114TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { 114 348

PROVIDING FOR CONGRESSIONAL DISAPPROVAL UNDER CHAPTER 8 OF TITLE 5, UNITED STATES CODE, OF A RULE SUBMITTED BY THE ENVIRONMENTAL PROTECTION AGENCY RELATING TO "STANDARDS OF PERFORMANCE FOR GREENHOUSE GAS EMISSIONS FROM NEW, MODIFIED, AND RECONSTRUCTED STATIONARY SOURCES: ELECTRIC UTILITY GENERATING UNITS"

NOVEMBER 19, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. UPTON, from the Committee on Energy and Commerce, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.J. Res. 71]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the joint resolution (H.J. Res. 71) providing for congressional disapproval under chapter 8 of title 5, United States Code, of a rule submitted by the Environmental Protection Agency relating to "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units"', having considered the same, report favorably thereon without amendment and recommend that the joint resolution do pass.

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PURPOSE AND SUMMARY

H.J. Res. 71 was introduced by Rep. Ed Whitfield (R KY) on October 26, 2015. The joint resolution provides for congressional disapproval under chapter 8 of title 5, United States Code, of a rule submitted by the Environmental Protection Agency relating to "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units."

BACKGROUND AND NEED FOR LEGISLATION

On October 26, 2015, Subcommittee on Energy and Power Chairman Whitfield introduced H.J. Res. 71 pursuant to the Congressional Review Act.[1] This joint resolution would disapprove the Environmental Protection Agency's (EPA) recently published final rule setting carbon dioxide (CO2) emissions standards for new fossil-fuel fired power plants.[2]

This final rule, together with EPA's final rule for existing fossil-fuel fired power plants, referred to by the agency as its "Clean Power Plan," was issued pursuant to the President's "Climate Action Plan" and an accompanying Presidential Memorandum.[3] These two rules would put in place an unprecedented regulatory structure throughout the U.S. electricity sector, effectively imposing renewable energy and cap-and-trade mandates similar to those in the Waxman-Markey cap-and-trade legislation that failed in 2010.[4]

H.J. Res. 71 would specifically disapprove of EPA's CO2 regulations for new power plants, referred to by the agency as "New Source Performance Standards'" or its "111(b) Rule." Under this rule, EPA interprets section 111(b) of the Clean Air Act to allow the agency to set standards for new coal-fired power plants premised on the installation of carbon capture and storage (CCS) technologies that are not commercially viable for electric power generation. While EPA maintains CCS is adequately demonstrated, there are no commercial-scale coal-fired power plants with CCS currently operating in the United States that could meet the standards. As a result, the rule imposes a de facto ban on construction in the United States of any new coal-fired power plants, even the most state of the art coal-fired electric generating units being built in Europe, Japan, and other countries.

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[1] The Congressional Review Act is set forth in *5 U.S.C. §§801 808*.

[2] This EPA's final rule for new power plants is entitled "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units'" and was published in the Federal Register at 80 Fed. Reg. 64510 (October 23, 2015).

[3] This EPA's final rule for existing power plants is entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units'" and was published at 80 Fed. Reg. 64662 (Oct. 23, 2015). The Climate Action Plan is available at *https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf* and the Presidential Memorandum dated June 25, 2013 is available at *https://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards.*

[4] *See* H.R. 2454, the "American Clean Energy and Security Act of 2009" (111th Cong. 2009).

This rule is highly controversial and there are significant questions regarding its legality.[5] Issues include whether the rule comports with the statutory requirements of section 111 of the Clean Air Act, which requires that performance standards be based on technologies that are "adequately demonstrated," as well as the Energy Policy Act of 2005, which prohibits the agency from considering technology used at a facility receiving assistance under the Department of Energy's Clean Coal Power Initiative, or at a facility receiving an advanced coal project tax credit, as being "adequately demonstrated" for purposes of section 111 of the Clean Air Act.[6]

There are also significant cost and energy policy issues raised by the rule, including its potential impacts on the diversity, affordability and reliability of the nation's electricity supplies, as well as the precedential effect of the regulation on other types of facilities subject to regulation under section 111 of the Clean Air Act.[7] At the same time, the climate benefits of the rule according to EPA will be negligible.[8]

