This is a preliminary transcript of a Committee hearing. It has not yet been subject to a review process to ensure that the statements within are appropriately attributed to the witness or member of Congress who made them, to determine whether there are any inconsistencies between the statement within and what was actually said at the proceeding, or to make any other corrections to ensure the accuracy of the record.

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``THE AMERICAN ENERGY INITIATIVE''

WEDNESDAY, MAY 9, 2012

House of Representatives,

Subcommittee on Energy and Power

Committee on Energy and Commerce

Washington, D.C.

The Subcommittee met, pursuant to call, at 9:04 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Ed Whitfield [Chairman of the Subcommittee] presiding.

Members present: Representatives Whitfield, Shimkus, Walden, Terry, Bilbray, Scalise, McMorris Rodgers, Olson, McKinley, Gardner, Pompeo, Griffith, Barton, Upton (ex officio), Sarbanes, Dingell, Capps, Doyle, and Waxman (ex officio).

Staff present: Michael Beckerman, Deputy Staff

Director; Anita Bradley, Senior Policy Advisor to Chairman Emeritus; Maryam Brown, Chief Counsel, Energy and Power; Allison Busbee, Legislative Clerk; Patrick Currier, Counsel, Energy and Power; Andy Duberstein, Deputy Press Secretary; Cory Hicks, Policy Coordinator, Energy and Power; Heidi King, Chief Economist; Ben Lieberman, Counsel, Energy and Power; Mary Neumayr, Senior Energy Counsel; Michael Aylward, Professional Staff Member; Jeff Baran, Senior Counsel; Greg Dotson, Energy and Environment staff Director; Caitlin Haberman, Policy Analyst; and Alexandra Teitz, Senior Counsel, Environment and Energy.

Mr. {Whitfield.} I would like to call this hearing to order this morning. This is the 19th day of our American Energy Initiative hearing, and today we are going to focus on two particular pieces of bipartisan energy legislation. The first one is the Resolving Environment and Grid Reliability Conflicts Act of 2012, and the second is the Hydropower Regulatory Efficiency Act of 2012.

Now, the Resolving Environmental and Grid Reliability Conflicts Act is a bipartisan bill brought forward by our colleagues Mr. Olson, Mr. Doyle, and Mr. Green. I understand that Mr. Green may not be here today because he was called out to do something else, but you are here, Mr. Doyle, so that is great. But this legislation amends the Federal Power Act to clarify that when an electric utility complies with a DOE order to generate electricity in order to prevent a reliability emergency, the generator will not be considered in violation of conflicting environmental laws, which has been a problem in many situations.

The other bill under consideration today is hydropower legislation developed by Representatives Cathy McMorris Rodgers and Diana DeGette. This legislation is another example of a bipartisan effort by Ms. McMorris Rodgers and Diana DeGette. Of course, one of the primary impediments to

greater utilization of hydropower resources is the regulatory red tape, which has proven costly, time consuming, and burdensome, even for small--very small hydropower plants.

[The prepared statement of Mr. Whitfield follows:]

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Mr. {Whitfield.} At this time, I would like to recognize Mrs. Rodgers to make any additional comments she may want to make about this legislation.

Mrs. {McMorris Rodgers.} Thank you, Mr. Chairman, and thank you very much for holding the hearing on this legislation. I also want to thank our witnesses who are going to be testifying before the Subcommittee today.

In eastern Washington, hydro plays a foundational role, whether it is conventional, small, conduit, hydro. In fact, hydropower provides two-thirds of the electricity in eastern Washington and into the Pacific Northwest. I recognize there is a vast array of clean green energies, including solar, wind, nuclear, but in my opinion, hydro potential should not be overlooked in the important role that it can play in helping make America energy independent. In fact, we could double hydropower electricity in this country without building a new dam, simply by investing in new technologies and upgrades. Only 3 percent of the current dams produce electricity.

That is part of the reason that Congresswoman Diana DeGette and I have been working to expand hydropower production. Today, this committee will examine our bill, the Hydropower Regulatory Efficiency Act. This legislation would

facilitate the development of hydropower and conduit projects through several commonsense reforms, such as updating the FERC license exemption standard to streamline the development of more small hydro projects, giving FERC the option to exempt hydro projects generating under 10 megawatts, and conduit projects generating between 5 and 40 megawatts from the permitting process. Also allowing FERC to extend the term of a preliminary permit for up to 2 years, for a total of 5 years, in order to allow a permittee sufficient time to develop and file a license application.

Our bill is timely and targeted, and it will help create jobs and encourage America's competitiveness in the energy sector.

