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ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
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July 15, 2013

To: Committee on Energy and Commerce Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Full Committee Markup of H.R. 1582, the "Energy Consumers Relief Act of 2013;" H.R. 1900, the "Natural Gas Pipeline Permitting Reform Act;" H.R. 83, a bill to require the Secretary of the Interior to develop an action plan to address the energy needs of the insular areas of the United States and the Freely Associated States; H.R. 2094, the "School Access to Emergency Epinephrine Act;" H.R. 698, the "HIV Organ Policy Equity Act;" and H.R. 2052, the "Global Investment in American Jobs Act of 2013."

On Tuesday, July 16, 2013, at 4:30 p.m. in 2123 Rayburn House Office Building, the Committee will convene to conduct opening statements for the markup of H.R. 1582, the "Energy Consumers Relief Act of 2013;" H.R. 1900, the "Natural Gas Pipeline Permitting Reform Act;" H.R. 83, a bill to require the Secretary of the Interior to develop an action plan to address the energy needs of the insular areas of the United States and the Freely Associated States; H.R. 2094, the "School Access to Emergency Epinephrine Act;" H.R. 698, the "HIV Organ Policy Equity Act;" and H.R. 2052, the "Global Investment in American Jobs Act of 2013."

The Committee will reconvene on Wednesday, July 17, 2013, at 10:00 a.m. in 2123 Rayburn House Office Building to continue consideration of the six bills.

I. H.R. 1582, ENERGY CONSUMERS RELIEF ACT OF 2013

For additional information, you can read a background memo on this bill here.

A. Summary of H.R. 1582

Section 2 of the bill prohibits EPA from finalizing any "energy-related rule" that is estimated to cost more than $1 billion if the Secretary of Energy determines that the rule will cause "significant adverse effects to the economy." The term "significant adverse effects to the economy" is not defined. In addition, the term "energy-related rule" is broadly defined to

include any rule that "regulates any aspect of the production, supply, distribution, or use of energy or provides for such regulation by States or other governmental entities." Any public health rule focused on air pollution likely would be an "energy-related rule" under this broad definition. This definition also could apply to rules issued under the authority of the Safe Drinking Water Act, Clean Water Act, Superfund, and Resource Conservation and Recovery Act pertaining to pollution and waste from energy-related activities such as electricity generation, coal mining, and oil and gas drilling.

Section 3 prevents EPA from issuing a final energy-related rule that is estimated to cost more than $1 billion until three actions are taken.

First, EPA is required to submit a report to Congress that contains an estimate of the costs of the rule (both direct and indirect) and a description of potential negative effects of the rule, including increased energy prices or potential job losses. During the Subcommittee on Energy and Power markup of the bill, Rep. Barton offered an amendment to provide that this report to Congress includes an estimate of the total benefits of the rule, as well as a description of the modeling, assumptions, and speculation associated with those benefits. The amendment passed by voice vote.

Second, the Secretary of Energy, in consultation with the Federal Energy Regulatory Commission and the Administrator of the Energy Information Administration, is required to prepare an "independent analysis" to determine whether the rule will cause any increase in energy prices, any impact on fuel diversity of the nation's electricity generation portfolio or on national, regional, or local electric reliability, or any other adverse effect on energy supply, distribution, or use. It is unclear what would constitute an impact on fuel diversity. Mr. Barton's amendment did not expand the scope of this analysis to include any benefits of EPA rules.

Third, if the Secretary of Energy determines that the rule will cause any such increase, impact, or effect, then the Secretary, in consultation with the Secretary of Commerce, Secretary of Labor, and Administrator of the Small Business Administration, shall determine whether such increase, impact, or effect will cause "significant adverse effects to the economy." In making this determination, the Department of Energy (DOE) is required to consider impacts on gross domestic product, unemployment, wages, consumer prices, and business and manufacturing activity. Mr. Barton's amendment did not expand the factors considered as part of DOE's determination to include consideration of any beneficial economic impacts of EPA rules.

The legislation does not establish deadlines for the completion of any of these actions.

B. Potential Impact of H.R. 1582

The bill's practical implications are broad and undefined in several important ways.

First, the bill provides the Secretary of Energy with an unprecedented authority to effectively veto EPA public health rules. If the Secretary of Energy determines that a rule would cause any "significant adverse effects to the economy," EPA would be blocked from finalizing the rule.

