Dissenting Views on H.J. Res. 71

On August 3, 2015, the Environmental Protection Agency (EPA) finalized a rule limiting carbon pollution from new, modified, and reconstructed power plants under section 111(b) of the Clean Air Act.[1] That same day, EPA also finalized the "Clean Power Plan" rule establishing emission guidelines for states to follow in developing plans to control carbon pollution from existing coal-fired and natural gas-fired power plants under section 111(d) of the Clean Air Act.[2]

H.J. Res. 71 is part of the Republicans' ongoing attack on EPA's Clean Air Act authority to cut carbon pollution and prevent dangerous climate change. If the resolution is enacted, EPA's 111(b) rule would not be implemented. And, EPA would not be able to reissue the 111(b) rule or any rule that is substantially the same.[3] This is particularly important since it would block this administration, or any future administration, from taking meaningful action to curb carbon emissions from power plants.

INACCURACIES IN THE MAJORITY'S REPORT

The majority's report includes a number of false statements, inaccuracies, and exaggerations regarding EPA's 111(b) rule.

Ban on Coal-Fired Power Plants

First, their report says that EPA developed the rule, "premised on the installation of carbon capture and storage (CCS) technologies that are not commercially viable for electric power generation...As a result, the rule imposes a de facto ban on construction in the United States of any new coal-fired power plants."[4]

The claim of a "de facto ban" is false. At a hearing before the Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, Dr. Julio Friedmann, Deputy Assistant Secretary for Clean Coal at the U.S. Department of Energy, stated unambiguously: "first generation CCS technology is commercially available today. You can call up a number of U.S. and international manufacturers, and they will sell you a unit at a large scale for capture of

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[1] U.S. Environmental Protection Agency, *Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units*, 80 Fed. Reg. 64510 (Oct. 23, 2015) (Final Rule) (online at online at www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22837.pdf) (hereinafter *GHG Standards for New, Modified, and Reconstructed Power Plants).*

[2] U.S. Environmental Protection Agency, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64662 (Oct. 23, 2015) (Final Rule) (online at www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22842.pdf) (hereinafter *Clean Power Plan*).

[3] 5 U.S.C. § 801(b).

[4] Majority Report at 2-3.

more than a million tons per year."[5] He added that a number of these companies also offer performance guarantees.[6]

Legality of the Rule

Next, their report makes assertions about the legality of the rule, specifically questioning whether EPA fulfilled the Clean Air Act's requirement "that performance standards be based on technologies that are 'adequately demonstrated.'"[7]

Section 111 of the Clean Air Act directs EPA to set performance standards to control air pollution from new stationary sources. Section 111(b) requires these standards to "reflect the degree of emission limitation achievable through the application of the best system of emission reduction which the Administrator determines has been adequately demonstrated."[8] Over the long history of this provision, which has been part of the Clean Air Act in various forms since 1970, the D.C. Circuit has provided guidance to EPA on how to interpret and implement this directive.[9] The key considerations for setting a section 111(b) standard are technical feasibility, quantity of emissions reductions, costs that are reasonable (i.e., not exorbitant), and advancing pollution-control technology.[10]

EPA is required to consider technological advancement when determining the standard because it is intended to force the adoption of new, innovative, and more effective technologies, and not simply those technologies that have already been widely adopted. This intent is clearly stated both in the requirement for "best system of emission reduction" and in the legislative history. For example, the Senate Committee Reports for the 1970 and 1977 Clean Air Act Amendments explain that new source performance standards "should provide an incentive for industries to work toward constant improvement"[11] and "stimulate the development of new and

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[5] House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, statement of Dr. Julio Friedmann, Deputy Assistant Secretary for Clean Coal, U.S. Department of Energy, *Hearing on Department of Energy Oversight: Status of Clean Coal Programs*, 113th Cong. (Feb. 11, 2014).

[6] *Id.*

[7] Majority Report at 3.

[8] Clean Air Act § 111(b).

[9] U.S. Environmental Protection Agency, *GHG Standards for New, Modified, and Reconstructed Power Plants* at 64540 (online at www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22837.pdf).

[10] *Id.*

[11] Senate Committee on Public Works, *National Air Quality Standards Act of 1970*, at 17, 91st Cong. (Sept. 17, 1970) (S. Rept. 91-1196).

better technology."[12] In interpreting this mandate, the D.C. Circuit has noted that the statute "embraces . . . technological innovation."[13]

The majority's report also claims that the rule violates provisions in the Energy Policy Act of 2005 (EPACT05) that bar EPA from considering the use of technology at a facility that received federal financial assistance under that Act to determine whether the technology is "adequately demonstrated" for the purposes of Clean Air Act section 111.[14] Some commenters on the proposed rule – including Murray Energy – took the position that the EPACT05 provisions bar all consideration of a facility's existence if the facility received EPACT05 assistance. [15]

These claims are based on an erroneous interpretation of the provisions, which prohibit EPA from making a section 111 determination based solely on the use of technology at a federally funded demonstration project, but do not preclude all use of such information as supporting evidence, as well as a misreading of EPA's proposal, which cites extensive other evidence supporting the proposed finding.[16]

In fact, EPA specifically solicited comment on its interpretation of these provisions and in the final rule "interprets these provisions to preclude EPA from relying solely on the experience of facilities that received DOE assistance, but not to preclude the EPA from relying on the experience of such facilities in conjunction with other information."[17]

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[12] Senate Committee on Environment and Public Works, *Clean Air Amendments of 1977*, at 17, 95th Cong. (May 10, 1977) (S. Rept. 95-127).

[13] *Sierra Club v. Costle*, 657 F.2d 298, 346 (D.C. Cir. 1981).

[14] Majority Report at 3.

[15] U.S. Environmental Protection Agency, *GHG Standards for New, Modified, and Reconstructed Power Plants* at 64542 (online at www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22837.pdf).

[16] *See, e.g.,* Environmental Defense Fund, *The Strong Legal Foundation for the Carbon Pollution Standards for New Power Plants: A Response to the House Energy and Commerce Committee's Letter on the Energy Policy Act of 2005 and Carbon Capture and Storage Technology* (Dec. 5, 2013) (online at blogs.edf.org/climate411/files/2013/12/Response-to-House-Committee-Letter-on-EPAct.pdf).

[17] U.S. Environmental Protection Agency, *GHG Standards for New, Modified, and Reconstructed Power Plants* at 64541 (online at www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22837.pdf).

CONCLUSION

The history of the Clean Air Act is a history of exaggerated claims that have never come true. In reality, 45 years of clean air regulation have shown that a strong economy and strong environmental and public health protection go hand-in-hand.

EPA's power plant rules are a critical part of our national strategy to reduce carbon pollution and protect the climate. These rules outline a path to cleaner air, better health, a safer climate, and a stronger economy. H.J. Res. 71 would nullify that rule, and replace it with nothing.

For the reasons stated above, we oppose the resolution and dissent from the views contained in the Committee's report.

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