I would also like to take this opportunity to introduce one of our witnesses on today's second panel. I have had the privilege of knowing Andrew Munro for the past few years. Andrew serves on the Grant County Public Utility District in Washington State. He formerly served as the president, CEO, and chairman of the board of the National Hydropower Association. Andrew understands the importance of this legislation, and sees it as a stepping stone for future hydropower legislation.

Again, I thank all the witnesses for participating, and for the Chairman for taking the time to hold this hearing

today. Thank you.

[The prepared statement of Mrs. McMorris Rodgers follows:]

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Mr. {Whitfield.} Thank you. At this time, I would like to recognize Ms. Capps of California. Mr. Rush is not with us this morning, but you are recognized for 5 minutes.

Mrs. {Capps.} Thank you very much, Mr. Chairman, and I want to welcome our witnesses who are being--who are here today to testify.

At today’s hearing, as the Chairman has said, the Subcommittee will examine two pieces of legislation. The first measure is a noncontroversial hydropower bill which we heard Ms. McMorris Rodgers explain, also co-sponsored by Ms. DeGette. It is encouraging to see bipartisan cooperation to promote the types of hydropower that are environmentally responsible. We have significant hydropower potential in California, including in my district on the central coast. When developers and environmentalists can agree on a common framework to utilize some of these resources in ways that are broadly supported, I think it is a good step in the right direction.

On the other hand, I have serious concerns about the Olson bill. Under the Federal Power Act, the Department of Energy has the authority to issue emergency orders to require the generation or transmission of electricity when grid reliability is threatened. Historically, this authority has

been used sparingly. In fact, it has only been used on six occasions since 1978. These emergency orders are a measure of last resort. The Olson bill would provide any entity operating under a DOE emergency order with a blanket waiver of all environmental liability that could result from actions necessary to carry out the order. We certainly don’t want to force a company to choose between complying with the DOE order and complying with environmental laws, but that kind of conflict has proven to be exceedingly rare. There is only one case from 6 years ago that arguably even falls into that category.

In trying to address those rare conflicts, we need to make sure we don’t create bigger problems. As currently drafted, the Olson bill has the potential to become a major loophole that could allow utilities to dodge compliance with environmental requirements. We need to avoid that outcome. The language of the Federal Power Act provision is quite broad. If we add a sweeping liability shield to that broad authority, we may have utilities lining up around the block to get a DOE order so they can avoid meeting environmental standards and installing modern pollution controls.

Under current law, operators have strong incentives to act responsibly and to comply with environmental requirements. With no risk of liability for violations of

environmental law, the entities would be very different. We want to make sure the lights stay on, and we all want to treat companies fairly, but let us not throw caution to the wind as we try to address an issue that has affected just one company in the last 35 years.

DOE and EPA are raising serious concerns about the Olson bill. We should take those concerns seriously and approach this issue in a thoughtful and balanced way. I thank all of today's witnesses for being here again, and I look forward to your testimony.

[The prepared statement of Mrs. Capps follows:]

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Mrs. {Capps.} At this point, the remainder of my time I would be happy to yield to the gentleman from Pennsylvania, my colleague, Mr. Doyle.

Mr. {Doyle.} I thank my colleague. Mr. Chairman, as you now I am cosponsor of the bill that Ms. Capps just talked about. This bill was the product of many months of work, including consultation with Chairman Upton’s staff, Ranking Member Waxman’s staff, the Department of Energy, various electricity providers, and many others. Admittedly, it has been a difficult needle to thread.

But I want to remind everybody on this committee, as we have debated numerous EPA regulations that will affect power providers, I have supported greenhouse gas regulations, federal regulation of coal ash, regulations for industrial boilers, and most recent, the Mercury and Air Toxics Standards. In fact, at this committee’s hearing on the MATS rule in February, I said, and I quote, ``Here we are trying to sort through claims that 24 years was not long enough for the power sector to prepare and a potential 5 additional years of compliance time provided by the rule, totaling to a full 29 years since the power sector knew controlling mercury would be required is simply too onerous. The time has come, and the time is now, so let us see what we can do about

ensuring the rule that has the least negative impact possible on those who matter most, the American consumer.''

What I simply want to make clear is that this bill before us today is not intended as a way out of compliance with any EPA regulations. But the fact remains, coal=fired power plant retirements are being announced nearly every month. Since last year, over 106 coal-fired power plants have announced their intention to shut down. It is my hope that these retirements will be managed safely by regional transmission authorities. However, should something go wrong, like an unexpected severe weather event, we have one tool of last resort, emergency orders issued under Section 202(c) of the Federal Power Act. Whether these issues--orders are issued once, twice, or 100 times, it is never acceptable for the Federal Government to require actions from a company that necessitates a choice of which law to violate. This bill attempts to resolve this conflict in a very narrow and responsible way.

