluate one BART factor collectively while mandating that the other four factors be evaluated separately for individual sources. In addition to distorting the statutory factors, the court thought the EPA's approach was “inconsistent with the Act's provisions giving the states broad authority over BART determinations.” *Id.* at 8; *see also Utility Air Regulatory Group v. E.P.A.*, 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination “requires states to determine the particular technology that an individual source subject to BART must install.”)

## **I. The Arbitrary and Capricious Nature of the EPA's Preemption and Disapproval of Oklahoma's SIP**

The CAA directs the States — not the EPA — to determine the appropriate level of BART to regulate regional haze. The EPA's proposed Federal Implementation Plan ("FIP") as it pertains to the disapproval of portions of the State Implementation Plan ("SIP") as to best available retrofit technology ("BART") and the long-term strategy ("LTS") is in violation of the Clean Air Act (CAA) and the discretion and authority granted to the State under that Act. In its quest to issue a Federal Implementation Plan ("FIP") that requires Oklahoma Gas and Electric Company ("OG&E") to spend over \$1.2 billion to install dry flue gas desulfurization technology ("scrubbers") on four electric generating units in the next five years to address aesthetic concerns about regional haze, the Environmental Protection Agency ("EPA") eviscerated the authority and discretion given to the State of Oklahoma by the Clean Air Act ("CAA" or "Act"). In substituting its judgment for the judgment of the State, EPA illegally usurps the broad authority given by Congress to the States to make best available retrofit technology ("BART") determinations for regional haze. *See* 42 U.S.C. § 7491. The Oklahoma SIP included a state-specific balancing of BART factors that considered Oklahoma's unique energy and economic needs; a balancing that EPA is neither equipped nor authorized to conduct. Instead, EPA improperly mandated its desired outcome in place of Oklahoma's considered judgment as to the appropriate BART for facilities in the state.

The CAA and RHR set forth the process that must be followed in determining BART, but neither requires any specific outcome. Thus, the CAA and RHR require, in part, that a State balance five factors in making a BART determination for each qualifying facility.<sup>2</sup> EPA

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<sup>2</sup> The five BART factors are: (i) the costs of compliance; (ii) the energy and nonair quality environmental impacts of compliance; (iii) any existing pollution control technology in use at the source; (iv) the

recognizes that “States are free to determine the weight and significance to be assigned each factor.” Proposed Oklahoma BART Rule, 76 Fed. Reg. 16,168, 16,174 (Mar. 22, 2011) (“Proposed Rule”). EPA further acknowledges that “[i]n some cases, the State may determine that . . . no additional controls would be needed for compliance with the BART requirement.” Original Regional Haze Regulations, 64 Fed. Reg. 35,714, 35,740 (July 1, 1999).

The CAA and RHR require that *States*, not EPA, have the primary role in implementing the regional haze program, including making BART determinations. *See, e.g.*, CAA § 169A(b)(2)(A), (g)(2), 42 U.S.C. § 7491(b)(2)(A), (g)(2) (“in determining [BART] *the state* (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration [the BART factors]”) (emphasis added). The states are directed to define the long-term strategy and BART, one component of the long-term strategy, under the Act. It is the states that are required to consider and balance the five factors relevant to a BART determination. *See id.* § 7491(g)(2). The scope of state discretion is further confirmed in EPA guidance, which states that “[*t*]he glidepath [*to the national goal*] is not a presumptive target, and States may establish a RPG [*reasonable progress goal*] that provides for greater, lesser, or equivalent visibility improvement as that described by the glidepath.” *Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program* at 1-3 (June 1, 2007)(emphasis added).

The EPA Proposed Rule ignores the plain language of the CAA and the Court of Appeals’ recognition of the states’ dominant role in determining BART in an effort to advance EPA’s preference for scrubbers on all EGUs. EPA does not have authority to disapprove a SIP simply because it disagrees with a state’s choice in emission control measures for specific

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remaining useful life of the source; and (v) the degree of improvement in visibility that may be expected as a result of such technology. 2 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.308(e)(1)(ii).

sources. *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981) (“If an [sic] SIP or a revised SIP meets the statutory criteria, however, the EPA must approve it”).

The EPA is proposing to take an action that usurps authority granted to Oklahoma in the Clean Air Act. The Clean Air Act created a Regional Haze program to improve visibility in certain national parks and wilderness areas. The EPA can set national goals and guidelines for the program, but individual states have the authority to craft plans specific to and appropriate for their state's citizens and interests. Each state has the right to select the best control technology ("BART") for sources of emissions that contribute to regional haze, taking into consideration five specific factors, including costs of control. Oklahoma chose the technologies that are appropriate for its sources in light of these five factors and submitted an implementation plan to EPA in February 2010. In particular, Oklahoma determined that low sulfur coal was the cost effective way to control sulfur dioxide emissions to address haze issues. A benefit of this determination is that it gives state utilities greater flexibility to switch to generating electricity with natural gas or renewable sources. The state determined that installing scrubbers now is not cost effective and would lock the utilities into burning coal for the next 20 years.

On March 22, 2011, EPA proposed to reject the state's determination and substitute its own judgment for the state's via implementation of its proposed FIP.<sup>3</sup> The EPA proposed to select scrubbers as the best technology for the relevant sources in Oklahoma. The adoption of a Federal Plan would go beyond the authority granted to the EPA by the Clean Air Act because the

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<sup>3</sup> On March 23, 2011 The State of Oklahoma submitted to the Administrator of the EPA a Notice of Intent to file suit pursuant to Clean Air Act section 304 (b)(2), 42 U.S.C. section 7604 (b)(2) and 40 C.F.R. Part 54, for the EPA's failure to perform nondiscretionary duties. The suit against the EPA will be filed because the EPA was not authorized to propose a FIP for regional haze in Oklahoma on March 22, 2011, as no final action has been taken regarding Oklahoma's SIP. In addition, the window for EPA to propose a regional haze FIP was not open on March 22<sup>nd</sup>. The EPA has violated its nondiscretionary duty to honor the time constraints provided in Section 110 (c) of the CAA and 42 U.S.C. § 7410(c) regarding the promulgation of a FIP.

