

TESTIMONY OF

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before the

**Energy & Commerce Committee's
Subcommittee on Energy & Power
U.S. House of Representatives**

**Hearing on
The American Energy Initiative
Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011**

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Mr. Chairman, ranking member Rush, and members of the subcommittee, I appreciate the opportunity to testify today on the discussion draft of the “Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011,” known as the “TRAIN Act.” The legislation would convene a cabinet-level committee to conduct a breathtakingly ambitious analysis of how regulations required by Congress might affect energy prices in the United States in 2030. A crystal ball might well prove more effective in deriving these estimates.

My testimony makes four points:

1. **Benefits ignored.** For reasons that are left a mystery but seem amazingly misguided, the legislation ignores the benefits that would be achieved by the targeted regulations. As a result, it will produce a highly prejudiced analysis of the issues at stake in those proceedings. Rules to protect public health and the environment, especially with respect to air pollution, most definitely do not have the effect of sweeping money into a pile and setting it on fire. Rather, they save the lives of millions of people, prevent many more millions from getting sick or becoming sicker, and preserve the irreplaceable natural resources without which human life would be impossible. According to a forthcoming study by Isaac Shapiro at the Economic Policy Institute, benefits exceed costs by several orders of magnitude for all of the EPA rules finalized during the Obama Administration, and proposed rules are likely to be even more beneficial. Ignoring benefits is akin to assessing our country’s well-being by carefully counting its GDP in dollars while ignoring whether Americans have a life expectancy over 50, are well enough to go to work or to school, are able to take care of each other, enjoy our leisure, or leave a sustainable world for their children.
2. **The Unknowable.** The core mission of the TRAIN Act is to determine the influence of selected environmental regulations on the costs of energy in 2020 and 2030. Under the legislation, these calculations must be completed no later than August 1, 2012, a date preceding by just a few weeks the national presidential election. I say that a crystal ball would be a more effective and less expensive way to determine these figures because of the thousands of unforeseen and unforeseeable variables that must be evaluated before calculating anything that would even simulate an accurate number. The studies required by the legislation are so ridden with uncertainty that their numbers will be not just meaningless but deceptive. The only silver lining in this quixotic effort is that it should remind Americans of the hard lesson we learned when Wall Street crashed and had reinforced when BP’s oil spill prevention and mitigation plan in the Gulf failed so drastically: alleging large numbers derived from complex calculations as facts, then wrapping them up in a glossy binder, does not make the numbers or the facts either true or reliable.
3. **Great grandmother of All Unfunded Mandates.** The bill’s requirements are exceptionally burdensome, yet it does not fund these costs, instead creating the great grandmother of all unfunded mandates. Much of the information needed to do the studies is in the possession of state government officials and thousands of private corporations, meaning that if the studies are developed in a responsible manner, they will be called upon to contribute these massive amounts of data without compensation

for their effort. This burden is all the more insupportable because the very few calculable estimates that lurk in the bowels of the legislation are already being compiled by the Environmental Protection Agency (EPA).

4. **Closed door process.** Although the bill has the word “transparency” in its title, the proceedings of the committee it creates to invent these estimates is exempt from the Federal Advisory Committee Act (FACA), allowing members to meet secretly with biased stakeholders who are never publicly named. Precedents for this kind of Star Chamber process designed to cripple environmentally protective rules come readily to mind, including Vice President Richard Cheney’s secret Energy Taskforce and Office of Information and Regulatory Affairs Administrator Cass Sunstein’s Cost of Carbon Taskforce, both of which met behind closed doors and did not disclose their membership upfront.

Benefits

Regulations implementing the Clean Air Act, especially with respect to ozone and fine particulate matter that cause cardiovascular and respiratory problems throughout the population, are uniformly recognized as a wonderful economic bargain by experts from the right to the left of the political spectrum. Indeed, if you invite John Graham, former regulatory czar under President George W. Bush, to testify before you, he would agree enthusiastically with that statement.¹

According to EPA’s very conservative numbers, which dramatically understate benefits and overstate costs, clean air rules saved 164,300 adult lives in 2010, and will save 237,000 lives annually by 2020. EPA estimates that the economic value of Clean Air Act regulatory controls will be \$2 trillion annually by 2020; costs of compliance in that year will be \$65 billion. Air pollution controls saved 13 million days of work loss and 3.2 million days of school loss in 2010. By 2020, they will save 17 million work loss days and 5.4 million school loss days.²