Moreover, the bill requires DOE to base this determination on a skewed analysis of only the costs of such rules without any consideration of the benefits. Under this approach, even if the economic benefits of a rule dramatically outweigh any "significant adverse effects to the economy," the rule would be blocked. EPA told the Subcommittee on Energy and Power that the bill "departs from the principle that both the benefits and costs of regulations should be considered together."[1] EPA noted that health and environmental benefits "are the driving rationale for our environmental laws and for the regulatory actions taken to implement these laws. By ignoring benefits, the draft legislation instructs policy makers to adopt an inherently biased approach that is inconsistent with the fundamental principles of environmental law and would lead to flawed decision making."[2]

Second, while the bill applies to energy-related rules with an estimated cost of more than $1 billion, it is silent on the time period associated with such costs. It is unclear whether the bill refers to costs of $1 billion annually or cumulatively over some unspecified period of time. If it applies to rules with annual costs of more than $1 billion, it would have affected about a dozen major rules promulgated during the last decade. If it applies to rules with cumulative costs of more than $1 billion, it likely would have applied to a much larger number of rules.

Third, the bill appears to allow for the indefinite delay of any EPA energy-related rule with estimated costs of more than $1 billion. The bill bars EPA from issuing a final rule before EPA submits its report to Congress and the Department of Energy completes its analysis and, if applicable, makes its determination as to whether the rule would cause significant adverse effects to the economy. However, the bill establishes no deadline for EPA to submit the report or DOE to complete the study or to make the determination. This appears to eliminate any statutory or judicial deadlines for the issuance of rules that would meet the broad definition of an "energy-related rule that is estimated to cost more than $1 billion." DOE's lack of expertise in macroeconomic analysis, the required DOE consultations with five other agencies, and the absence of additional funding to complete the newly required analysis could lengthen the time it takes to complete the analysis and therefore lengthen the delay of important public health rules, even if the Secretary of Energy ultimately determined that the rules did not cause significant adverse effects to the economy.

Finally, the regulatory analysis process established by the bill would be duplicative. EPA commented that the bill "would waste limited analytical resources on duplicative analysis that could needlessly delay important public health protections at an additional cost to taxpayers."[3] EPA noted that Executive Order 13211 already requires the agency to examine energy effects, including "impacts on energy prices and output, changes in electricity generation mix, impacts on reserve margins for reliability, and other energy-related metrics where relevant for

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[1] U.S. EPA, Statement for the Record, *Hearing on H.R. __, the Energy Consumers Relief Act*, Subcommittee on Energy and Power, Committee on Energy and Commerce, 113th Cong. (April 12, 2013).

[2] *Id.*

[3] *Id.*

regulations."[4] These analyses are then subject to extensive interagency review. The bill would duplicate a well-understood and thorough review process with a parallel regulatory process focused exclusively on costs that uses vague and undefined terms. Compounding the waste in taxpayer resources associated with this new process is the requirement to consult with agencies that already participate in the current interagency review process.

II. H.R. 1900, NATURAL GAS PIPELINE PERMITTING REFORM ACT

For additional information, you can read a background memo on this bill here.

A. Summary of H.R. 1900

Section 2 of the bill amends section 7 of the Natural Gas Act to add two new subsections. The new subsection (i) requires FERC to approve or deny an application for a certificate of public convenience and necessity within 12 months of the Notice of Application. The new subsection (j) applies to any federal or state agency responsible for issuing any license, permit, or approval required under Federal law in connection with the siting, construction, expansion, or operation of any interstate natural gas pipeline for which a certificate is sought. Subsection (j) requires any such agency to approve or deny the issuance of the license, permit, or approval not later than 90 days after FERC issues its final environmental document for the pipeline project. An agency may request a 30-day extension of the deadline, which FERC shall grant if the agency demonstrates that the extension is necessary because of unforeseen circumstances beyond the agency's control. Under subsection (j)(3), if an agency does not approve or deny the issuance of the license, permit, or approval within the deadline, it automatically goes into effect.

B. Questions Raised by H.R. 1900

This legislation raises significant questions.