EPA does not have the power to question the state's determination as long as the state relied on the proper factors in making it, which Oklahoma did. It is estimated that the emission controls required by EPA will cost approximately \$2 billion to install and result in a 15% - 20% increase in residential electric rates.

EPA may disapprove a SIP and promulgate a FIP only where a State's SIP fails to meet minimum CAA requirements. 42 U.S.C. § 7410(k)(3); *see also Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975). The RHR and BART guidelines issued by EPA, 70 Fed. Reg. 39,104 (July 6, 2005), require only that States engage in the process of weighing the five statutory factors in determining BART for eligible sources in a manner consistent with the RHR, and that "States are free to determine the weight and significance to be assigned to each factor." *See* 76 Fed. Reg. 16,168, 16, 174 (Mar. 22, 2011). As the Oklahoma SIP clearly shows, Oklahoma did properly engage in that process in making its BART determinations for the OG&E Units.

Oklahoma submitted its' SIP to EPA long before EPA proposed the Oklahoma FIP, and with a full record. Since ODEQ applied the statutory factors in promulgating the Oklahoma SIP, EPA was not free to reject Oklahoma's BART determinations with respect to the OG&E Units and promulgate a FIP substituting its judgment for that of the State.

As previously set forth, the U.S. Court of Appeals for the D.C. Circuit has affirmed that EPA's role in determining regional haze plans is limited, stating that the CAA "calls for states to play the lead role in designing and implementing regional haze programs." *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 2 (D.C. Cir. 2002). The Court reversed a portion of EPA's original RHR because it found that EPA's method of analyzing visibility improvements distorted the statutory factors and was "inconsistent with the Act's provisions giving the *states* broad authority

over BART determinations.” *Id.* at 8 (emphasis added); *see also Utility Air Group v. EPA*, 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination “requires states to determine the particular technology that an individual source ‘subject to BART’ must install”). EPA lacks the authority to disapprove the Oklahoma SIP merely because it disagrees with Oklahoma’s choice in emission controls for specific sources.

The CAA gave Oklahoma the right to conduct this analysis and make a determination without being second-guessed by EPA. Oklahoma exercised the authority granted by the CAA and determined that “[t]he cost for [scrubbers] is too high, the benefit too low and these costs, if borne, further extend the life expectancy of coal as the primary fuel in the Sooner facility for at least 20 years and beyond. BART is the continued use of low sulfur coal.” *See* Ex. 3, Oklahoma SIP, App. 6-5, Item 1, Sooner BART Review at p. 29, and Muskogee BART Review at p. 29.

EPA second guessed Oklahoma’s authority by rejecting significant portions of the 2009 site-specific costs estimates, in many instances simply assuming, without verifying, that they resulted in the double counting of expenses. While OG&E disputes EPA’s conclusion regarding the 2009 cost estimates, once EPA reached the conclusion that the CCM estimates should control, the proper response by EPA should have been to return to the 2008 cost estimates, which both EPA and ODEQ had stated complied with the CCM and which support the State’s BART determinations for the OG&E Units. EPA’s attempt to create a hybrid cost estimate by selectively modifying the 2009 estimate resulted in cost estimates that were neither site-specific and real (like OG&E’s 2009 cost estimates) nor reflective of the CCM general estimates (like OG&E’s 2008 cost estimates). EPA’s “cherry-picking” approach to the cost estimates for the OG&E Units in order to justify its predetermined conclusion that scrubbers were BART was, therefore, arbitrary and capricious.

Despite the Act's exclusive assignment to the States of the authority to weigh the statutory factors, EPA nonetheless disputes Oklahoma's cost effectiveness analysis and seeks to use the assumptions and speculation of its consultant as the basis for disapproval of the Oklahoma SIP. EPA's principle contention is that the 2009 site-specific cost estimates considered by Oklahoma did not comply with the CCM. To reach that result, however, EPA (i) ignored the 2008 cost estimates that it had acknowledged were prepared in accordance with the CCM; (ii) rejected the 2009 estimates by giving preference to the assumptions and speculation of its consultant over the judgment of the State; and (iii) manipulated the inputs for the cost effectiveness calculation by ignoring the requirements of its own guidelines and basic engineering principles. Even beyond these fundamental flaws in EPA's cost effectiveness review of the Oklahoma SIP, the separate cost analysis conducted by EPA's consultant was not supported by the record and was arbitrary in its approach. At the same time, EPA took an improper approach to visibility improvement designed to overstate the benefits from the installation of scrubbers. The fundamental flaws in EPA's cost-effectiveness analysis not only demonstrate that its disapproval of the Oklahoma SIP was arbitrary and capricious, but also preclude a finding that EPA had a reasoned and proper basis for the FIP.

"States have flexibility in how they calculate costs." 70 Fed. Reg. at 39,127. Where the RHR give States flexibility and Congress has designated that States take the dominant role in determining BART, EPA is not free to undercut the State's reasonable exercise of that flexibility, particularly by substituting its own arbitrary approach. EPA illegally usurped State authority in violation of the plain language of the Act when it rejected Oklahoma's BART determination for the OG&E Units and, thus, the FIP is unlawful. In addition, because EPA published a notice that certain States, including Oklahoma, had initially failed to meet the deadline for submitting

regional haze SIPs, the CAA unequivocally imposed a two-year requirement for EPA to issue a FIP. *See* 42 U.S.C. § 7410(c); *Gen. Motors v. United States*, 496 U.S. 530, 537 (1990) (citing CAA §110(c) as an example of “explicit deadlines” established by the CAA). It is undisputed that EPA failed to promulgate a FIP within that two-year window. Thus, EPA’s attempt to promulgate the Oklahoma FIP outside that two-year window, without first providing a new notice to re-open the two-year window for doing so, was contrary to the Act. Clearly, the EPA is going beyond its authority and abusing its power by overregulating in areas statutorily regulated by the States.

As previously noted, Oklahoma has the primary authority to determine BART and, pursuant to EPA’s own guidelines, this primacy extends to the cost analysis, where the State is given “flexibility in how [it] determines costs.” 70 Fed. Reg. at 39,127. Oklahoma’s cost analysis, set forth in the Oklahoma SIP, clearly meets statutory requirements. Even if EPA was authorized to second guess Oklahoma’s judgment, EPA has not articulated any sound or reasonable basis for rejecting Oklahoma’s considered judgment regarding the appropriate costs to consider.

