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ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

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MEMORANDUM

April 21, 2014

To: Subcommittee on Energy and Power Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Markup of H.R. ___, the "Ratepayer Protection Act of 2015"

On Wednesday, April 22, 2015, at 10:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Energy and Power will hold a markup of H.R. __, the "Ratepayer Protection Act of 2015," a discussion draft recently released by Subcommittee Chairman Whitfield. The Subcommittee held a legislative hearing on the discussion draft on April 14, 2015.

I. BACKGROUND

The discussion draft relates to a proposed Environmental Protection Agency (EPA) rule to regulate carbon pollution from existing power plants, typically referred to as the "Clean Power Plan." Issued on June 2, 2014, the proposed rule establishes 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.[1]

On March 17, 2015, the Subcommittee held a hearing on the legal and cost issues associated with the Clean Power Plan. For further background information on the proposed Clean Power Plan, please see the memo from the previous hearing.[2]

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[1] U.S. Environmental Protection Agency, *Carbon Pollution; Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34830 (June 18, 2014) (Proposed Rule) (online at www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-13726.pdf).

[2] House Committee on Energy and Commerce, Subcommittee on Energy and Power, *Hearing on EPA's Proposed 111(d) Rule for Existing Power Plants: Legal Cost Issues*, 114th Cong. (Mar. 17, 2015) (online at democrats.energycommerce.house.gov/index.php?q=hearing/hearing-on-epa-s-proposed-111d-rule-for-existing-power-plants-legal-and-cost-issues-subcommi).

The Whitfield discussion draft would adversely impact the Clean Power Plan in two very significant ways. First, the bill would suspend implementation of the final Clean Power Plan and would extend all final compliance and submission deadlines by the amount of time needed to complete judicial review. And second, the bill allows governors to effectively exempt their respective states from any requirements of a federal plan to reduce carbon pollution from existing power plants. Under current law, EPA is required to develop and implement a federal section 111(d) plan for any state that fails to submit its own state plan. The Whitfield discussion draft would overturn this existing Clean Air Act requirement as it relates to the Clean Power Plan.

II. ANALYSIS OF H.R.__, THE "RATEPAYER PROTECTION ACT OF 2015"

The following is a brief summary and analysis of the discussion draft.

A. Summary of the Discussion Draft

Section 2 of the discussion draft delays implementation of the final Clean Power Plan by extending all compliance deadlines based on pending judicial review. Under subsection (b), the compliance or submission date extension applies to "any final rule to address carbon dioxide emissions from existing sources that are fossil fuel fired electric utility generating units under section 111(d) of the Clean Air Act." Also, subsection (b) specifically references and applies to rules that grow out of both the Clean Power Plan and the November 4, 2014 supplemental proposal covering Indian Country and U.S. Territories.[3]

Subsection (c) establishes a uniform time period for all Clean Power Plan compliance and submission deadline extensions. Under the legislation, the time period starts 60 days after the final rule appears in the Federal Register, and ends when "judgment becomes final, and no longer subject to further appeal or review."[4]

Section 3 of the discussion draft restates current law, that no state is required to submit a 111(d) plan. Subsection (a) further allows any governor to decide that the state shall not be subject to a federal 111(d) plan, if the governor makes a determination that implementation of the state or federal plan would "have a significant adverse effect on the State's residential, commercial, or industrial ratepayers" or would "have a significant adverse effect on the reliability of the State's electricity system."[5]

In making a determination on the state or federal plan's impact on ratepayers and electric reliability, the governor shall take into account a number of specific factors. Regarding the potential impact on ratepayers, a governor must consider any rate increases that are either associated with, or necessary for, implementation of the state or federal plan, as well as "other

[3] H.R.__, the "Ratepayer Protection Act of 2015," at § 2(b).

[4] *Id.* at § 2(c).

[5] *Id.* at § 3(a).

rate increases that have been or are anticipated to be necessary to implement, or are associated with, other Federal or State environmental requirements."[6] Further, the governor must consider the state's existing and planned electricity generation, retirements, transmission and distribution infrastructure, and projected demand when determining the state or federal plan's impact on electric reliability.[7]

Subsection (b) requires the governor to consult with the public utility commission or public service commission of the state, state environmental protection, public health and economic departments, and any regional transmission organization or independent service operator with jurisdiction over the state.