EPA’s estimates are based on exceptionally conservative assumptions regarding regulatory benefits that, if anything, low-ball these figures by orders of magnitude. For example, EPA says that when Clean Air Act protections prevent a non-fatal heart attack in a person 0-24 years old, the incident is worth only \$84,000.³ How many of the young people in this room would accept \$84,000 to undergo a non-fatal heart attack or, for that matter, would pay that amount to avoid one? The millions of parents who have asthmatic children will be interested to

¹ “In summary, CAIR [the Clean Air Interstate Rule] salvaged most of the sulfur- and nitrogen control benefits that were contained in the failed Clear Skies proposal. With projected benefits exceeding \$100 billion per year, CAIR is one of the most beneficial rules in the history of OIRA. In summary, CAIR salvaged most of the sulfur- and nitrogen control benefits that were contained in the failed Clear Skies proposal. With projected benefits exceeding \$100 billion per year, CAIR is one of the most beneficial rules in the history of OIRA.” John Graham, *Saving Lives through Administrative Law and Economics*, 157 PA. L. REV. 395, 473 (2008). Graham’s tribute to rulemaking under the Clean Air Act continues for several pages.

² See Env’tl. Protection Agency, *The Benefits and Costs of the Clean Air Act from 1990 to 2020* (Mar. 2011), available at <http://www.epa.gov/oar/sect812/feb11/fullreport.pdf>.

³ *Id.* at 5-18 to 5-19 (Table 5-4).

learn that cleaning up the air to the point they can avoid a single emergency room visit is worth only \$363 per asthmatic child.⁴ Hospitals don't give you a plastic ID bracelet for that little, and the trip to the hospital with a breathless, frantic child is worthless in these calculations.

It's also worth noting that before a rule has been in effect for several years, estimates of compliance costs, which are typically provided by regulated industries, overstate those amounts significantly. For members interested in pursuing these well-documented problems with cost estimates, I have attached to my testimony two very interesting analyses of how pollution control technologies for pollution from coal-fired power plants have become both more affordable and far more effective under the Clean Air Act:

- U.S. Gov't Accountability Office, *Clean Air Act: Mercury Control Technologies at Coal-Fired Power Plants Have Achieved Substantial Emissions Reductions* (GAO-10-47, Oct. 2009), available at <http://www.gao.gov/new.items/d1047.pdf>
- James E. Staudt, Ph.D, Andover Technology Partners, M.J. Bradley & Assocs., *Control Technologies to Reduce Conventional and Hazardous Air Pollutants from Coal-Fired Power Plants* (Mar. 31, 2011) (prepared for NESCAUM)

I would also refer members and staff to the following sources:

- Frank Ackerman, *The Unbearable Lightness of Regulatory Costs*, 33 FORDHAM URB. L.J. 1071(2006)
- W. Harrington & R.D. Morgenstern, et al., *On the Accuracy of Regulatory Cost Estimates*, 19 J. POL'Y ANALYSIS & MGMT. 297 (2000)
- H. Hodges, *Falling Prices: Costs of Complying with Environmental Regulations Almost Always Less Than Advertised* (Econ. Pol'y Inst., 1997)
- U.S. Congress, Office of Tech. Assessment, *Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health—An Appraisal of OSHA's Analytic Approach*, U.S. Gov't Printing Office OTA-ENV-635, available at <http://www.fas.org/ota/reports/9531.pdf>
- Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2042- 44 (2002)
- Ruth Ruttenberg, *Not Too Costly After All: An Examination of the Inflated Cost Estimates of Health, Safety, and Environmental Protections*, (Public Citizen White Paper, Feb. 2004), available at <http://www.citizen.org/documents/ACF187.pdf>

As for the benefits achieved by the rules that are targeted by the TRAIN Act discussion draft, Center for Progressive Reform (CPR) Policy Analyst James Goodwin and I prepared the following summary showing how the projected benefits of the four most important rules far outnumber their estimated costs. And note please that some of the most significant benefits of these regulations were not monetized, because they frankly defy monetization. They were therefore dismissed by cost-benefit analysis as having no economic value whatsoever, a huge

⁴ *Id.*

liability of cost-benefit analysis that not coincidentally always leads to understating the value of a proposed regulation.