## **II. The EPA’s Abrogation of Notice and Comment Requirements When Imposing FIP’s**

The Final Rule violates the Administrative Procedure Act (“APA”), 5 U.S.C. § 551, *et seq.*, because it introduces and relies upon rules or approaches not previously discussed in the proposed rule. *See* 5 U.S.C. § 553(b)(3) (requiring agencies to give notice of “the terms or substance of the proposed rule or a description of the subjects and issues involved.”). “To satisfy the APA’s notice requirement, . . . an agency’s final rule need only be a logical outgrowth of its notice.” *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (internal

quotations and citations omitted). However, “a final rule fails the logical outgrowth test and thus violates the APA’s notice requirement where interested parties would have had to divine the agency’s unspoken thoughts because the final rule was surprisingly distant from the proposed rule.” *Id.* (vacating portion of agency’s final rule for violating APA’s notice requirements) (internal quotations and citations omitted). Here, Oklahoma had no means by which to divine EPA’s introduction of several new outcome determinative approaches set forth for the first time in the Final Rule and, therefore, had no opportunity to properly comment on or present evidence regarding them. The issues raised by the use of these new approaches are particularly important in this case because they tread on areas that the CAA commits to the discretion of the State in the first instance.

EPA’s issuance of the Oklahoma FIP was also procedurally defective because of its timing. First, the CAA does not give EPA authority to propose a FIP prior to final disapproval of the Oklahoma SIP. The Act, moreover, requires that EPA give Oklahoma a reasonable opportunity to cure any alleged defects in a disapproved SIP. CAA Section 110(c)(1)(A) allows promulgation of a FIP after EPA “finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section or . . . disapproves a State implementation plan submission in whole or in part.” 42 U.S.C. § 7410(c)(1). Section 110(c) also states that EPA shall propose a FIP “unless the State corrects the deficiency,” thereby reflecting Congress’s intention for States to have the power to design their own SIP and have an opportunity to correct a SIP before a FIP is issued. § 7410(c). Simultaneous promulgation of the FIP is also inconsistent with the Act’s definition of a FIP. A FIP is defined as a plan “to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in

a State implementation plan.” § 7602(y). Thus, a FIP cannot properly exist until after final action has been taken on a State’s SIP.

CAA § 307(d)(3) requires that “[t]he statement of basis and purpose” that must accompany each proposed FIP include a summary of “the factual data on which the proposed rule is based” and “the major legal interpretations and policy considerations underlying the proposed rule.” 42 U.S.C. § 7607(d)(3). EPA cannot credibly claim to be able to present the relevant factual, legal, and policy information and rationale to justify a proposed FIP before it has: (1) determined whether and to what extent the Oklahoma SIP may be deficient and un-approvable; (2) provided the public with an adequate explanation of any such determination in a proposed EPA rule on SIP approval or disapproval that is published for public review and comment; (3) received, considered, and responded to public comments on the proposed action; and (4) made a final determination and taken final action to disapprove the SIP in whole or in part.

This due order of action by EPA is important because, as demonstrated by the discussion above regarding cost effectiveness, EPA’s authority when reviewing a Regional Haze SIP is much different than its authority when promulgating a FIP. Because the CAA delegates the power to determine BART exclusively to the States, the fact that EPA would take a different approach or reach a different conclusion is irrelevant to its approval or disapproval of a Regional Haze SIP. Yet, if EPA is allowed to take final action on such a SIP at the same time that it issues a FIP, it can blur this distinction and impermissibly use the FIP process to impose its preferences with respect to the five statutory BART factors onto the States.

Second, because EPA published a notice that States, including Oklahoma, had failed to meet the statutory deadline for submitting regional haze SIPs, it is undisputed that the CAA

unequivocally imposes a two-year limit on EPA's ability to take such action. *See* 42 U.S.C. § 7410(c)(1); *Gen. Motors v. United States*, 496 U.S. 530, 537 (1990) (citing CAA § 110(c) as example of "explicit deadlines" established by the CAA). It is also undisputed that EPA failed to promulgate a FIP within that two-year window. Thus, EPA's attempt to promulgate the Oklahoma FIP outside that two-year window, without first providing a new notice to re-open the two-year window for doing so, was contrary to the Act.

The new "overnight" cost method used by EPA to determine the cost effectiveness of scrubbers is at the core of EPA's Final Rule, both in disapproving the Oklahoma SIP and in justifying its FIP. EPA's failure to raise these new approaches as justification for its proposed actions in the Proposed Rule deprived Petitioners of the right and opportunity to comment on them. It was, therefore, improper under the APA and it deprived the State of the authority delegated to it by the CAA to determine the reasonable and appropriate methods for evaluating costs in making BART determinations. EPA's Final Rule is fatally defective because of its failure to provide notice of this new approach and allow comment on it.

The Final Rule also reveals, for the first time, EPA's new methodology to determining visibility improvement—the so-called "number of days" approach. 76 Fed. Reg. at 81,736. Again, because this approach was not raised by EPA in the Proposed Rule, the Final Rule is fatally defective. Because the Final Rule fails the logical outgrowth test, Petitioners' challenges to the Oklahoma FIP are likely to succeed, justifying a stay of the FIP.

The administrative record shows that EPA's "nothing but scrubbers" approach led it to reject a final regional haze state implementation plan ("SIP") that Oklahoma sent to EPA over a year before EPA proposed to adopt the FIP. The only way that EPA could achieve this predetermined outcome was to ignore the Act and its own guidance and violate the

Administrative Procedures Act (“APA”) by raising and relying on new rules and methodologies for the first time in its final rule adopting the FIP. For EPA to accomplish this objective, it had to ignore its own policies and procedures for making these determinations and, in the Final Rule, use new approaches regarding cost effectiveness and visibility improvement that it had not identified in the proposed rule. This approach precluded public comment and violated Petitioners’ procedural rights.