I look forward to working with my colleagues as the bill moves through the committee, and Mr. Chairman, I do have a statement for the record from Mr. Green who was unable to be at the hearing today, and I ask unanimous consent that it be inserted into the record.

Thank you.

[The prepared statement of Mr. Green follows:]

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[The prepared statement of Mr. Doyle follows:]

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Mr. {Whitfield.} At this time, I would like to recognize the Chairman of the full Committee, Mr. Upton of Michigan, for 5 minutes.

The {Chairman.} Well thank you, Mr. Chairman. Today we have two very important pieces of bipartisan legislation before us. I want to commend my colleagues for their hard work and for reaching across the aisle to find common ground in developing both of these bills. Ms. McMorris Rodgers and Ms. DeGette worked together to develop a critical piece of hydropower legislation, the Hydropower Regulatory Efficiency Act of 2012. We know that hydropower is the Nation’s largest renewable energy resource, and the bill before us today will help to aid the development of a new hydropower resource. It accomplishes that goal without new subsidies or deficit spending. Instead, it cuts through the red tape to make it easier for this renewable resource to come online to power our communities. This is what ``all of the above'' is all about. It in turn will stimulate job growth as new hydropower resources are constructed and operated, while the electricity provided by these new projects will provide low cost power to American homes and businesses.

This legislation has great promise for increased hydropower development, including my State of Michigan, which

has significant potential for small hydro projects. In addition, Michigan manufacturers produce many of the components vital to the hydropower industry, enhancing the positive economic benefits.

The other bill under consideration today is Resolving Environmental and Grid Reliability Conflicts Act of 2012, authored by Mr. Olson, Mr. Doyle, and Mr. Green. It is clear that the Nation’s generation fleet will be undergoing a significant shift over the next several years and beyond, and although we may disagree on why it is occurring or what the impacts will be, we should be able to agree that ensuring the reliable supply of electricity is paramount. That is why H.R. 4273 is such a critical piece of legislation. The bill protects our Nation’s electricity producers from being penalized or sued for violating a conflicting environmental law when they have been directed by the Federal Government to operate during an emergency. Government can’t have it both ways. It can’t direct the generator to operate for emergency purposes and then turn around and fine them for doing so. It is like having one police officer telling you to speed up while another sits at the end of the street to give you a ticket. It is not fair, which is why I am pleased that our colleagues have developed this bipartisan legislation.

So with that, I will yield to any of my colleagues who

wish time. Seeing none, I yield back the balance of my time.

Mr. Olson, do you want my time?

[The prepared statement of Mr. Upton follows:]

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Mr. {Whitfield.} Mr. Olson is correct. Mr. Barton, it is my understanding, is not going to give a statement, and so Mr. Olson, I recognize you for 5 minutes for your opening statement.

Mr. {Olson.} Well thank you, Mr. Chairman. I thank the Chairman of the full Committee for his hospitality, and thank you, Chairman, for bringing H.R. 4273, the Resolving Environmental and Grid Reliability Conflicts Act of 2012, before this Subcommittee. I also want to thank the witnesses for appearing here today to provide their input on this important piece of legislation which removes electricity generators from the Catch 22 of conflicting legal mandates that complicate electricity emergencies and threaten grid reliability.

I introduced H.R. 4273 with bipartisan support. I would like to thank my colleagues, Mr. Green and Mr. Doyle, for being the original cosponsors to clarify Congress’s intent that compliance in an emergency order issued by the Department of Energy should not be considered a violation of any federal, State, or local environmental laws or regulations.

This common sense legislation is extremely relevant today, as the Environmental Protection Agency, the Federal

Energy Regulatory Commission, and the Department of Energy and others have acknowledged that grid reliability could be threatened due to power plant closures. Secretary Chu, in this hearing room last month, expressed support for the concept of holding power generators harmless when they exceed emission limits when ordered to do so by the grid regulator. One of the safety valves in the toolbox is dealing authority to mandate power generation and transmission under Section 202(c) of the Federal Power Act. It is no silver bullet, but it is a fallback in times of true emergency.

However, as we hear from our witnesses today, 202(c) cannot work effectively unless Congress passes legislation like H.R. 4273 to resolve the potential conflict between the DOE mandate and environmental regulations. Absent legislative action, the risks and costs associated with temporary noncompliance with environmental requirements could prohibit a company from complying with the energy order, placing reliability in jeopardy.

If my home State of Texas has another exceptionally hot summer like they did last summer and the power is shut off, air conditioning goes off, lives will be at risk, particularly elderly and young ones. In fact, last week in my home city of Sugarland, Texas, a young infant died in an automobile when the heat rose to 90 degrees. We had 100

degree heat last summer. If that happens again and the grid goes down, people's lives will be at risk.

