

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

April 13, 2014

To: Subcommittee on Energy and Power Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Legislative Hearing on H.R. ____, the “Ratepayer Protection Act of 2015”

On Tuesday, April 14, 2015, at 10:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Energy and Power will hold a legislative hearing on H.R. ____, the “Ratepayer Protection Act of 2015,” a discussion draft recently released by Subcommittee Chairman Whitfield. 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

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

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) (hereinafter *GHG Existing Source Performance Standards NPRM*).

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).

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.

I. 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 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

³ H.R. __, the “Ratepayer Protection Act of 2015,” at § 2(b).

⁴ *Id.* at § 2(c).

⁵ *Id.* at § 3(a).

⁶ *Id.* at § 3(a)(1).

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.

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.

The discussion draft's proponents have also argued that the legislation is needed to provide a "safe harbor" for states who 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.

⁷ *Id.* at § 3(a)(2).

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.

II. WITNESSES

The following witnesses are expected to testify:

Panel One:

The Honorable Janet McCabe
Acting Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency

Panel Two:

Eugene M. Trisko
Energy Economist and Attorney
On behalf of the American Coalition for Clean Coal Electricity

Lisa D. Johnson
Chief Executive Officer and General Manager
Seminole Electric Cooperative, Inc.
On behalf of National Rural Electric Cooperative Association

Kevin Sunday
Manager, Government Affairs
Pennsylvania Chamber of Business and Industry

Paul Cicio
President
Industrial Energy Consumers of America

Sue Tierney, Ph.D.
Managing Principal
The Analysis Group

Melissa A. Hoffer
Chief, Energy and Environment Bureau
Office of the Attorney General of the Commonwealth of Massachusetts