The RHR require States to submit their BART determinations, along with other required elements, as SIP revisions to EPA for approval (“Regional Haze SIPs”). EPA may disapprove a Regional Haze SIP and issue a FIP only when a SIP fails to meet all of the applicable requirements of the Act. 42 U.S.C. § 7410(k)(3). In this instance, the applicable requirements are that the emission limitations developed to address regional haze be developed pursuant to the evaluation process and balancing of the BART factors set out in the CAA and RHR. 42 U.S.C. § 7491(b).

### **III. Economic Costs Associated with the EPA’s Illegal Actions Under the Regional Haze Program**

The EPA’s action is sure to raise the costs of electricity to consumers, with a corresponding loss of jobs and economic activity. EPA’s illegal adoption of the Final Rule will have an immediate and irreparable impact on the State whose CAA authority has been eviscerated by EPA’s actions. Likewise, electricity consumers in Oklahoma will face significant electricity rate increases as a result of the costs imposed by the Final Rule.

Oklahoma has demonstrated the substantial economic impact EPA’s Final Rule would have on the State. OG&E will be required to expend significant resources immediately in order to implement the installation of the scrubbers with any chance of meeting the five year deadline,

and just in the first two years, the costs will exceed \$200 million. Even if OG&E were able to roll some of those costs into its rate structure, this will have an obvious adverse effect on the citizens of Oklahoma who have to pay those higher electricity rates. In today's economic climate, those very real economic impacts of EPA's FIP cannot and should not be ignored.

#### **IV. Conclusion**

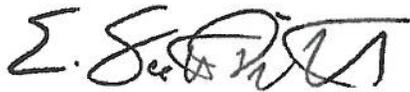
First, as noted above, Congress designated the State as the principle decision maker for BART determinations and regional haze programs. The EPA's actions here deprive Oklahoma of the ability to fashion a regional haze program that balances costs and visibility improvement in a manner that is appropriate for the citizens and economy of this State. The EPA's actions undermine the State's authority and damage the ability of Oklahoma to fulfill its regulatory function as created by Congress.

Second, as noted above, the EPA's abrogation of notice and comments when imposing FIP's on Oklahoma violates key and foundational principles of rulemaking.

Finally, if some of these costs are imposed on consumers in Oklahoma, the increased electricity rates will have an adverse economic impact with consumers paying higher rates directly and businesses looking to pass their higher costs to their customers. Indeed, as a large electricity consumer, the State too will feel the direct economic impact of higher rates. Neither the State nor its citizens has recourse for such unnecessary costs. Thus, irreparable harm will result from continuation of the current effective date for the Oklahoma FIP.

The State of Oklahoma has properly exercised its discretion under the CAA's visibility program to establish a long-term strategy for the reduction of visibility impairing pollutants, including the selection of BART. The EPA's proposed action disregards clear congressional intent that primary regulatory authority under the visibility program rests with the States. The

EPA's proposal would impose the EPA's policy judgments based on the EPA's balancing of factors where it has no authority to do so. The EPA does not have the right under the Clean Air Act to substitute its judgment for that of the state when it comes to determination of the best control technology for sources in the state.

A handwritten signature in black ink, appearing to read "E. Scott Pruitt". The signature is stylized and somewhat cursive.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA



Testimony before the Committee on Oversight and Government Reform Subcommittee on Energy Policy, Health Care and Entitlements

**“Oversight of IRS’s Legal Basis for Expanding Obamacare’s Taxes and Subsidies”**

July 31, 2013

E. Scott Pruitt  
Attorney General  
State of Oklahoma

Chairman Lankford, Ranking Member Speier, and Members of the Subcommittee,

Good morning, and thank you for inviting me to appear before you today to present concerns on the implementation of the Affordable Care Act, and the legal and economic implications of actions taken by the U.S. Internal Revenue Service, the Treasury Department and the U.S. Department of Health and Human Services.

This is a critical issue for Oklahoma and for every one of the 34 states that chose not to establish a state health care exchange – a choice that was provided to us by Congress and affirmed by the United States Supreme Court.

Because of the serious ramifications facing our states, I appreciate the attention that this subcommittee is giving to these concerns with this matter.

First, I would like to be clear about my intentions today regarding health care policy and the law.

My comments will not focus on the need for health care reform or the wisdom of the policy choices embodied in the ACA. Our responsibility as attorneys general is to preserve the rule of law; is to give meaning and affect to that which you have passed in Congress while protecting the rights and interests of our citizens.

When Congress passed the health care act, they provided states a choice. That choice was whether to establish a state health care exchange or to opt for a federal exchange. The ACA included with that choice a set of consequences and benefits that states had to consider. As the Chairman indicated, our policymakers did in fact go through that process in a very deliberative fashion. Among the outcomes of a state choosing not to establish a state exchange is a consequence of no subsidies flowing into that state. The law also provided a benefit of no penalties in the employers mandate arena for large employers.

Our Governor Mary Fallin and other state stakeholders thoughtfully and thoroughly reviewed the options provided them under the Affordable Care Act, and ultimately chose not to establish a state health care exchange.

But after the decision was made, the IRS finalized a rule that would strip states of the main benefit of their choice – no large-employer penalty. Congress provided this choice to states, and now the IRS is attempting to take that away by rule.

The IRS is acting as a super legislative body in this capacity by enacting regulations that Congress did not authorize. Their actions conflict with the ACA, and when informed of this, the regulators ignored public warnings and concerns that pointed out the problem. In fact, many months before the rule went final in May 2012, the record was made as early as November 2011 with respect to these concerns.

The IRS does not have the authority to expand access to subsidies beyond what is clearly written in the law. As the Chairman indicated, that's billions of dollars that will be flowing unauthorized by Congress. The regulation appears geared more toward enacting the agency's own policies than faithfully following implementation of the law passed by Congress.

That is why in September of last year, I filed a lawsuit in the Eastern District of Oklahoma challenging the IRS rule and its lack of authority under the Affordable Care Act. Our unique position allowed us to lead the charge against rogue agencies misusing the law to advance their own agenda.

As we have stated in our lawsuit, Oklahoma's position has been clear from the very beginning – that the large-employer penalty not only violates the law when implemented in states without a state health care exchange, but cripples businesses with burdensome and onerous requirements and penalties.

For a medium-sized company, already struggling to meet the needs of its thousands of employees, the penalty equates to millions annually when only one of its employees qualifies for a subsidy under subpart A.