Although many pipeline applications are approved in less than 12 months, there are complex pipeline projects for which FERC likely will not be able to issue a certificate of public convenience and necessity within 12 months. The time required to issue a certificate is highly variable and depends on the complexity of the project, the length of the proposed pipeline, the proposed path of the pipeline, and the degree of public concern, among other factors. Completing an environmental impact statement for a complex pipeline project in less than 12 months may not be feasible in every case. A 12-month deadline for all applications could result in a truncated or inadequate environmental analysis, which could adversely impact FERC decision making and potentially expose a FERC-issued certificate to litigation risk. Alternatively, if FERC cannot finish the analysis necessary to produce a complete certificate by the deadline that adequately addresses all of the environmental, engineering, tariff, and accounting issues presented by a pipeline application, FERC may be required to dismiss the application. In other words, requiring FERC to either approve or deny an application in 12 months may result in FERC denying applications that would have been granted if the Commission had adequate time to consider the application.

[4] *Id.*

At the July 9, 2013, Energy and Power Subcommittee hearing on H.R. 1900, the career Director of FERC's Office of Energy Projects confirmed that the 12-month time limit may actually lead to more pipeline delays, contrary to the sponsors' stated purpose. The nonpartisan staff witness testified, "I do not believe [H.R. 1900] would effectively cause pipelines to be permitted faster than they are now" and that if FERC must deny applications that cannot be properly reviewed in 12 months, "quite possibly . . . it could take longer for certain projects" to be approved because applicants will be forced to re-file and start over.

Similarly, a 90-day deadline for federal and state agencies to approve or deny applications for all other permits or approvals required by federal law may lead to more pipeline delays and other concerns. Agencies are required to comply with their statutory responsibilities under the Clean Water Act, Clean Air Act, Endangered Species Act, Rivers and Harbors Act, National Historic Preservation Act, Coastal Zone Management Act, Mineral Leasing Act, and other statutes. Agencies that cannot complete the legally-required analysis necessary to issue a permit or authorization within 90 days of the completion of the FERC environmental document may have no choice but to deny the application in order to comply with federal law and avoid adverse impacts to health, safety, and the environment. Under the bill, the standard for extending the deadline by even 30 days would likely be difficult for an agency to meet as it requires a finding of "unforeseen circumstances beyond the control of the agency."

The bill also provides for licenses, permits, and approvals to automatically go into effect if an agency does not approve or deny them by the deadline established in the bill. It is unclear how a license or permit that would need to include terms of conditions written by an agency could simply go into effect. At the hearing on H.R. 1900, witnesses were asked what it would mean for a permit that might not even be written to automatically take effect if a deadline is missed. The witnesses could not provide an answer.

Moreover, automatically granting important licenses and permits without any agency determination that statutory requirements have been met creates a significant risk that pipelines will have unmitigated adverse environmental, health, or cultural impacts. The provision also may increase the likelihood that an agency that cannot complete the permitting process by the deadline will deny the license or permit rather than have it automatically go into effect.

The Army Corps of Engineers, Environmental Protection Agency (EPA), Bureau of Land Management (BLM), and Fish and Wildlife Service (FWS) have all raised concerns about the 90-day deadline and automatic effect provisions. The Army Corps of Engineers states H.R. 1900 "could allow certain activities to proceed despite potential adverse and significant impacts to aquatic resources and without appropriate compensatory mitigation."[5] According to EPA, H.R. 1900 "would severely limit states' ability to ensure that discharges comply with water quality standards", and the automatic effect provision "could potentially result in sources receiving an inadequate permit or a permit that does not assure compliance with the Clean Air Act."[6] BLM

[5] U.S. Army Corps of Engineers, *Technical Analysis: HR 1900* (Jul. 1, 2013).

[6] U.S. EPA, *Technical Assistance on H.R. 1900- "Natural Gas Pipeline Permitting Act"* (Jul. 8, 2013).

informed Committee staff, "Unduly short timeframes could cause the BLM to deny pipeline right-of-way applications rather than allow approval to automatically take effect as provided in H.R. 1900."[7] Finally, FWS states that "automatic approval of an eagle permit contravenes the Bald and Golden Eagle Protection Act" and that H.R. 1900 is in "direct conflict" with the National Wildlife Refuge statute.[8]

III. H.R. 83, A BILL TO REQUIRE THE SECRETARY OF THE INTERIOR TO DEVELOP AN ACTION PLAN TO ADDRESS THE ENERGY NEEDS OF THE INSULAR AREAS OF THE UNITED STATES AND THE FREELY ASSOCIATED STATES.

Congresswoman Donna Christensen introduced H.R. 83 on January 3, 2013.