B. Issues Raised by the Discussion Draft

This legislation raises several major issues. In summary, the discussion draft would suspend implementation of the Clean Power Plan and effectively prevent EPA from ever controlling carbon pollution from existing power plants to any significant degree, if a state fails—or outright refuses—to comply with the requirements of section 111(d) of the Clean Air Act. At the legislative hearing, Janet McCabe, EPA's Acting Assistant Administrator for Air and Radiation, said the Agency views the bill, "as premature, unnecessary and ultimately harmful."[8] Public health groups noted that the discussion draft "would put lives at risk by dramatically weakening and delaying vital Clean Air Act safeguards."[9]

The discussion draft's proponents argue that legislation is needed to delay implementation of the Clean Power Plan until all legal challenges are resolved by the courts. However, legal challenges to final EPA rules are routine and courts have the power on their own to stay the effectiveness of regulations under court challenge. The discussion draft throws out the existing judicial process by legislatively granting a blanket extension for any compliance deadline, regardless of the merits of the legal challenge or the final outcome. Under the legislation, the Clean Power Plan would automatically be delayed by however much time it takes to conclude litigation, providing encouragement both for frivolous challenges and additional appeals in order to extend the ultimate compliance time. At the legislative hearing, Massachusetts Assistant Attorney General, Melissa Hoffer, pointed out that the current judicial

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[6] *Id.* at § 3(a)(1).

[7] *Id.* at § 3(a)(2).

[8] Testimony of the Honorable Janet McCabe, Acting Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency, Committee on Energy and Commerce, Subcommittee on Energy and Power, *Legislative Hearing on H.R. __, the Ratepayer Protection Act of 2015*, 114th Cong. (Apr. 14, 2015) (online at democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-McCabe-EP-Ratepayer-Protection-2015-04-14.pdf).

[9] Letter from the Allergy & Asthma Network, American Lung Association, American Public Health Association, Asthma and Allergy Foundation of America, Healthcare Without Harm, and Trust for America's Health, to the House Energy and Commerce Committee (Apr. 13, 2015).

process for delaying a rule "has withstood the test of time, and ensures that courts will undertake a careful balancing of interests before granting a stay of agency action."[10] She further explained that the blanket extension in the discussion draft would "create powerful incentives for frivolous litigation in an effort to stall and avoid compliance with the Clean Power Plan."[11]

The discussion draft's proponents have also argued that the legislation is needed to provide a "safe harbor" for states that cannot –or will not—comply with the requirements of the Clean Power Plan. Under current law, EPA sets the emissions reduction goals under section 111(d) and it is up to the states to decide how to best achieve these reductions. States are not required to develop or implement their own plans for reducing carbon emissions from existing power plants, but EPA is required to step in with a federal 111(d) plan when a state does not implement its own. The Clean Air Act's use of cooperative federalism ensures that environmental risks are addressed, either by state action or by federal action where a state fails to act.

The discussion draft's opt-out provision disregards decades of success under the Clean Air Act's use of cooperative federalism. Instead, the draft would allow governors to refuse to comply unconditionally with the federal requirements of the Clean Power Plan. A governor would be able to take the "Just Say No" approach to reducing carbon emissions by simply determining that compliance with a phantom plan would adversely impact ratepayers or electric reliability. As discussed by a number of environmental groups, this provision "would destroy the national guarantee that makes the Clean Air Act work by simply letting any state just 'opt out' of meeting national carbon pollution standards."[12]

Under the discussion draft, a state could be exempted from the federal plan requirement, so long as its governor makes an adverse impact determination. The proposed legislation provides little detail, however, as to the requisite level or quality of information to support such findings and the resulting determination. For those governors who are either not inclined or may not intend to develop a state plan or submit to the oversight of a workable federal plan, a gubernatorial finding of adverse impact could prove to be too alluring an option – essentially giving any governor the ability to opt out of the proposed Clean Power Plan rule with minimal effort.