Until now, the Obama Administration has argued in court that the mandate is uncomplicated and easy, but its recent sudden reversal and delay of the mandate, clearly demonstrates and acknowledges that the large-employer mandate is in fact a complex, job killing and harmful mandate on businesses, and again Oklahoma is considered a large business under the statute.

Exactly where these burdens fall is a serious matter, and if the ACA exempts employers in states foregoing the establishment of their own exchange, that exemption should be recognized and enforced, and we appreciate the committee's focus on that.

These issues are of great importance to the Great State of Oklahoma because we value our state's economic stability and growth, and the rule of law.

Our fight continues on behalf of Oklahoma citizens to confront the Administration when it seeks to overreach its authority and circumvent the law. We hope to obtain relief in this matter through the Courts, but we also welcome Congressional oversight being brought to bear on these agencies.

I look forward to answering any questions you may have and I thank you for your time this morning, Mr. Chairman.



Testimony before the Senate Environmental and Public Works Subcommittee  
on Clean Air and Nuclear Safety

“Legal Implications of the Clean Power Plan”

May 5, 2015

E. Scott Pruitt  
Attorney General  
State of Oklahoma

Chairwoman Capito, Ranking Member Carper, Chairman Inhofe, and Members of the Subcommittee,

Thank you for the invitation to discuss the legal ramifications of the EPA's proposed Clean Power Plan.

This is an issue of major importance to states 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 the 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 in 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 both suffer.

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 bureaucrats' authority over States' energy power generation mixes.

The plan requires each State to submit a plan to cut carbon-dioxide emissions by a nationwide average of 30 percent by 2030.

In Oklahoma, 40.5 percent of energy generation comes from coal-fired power plants while 38.1 percent comes from natural gas. Oklahoma ranks fourth in the nation with 15 percent of power generation coming from wind.

This begs the question, how does the EPA expect States like Oklahoma to meet the goals of the Clean Power Plan? There are only so many ways Oklahoma can achieve the 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-fired power plants 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 can actually be achieved by existing industrial sources through source-level, "inside-the-fence-line" measures.

The proposal's attempt to force States to regulate energy consumption and generation throughout their jurisdictions, in the guise of reducing emissions from fossil fuel-fired power plants, violates Section 111(d)'s plain-text requirement that the performance standards established for existing sources by the States must be limited to measures that apply at existing power plants themselves.

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 a State's entire resource and energy sectors.

To meet the objectives of the EPA's proposed rule, States will 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 would also be forced to alter existing regulatory framework which would threaten energy affordability and reliability for consumers, industry and energy producers.

Finally, there is substantial concern that the EPA – before the Clean Power Plan rule 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 sanctions.

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 like-minded states.

Madam Chairwoman, I am not one who believes the EPA has no role. The agency has played an 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 context, by elevating renewable power generation at the expense of fossil-fuel fired 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 the agency. States should be left to make decisions on the fuel diversity that best meets their power 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 State authority under the Clean Air Act be respected and preserved and that 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 discuss these issues with you.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Scott Pruitt". The signature is stylized with a large, sweeping initial "E" and a horizontal line extending to the right.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA



E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

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*Joint Hearing of the Senate Committee on Environment and Public Works and House Committee  
on Transportation and Infrastructure*

*"Impacts of the Proposed Waters of the United States Rule on State and Local Government"*

Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio, Members of the Senate Committee on Environment and Public Works and House Committee on Transportation and Infrastructure, thank you for this opportunity to discuss the Environmental Protection Agency's proposed rule to redefine the "Waters of the United States" and the significant negative impact such a rule would inflict on states and the landowners within their borders.

Respect and protection of private property rights sets the United States apart from other nations and has fueled the greatest expansion of economic freedom the world has ever known. Indeed, private property rights are among the foundational rights of any functional democracy, not just ours.

President Obama's Environmental Protection Agency currently stands poised to strike a blow to private property rights, through a proposed rule that radically expands EPA jurisdiction by placing virtually all land and water under the heavy regulatory hand of the federal government.

The Proposed Rule aims to redefine what constitutes "navigable waters" or "waters of the United States" – a term that long been understood to include only significant bodies of water capable of serving as conduits for interstate commerce. The proposed rule redefines those terms to now include virtually every body of water in the nation, right down to the smallest of streams, farm ponds and ditches. This is a naked power grab by the EPA.

Messrs. Chairmen, the EPA should undoubtedly have a role in solving interstate water quality issues. That role should not, however, be so expansive so as to render virtually every property owner in the nation subject to often unpredictable, unsound, and Byzantine federal regulatory regimes. When the states are cut out of the loop in favor of federal regulators, landowners are left lobbying distant federal bureaucrats when the system wrongs them – and wrong them it will.

Simply put, the proposed rule is a classic case of overreach, and flatly contrary to the will of Congress, who, with the passing of the Clean Water Act, decided that it was the states who should plan the development and use of local land and water resources.

The EPA has been generally dismissive of these concerns brought by states, local governments and individual citizens, with their primary tactic being an ineffective public relations campaign

to sway opinions in rural America. EPA Administrator Gina McCarthy has been documented as dismissing many concerns wholesale — calling them “ludicrous” and “silly” — while also asserting that the proposed rule is all about “protecting waters” and providing clarification.

To Administrator McCarthy, who appeared before you today, I say: pardon my skepticism, but these reassurances are from the same administration that preyed on the “ignorance” (their words, not mine) of the American voters to sell them on a federal takeover of healthcare, with lies like “if you like your insurance, you can keep your insurance.” So, just as President Reagan told us, “Trust, but verify,” we would like to trust you, but something does not add up. This rule smells like far more than mere clarification; indeed, it reeks of federal expansion, overreach, and interference with local land use decisions.

Notably, there are several United States Supreme Court decisions illustrating that the intended regulatory jurisdiction of the EPA has been limited primarily to the “navigable waters” of the United States, with all other waters rightly left for the states to regulate.