A. Summary of H.R. 83

At the June 10, 2013, Subcommittee on Energy and Power markup, Rep. Christensen introduced an amendment making minor technical changes worked out with the Chairman to clarify H.R. 83 and avoid unintended consequences. The amendment passed by a voice vote.

Section 1(b) of the bill requires the Secretary of the Interior to establish a team of technical, policy, and financial experts within 180 days to develop energy action plans addressing the immediate, near-term, and long-term energy and environmental needs of each of the insular areas of the United States and the Freely Associated States. The insular areas are American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands. The Freely Associated States are the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. The team of experts must also assist each of these areas in implementing an energy action plan. Under Section 1(c), the Secretary of the Interior shall consider including regional utility organizations as participants on the team of experts.

Section 1(d) requires that the energy action plans include recommendations to promote access to affordable, reliable energy; develop indigenous, nonfossil fuel energy resources; and improve access to energy infrastructure and energy efficiency. The plan must also include schedules for implementing the recommendations and identification and prioritization of specific projects; a financial and engineering plan for implementing and sustaining projects; and benchmarks for measuring progress toward implementation.

Section 1(e) requires the team of experts to submit annual progress reports to the Secretary of the Interior. Within 30 days of receiving an annual report, Section 1(f) requires the Secretary to submit a summary of the report to the appropriate Committees of Congress.

B. Energy Needs Addressed by H.R. 83

[7] Bureau of Land Management, *H.R. 1900 White Paper* (Jul. 9, 2013).

[8] U.S. Fish and Wildlife Service, *H.R. 1900 White Paper* (Jul. 9, 2013).

The insular areas of the United States and the Freely Associated States face significant energy challenges due to their near total reliance on imported fossil fuels to meet their energy needs. According to a 2006 report from the U.S. Department of the Interior, this "reliance on a single, increasingly expensive energy source has created fiscal burdens that have hampered economic development."[9] In 2008, the Acting Assistant Secretary of the Interior for Insular Affairs testified before the House Subcommittee on Insular Affairs and the House Subcommittee on Energy and Mineral Resources that "[h]igh energy prices are currently the greatest threat to all of the economies of the United States-affiliated insular areas."[10]

Energy prices in the insular areas and Freely Associated States are much higher than they are on the mainland U.S. In 2011, Congressman Gregorio Sablan of the Northern Mariana Islands noted that "People in the Northern Marianas and the other U.S. insular areas face energy costs that are two to three time higher than the national average."[11] In the Virgin Islands, residents pay four to five times more for energy than do residents on the mainland.[12]

These high prices are exacerbated by high reliance on imported petroleum for energy – approaching 100% – which makes the insular areas and Freely Associated States acutely vulnerable to oil price shocks. For example, rising oil prices in 2008 forced the Marshall Islands to spend almost 20% of its budget on energy, leading to high rates of inflation and public debt.[13]

Reliance on fossil fuels has also had other adverse impacts. In January 2012, for example, the Hovensa refinery, the Virgin Islands' largest private employer, closed, leading to widespread unemployment. Among other economic impacts, loss of this local refinery increased the price of diesel fuel by $21.25 per barrel, raising already high electricity rates even higher.[14]

With virtually no local petroleum resources, the insular areas and Freely Associated States are increasingly looking to develop clean energy to reduce their reliance on imported

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[9] U.S. Department of the Interior, *United States of America Insular Areas Energy Assessment Report* (Aug. 2006), at ii.

[10] U.S. Department of the Interior, *Statement of Nikolao I. Pula, Acting Deputy Assistant Secretary of the Interior for Insular Affairs before the House Sub-Committee on Insular Affairs and the House Subcommittee on Energy and Mineral Resources on Charting a Clean Energy Future for the Insular Areas* (Apr. 12, 2008) (press release).

[11] Congressman Gregorio Kilili Camacho Sablan, *Insular reps want full funding for LIHEAP* (Nov. 1, 2011) (press release).

[12] U.S. Department of Energy, National Renewable Energy Laboratory, NREL Helping Virgin Islands Cut Fuel Use (Jan. 11, 2012).

[13] Republic of the Marshall Islands, *National Energy Policy and Energy Action Plan: Volume 1: National Energy Policy* (Sep. 2009), at 1.

