



THE ATTORNEY GENERAL
STATE OF ARKANSAS
LESLIE RUTLEDGE

Chairwoman Lummis, Ranking Member Lawrence, members of the committee, thank you for inviting me to speak to this committee today. My name is Leslie Rutledge and I am the Attorney General of Arkansas. I am here today to give you a sense of how our state, one that has a rich natural heritage and is known across the nation as the Natural State for its rolling hills, dense woodlands, and miles of rivers and lakes, will be impacted by overreaching EPA regulations. Specifically, I will discuss how the EPA exceeds its legal authority in three recently proposed rules. The EPA's unsupported application of the law in its proposed Clean Power Plan, ground-level ozone standards and changes to the Clean Water Act definition of the Waters of the United States would produce broad, cumulative impacts that could cripple the economy of Arkansas, already one of the poorest in the country.

Clean Power Plan

As Attorney General, I represent the interests of Arkansas's utility ratepayers. These are hardworking Arkansans;

some own their own small business, while others might maintain their family farm that has been passed down from one generation to the next. From Fayetteville to Warren, and Texarkana to Jonesboro, and all points in between, I have consistently heard great concern about the EPA's proposed Clean Power Plan.

The rule as proposed will require Arkansas to meet an almost 45% reduction in carbon emissions from electric generating units by 2030. This is the 6th highest rate of reduction in the nation, imposed upon a state that currently ranks 46th in per capita income. There can be no question that the proposed rule will have a huge impact on our state's utility rates, and these rate increases will disproportionately harm low income Arkansans. Additionally, these policy objectives will stifle job growth and limit Arkansas's ability to compete across the country and the globe - a concern for all of us during this time of still-sluggish growth, post-recession.

Over three million public comments were filed on this proposed rule, several from the State of Arkansas. Many in opposition discuss the technical deficiencies in the plan. See the list of relevant resources attached to this testimony for information about accessing more comments from Arkansas.

First, the proposed rule is unlawful because the EPA regulates coal-fired power plants, such as the one in the county

where I was raised, under Section 112 of the Clean Air Act, not Section 111(d). In fact, the law cannot be any clearer - it specifically prohibits the EPA from invoking Section 111(d) where the "source category...is regulated under section [112]...." 42 U.S.C. § 7411(d) (1) (A) (i).

Second, even if Section 111(d) were applicable, the proposed rule is also improper because the EPA has not completed Section 111(b) "new source" regulation of carbon dioxide emission from coal-fired power plants. Under the law, there must be a performance standard for new sources prior to the development of a standard for existing sources. See 42 U.S.C. § 7411(d) (1) (a) (ii). Currently, the Section 111(b) rule for "new source" emissions has been proposed, but it has not been finalized.

Third, the proposed rule is a glaring example of the EPA's overreach into the management of states' energy generation and usage. Rather than addressing air pollution, which is the EPA's sole responsibility under the Clean Air Act, the proposed rule seems to attempt to impose the Obama Administration's preferred national energy policy which is clearly beyond the EPA's legal authority to act.

My opposition to the rule may beg the question as to whether I am for clean air? I certainly am, and I would say confidently

that my fellow Arkansans are in favor of clean air, but this leads me to my next, and fourth, point.

The proposed rule mandates what each state *must* achieve, rather than what the EPA is actually authorized to do, which is to provide guidelines and appropriate procedures for states to use in establishing standards of performance for sources within their state. This proposed rule is a serious departure from the implementation of any other limits set under the Clean Air Act. The purpose of this proposed rule is unclear. Is this rule from the EPA about working cooperatively with the states and stakeholders to preserve clean air or is this rule established to force states into complying with a national energy policy to fit the needs of the current administration?

In addition to exceeding its legal authority, the EPA fails to recognize the cumulative impacts of all the pending air regulations. Other proposed rules under the Clean Air Act should be finalized prior to the adoption and implementation of the Clean Power Plan, to ensure that important economic decisions on the future of existing power plants can be made. Proposed changes to different air standards may affect both coal and natural gas fired units. Some units may be shut down, idled, or unable to generate an optimal amount of energy. Not only are power plants long-term investments, requiring serious economic

review and decision-making, but any meaningful carbon regulation will be better developed after it is determined which power plants will remain after other clean air regulations are finalized.

Ozone Standards

In addition to regulating carbon through the Clean Power Plan, the EPA has proposed stricter ground level ozone standards. The Clean Air Act requires the EPA to review national ambient air quality standards every five years. The EPA set a standard for ground-level ozone in 2008, at a level of 75 parts per million. Through court order, the EPA was forced to review the standard which has resulted in the proposal of unnecessarily restrictive standards. The law does not require that the standard be lowered every time it is reviewed. If the standard is protective of the human health and the environment, it can remain unchanged. The standard of 75 parts per million should remain unchanged.