At the time the Clean Water Act (CWA) was passed, the Supreme Court had previously defined the “navigable waters of the United States” as interstate waters that are navigable in fact or readily susceptible of being rendered so. [The Daniel Ball, 10 Wall. 557, 563 (1871)]. More recently, the Court decided *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* [531 U.S. 159 (2001)], known as SWANCC, and *Rapanos v. United States* [574 U.S. 715 (2006)]. These two cases more clearly specify the limits of federal jurisdiction under the CWA, placing two significant limitations on federal jurisdiction. First, the Court has made clear that any examination of federal jurisdiction must begin with the understanding that Congress intended the States to retain primacy over the development and use of local land and water resources. Second, the Court made clear that federal jurisdiction is only proper over water that has a continuous surface connection to a “core” water.

In *SWANCC*, the Court ruled that the Army Corps of Engineers exceeded its authority by attempting to regulate “non-navigable, isolated, intrastate waters,” such as seasonal ponds. The Court explained that in enacting the CWA, Congress intended to preserve the States’ historical primacy over the management and regulation of intrastate water and land management.

In *Rapanos*, the Court described two different tests for when a secondary water can be considered a “water of the United States.” A four-Justice plurality thought the question turned on whether the water has a continuous surface connection to a core water, while Justice Kennedy’s concurring opinion examined whether a water has a “significant nexus” to a core water.

With this Proposed Rule, the EPA has attempted to transform Justice Kennedy’s concurring opinion in *Rapanos* into a regulatory blank check for themselves. But the Proposed Rule’s *ad hoc* approach is certainly contrary to the test adopted by the *Rapanos* plurality and is broader than even Justice Kennedy would permit.

In addition, and critically, the proposed rule’s inclusion of this vague, catch-all category defeats the EPA’s claimed purpose of the rule of bringing “transparency, predictability and consistency” to the scope of CWA jurisdiction and land-use decisions. Instead, the EPA has simply redefined the meaning of “navigable waters” in an extraordinarily broad way, so that any land owner may

be subject to onerous permitting requirements or severe civil penalties if violated, even if unknowingly.

Oklahoma has seen firsthand how the federal government, specifically the EPA, abuses its regulatory power in states that have interests in energy, farming and ranching. The states are not, and should not be used as, a vessel to carry out the misguided visions of bureaucrats in Washington, who often seem to have little regard for how their actions negatively impact the economy and private property rights.

During the comment period for this rule, Oklahoma filed its objections to the rule. Additionally, as the chief law officer of the state of Oklahoma, I can say with confidence that if the EPA continues forward with this rule as proposed, the rule will be challenged in court.

If this rule is issued as proposed, we will all live in a regulatory state where farmers must go before the EPA to seek permission to build a farm pond to keep their livestock alive, where home builders must seek EPA approval before beginning construction on a housing development that contains a dry creek bed, and where energy producers are left waiting for months or even years to get permits from the EPA, costing the producers tens, if not hundreds, of thousands of dollars that inevitably will be passed on to consumers.

Messrs. Chairmen, the EPA's proposed rule is unlawful and must be withdrawn. We urge the EPA to meet with state-level officials who can help the agency understand the careful measures that states already have in place to protect and develop the lands and waters within their borders. We urge the EPA to listen to Congress regarding the intent of the law to limit the regulation of non-navigable waters. But most of all, we urge the EPA to take note of the harm that its rule will do to the property rights of the average American and their ability to make land use decisions.

Thank you for the opportunity to speak to your committees.

## The Next Supreme Court Justice

By Scott Pruitt

When Justice Antonin Scalia passed away this February, talk almost immediately turned to who would replace him. But it's hard to fathom how such a man could be "replaced." Justice Scalia was without a doubt the most influential jurist in our generation. Even those who vehemently disagreed with him acknowledge his profound impact. His scholarship and judicial opinions, through brilliance and wit, transformed how we think about the law and the Constitution. He inspired a generation of law students and lawyers. He provided the foundation for the works of judges and legislators, as well as attorneys general like myself. And he challenged those opposed to his ideas to sharpen their arguments to meet the force of his logic.

Many of those who knew Justice Scalia will attest that his brilliance was matched only by his warmth, cheer, and grace. I personally was privileged to experience this truth. I was visiting Washington, D.C. last year, about to head back to Oklahoma, when my good friend Leonard Leo, Executive Vice President for the Federalist Society, invited me to stay some extra time to have dinner with a few friends. One of them was Justice Scalia. I cannot express the joy I experienced having the opportunity to pray over a meal with this man, whom I greatly admired, and to break bread with him as we shared stories and our mutual love for this country and its Constitution. He will be deeply missed.

As I've had time to reflect on his legacy, and my hopes for the person who will take his seat on the Supreme Court, I wanted to share with you some of the principles I believe Justice Scalia stood for, and that I pray the next Justice will share. First, as a scholar and a judge, Justice Scalia championed the idea that the law, from statutes to the Constitution, must be applied according to its text, and only its text. Judges should not apply the law based on what is good policy or what they guess Congress may have wanted (but did not express) in passing a law. This idea may be simple and obvious to us now, but before Justice Scalia, it was rare for courts to faithfully apply the law as written and only as written. Through the force of argument and relentless dedication, Justice Scalia was able to transform the legal culture into paying attention first and foremost to the text of the law. As his colleague liberal Justice Elena Kagan declared, thanks to Scalia, "we're all Textualists now." The next Justice must have the humility and rigor to be faithful to the text of the law.

Determining the meaning of that text led Justice Scalia to the second great cause of legal career, Originalism. In Justice Scalia's view, the words of the law should be understood just as they were understood by the people when the law was enacted—also known as the "original public meaning." For example, if you strike a bargain with someone, and later there is a dispute about that bargain, how do you interpret the words of your contract? Do you look to what the words of the contract meant at the time you agreed to them? Or do you look to what those words mean to someone else ten or fifty years after the fact? There are some who believe that the meaning of words in the law change over time, untethered to history or any objective inquiry. What is legal one day could be illegal the next without any changes to the words of the law. Justice Scalia rejected that notion and

held fast to the idea that the meaning of the words of the law is fixed, and it is the meaning ascribed to the words by the people at the time they were enacted. *That* is the law the people or their representatives agreed to and voted on, and no other. If later the people see fit to change the law, finding the text outdated or ill-advised, it is for them to change it, not for unelected judges. The next Justice must be an Originalist.