Proposed Interstate Transport Rule

EPA's proposed Interstate Transport Rule requires power plants in 31 eastern states and in the District of Columbia to significantly reduce their emissions of sulfur dioxide and nitrogen oxide pollution. These pollutants contribute to the formation of ground level ozone and fine particulate matter—both of which are extremely harmful to public health and the environment—which travel long distances across state lines, making it difficult for downwind states to comply with national clean air standards

- **Total monetized benefits:** \$110 billion and \$290 billion by 2014.⁵
- **Costs:** \$2.0 billion to \$2.2 billion.⁶
- **Health impacts of fine particulate matter:**
 - Fine particulate matter “contains microscopic solids or liquid droplets that are so small that they can get deep into the lungs and cause serious health problems. The size of particles is directly linked to their potential for causing health problems. Small particles less than 10 micrometers in diameter pose the greatest problems, because they can get deep into your lungs, and some may even get into your bloodstream.”⁷
 - Ingestion of fine particulate matter can cause “premature death in people with heart or lung disease.”⁸
- **Health benefits of reduced fine particulate matter⁹:**
 - 14,000 to 36,000 fewer premature mortalities
 - 9,200 fewer cases of chronic bronchitis
 - 22,000 fewer non-fatal heart attacks
 - 11,000 fewer hospitalizations (for respiratory and cardiovascular disease combined)
 - 10 million fewer days of restricted activity due to respiratory illness
 - 1.8 million fewer work-loss days
- **Health impacts of ozone:**
 - “Breathing ozone can trigger a variety of health problems including chest pain, coughing, throat irritation, and congestion. It can worsen bronchitis, emphysema, and asthma. Ground-level ozone also can reduce lung function and inflame the linings of the lungs. Repeated exposure may permanently scar lung tissue.”¹⁰

⁵ Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45210, 45344 (proposed Aug. 2, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, and 97).

⁶ *Id.* at 45348.

⁷ Env'tl. Protection Agency, *Particulate Matter: Health and Environment*, <http://www.epa.gov/pm/health.html> (last visited Apr. 5, 2011).

⁸ *Id.*

⁹ Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45210, 45346 (proposed Aug. 2, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, and 97).

¹⁰ Env'tl. Protection Agency, *Ground-Level Ozone: Health and Environment*, <http://www.epa.gov/air/ozonepollution/health.html> (last visited Apr. 5, 2011).

- **Health benefits of reduced ozone¹¹:**
 - 50 to 230 fewer premature mortalities
 - 690 fewer hospital admissions for respiratory illnesses
 - 230 fewer emergency room admissions for asthma
 - 300,000 fewer days with restricted activity levels
 - 110,000 fewer days where children are absent from school due to illnesses
- **Environmental benefits (not quantified or monetized)¹²:**
 - Reduced acid rain, which harms rivers streams, and forest ecosystems
 - Reduced ozone damage to vegetation

Proposed Ozone NAAQS

EPA's proposed revision of the ozone National Ambient Air Quality Standard (NAAQS) would reduce the allowable 8-hour primary standard (a standard designed to ensure that pollution levels are kept low enough to protect public health) from 0.075 parts per million (ppm) to between 0.060 and 0.070 ppm in accordance with the recommendations of the EPA's Clean Air Science Advisory Committee (CASAC). (The agency is also considering lowering the standard even more to 0.055 ppm, as well as maintaining the existing standard.)

- **Total monetized benefits:** Between \$53 billion and \$160 billion (0.055 ppm standard) to between \$6.9 billion and \$18 billion (0.075 ppm standard).¹³
 - Monetized benefits include reduced health effects from reduced exposure to ozone, reduced health effects from reduced exposure to fine particulate matter, and improvements in visibility.¹⁴
- **Costs:** Between \$78 billion and \$130 billion (0.055 ppm standard) to between \$7.6 billion and \$8.8 billion (0.075 ppm standard).¹⁵
- **Health benefits of rule¹⁶:**
 - 760 to 22,200 fewer premature mortalities
 - 470 to 3,200 fewer cases of chronic bronchitis
 - 1,300 to 7,500 fewer nonfatal heart attacks
 - 88,000 to 600,000 fewer work-loss days
 - 190,000 to 3.7 million fewer school loss days

NESHAP for Major Sources: Boilers

EPA's rule establishing National Emissions Standards for Hazardous Air Pollutants (NESHAP) for major source boilers (*i.e.*, larger boilers used to power large industrial and commercial

¹¹ Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45210, 45346-47 (proposed Aug. 2, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, and 97).