This legislation is bipartisan support because it simply ensures a common sense solution to protect grid reliability when it is most needed. I urge my colleagues to support H.R. 4273 to protect grid reliability and to provide certainty to electric providers.

Mr. Chairman, I ask unanimous consent to include records of support for my legislation from the American Public Power Association, the National Rural Electric Cooperative Association, the Electric Power Supply Association, the Edison Electric Institute, the Industrial Energy Consumers of America, and the Midwest Power Coalition. I ask unanimous consent for these letters of support to be inserted into the record.

[The information follows:]

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Mr. {Whitfield.} Without objection.

Mr. {Olson.} I yield back the balance of my time. Thank you.

[The prepared statement of Mr. Olson follows:]

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Mr. {Whitfield.} Thank you, Mr. Olson. Mr. Waxman was delayed a little bit this morning, so we are going to proceed with the hearing, but when he comes in, I am just going to interrupt to give him an opportunity to make his opening statement at that time.

I also want to welcome our witnesses today. We have two panels, and we genuinely appreciate all of you taking time to come up and give us your views and expertise on these two pieces of legislation.

I might also say that we do these hearings, and it really does take a major effort by everyone, by the witnesses, by the staff, and a lot goes into every hearing that we have. And we have had a lot of hearings, and we have repeatedly requested that testimony from witnesses, that we receive it 2 days in advance of the hearing, simply because it gives us an opportunity to more thoroughly review and assess and look at the views of those witnesses. And unfortunately, once again, Ms. McCarthy, we didn’t get your testimony until yesterday around 5:00--after 5:00 yesterday, and Ms. Hoffman, we didn’t get yours until after 5:00 yesterday, which was considerably later than what we really asked for. Now I know everyone has a lot of demands on their time, and we have talked about this before, but I would

really appreciate if in the future you all would make a real effort to get that testimony here at least 2 days before so that we can more thoroughly do our job as well.

So thank you for being here, and at this time, Ms. Hoffman, I will recognize you for 5 minutes for your opening statement.

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^STATEMENTS OF THE HONORABLE PATRICIA HOFFMAN, ASSISTANT SECRETARY FOR THE OFFICE OF ELECTRICITY DELIVERY AND ENERGY RELIABILITY, U.S. DEPARTMENT OF ENERGY; THE HONORABLE GINA MCCARTHY, ASSISTANT ADMINISTRATOR FOR THE OFFICE OF AIR AND RADIATION, U.S. ENVIRONMENTAL PROTECTION AGENCY; THE HONORABLE PHILIP D. MOELLER, COMMISSIONER, FEDERAL ENERGY REGULATORY COMMISSION; AND JEFFERY C. WRIGHT, DIRECTOR, OFFICE OF ENERGY PROJECTS, FEDERAL ENERGY REGULATORY COMMISSION

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^STATEMENT OF PATRICIA HOFFMAN

} Ms. {Hoffman.} Good morning, Mr. Chairman and members of the committee. Thank you for the opportunity to appear before you today to discuss the Department of Energy’s emergency authority under Section 202(c) of the Federal Power Act, and the proposed legislation intended to address the use of this authority and potential conflicts with other federal, State, and local laws and regulations.

Currently under 202(c) of the Federal Power Act, the Secretary can order a generator to operate or a grid connection to be made when, for example, outages occur due to weather events or equipment failures, or when there is or may

be insufficient electricity supply available that has a potential to cause a blackout.

Section 202(c) orders are issued only if a determination is made that an emergency exists due to a sudden increase in the demand for electricity for electric energy, or a shortage of electric of energy, or a shortage of facilities for the generation or transmission of electric energy. The Secretary’s 202(c) order can direct the temporary connection or operation of facilities for generation delivery, interchange, or transmission of electricity in order to best meet the emergency, and serve the public interest.

The Department views the issuance of 202(c) orders as a measure of last resort to be used only during and in the face of imminent emergencies. Since the Department was formed in 1978, the Secretary has exercised this emergency authority for only six events. Past 202(c) orders were issued to address circumstances such as inadequate supply of electricity during the 1999-2001 California electricity crisis, in response to the 2003 blackout, to address reliability issues resulting from the devastation caused by hurricanes, and to ensure compliance with reliability standards to prevent potential blackouts. Section 202(c) orders are not intended to provide a long-term alternative to environmental compliance. They are available only under

limited emergency situations, and are temporary solutions to imminent reliability threats.

If a 202(c) emergency results from inadequate planning, DOE expects the affected entities to take the necessary steps to resolve the problem in order to avoid the need for a continuing emergency order. Generators subject to a 202(c) order are required to operate in compliance with all other applicable laws to the extent possible, and after the reliability threat has been eliminated, the affected generator is still expected to comply with all relevant environmental statutes.