These two principles—Textualism and Originalism—are ultimately rooted in a third characteristic of Justice Scalia’s jurisprudence: An unwavering respect for the institution of Democracy. Laws, including the Constitution, are only legitimate to the extent that they emanate from the people. The Constitution is not an autonomously evolving document that sprouts forth new rights and obligations that the people never intended nor voted to include. Accordingly, like Justice Scalia, judges should reject the invitation to discover new “rights” in the Constitution. They should respect the constitutional prerogatives of the people to pass laws through their democratically-elected legislatures, limited only by the restraints actually put in the Constitution by vote of the people. The next Justice should stay strong against the temptation to exalt his or her own wisdom over the wisdom of the people. Doing any less fails to recognize that we live ultimately in a democracy, not in a society in which judges are our rulers.

This caution against creative interpretation of the Constitution must be balanced with a fourth characteristic of Justice Scalia’s life work: Vigorous and tenacious enforcement of the rights and provisions actually written in the Constitution. When a right was firmly rooted in the Constitution’s text and history, there was no more ardent advocate for that right than Justice Scalia. He was often more passionate in defense of such rights than even his liberal colleagues. From the right of free speech to the rights of criminal defendants—like the right to freedom from unwarranted searches or the right to confront your accuser—Justice Scalia was unmatched in his defense of constitutional liberties. Beyond enumerated individual liberties, Justice Scalia also recognized that the Constitution’s primary protection of liberty is its structure—of checks and balances between branches, of the separation of powers between the federal government and the states. He consistently held the government to account in ensuring that it was acting pursuant to proper authority and procedure. In short, Justice Scalia rejected the judicial activism of inventing law while embracing judicial engagement by ensuring that the limits on government are strictly enforced. The next Supreme Court Justice must be similarly engaged.

Having a Justice in the mold of Justice Scalia on the Supreme Court may be more important now than it has been in half a century. If you are a legal conservative—a Textualist, an Originalist, a Constitutionalist—there is some to gain, but an enormous amount to lose, in the appointment of next Associate Justice. Not since the New Deal has the country had a conservative majority on the Supreme Court. During the last sixty years, the Court has either been decidedly liberal or has been split between liberals and conservatives. This means that over the last 25 years, the Court’s most controversial and closely-divided decisions sometimes led to a liberal outcome, sometimes to a conservative one. This was the case at the time of Justice Scalia’s death—four unwaveringly liberal Justices (Ginsburg, Breyer, Sotomayor, and Kagan), three solidly conservative Justices (Scalia,

Thomas, and Alito), a fourth who votes conservative much of the time (Chief Justice Roberts), and one swing-vote (Justice Kennedy). Replacing Justice Scalia with a liberal would fundamentally alter that balance, providing the liberal wing of the Court with a solid five-justice majority that will ensure all controversial decisions will have only one possible outcome. By contrast, if Justice Scalia is replaced by a conservative like himself, the status quo remains a closely-divided Court where ideologically-charged cases could come out either way.

Make no mistake: The liberal Justices of the Court vote as a solid block, rarely departing from one another. Whereas a conservative Justice may occasionally for reasons of judicial philosophy depart from what some might consider the “conservative” outcome—as Justice Scalia often did—one is hard-pressed to find many decisions where a liberal Justice’s vote is ever in question. For example, in the Supreme Court’s 2014-2015 term, all four liberal Justices agreed with each other over 90% of the time—more agreement than any single conservative Justice had with another conservative Justice. By contrast, Chief Justice Roberts agreed with Justice Thomas in only 70% of cases. If the liberal wing of the Court has a five-Justice majority, we would be wise to expect that no controversial decision of the Supreme Court will ever cut in conservatives’ favor.

From a broad perspective, this is what is at stake with the appointment of the next Supreme Court Justice. But assigning labels like “liberal” and “conservative” can sometimes be unhelpful when speaking of an institution as complex as the U.S. Supreme Court and cases as nuanced as those before the Court. So I want to provide a survey of the issues that the Court might decide in the upcoming years once a ninth Justice is appointed.

It might be appropriate to begin with one of our core liberties, without which our democracy cannot function: The freedom of speech. At issue these days is the freedom to spend—or not spend—money on political speech. For example, before Justice Scalia passed away, the Supreme Court voted to grant review of a case called *Friedrichs v. California Teachers Association*, in which public-sector employees wanted the right to be free from paying compulsory union dues. This case asked an important question about free speech: Can the government force you to contribute money to a political cause you oppose? But Justice Scalia died before the case was decided. The Court split evenly 4-4, leaving the issue to ultimately be resolved by a future Supreme Court—and the deciding vote to be cast by the future ninth Justice.

On the other side of the political speech coin is the continued vitality of the Supreme Court’s *Citizens United* decision. Let me clarify a common misconception: *Citizens United* did *not* hold that corporations may give unlimited amounts to political candidates. In fact, the laws limiting the amount of campaign contributions to a few thousand dollars are still valid and in place. Rather, in *Citizens United*, the Supreme Court held that the government may not limit the amount of money anyone—including individuals, unions, and corporations—spends on their own, independent political advocacy and speech. But this decision was decided 5 to 4, with Justice Scalia in the majority. If his vote is replaced with someone who disagreed with *Citizens United*, it very well might be overturned.

The First Amendment also protects our religious liberty—another core right at stake in the coming years. For example, before Justice Scalia passed away, the Supreme Court granted review in *Trinity Lutheran Church of Columbia v. Pauley*, which is to decide whether certain state laws called “Blaine Amendments” are constitutional. Blaine Amendments, if you are not familiar with them, are provisions added to state constitutions during a time of anti-Catholic fervor that prevent any state funds from being used to benefit a church or a religion for *any* reason. This means that if a state government is running a program that provides resources to private institutions, it must discriminate against those institutions that happen to be religious, even if the program that is being funded is not at all religious. In this case, the State of Missouri ran a program providing scrap tires for flooring in playgrounds to make them more safe for children. But because of the Blaine Amendment, the State refused to provide tires for a Church’s playground. With other Attorneys General, I filed a brief supporting the effort to get these discriminatory Blaine Amendments struck down. The new justice is likely to cast the deciding vote on whether to remove this legacy of bigotry and hostility to religion from our laws.