The EPA's proposed rule states that the agency is considering a standard somewhere between 65 and 70 parts per million, but it is also asking for comments regarding a standard as low as 60 parts per million or leaving the standard unchanged. Thus, the regulated community is left guessing

whether the final rule will be a standard somewhere between 60 and 75 parts per million.

While that might not sound like much, the change would have a dramatic effect on the State of Arkansas. At 75 parts per million, only a small part of the state is not likely to meet the standard. At 60 parts per million, all of Arkansas would likely have trouble with attainment of the standard. Anyone who has ever been to Arkansas would be hard-pressed to believe that the beautiful Ozark and Ouachita Mountains, and the tourism industry based on their natural grandeur, have a smog problem. Nonattainment in the economic centers of Central Arkansas and Northwest Arkansas would cripple manufacturing and setback any economic recovery that we have achieved in the past few years. Plainly speaking, the EPA's belief that a review of the ozone standard means that the standard should be reduced will result in significant job losses in Arkansas which would destroy communities and educational opportunities for its citizens.

Waters of the United States

Likewise, the EPA's attempt to "clarify" the definition of "waters of the United States" under the Clean Water Act is so expansive that it could likely control land use activities over most of the United States. As Arkansas's Attorney General, this is a major concern for me, as this would drastically impact,

among others, Arkansas's farmers and ranchers. At best, the proposed definition simply creates more confusion and litigation over federal jurisdiction under the Clean Water Act. At worst, the EPA and U.S. Army Corps of Engineers exert unfettered regulatory jurisdiction over areas that typically look more like land than water.

The new definitions of "significant nexus" and "tributary" are more complicated than tests applied under current law. Under current case law, the EPA and the Corps must determine whether there is a hydrological connection between the water body in question and a traditional navigable waterway. The definition of "significant nexus" in the proposed rule now requires the agencies to make multiple factual determinations before deciding if a waterbody - either alone or in combination with "similarly situated" waters - significantly affects a navigable waterway. But one determination that the agencies seem to overlook is the law's requirement that the nexus be "significant." Under the proposed rule, nearly any nexus to a traditional navigable waterway would be enough to establish jurisdiction under the Clean Water Act. This will invariably lead to a lengthy and expensive permitting process or litigation for the Arkansas agriculture community - the state's largest

industry, which accounts for nearly one quarter of the state's economic activity.

Likewise, the proposed rule's definition of "tributary" introduces so many exceptions and qualifications that it fails to provide a clear and enforceable regulatory standard. The definitions of "significant nexus" and "tributary" are overly broad and contain so many factual components that they can hardly be called "definitions." As a result, the process for determining jurisdiction over a particular body of water becomes a maze for both regulators and the public to navigate.

As mentioned above, Arkansas's agricultural community would be left with increased uncertainty over the applicability of the Clean Water Act. Agriculture is essential to our economy. According to the Arkansas Farm Bureau, agriculture provides \$16 billion annually and one out of every six jobs in the state. While the EPA and the Corps have repeatedly offered verbal assurances that agriculture need not worry about the scope of the proposed definition of "waters of the United States," farmers in Arkansas are worried because of the actions of the agencies, not their words. In 2014, the Corps took action against a Tennessee row crop farm and found part of the farm field to be "waters of the United States" because the area

contained features such as a bed, bank and high water mark that made it a tributary to an adjacent water of the United States. Arkansas farmers worry that everyday activities, such as plowing and the appropriate application of pesticides and fertilizer, will subject them to federal jurisdiction under the Clean Water Act like the farmer from the neighboring state mentioned above. Compliance with such a regulatory scheme would be a lengthy and expensive process, which puts the safe and affordable food supply that Americans enjoy at risk.

Conclusion

While each of these rules would cause great harm to Arkansas on its own, the cumulative effect cannot be overstated. For example, if compliance with the Clean Power Plan requires the construction of new electric infrastructure, the proposed changes to the Clean Water Act could hinder the acquisition of permits for constructing the infrastructure. Likewise, the National Association of Manufacturers estimates that one-third of power plants that remain online after compliance with the Clean Power Plan would need to be shuttered to comply with the ozone standard because there is no technology available to meet the stricter standards.

And while this hearing focuses on EPA regulations, the Fish and Wildlife Service has simultaneously proposed new regulations

that exceed the authority of the Endangered Species Act. Any activities undertaken in compliance with the Clean Air Act and the Clean Water Act must also comply with the Endangered Species Act. As the Arkansas Electric Cooperatives recently learned when building a short, five-mile transmission line, the federal agencies may be in conflict and navigating the regulatory maze can prove difficult for the federal government as well as stakeholders and citizens required to comply, resulting in a significant delay of a project.