The Department is aware of only one incident of a potential conflict between the emergency order issued under Section 202(c) and the environmental statute. It was the 2005 Potomac River Generation Station order. In this case, Mirant, now GenOn Energy, Inc., ceased operation of the Potomac River Generation Station in response to a letter from the Virginia Department of Environmental Quality, requesting that Mirant undertakes actions as necessary to the protection of human health and environment in the area surrounding the plant. In response to requests from the D.C. Public Service Commission, the Secretary issued a 202(c) order requiring the plant to run to ensure compliance with reliability standards for the central D.C. area. Over the next several months, the

Department worked closely with EPA and the Virginia DEQ to minimize environmental impacts.

The Administration works to ensure the current statutory authorities work together, especially in the context of 202(c) authority. DOE recognizes the importance of working closely with the environmental authorities to achieve the necessary balance between ensuring reliability and addressing emergencies, and achieving environmental protection.

Regarding the proposed changes to Section 202(c) of the federal act, at this time, the Administration has not taken a position on H.R. 4273. Any time generators anticipate reliability issues, they should immediately start planning and working with their grid operators and EPA. As proposed, the amendment to 202(c) could potentially create a disincentive for some generators to use the compliance options EPA provided.

Again, DOE’s 202(c) authority is one of last resort, and should not be viewed as an alternative to working with EPA on environmental compliance with grid operators on any potential reliability issues. The Administration works to ensure statutory authorities work together to enable both the reliable operation and electricity of the electric system and the environmental protection. At the same time, Section 202(c) emergency authority will be considered only when

necessary and is not an alternative to environmental compliance, even on a temporary basis. DOE will continue to work through potential conflicts to ensure reliability is met and public interest is served when exercising its 202(c) authority.

This concludes my statement, Mr. Chairman, and I look forward to answering any questions you may have.

[The prepared statement of Ms. Hoffman follows:]

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Mr. {Whitfield.} Thank you very much.

Ms. McCarthy, you are recognized for 5 minutes.

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^STATEMENT OF GINA MCCARTHY

} Ms. {McCarthy.} Thank you, Chairman Whitfield, Ranking Member Rush, members of the Subcommittee. Thank you for the opportunity to testify.

Initially, let me emphasize that EPA completely agrees with the goal of maintaining the reliability of the electricity grid. The lights have not gone out in the past, due to Clean Air Act regulations, and our rules won’t cause them to go out in the future. However, it is not clear to me what real world problem this legislation is attempting to solve. To the extent that others see potential problems, it is important to resolve any reliability issues that do arise in more, rather than less, environmentally protective ways. This bill decreases the incentives to do so, and could have unintended consequences, creating problems that would not otherwise exist.

Section 202(c) history does not demonstrate the need for legislation to override environmental requirements. The Department of Energy has invoked Section 202 sparingly, and only the 2005 order concerning the Mirant Potomac River Generating Station appears to have had claims that compliance resulted in a conflict with environmental requirements.

But two points are important to understand first. DOE, EPA, and the Virginia Department of Environmental Quality worked cooperatively with one another and with Mirant. DOE's 202(c) order minimized the likelihood of violations of environmental requirements, and EPA's administrative order allowed continued operation of the plant, but it minimized adverse environmental consequences.

Secondly, DOE's order apparently did not require that Mirant violate any environmental law, although Virginia later fined Mirant $30,000 for environmental violations while operating pursuant to the DOE order. Our understanding is that this fine was not a violation compelled by the order; rather, Virginia found that Mirant could have operated the plant in compliance with the DOE and EPA orders, but they simply failed to do so.

A Section 202(c) order is a tool of last resort. It has really been invoked and virtually never implicated any conflict with environmental compliance because affected parties and regulators have a very strong record of addressing potential reliability issues before conflicts arise. EPA has recently promulgated power sector regulations, including the Mercury Air Toxic Standards, or MATS rule, did not create a rationale for amending 202(c). The EPA and DOE's analysis projected that the vast majority,

if not all of the sources, will be able to comply with MATS within the Clean Air Act timeframes. In addition to the MATS 3-year compliance date, EPA is encouraging permitting authorities to make a fourth year broadly available, and EPA is providing a clear pathway for units that have shown to be critical for electric reliability to obtain a schedule to achieve compliance within up to an additional year beyond the four. A 202(c) order is not required to get that fifth year.

When faced with the need to resolve reliability issues, current law provides important incentives to select more rather than less environmentally sound solutions. This legislation could change those incentives. In fact, the legislation could have the unintended consequence of creating problems that wouldn’t otherwise arise, increasing the likelihood of conflicts between reliability and compliance with environmental laws. The bill shields power plants from reliability for violations of environmental laws without regard to whether the owner of that facility took responsible actions to comply with environmental requirements, or to mitigate reliability concerns. This would eliminate important incentives for owners to take expeditious actions to comply with environmental requirements and avoid conflicts of this nature.