The Attorneys General or state agencies of at least 23 states have challenged this regulation, including Alabama, Arkansas, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming.[9]

What the resolution will do

The legislation provides that Congress disapproves the rule submitted by the EPA relating to "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units'" (published at 80 Fed. Reg. 64510 (October 23, 2015)), and such rule shall have no force or effect. Under the Congressional Review Act, an agency may not issue a rule that is the same or substantially similar to a rule that has been disapproved through the statutorily prescribed process unless authorized by subsequent legislation.[10]

HEARINGS

The Subcommittee on Energy and Power held three hearings relating to EPA's regulation of new power plants under section 111(b) of the Clean Air Act. The hearings and witnesses included the following:

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[5] Legal issues surrounding EPA's 111(b) rulemaking were addressed in the Committee's report on H.R. 3826, the Electricity Security and Affordability Act, Feb. 28, 2014, available at *https://www.congress.gov/113/crpt/hrpt365/CRPT–113hrpt365.pdf.*

[6] *Id.*

[7] *Id.*

[8] 80 Fed. Reg. at 64515 ("EPA projects that this rule will result in negligible CO2 emission changes . . . by 2022 as a result of the performance standards for newly constructed EGUs'").

[9] *See State of West Virginia et al* v. *United States Environmental Protection Agency*, U.S. Court of Appeals for the District of Columbia, Case No. 15 1399.

[10] *See 5 U.S.C. 801(b)(2)* ("A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."); *see also "The Congressional Review Act (CRA),"* Congressional Research Service (Dec. 11, 2014) available at *http://www.crs.gov/reports/pdf/IF10023*; *"The Congressional Review Act: Frequently Asked Questions,"* Congressional Research Service (April 17, 2015) available at *http://www.crs.gov/Reports/pdf/R43992?source=search.*

- On October 22, 2015, the Subcommittee held a hearing entitled "EPA's CO2 Regulations for New and Existing Power Plants: Legal Perspectives" and received testimony from:
  - Elbert Lin, Solicitor General of West Virginia;
  - Allison D. Wood, Partner, Hunton & Williams, LLP;
  - Raymond L. Gifford, Partner, Wilkinson Barker Knauer LLP;
  - Richard L. Revesz, Lawrence King Professor of Law, Dean Emeritus, Director, Institute for Policy Integrity, New York University School of Law; and
  - Emily Hammond, Associate Dean for Public Engagement, Professor of Law, George Washington University School of Law.
- On October 7, 2015, the Subcommittee held a hearing entitled "EPA's CO2 Regulations for New and Existing Power Plants" and received testimony from:
  - The Honorable Janet McCabe, Acting Administrator, Air and Radiation, U.S. Environmental Protection Agency.
- On November 14, 2013, the Subcommittee held a hearing entitled "EPA's Proposed GHG Standards for New Power Plants and H.R. __, Whitfield-Manchin Legislation" and received testimony from:
  - The Honorable Joe Manchin, Senator, West Virginia;
  - The Honorable Janet McCabe, Acting Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency;
  - The Honorable E. Scott Pruitt, Oklahoma Attorney General;
  - The Honorable Henry Hale, Mayor, Fulton, Arkansas;
  - Tony Campbell, President and CEO, East Kentucky Power Cooperative;
  - Dr. Donald R. van der Vaart, Chief, Permitting Section, North Carolina Department of Environment and Natural Resources-Division of Air Quality;
  - J. Edward Cichanowicz, Engineering Consultant;
  - Ross E. Eisenberg, Vice President, Energy and Resources Policy, National Association of Manufacturers;
  - David Hawkins, Director of Climate Programs, Natural Resources Defense Council; and
  - Susan F. Tierney, Managing Principal, Analysis Group.

COMMITTEE CONSIDERATION

On November 3, 2015, the Subcommittee on Energy and Power met in open markup session to consider H.J. Res. 71 and forwarded the bill to the full Committee, without amendment, by a record vote of 15 ayes and 12 nays.