In short, the Obama Administration is intent on following an agenda that ignores the plain language of the laws passed by Congress and has created a perfect storm of federal regulations that will result in economic disaster for a state such as Arkansas. Arkansans believe in protecting our environment and we take great pride in being the Natural State, but we also take pride in supplying the world with food and in our growing manufacturing sector. The EPA regulations that go beyond the scope of the authority granted to them by Congress are not only unlawful, but also unnecessary and harmful to our communities.

I want to thank the Committee once again for inviting me today to speak to you and for your time and consideration of this issue that is very important to me. I am happy to answer any questions that you may have.

List of Relevant Resources

Clean Power Plan

Rule Portal: www.regulations.gov; docket number: EPA-HQ-OAR-2013-0602 (<http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OAR-2013-0602>)

Comments from Arkansas (documents may be retrieved by entering these numbers at the above website):

Governor Hutchinson: EPA-HQ-OAR-2013-0602-22957
Sen. John Boozman, Arkansas, United States Senate: EPA-HQ-OAR-2013-0602-24267
Arkansas Department of Environmental Quality/Arkansas Public Service Commission: EPA-HQ-OAR-2013-0602-22736
Arkansas Attorney General's Office: EPA-HQ-OAR-2013-0602-23349
Arkansas State Chamber of Commerce/Associated Industries of Arkansas: EPA-HQ-OAR-2013-0602-29696; EPA-HQ-OAR-2013-0602-23071
Arkansas Electric Cooperatives Corporation: EPA-HQ-OAR-2013-0602-22812
Arkansas Electric Energy Consumers/Arkansas Gas Consumers: EPA-HQ-OAR-2013-0602-24251
American Electric Power (AEP): EPA-HQ-OAR-2013-0602-24030
Entergy Corporation: EPA-HQ-OAR-2013-0602-22874
Mass comment from SWEPCO employees: EPA-HQ-OAR-2013-0602-33187

Waters of the United States

Rule Portal: www.regulations.gov; docket number: EPA-HQ-OW-2011-0880 (<http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OW-2011-0880>)

Sen. Missy Thomas Irvin, Assistant Pro Tempore, The Senate, Arkansas: EPA-HQ-OW-2011-0880-17000
Arkansas Attorney General's Office: EPA-HQ-OW-2011-0880-16899
Arkansas Farm Bureau: EPA-HQ-OW-2011-0880-15145
Arkansas Agricultural Council: EPA-HQ-OW-2011-0880-7092
National Pork Producers, et al.: EPA-HQ-OW-2011-0880-1433
Arkansas Electric Cooperative Corporation: EPA-HQ-OW-2011-0880-16579
American Electric Power (AEP): EPA-HQ-OW-2011-0880-15079
Beaver Water District: EPA-HQ-OW-2011-0880-15405

National Ambient Air Quality Standards for ground-level ozone

Rule Portal: www.regulations.gov; docket number: EPA-HQ-OAR-2008-0699
(<http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OAR-2008-0699>)

Comment period ends March 17, 2015

Arkansas-specific information from the National Association of Manufacturers

(Economic Data) <http://www.nam.org/Issues/Energy-and-Environment/Ozone-Regulations/State-Ozone-Impact/Impact-of-Ozone-Regulations-on-Arkansas-%282014%29/>

(Nonattainment Data) <http://www.nam.org/Issues/Energy-and-Environment/Ozone-Regulations/State-Overview/EPA-Regulations-Will-Stifle-Manufacturing-Growth-in-Arkansas-%282013%29/>

UNITED STATES HOUSE OF REPRESENTATIVES

Committee on Oversight and Government Reform

Biography of Arkansas Attorney General Leslie Rutledge

February 26, 2015



Leslie Carol Rutledge is the 56th Attorney General of Arkansas. Elected on November 4, 2014, she is the first woman and first Republican in Arkansas history to be elected to the office.

Rutledge, a native of Batesville, Arkansas, is a graduate of the University of Arkansas in Fayetteville and the University of Arkansas William H. Bowen School of Law in Little Rock. She began her legal career as Clerk for Arkansas Court of Appeals Judge Josephine Hart, now Associate Justice on the Arkansas Supreme Court. She was appointed Deputy Counsel for Arkansas Governor Mike Huckabee and later served as Legal Counsel on the Mike Huckabee for President Campaign. She served as a Deputy Prosecuting Attorney in Lonoke County and in subsequent service as Attorney for the State of Arkansas's Division of Children and Family Services. She also served as Deputy Counsel at the National Republican Congressional Committee before joining the Republican National Committee as Counsel. Prior to her election as Attorney General, she founded and practiced law at The Rutledge Firm, PLLC. Rutledge lives in Little Rock.

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