The freedom of religious conscience may also hang in the balance. We have seen this in the *Hobby Lobby* case, where the Supreme Court protected the right of religious employers not to fund abortions. So too in the *Little Sisters of the Poor* case, where the Supreme Court has, for now, narrowly avoided the question of whether Catholic nuns can be required to have their health insurance plan cover contraception. On the horizon are other cases where our freedom of conscience is at issue. One case recently appealed to the Supreme Court involves pharmacists objecting to a Washington law that requires them to sell abortion drugs even when supporting abortion violates their beliefs. Similarly, whether civil rights laws can be used to force, for example, a Christian photographer to use her artform to celebrate a same-sex wedding may also reach the Court soon. All of these First Amendment issues, from freedom of speech to freedom of religion, need a new Supreme Court Justice that is dedicated to ensuring that those freedoms are vigorously protected.

Moving from the from the First Amendment to the Second, the next Justice will likely cast the deciding vote on whether to continue to recognize an individual right to keep and bear arms, or whether to make that right so narrow that it is, for practical purposes, read out of existence. For example, the Ninth Circuit Court of Appeals in California just this month held that the Second Amendment does not forbid laws that effectively prohibit most people from carrying a firearm in public. Without a Justice willing to stand up for an effective right to bear arms, the Second Amendment might very well be a dead letter.

Numerous more issues hang in the balance at the Supreme Court. My office defended the most recent case challenging the death penalty and forms of execution, but with an additional liberal Justice on the Court, the death penalty might soon meet its own swift demise. The list can go on: affirmative action, the regulation of the abortion industry, and voting laws are all potential subjects of a deciding vote from the person filling Justice Scalia’s seat on the Supreme Court.

But I want to focus on one final set of constitutional questions that have reached their tipping point in recent years and could be in the hands of the future ninth Justice. Those questions have to do with the structure of our Constitution. Contrary to what might be popular belief, the primary guarantee of our liberty in the Constitution is not the Bill of Rights, but that the Constitution has set up a structure that prevents accumulation of power and oppression of the people. It does so in part by separating power between organs of government. Power is divided between the states and the federal government. Within the federal government, it is further divided between the Executive, Legislative, and Judicial branches. The founders expected that those in the different organs of government would be jealous for their own power, zealously defending it from other parts of government that would attempt to seize it. In this manner, the structure of the Constitution provides the greatest and broadest guarantee of liberty—by limiting power at the root.

But these structural protections are under threat. Since at least the New Deal, the President has been accumulating more and more power, and the current administration has taken this quest for unilateral authority to new levels. For example, the President has engaged in numerous attempts to effectively rewrite existing laws—the job of Congress—when Congress refuses to pass laws that he desires. Last year the President’s Environmental Protection Agency instituted a new “Clean Power Plan,” which is his attempt to fight climate change absent any authority granted by Congress, by effectively attempting to put the coal industry out of business. The State of Oklahoma, along with 28 other States, sued to have this rule blocked. In his last act on the bench, Justice Scalia voted to put this Clean Power Plan temporarily on hold while it is being litigated, providing a good indication that five of the Justices thought it to be unlawful. But with Justice Scalia gone, it will likely be his replacement that finally decides this important issue of executive power and energy policy.

The President’s attempts to rewrite laws doesn’t end there. The EPA and the Army Corps of Engineers recently rewrote the definition of the Clean Water Act’s term “Waters of the United States” (WOTUS) to include almost every puddle and pond in the country, meaning that the Executive will seize authority to regulate that water away from the states. Again, Oklahoma and 26 other States have challenged this power grab. Most recently, the President and his agencies have decided to unilaterally create mandatory accommodations for transgender people by rewriting laws like Title IX, which prohibits discrimination based on “sex.” In the President’s world, the word “sex” in the law no longer means biological sex, but rather means “gender identity,” which the administration defines as a person’s “internal sense of gender.” A new Justice will likely cast the deciding vote on whether courts should check this type of executive overreach.

In addition to virtually inventing new laws to enforce, the second way in which the President has expanded his power is by deciding not to enforce laws he simply does not like. This effectively gives him the power to make law by repealing it. He has done so with the immigration laws by designating entire classes of people as having “legal status” and therefore cannot be deported, even though the law very clearly states that these people are unlawfully present. Similarly, the Administration has effectively legalized marijuana in certain states by refusing to enforce federal laws prohibiting it in states that promote its recreational use. The extent to which the President must follow his

constitutional mandate to “take care that the laws be faithfully executed” is a hotly contested issue on which the next Supreme Court justice might provide the pivotal vote.

One final note on what is at stake with the next Supreme Court Justice. The next Justice will not only decide the outcome in pending cases, he or she will influence the *type* of cases that make it to the Court in the first place. Businesses are less likely to challenge exorbitant or unfair rulings against them knowing they have a majority of Justices hostile to their interests. Conservatives will be less likely to put their time and resources in defending the Constitution if they know the Court won't enforce it. Meanwhile, liberal groups will be emboldened to bring cases that attempt to rollback the progress made in the last decade on First Amendment and Second Amendment rights, among others. They will also attempt to bring cases attempting to establish new constitutional requirements, such as a property right to government welfare payments, a right to a free attorney in civil (not just criminal) cases, a right to greater funds for public schools, a prohibition on racial disparities in criminal justice outcomes, an exception to the First Amendment for so-called “hate speech,” or a prohibition on all sex-segregated restrooms.

I do not mean to be alarmist, but it can hardly be doubted that the appointment of the next Supreme Court Justice could be the most legally-significant event for our country in a generation. If the next Justice is in the mold of Justices Ginsburg or Sotomayor, the rulings of the Court will shift dramatically to the left. If, on the other hand, the next Justice takes his principles and philosophy from Justice Scalia, the ideologically-balanced Court that we have grown accustomed to in the last quarter-century is likely to remain. As somebody whose job it is to defend the rights of my State before the courts, this turning point is obviously very important to me. But as I hope I have explained, the next Supreme Court Justice will also make decisions that touch on the rights of every American, from the most mundane portions of their daily life to their most important decisions. The next Justice's decisive vote may come to define the nature of our government and our democracy for many years to come. That is what is at stake.