[14] *One Year Post-Hovensa: Worse Before It Gets Better?* St. Croix Source (Jan. 23, 2013).

fossil fuels and enhance energy security.[15] H.R. 83 would help further these goals by providing the insular areas and Freely Associated States with technical, policy, and financial expertise.

IV. H.R. 2094, SCHOOL ACCESS TO EMERGENCY EPINEPHRINE ACT

H.R. 2094 amends provisions of the Children's Asthma Treatment Grants Program (authorized in Section 399L of the Public Health Service Act) to provide for an additional preference to states that allow trained school personnel to administer epinephrine to students such personnel believe to be having an anaphylactic reaction. Epinephrine injections are given through a so-called "EpiPen" to treat life-threatening allergic reactions brought on by insect bites, food allergies, latex and other causes.

No additional funds are made available through the legislation.

H.R. 2094 was introduced by Congressmen Roe and Hoyer and has bi-partisan support. It is a revised version of H.R. 3627, similar legislation that was introduced by Congressmen Roe and Hoyer during the 112th Congress. No amendments to the legislation are anticipated.

V. H.R. 698, HIV ORGAN POLICY EQUITY ACT

H.R. 698 amends the federal Organ Procurement and Transplantation Network (authorized in Section 372 of the Public Health Service Act) to allow for the transplantation of human organs infected with HIV. Such organs may only be transplanted into individuals who are infected with the HIV virus before undergoing a transplant procedure. The Secretary of the Department of Health and Human Services is required to establish guidelines, standards and regulations regarding the transplantation of organs infected with HIV.

H.R. 698 was introduced by Congresswoman Capps. Among other Members, it is co-sponsored by Congressman Burgess and has bi-partisan support. As introduced, the bill is identical to S. 330, an amended version of which has passed the Senate. That legislation includes minor and technical changes to the original bill. No amendments to H.R. 698 are anticipated.

VI. H.R. 2052, THE "GLOBAL INVESTMENT IN AMERICAN JOBS ACT OF 2013"

H.R. 2052 was introduced by Subcommittee Chairman Terry, Ranking Member Schakowsky, Rep. Roskam, and Rep. Barrow on May 20, 2013. On May 23, 2013, the Subcommittee on Commerce, Manufacturing, and Trade forwarded H.R. 2052 to the full Committee, with one bipartisan, largely technical amendment.

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[15] *See, e.g.*, U.S. Department of Energy, National Renewable Energy Laboratory, *U.S. Virgin Islands Makes Aggressive Energy Pledge at NREL* (Mar. 1, 2010); U.S. Department of Interior, *OIA Energy Initiative for the Pacific Territories: Briefing Paper for the Interagency Group on Insular Areas* (Mar. 1, 2011).

Key portions of H.R. 2052 are as follows:

- ***Requires the Secretary of Commerce to conduct an interagency review of the global competitiveness of the United States in attracting foreign direct investment.*** The review shall be conducted in coordination with the Federal Interagency Investment Working Group and the heads of other relevant federal departments and agencies.

- ***Mandates that the review include several specific matters.*** The review is required to include assessments of: (1) the domestic economic impact of foreign direct investment in the United States, including both costs and benefits; (2) trends in global cross-border investment flows; (3) federal policies that are closely linked to the ability to attract foreign direct investment; (4) foreign direct investment as compared to direct investment by domestic entities; (5) greenfield foreign direct investment – where foreign investors create a new, productive unit – as compared to foreign direct investment reflecting merger and acquisition activity; (6) the unique challenges posed by foreign direct investment by state-owned enterprises; (7) ongoing federal efforts to facilitate greater levels of foreign direct investment; (8) state, regional, and local efforts to attract foreign investment; and (9) initiatives by other countries to attract foreign direct investment.

- ***Limits the scope of the review to exclude any consideration of laws or policies relating to the Committee on Foreign Investment in the United States (CFIUS).*** CFIUS is the interagency committee chaired by the Secretary of the Treasury that is responsible for assessing the national security consequences of transactions that could result in control of a U.S. business by a foreign person.

- ***Requires the Secretary of Commerce to report to Congress the findings of the review and submit recommendations for making the United States more competitive in attracting global investment.*** H.R. 2052 states that the report to Congress shall include not just the results of the review but also recommendations, and that these must be recommendations for increasing the global competitiveness of the United States in attracting foreign direct investment without weakening labor, consumer, financial, or environmental protections.