¹² *Id.* at 45349-52.

¹³ Env'tl. Protection Agency, *Summary of the updated Regulatory Impact Analysis (RIA) for the Reconsideration of the 2008 Ozone National Ambient Air Quality Standard (NAAQS)* S1-4 (Table S1.1) (2010), available at http://www.epa.gov/ttn/ecas/regdata/RIAs/s1-supplemental_analysis_full.pdf.

¹⁴ *Id.* at S1-3.

¹⁵ *Id.* at S1-4 (Table S1.1).

¹⁶ *Id.* at S2-24 (Table S2.13), S3-5 (Table S3.1).

facilities) requires these facilities to significantly reduce their emissions of toxic air pollutants, which include mercury, other metals, polycyclic organic matter (POM), and dioxins.

- **Total monetized benefits:** Between \$20 billion and \$54 billion.¹⁷
 - “The benefit categories associated with the emission reduction anticipated for this rule can be broadly categorized as those benefits attributable to reduced exposure to hazardous air pollutants (HAPs) and those attributable to exposure to other pollutants. Because we were unable to monetize the benefits associated with reducing HAPs, all monetized benefits reflect improvements in ambient PM2.5 and ozone concentrations. This results in an underestimate of the total monetized benefits.”¹⁸
- **Costs:** \$1.5 billion.¹⁹
- **Health co-benefits of the rule**²⁰:
 - 2,500 to 6,500 fewer premature mortalities
 - 1,600 fewer cases of chronic bronchitis
 - 4,000 fewer nonfatal heart attacks
 - 1,910 fewer hospitalizations (for respiratory and cardiovascular disease combined)
 - 2,400 fewer emergency room visits
 - 310,000 fewer work-loss days
 - 810 fewer school loss days
- **Un-quantified and un-monetized benefits of the rule**²¹:
 - The direct health benefits from reducing hazardous air pollutants (*e.g.*, mercury, hydrogen chloride, hydrogen cyanide, toluene, formaldehyde, polycyclic aromatic hydrocarbons, dioxins, etc.):
 - Various forms of cancer
 - Noncancer health effects can include neurological, cardiovascular, liver, kidney, and respiratory effects as well as effects on the immune and reproductive systems
 - Reduced ozone damage to vegetation

Proposed NESHAP: Utilities

EPA’s proposed NESHAP for utilities (*i.e.*, large power plants) requires these facilities to significantly reduce their emissions of toxic air pollutants, which include mercury (Hg), arsenic, chromium, nickel, hydrogen chloride (HCl), and hydrogen fluoride (HF).

¹⁷ National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 76 Fed. Reg. 15608, 15651 (Mar. 21, 2011) (to be codified at 40 C.F.R. pt. 63).

¹⁸ *Id.*

¹⁹ *Id.* at 15654.

²⁰ *Id.* at 15652 (Table 5).

²¹ Env’tl. Protection Agency, *Regulatory Impact Analysis: National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters 7-37 – 7-57* (2011), available at http://www.epa.gov/ttn/ecas/regdata/RIAs/boilersriafinal110221_psg.pdf.

- **Total monetized benefits** between \$53 billion and \$140 billion.²²
 - “These estimates reflect the economic value of the Hg benefits as well as the PM2.5 and CO2-related co-benefits.”²³
 - “It should be emphasized that the monetized benefits estimates provided above do not include benefits from several important benefit categories, including reducing other air pollutants, ecosystem effects, and visibility impairment. The benefits from reducing various HAP have not been monetized in this analysis, including reducing 68,000 tons of HCl, and 3,200 tons of other metals each year.”²⁴
- **Costs:** \$10.9 billion.²⁵
- **Health benefits of rule**²⁶:
 - 17,000 fewer premature deaths
 - 11,000 fewer heart attacks
 - 120,000 fewer asthma attacks
 - 12,200 fewer hospital and emergency room visits
 - 4,500 fewer cases of chronic bronchitis
 - 5.1 million fewer restricted activity days
 - 850,000 fewer work-loss days
- **Environmental benefits of rule** (not quantified or monetized)²⁷:
 - Increased agricultural crop and commercial forest yields
 - Visibility improvements
 - Reduced acid rain, which harms rivers streams, and forest ecosystems