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[10] Testimony of Melissa Hoffer, Assistant Attorney General, Chief of the Energy and Environment Bureau, Massachusetts Attorney General's Office, Committee on Energy and Commerce, Subcommittee on Energy and Power, *Legislative Hearing on H.R. __, the Ratepayer Protection Act of 2015*, 114th Cong. (Apr. 14, 2015) (online at democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Hoffer-EP-Ratepayer-Protection-2015-04-14.pdf).

[11] *Id.*

[12] Letter from various Environmental Organizations to the House Energy and Commerce Committee (Apr. 13, 2015) (online at democrats.energycommerce.house.gov/sites/default/files/documents/Letter-EP-Oppose-Whitfield-111%28d%29-2015-4-14.pdf).

III. RECENT LEGAL CHALLENGES

On April 16, 2015, the United States Court of Appeals for the District of Columbia Circuit heard oral arguments in a number of lawsuits challenging the Clean Power Plan.[13] At issue was whether it was appropriate for the court to review EPA's proposed Clean Power Plan, and if such review was appropriate, whether EPA has authority to issue the plan under section 111(d) of the Clean Air Act.

The consolidated cases were heard by a panel of three Republican appointed judges: Judge Henderson, Judge Kavanaugh and Judge Griffith. Most press accounts and commentators have reported that both Judge Kavanaugh and Judge Griffith appeared highly skeptical about agreeing to review a proposed rule, rather than waiting for a final rule to review.[14] Early in the oral argument, Judge Griffith asked counsel for the State of West Virginia, arguing in opposition to the EPA proposal, "do you know of any case in which we have halted a proposed rule?" Griffith went on to suggest that review of a proposed rule would be a "morass."[15] Judge Kavanaugh also suggested "you can ask for a stay as soon as the final rule is out there."[16] These statements could suggest that a majority of the panel is unlikely to rule in favor of reviewing a proposed rule. However, Judge Henderson noted that because EPA is unlikely to change its position on its authority to issue the rule prior to finalization, she might be willing to consider review of the proposed rule.

Arguments were also heard on the merits of the legal challenge to the authority of rule, which is based on two conflicting provisions in the Clean Air Act. Judge Kavanaugh noted "both amendments were signed by the President."[17] Judge Griffith asked, "how is this Scrivener's error?" and stated that "you have two conflicting provisions."[18] Both Judges Griffith

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[13] *In re: Murray Energy, Murray Energy, et al. v. EPA, et al.*, No. 14-1112 & No. 14-1151; and *West Virginia, et al. v. EPA, et al*, No. 14-1146.

[14] *See eg.*: *Skeptical Judges Question Attack on EPA's Proposed Rule*, Greenwire (Apr. 16, 2015); *Judges Skeptical of Challenge to Proposed E.P.A. Rule on Climate Change*, New York Times (Apr. 16, 2015); *Obama's Climate Change Policy Appears to Survive Early Court Challenge*, L.A. Times (Apr. 16, 2015); *Judges Raise Doubts Over Challenges to Obama's Climate Rules*, The Guardian (Apr. 16, 2015).

[15] *Judges Raise Doubts Over Challenges to Obama's Climate Rules*, the Guardian (Apr. 16, 2015) (online at www.theguardian.com/environment/2015/apr/16/judges-doubts-epa-obama-climate-change-rules).

[16] *Obama's Climate Change Policy Appears to Survive Early Court Challenge*, L.A. Times (Apr. 16, 2015) (online at www.latimes.com/nation/la-na-obama-climate-court-challenge-20150416-story.html).

[17] *Judges Skeptical of Clean Power Plan Authority but Wary of Setting Precedent*, Bloomberg BNA (Apr. 17, 2015) (online at www.bna.com/judges-skeptical-clean-n17179925338/).

[18] *Id.*

and Kavanaugh suggested that if the provisions are considered "conflicting" rather than "error", then Supreme Court precedent may possibly afford EPA deference in interpreting the statute, which is consistent with EPA's argument.

A court ruling based on the briefs and oral argument is expected prior to the time that EPA issues its final rule, later this year.