By decreasing incentives for environmental protective

ways of addressing any reliability issues that might emerge, this bill could unnecessarily delay needed public health protections. If the bill results in 202(c) orders that would not exist under current law, it increases the likelihood that facilities will operate in violation of environmental regulations. Additionally, the hortatory statement that DOE should minimize conflicts with environmental laws is not adequate. The bill as currently drafted significantly decreases current incentives for input from EPA and the State and local environmental officials on how best to craft orders that are more, rather than less, environmentally sensitive.

Over the 40-year history of the Clean Air Act, stakeholders working together with State and federal regulators have had an outstanding track record of substantially reducing pollution while maintaining reliability. In light of this situation, we encourage the committee to very carefully consider the potential unintended consequences of this bill.

Thank you, Mr. Chairman.

[The prepared statement of Ms. McCarthy follows:]

********** INSERT 2 **********

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Mr. {Whitfield.} Ms. McCarthy, thank you. I neglected to say this, but Ms. Hoffman is the Assistant Secretary for the Office of Electricity Delivery and Energy Reliability at the Department of Energy, and of course, Gina McCarthy is the Assistant Administrator for Air and Radiation from the EPA. Mr. Moeller is a Commissioner over at the Federal Energy Regulatory Commission, and I would recognize him for 5 minutes at this time.

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^STATEMENT OF PHILIP D. MOELLER

} Mr. {Moeller.} Chairman Whitfield and members of the Subcommittee, thank you for the invitation to testify on H.R. 4273, the Resolving Environmental and Grid Reliability Conflicts Act of 2012. My name is Phil Moeller, and I serve as one of four sitting commissions at the Federal Energy Regulatory Commission, FERC. I appreciate your interest in addressing the important issues facing the Nation’s reliable supply and delivery of electricity.

Along with myself, my three colleagues Chairman John Wellinghoff, Commission John Norris, and Commissioner Cheryl LaFleur all support the concept behind H.R. 4273. That is, we all agree that generators of electricity should not be put in a position of having to choose whether to violate Section 202(c) of the Federal Power Act, or whether to violate the Clean Air Act when certain generating facilities are needed for crucial electric reliability needs. The testimony of the next panel will describe occasions when generators were forced to make this difficult choice.

The electric power grid can roughly be divided into two categories, the bulk power system which carries electricity at generally high voltage over great distances, and the

distribution system, which takes electricity from the bulk system to serve local needs, such as the needs of a town or city. While short disruptions of local service are common for many people during thunderstorms and other weather-related events, the high reliability of the bulk power grid ensures that wide-scale blackouts are extremely unusual.

But to ensure that the bulk power grid continues to be reliable, Section 202(c) of the Federal Power Act permits the Federal Government to require a power plant to in certain circumstances, even if the owner of that power plant would rather not run the power plant. In short, the security of this Nation depends on a reliable power grid, and Section 202(c) addresses the need of this Nation to have a reliable system. Ideally, we hope that Section 202(c) will never need to be invoked, but experience indicates that orders under 202(c) are sometimes necessary.

Yet the very operation of a power plant in compliance with a Section 202(c) order can result in a violation of the Clean Air Act. In this sense, federal law can sometimes require the owners and operators of a power plant to violate either the Clean Air Act or the Federal Power Act. The law should not require citizens to choose which law to violate.

Our nation has always faced unique challenges to electric reliability, and these challenges could accelerate

as older power plants gradually retire or run less frequently, as new technologies allow new power sources to compete with traditional power plants, and as environmental mandates change. While the Commissioners at FERC sometimes disagree on the extent to which electric reliability can be threatened by the mandates of the Environmental Protection Agency, EPA, all of the FERC Commissioners support the concept that the law should not require a generator to decide whether to violate the Clean Air Act or the Federal Power Act.

At this time, the Commission is working to formulate a role in advising the EPA on the reliability impacts of retiring or retrofitting various power plants in compliance with EPA regulations. Regardless of how well FERC and EPA can coordinate their reliability efforts, a bill like H.R. 4273 is essential to address potential reliability challenges. Like 202(c) more broadly, we hope that the provisions in a bill like H.R. 4273 would never need to be invoked, but erring on the side of reliability is the responsible approach.

Thank you again for the opportunity to testify, and I look forward to working with you in the future and answering any questions today.

[The prepared statement of Mr. Moeller follows:]

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Mr. {Whitfield.} Thank you very much, Mr. Moeller.

Our last witness on the first panel is Mr. Jeffery Wright, who is the Director of the Office of Energy Projects at FERC, so Mr. Wright, thank you for being here and we recognize you for 5 minutes.