Proposed Coal Ash Rule

Last but not least, the TRAIN Act targets EPA’s proposed coal ash rule, a measure that would require utilities with coal-fired power plants to stabilize the huge dump sites where they have deposited the ash generated by such combustion.²⁸ U.S. power plants generate 140 million tons of coal ash annually. Byproducts of burning coal include a variety of toxic metals that are heavily concentrated in these residues, and these concentrations will increase as air pollution control technologies remove more toxic particles from the gas and deposit them in the ash. Or, in other words, substances considered to be hazardous air pollutants are transferred to land and water when the ash is disposed, causing additional environmental harm. Some of this coal ash is

²² Env’tl. Protection Agency, *National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units* 556 (pre-publication draft of proposed rule), available at <http://www.epa.gov/airquality/powerplanttoxics/pdfs/proposal.pdf>.

²³ *Id.*

²⁴ *Id.* at 562.

²⁵ Env’tl. Protection Agency, *Regulatory Impact Analysis of the Proposed Toxics Rule: Final Report* 1-1 (2011), available at <http://www.epa.gov/ttn/ecas/regdata/RIAs/ToxicsRuleRIA.pdf>.

²⁶ *Id.* at 1-4 (Table 1-2).

²⁷ *Id.* at 1-9 – 1-10 (Table 1-4).

²⁸ Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128, 35,211 (proposed June 21, 2010) (to be codified at 40 C.F.R. pts. 257, 261, 264, 265, 268, 271, 302).

recycled, but about 70 percent (94 million tons annually, more than twice the amount of hazardous waste now generated in the U.S.), is dumped into landfills and surface impoundments. On December 22, 2008, one such facility operated by TVA burst open, releasing *one billion gallons* of inky coal ash sludge across 300 acres of Kingston, Tennessee.²⁹

Of 629 impoundments nationwide, one-third were not designed by a professional engineer, and 96 are at least 40 feet tall and at least 25 years old. EPA has identified 50 “high-hazard” surface impounds likely to kill people if they fail. The Pennsylvania Department of Environmental Protection predicts that the failure of the Little Blue Run ash basin could kill 50,000 people. Beyond the catastrophic implications of a sudden spill, such sites, which are typically unlined, cause irreversible contamination of groundwater by such toxic metals as arsenic, cadmium, chromium, lead, mercury, and selenium. About 140 cases of such contamination have already been documented.³⁰

I have attached to this testimony a chart showing the coal ash disposal sites in the districts of members of the subcommittee. I urge the subcommittee to consider the hazards posed by these sites before you vote on whether to adopt yet another weapon to eliminate such protective regulation.

The Unknowable

The core mission of the legislation before the subcommittee is to determine the influence of selected environmental regulations on the costs of energy in 2020 and 2030. These calculations must be completed no later than August 1, 2012, a date preceding by just a few weeks the national presidential election. In this instance, haste most assuredly will mean waste, except in the sense that the very large estimates that the bill’s sponsors hope will be plucked from the ether will be used to further cripple EPA’s efforts to implement the Clean Air Act.

Indeed, one irony that underlies this entire exercise is the argument often made by climate change skeptics to the effect that scientific projections of what might happen to climate over the next ten, twenty, or thirty years amount to sheer conjecture and do not afford a reliable basis for action. Yet these same skeptics would undoubtedly endorse this effort to demonstrate that if we act to control carbon emissions, we won’t be able to afford the energy we need to stay warm, cool off, or even read a book. Only in this context, we have no ice cores, climate history, or other scientific evidence to rely upon, and instead must project the future course of history around the globe, teasing out with false precision whether saving Washington, New York, Chicago, or Los Angeles from dangerous smog that requires us to stay inside all day is truly worth an unknowable increment of increase on utility bills we will receive two decades hence.

²⁹ Stephanie Smith, *Months After Ash Spill, Tennessee Town Still Choking*, CNN, July 13, 2009, http://articles.cnn.com/2009-07-13/health/coal.ash.illnesses_1_coal-ash-drinking-water-coal-power-plant?_s=PM:HEALTH; *Toxic Tsunami*, NEWSWEEK, July 18, 2009, <http://www.newsweek.com/2009/07/17/toxic-tsunami.html>.