On November 17 and 18, 2015, the Committee on Energy and Commerce met in open markup session to consider H.J. Res. 71. A motion by Mr. Upton to order H.J. Res. 71, reported to the House, was agreed to by a record vote of 28 ayes and 20 nays.

COMMITTEE VOTES

Clause 3(b) of Rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion

to report legislation and amendments thereto. The following reflects the record votes taken during the Committee consideration:

COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 41

BILL: H.J.Res. 71, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of a rule submitted by the Environmental Protection Agency relating to "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units"

AMENDMENT: A motion by Mr. Upton to order H.J.Res. 71 favorably reported to the House, without amendment.

DISPOSITION: AGREED TO, by a roll call vote of 28 yeas and 20 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Pallone		X	
Mr. Barton				Mr. Rush		X	
Mr. Whitfield	X			Ms. Eshoo		X	
Mr. Shimkus	X			Mr. Engel			
Mr. Pitts	X			Mr. Green		X	
Mr. Walden	X			Ms. DeGette		X	
Mr. Murphy	X			Ms. Capps		X	
Mr. Burgess	X			Mr. Doyle		X	
Mrs. Blackburn	X			Ms. Schakowsky		X	
Mr. Scalise				Mr. Butterfield			
Mr. Latta	X			Ms. Matsui		X	
Mrs. McMorris Rodgers				Ms. Castor		X	
Mr. Harper	X			Mr. Sarbanes		X	
Mr. Lance	X			Mr. McNerney		X	
Mr. Guthrie	X			Mr. Welch		X	
Mr. Olson	X			Mr. Lujan		X	
Mr. McKinley	X			Mr. Tonko		X	
Mr. Pompeo	X			Mr. Yarmuth		X	
Mr. Kinzinger	X			Ms. Clarke		X	
Mr. Griffith	X			Mr. Loebsack		X	
Mr. Bilirakis	X			Mr. Schrader		X	
Mr. Johnson	X			Mr. Kennedy		X	
Mr. Long	X			Mr. Cardenas			
Mrs. Ellmers	X						
Mr. Bucshon	X						
Mr. Flores	X						
Mrs. Brooks	X						
Mr. Mullin	X						
Mr. Hudson	X						
Mr. Collins	X						
Mr. Cramer	X						

11/18/2015

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee made findings that are reflected in this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

H.J. Res. 71 provides for congressional disapproval under chapter 8 of title 5, United States Code, of a rule submitted by the Environmental Protection Agency relating to "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units"'.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.J. Res. 71 would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

EARMARK, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives, the Committee finds that H.J. Res. 71 contains no earmarks, limited tax benefits, or limited tariff benefits.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

At the time this report was filed, the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974 was not available.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.J. Res. 71 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111 139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULEMAKINGS

The Committee estimates that enacting H.J. Res. 71 specifically directs to be completed no specific rulemakings within the meaning of 5 U.S.C. 551 that would not otherwise be issued by the agency.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION–BY–SECTION ANALYSIS OF THE LEGISLATION

The legislation provides that Congress disapproves the rule submitted by the EPA relating to "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units'" (published at 80 Fed. Reg. 64510 (October 23, 2015)), and such rule shall have no force or effect.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation does not amend any existing Federal statute.

DISSENTING VIEWS

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

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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 *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.

capture of 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 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]

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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).

[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*).

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]

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.

FRANK PALLONE, Jr.,
Ranking Member.
BOBBY L. RUSH.
ANNA G. ESHOO.
ELIOT L. ENGEL.
GENE GREEN.
DIANA DEGETTE.
LOIS CAPPS.
MIKE DOYLE.
JAN SCHAKOWSKY.
G. K. BUTTERFIELD.
DORIS O. MATSUI.
KATHY CASTOR.
JOHN SARBANES.
JERRY MCNERNEY.
PETER WELCH.
BEN RAY LUJÁN.
PAUL TONKO.
JOHN YARMUTH.
YVETTE D. CLARKE.
DAVID LOEBSACK.

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[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*).

KURT SCHRADER.
JOSEPH P. KENNEDY, III.
TONY CÁRDENAS.

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