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^STATEMENT OF JEFFERY C. WRIGHT

} Mr. {Wright.} Thank you, Chairman Whitfield and members of the Subcommittee. Again, my name is Jeff Wright, and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission. I appreciate the opportunity to appear before you to discuss the draft legislation entitled ``The Hydropower Regulatory Efficiency Act of 2012.'' The views I express in my testimony are my own.

The Commission regulates over 1,600 non-federal hydropower projects at over 2,500 dams, pursuant to Part I of the Federal Power Act, or FPA. Together these projects represent 54 gigawatts of hydropower capacity, more than half of all the hydropower in the U.S.

The FPA authorizes the Commission to issue licenses and exemptions for projects within its jurisdiction. About 71 percent of the hydropower projects regulated by the Commission have an installed capacity of 5 megawatts or less.

The Commission has seen an increased interest in small hydropower projects, and has responded by implementing measures to facilitate efficient review of project proposals, including the following: adding new web-based resources to the Commission’s website to make it easier for applicants to

understand and complete the licensing process, updating or creating MOUs with other agencies to improve coordination, continuing our small hydropower hotline and e-mail address to answer applicant questions, and educating potential small hydropower developers through an education and outreach program. With this background, I will turn to the draft legislation.

Section 3 would increase the limit for small hydropower exemptions from 5 megawatts to 10 megawatts. Section 4 would establish various measures to remote conduit hydropower projects. These proposals are consistent with the Commission’s policy to promote small hydro generation.

Specifically, Section 4(a) would amend Section 30 of the FPA to establish a procedure whereby conduit projects with an installed capacity of 5 megawatts or less would not be required to be licensed, provided the applicant makes a showing that the project qualifies as a conduit project. I support this provision which would serve to increase the amount of electric generation derived from conduits. This section would also allow the Commission to grant conduit exemptions for all projects with an installed capacity of over 5 megawatts and up to 40 megawatts.

Section 5 of the draft legislation would amend the FPA to authorize the Commission to extend the term of a

preliminary permit issued under FPA’s Section 5 for up to 2 years. Preliminary permits grant the holder a ``first to file'' preference with respect to license applications for projects being studied under a permit. Commission staff has heard that the need for environmental studies in some instances make it difficult to complete a license application within the current 3-year term of the permit, with the result that a developer that has invested substantial time and money studying a project may face the possibility of losing its project based on competition from other entities if it needs to seek a subsequent permit. I therefore support the proposed FPA amendment which could eliminate this problem, and it might be worth considering as an alternative, authorizing the Commission to issue permits for terms up to 5 years, which could avoid the need for developers to go through the process of seeking an extension.

Section 6 would require the Commission to investigate the feasibility of implementing a 2-year licensing process for hydropower developing at existing non-power dams, and for closed loop pump storage projects. I support the goal of an expedited licensing process. It is Commission staff’s goal to act on all license applications as quickly as possible, and we have established procedures that allow for great flexibility and efficiency. I am thus though not certain

whether an additional licensing process is necessary. We have been able to issue licenses in a matter of a few months where the project proponent has selected a site wisely, stakeholders had agreed on information needs, and State and federal agencies performed their responsibilities quickly. Moreover, the Commission operates under significant constraints imposed by the FPA and by other legislation affecting the licensing process, including the Clean Water Act, the Coastal Zone Management Act, the Endangered Species Act, and the National Historic Preservation Act, among them.

In the absence of the ability to waive sections of the FPA and other acts, or to set enforceable schedules in licensing proceedings, it is not clear that the Commission, under its existing authorities, can mandate a shortened process.

Section 7 would require the Department of Energy to study the flexibility and reliability that pump storage facilities can provide, and the opportunities and potential generation from conduits. While I cannot speak for the Department of Energy, I do support such research.

In conclusion, there is a great deal of potential for the development of additional hydropower projects throughout the country, including small projects. Working within the authority given it by Congress, the Commission continues to

adapt its existing flexible procedures to facilitate the review, and where appropriate, the approval of such projects. Commission staff remains committed to exploring with all stakeholders every avenue for the responsible development of our Nation’s hydropower potential. The legislation under consideration will assist in realizing that potential.

This concludes my remarks. I will be pleased to answer any questions you may have.

[The prepared statement of Mr. Wright follows:]

********** INSERT 4 **********

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Mr. {Whitfield.} Thank you very much, Mr. Wright, and thank all of you for your testimony.