³⁰ For further information on the proposed rule, and the hazards posed by the sites, see CPR Comments filed on November 19, 2010 and available at http://www.progressivereform.org/articles/Coal_Ash_Comments_Steinzor_111910.pdf.

Imagine for a moment that you could muster a meeting of the most sophisticated and knowledgeable experts on global oil prices. Throw in climate scientists, military experts, geologists, and the leaders of the ten countries with the largest deposits of oil, natural gas, and coal in the world. Ask the assembled group to tell you what the wholesale costs of these fuels will be in six months, and you will get lots of discussion that could take hours, if not days, and might even involve a range of estimates orders of magnitude apart depending on the perspective of the estimator. Now ask what the wholesale costs of these fuels will be in 2030. You would get laughter, shrugs, and protestations of disbelief that you are serious.

Over the last several weeks, we have seen popular uprisings course across the Middle East, sending gas prices through the roof. No one knows how these deeply rooted social cataclysms will play out, and they are likely to play a far more significant role in determining energy prices 10 or 20 years hence than projected costs of an EPA regulation that has not even been finalized yet. Unless sponsors of the legislation intend for its committee to simply pull the likely price of gas, oil, and coal in 2030 out of thin air, such projections are impossible to calculate in any reliable manner. Or consider the potential role of nuclear energy in America's future, a goal supported both by the President and many members of this committee. Nuclear energy will be far less regulated by the Clean Air Act than its fossil fuel counterparts. But who could have anticipated that a tsunami across the ocean in Japan would threaten its immediate future in the U.S.?

To the extent that the real answer sought by the legislation is how much the environmental rules under the Clean Air Act are likely to cost, as my earlier summary of benefits for four of the rules targeted by the legislation indicates, we have only to consult the elaborate regulatory impact assessments prepared by EPA under the stern oversight of OMB. But without the denominator of this fraction—how much energy will cost in 2020 or 2030, even those elaborate projections would not do the job this legislation demands.

Lastly, the legislation makes the job of knowing the unknowable even more ridiculously impossible by including rules that have not yet been promulgated in final form. These include most of the Clean Air Act rules explained above, which at least have been proposed by publication in the *Federal Register*. But it also includes potential rules that are at very early stages of development, including actions to improve visibility in certain national parks and wilderness areas (Clean Air Act Sections 169A and 169B) and rules to establish or modify a NAAQS.

Great Grandmother of All Unfunded Mandates

The discussion draft of the TRAIN Act contains a provision requiring the evaluation of how “covered actions” will affect energy costs and the reliability of the grid in 2020 and 2030. Covered actions are defined as “any” action occurring after January 1, 2009 and involving restrictions imposed by federal, state, or local governments on greenhouse gases using their Clean Air Act authority. In yet another striking paradox, the bill's drafters ignore how burdensome this requirement will be for countless thousands of public and private sector parties, even though their disgust with the burdens of regulatory requirements is ostensibly what drives

their support for the legislation. One must conclude that in the view of the drafters of this legislation, some burdens are OK to impose, so long as they don't help fight climate change or otherwise protect the environment. The mandate that some group of government accountants and economists quantify the implications of those potential requirements for projects in the planning stage for 2030 is nothing less than the great grandmother of all unfunded mandates.

To do a responsible job, federal numbers crunchers would be compelled to send information requests to every federal, state, and local government office--as well as any private sector company--that might be in a position to control the development or operation of a greenhouse gas-generating facility 20 years in the future. The reams of data that would be generated by such requests, not to mention the government resources that would be consumed in the analysis of such data, are quite literally mind-boggling.

In December 2010, EPA announced plans to issue an New Source Performance Standard (NSPS) limiting GHG emissions from fossil fueled power plants by May of 2012 and an NSPS limiting GHG emissions from petroleum refineries by November of 2012, as part of a settlement agreement with several environmental groups and state and local governments.³¹ The agency has not yet issued any proposed rules, so the precise details of the NSPSs are not clear. The Clean Air Act requires EPA to set NSPSs based on the best demonstrated technology for controlling emissions, and to review and revise existing NSPSs to account for advances in emissions control technology. EPA has provided no information about its assessment of the potential emissions control technology, or whether it will consider controversial control technologies like carbon capture and sequestration. Crunching numbers in the face of such uncertainty will be a waste not only of government but of private sector resources.

