The Committee on Science, Space, and Technology
September 11, 2015
Testimony of Dr. Bryan W. Shaw, Chairman of the TCEQ

Mr. Chairman, Ranking Member Bonamici, members of the committee:

Good morning, and thank you for the opportunity to talk to you today about the EPA's final Clean Power Plan. My name is Dr. Bryan Shaw, and I am the Chairman of the Texas Commission on Environmental Quality. As the leader of this agency, my job is to ensure we carry out our mission to mitigate environmental risks, while basing all of our regulations on sound science and compliance with state and federal statutes. In every case where Texas disagrees with EPA's actions, it is because EPA's actions are not consistent with these principles.

As you know, the EPA's final Clean Power Plan for existing power plants was signed by the EPA Administrator on August 3, 2015, and is currently awaiting publication in the Federal Register. The final version of the Clean Power Plan is radically different than the EPA's proposal and as such, the TCEQ is continuing to study and evaluate the impacts of the final rule. Currently, the following concerns with the rule have been identified.

First, EPA's methodology for determining the "Best System of Emission Reduction" in this Rule marks a radical departure from historical practice, and, I would argue, the plain language of the Clean Air Act.

Specifically, the EPA has now asserted the power to determine BSER by evaluating technologies and methods "outside the fence" of the facilities it claims to be regulating. This is the first time the EPA has not determined BSER based on technology or methods that could be applied to the source itself or materials being used by the source. In the past, BSER evaluations have included installing scrubbers, low emission combustion technology, pretreatment of fuels, and myriad other systems that a facility operator can control.

But in this case, the EPA has evaluated States' electric grids and energy policies as a whole, instead of the individual sources which it has authority to regulate under §111(d). The final Clean Power Plan establishes national performance rates for two subcategories, steam generating units and stationary combustion turbines, by applying three building blocks as BSER. While the final rule allows states to elect to use alternate statewide goals, these goals are derived from the same performance rates. However, only the first of these blocks, Block 1 or heat rate improvement at existing coal-fired power plants, is within the historical approach of how EPA has determined BSER. Block 2, redispatching generation from steam generating units to natural gas combined cycle units, and Block 3, increased renewable energy, rely on the assumption of other generating units increasing generation; generating units which in most circumstances are not located at the same site and, for most forms of renewable energy, are not even subject to the Federal Clean Air Act. In effect, EPA is setting standards for existing power plants based on the method of electric generation they prefer, not on the control technology or methods that can be feasibly applied to existing sources.

Another major concern is that the final CPP will have an insignificant effect on global carbon dioxide concentrations, global temperatures, and sea level rise. The final rule does not provide a single quantifiable climate benefit. EPA's purported climate benefits are based solely on the Office of Management and Budget's Social Cost of Carbon (SCC), and their claim that it will put the United States in a stronger bargaining position at the President's upcoming climate summit in December. Aside from the obvious substantive objections I have to this line of reasoning, I submit to you that a regulation this expensive that entails such an unprecedented arrogation of power to the Executive Branch can not be justified as a bargaining chip or with fuzzy math.

Furthermore, the EPA is deceiving the American public by claiming wildly inflated economic benefits only tangentially related to the purpose of the rule. The rest of EPA's claimed benefits from the rule are actually co-benefits from reductions of non-GHG pollutants such as nitrogen oxides and sulfur dioxide and even these benefits are suspect. Not only are criteria pollutants not the purpose of the final Clean Power Plan, the majority of claimed co-benefits are due to changes in ambient concentrations of ozone and PM2.5 in areas that are already attaining the NAAQS for these criteria pollutants. It is irrational for the EPA to claim a health benefit from reduction in a pollutant in areas where the EPA has already determined that the current concentration of the pollutant is adequate to protect human health. In areas not attaining the NAAQS for criteria pollutants, states have already or will be required to submit a State Implementation Plan (SIP) to bring those areas into compliance.

A more technical concern is the concept of "leakage" that the EPA has included in the final rule. "Leakage" is the shift of generation from existing units to new units that are not subject to the Clean Power Plan, resulting in a net increase in emissions. The EPA is requiring states that choose to use a mass-based approach must address "leakage" in their state plan; EPA also proposed to address "leakage" in their proposed federal plan, if they decide to use a mass-based approach. EPA's motivation for its "leakage" policy is to remedy the nonsensical situation that emission standards for existing fossil fuel units under §111(d) are much more stringent than the standards for new fossil fuel units under §111(b). If EPA had followed the approach for determining BSER for existing units that it has used in all previous §111(d) rules and set BSER and the standards of performance appropriately, this issue would not even exist. Worse, this requirement would seem to only encourage companies to keep older, less efficient power plants operating longer, which ultimately could result in a less efficient and less reliable power generation fleet.

The Rule's provision allowing states to request up to a two-year extension will do nothing to help the State of Texas implement the Rule. The time for states to make decisions whether to submit a state plan and what approach that plan might take, and then to develop a state plan is still a significant concern. The next scheduled meeting of the Texas Legislature isn't until 2017. Any state plan for the Clean Power Plan will fundamentally affect state energy policy. If the Texas Legislature wanted to give specific direction on the implementation of a state plan, practically speaking, 2017 is too late. In order to have adequate time to develop a state plan, TCEQ estimates that decisions regarding the approach taken in a state plan would need to be made by late 2016. Essentially, the EPA's schedule for the Clean Power Plan may force the Texas Legislature to have a special session, which would come at a substantial cost to the state.

So, the Clean Power Plan is based on technologies and methods that are impractical and were illegal for the EPA to consider in the first place. The EPA's "outside the fence" approach disregards precedent and the plain meaning of the Clean Air Act. The rule is still riddled with technical flaws that make it impractical and/or impossible to implement, and the EPA has not given states, especially Texas, nearly enough time to formulate and submit a state plan. And all this when even the EPA acknowledges that this rule will not have a single discernible impact on climate change or sea level rise. I would be derelict in my duty to protect the TCEQ's mission that I previously mentioned if I did not make plain this Rule's shortcomings.