Secret, Not to Mention Biased, Government

The public's confidence in and respect for our government is directly influenced by the transparency and sunshine provisions that good government laws like the Federal Advisory Committee Act (FACA) provide. Congress passed FACA because the federal government routinely consults a wide variety of scientists, engineers, business people, and citizens about public policy. The statute requires these consultations to be open, accountable, and balanced, including stakeholders with a full range of views on the issues. These requirements apply to any advisory group that is established or utilized by federal agencies and that has at least one member who is not a federal employee. Agencies must give advanced notice of meetings, keep minutes, permit interested persons to attend, and make available to the public any records or documents received by the group. Most importantly, FACA prohibits the stacking of advisory panels with one point of view. Agencies must ensure that each committee is fairly balanced in its membership in terms of the points of view represented and the functions to be performed.

³¹ Press Release, Env'tl. Protection Agency, EPA to Set Modest Pace for Greenhouse Gas Standards (Dec. 23, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/6424ac1caa800aab85257359003f5337/d2f038e9daed78de8525780200568bec!OpenDocument>.

Incredibly, despite its title, the Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011 would exempt the deliberations of the special “Committee for the Cumulative Analysis of Regulations that Impact Energy and Manufacturing in the United States” from FACA, and from any obligation to conduct its affairs in public or make the basis for its conclusions transparent. I appreciate that whoever named the bill needed a “T” to round out the acronym, but “transparency” is the last thing this bill can claim. Let me suggest that you add the phrase, “So-called” up front – the So-called Transparency in Regulatory Analysis of Impacts on the Nation Act. That would make both the name, and the acronym, STRAIN, much more accurate.

As disturbing, the legislation stacks the committee with federal officials—and a single private sector representative (a representative from the North American Electric Reliability Corporation)—who can be expected to share a clear bias against EPA regulations that the electric power and energy production industries might deem inconvenient. In fact, EPA itself is the only member of the committee that might speak up in defense of those rules, and it is hard to imagine why its sole representative would make the effort when she is so badly outnumbered and the meeting is occurring behind closed doors.

Conclusion

Mr. Chairman, and members of the subcommittee, the discussion draft of the TRAIN Act is a collection of bad ideas that cannot be executed in service of a dangerous and misguided objective. These requirements will waste time and money and could cost lives. If Congress is truly interested in making government more effective, it should drop this politically motivated piece of legislation and let EPA get back to work.

Witness Background

I am a law professor at the University of Maryland School of Law and the President of the Center for Progressive Reform (CPR) (<http://www.progressivereform.org/>). Founded in 2002, CPR is a 501(c)(3) nonprofit research and educational organization comprising a network of sixty scholars across the nation who are dedicated to protecting health, safety, and the environment through analysis and commentary. I joined academia mid-career, after working for the Federal Trade Commission for seven years and this committee for five years, and serving as outside counsel for a wide variety of small and mid-sized businesses for seven years. My work on environmental regulation includes four books, and over twenty-seven articles (as author or co-author). My most recent book, published by the University of Chicago Press, is *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment*, which I co-authored with Professor Sidney Shapiro of Wake Forest University's School of Law, analyzes the state of the regulatory system that protects public health, worker and consumer safety, and natural resources, concluding that these agencies are under-funded, lack adequate legal authority, and are undermined by political pressure motivated by special interests. I have served as consultant to EPA and have testified previously before Congress on regulatory subjects on numerous occasions.

Attachments:

- U.S. Gov't Accountability Office, *Clean Air Act: Mercury Control Technologies at Coal-Fired Power Plants Have Achieved Substantial Emissions Reductions* (GAO-10-47, Oct. 2009), available at <http://www.gao.gov/new.items/d1047.pdf>
- James E. Staudt, Ph.D, Andover Technology Partners, M.J. Bradley & Assocs., *Control Technologies to Reduce Conventional and Hazardous Air Pollutants from Coal-Fired Power Plants* (Mar. 31, 2011) (prepared for NESCAUM)
- Chart of Coal Ash Sites in Subcommittee Members' Districts