At this time I recognize myself for 5 minutes of questions. You know, we find ourselves today in a situation where we have a plethora of regulations that are coming out of EPA that are having significant impact on the energy sector production of electricity, as well as on the transportation side. In addition to that, we have been struggling with out economy and demand has been lower for electricity and other energy needs than some times in the past, and we are making an effort to stimulate the economy, keep growing again. And with all of this change taking place, and you see a lot of coal plants closing down today because of regulation and also because of low natural gas prices. And so there is a significant change going on in our country in the electric energy sector.

And everyone talks about that we need an ``all of the above'' energy program. And I was looking at President Obama’s website the other day on his campaign, and I really was actually disturbed by it. I would just like to ask the clerk if she would put up this campaign website of President Obama. Now, you may not be able to read that, but the thing that bothers me about it is that President Obama has gone

around the country, like many of us, and he has talked about we want an ``all of the above'' energy policy. In that circle on his campaign site, he talks about the energy sectors. He talks about oil, natural gas, fuel efficiency, biofuels, wind, solar, and nuclear. Now, there is one glaring absence, and that happens to be coal, which still provides almost 50 percent of the electricity in America. Many of us get upset about that, because it has a tremendous economic impact on our country. It provides a lot of jobs and it makes us competitive in the global marketplace because coal is still a valuable resource. We have a 250-year reserve of coal, and yet, this Administration has been openly in the business of putting coal out of business. For the President to go run around talking about ``all of the above'' energy policy and even on his campaign website to not even mention coal as an important energy sector is unbelievable to me.

Now, we are talking about reliability today on one of these bills and the ensuring reliability and the conflict between environmental laws and reliability and I don’t see how anybody could have a problem with this legislation, because we are talking about emergency orders that puts companies in conflict between an environmental law and an emergency order from the Department of Energy. With these

reliability issues become more and more prevalent, I think we are going to see more and more of this conflict. I am delighted, Mr. Moeller, that FERC--they feel like this is something that we should certainly explore, and I am disappointed that Ms. Hoffman, you and Ms. McCarthy are not willing to support this kind of legislation.

I said I was going to ask a question. I guess I haven't asked a question yet. This is my second opening statement. But we talk about this Utility MACT. I really get upset about it because that Utility MACT was sold to the American people that we were going to reduce mercury emissions, and that is all that anyone ever talked about. We are going to reduce mercury emissions, maybe by .001 percent or whatever, and we have had testimony from all sorts of groups saying that the technology is not there to meet the requirement, but more important than that, when the analysis was done of EPA's own figures, the experts said there is no benefit significantly from reducing mercury emissions. All of the benefits of the Utility MACT, which is the most costly regulation ever issued, all of the benefits comes from reduction of particulate matter, which is already regulated under another aspect of the Clean Air Act.

So my time is already expired, but I wanted to get that off my chest because I feel like EPA misled the American

people on Utility MACT, and deliberately so, and Ms. Capps, forgive me for going 20 seconds over, but I recognize you for 5 minutes of questioning.

Mrs. {Capps.} Thank you, Mr. Chairman, for recognizing me. I am sure I don’t need to restate my concerns about the Olson bill which I referred to in my opening remarks. I got that off my chest in the beginning, Mr. Chairman, so now I think I am ready to ask a couple of questions.

You know, this bill before us ``waives my ability''--and this is a quote--``under any federal, State, or local environmental law or regulation''--that is the end of the quote--for an entity complying with the DOE reliability order. That strikes me as very broad language, and Ms. Hoffman, I will start with you. Do you have any idea of what specific laws and regulations are waived by this kind of language?

Ms. {Hoffman.} My apologies. It is a very good question, and I think it is the heart of some of the discussions that have been occurring, and such that it waives, from my understanding, penalties from statutes that are in the Clean Air Act, but it doesn’t appear--at least the question that we are trying to struggle with, with respect to administrative compliance order, does it waive any of those penalties involved in that? And I think that is a part of

the discussion that the intent is unsure.

Mrs. {Capps.} I see. It seems to me that because of its broadness that it is very hard to get to the kind of nitty gritty places where you really do have discussions between a variety of agencies. It seems to me this would include federal, State, and local requirements. It could be as broad as controlling air pollution, controlling water pollution, protecting drinking water for safe disposal of waste, or to protect endangered species. I don’t even think that would necessarily be the end of the list.

Maybe I will try this another way. Are you aware of any example of a conflict between compliance with a 202(c) order and a compliance with an environmental requirement, other than an air pollution control requirement?

Ms. {Hoffman.} I am not aware of any.

Mrs. {Capps.} How about you, Ms. McCarthy? Are you aware of some examples of any conflicts under any of these laws?

Ms. {McCarthy.} I do not believe that there is an inherent conflict between 202(c) and EPA moving forward with environmental regulations and compliance with those. No, I am not aware of any that have happened, and I am not aware that there is any need for that conflict to happen.

Mrs. {Capps.} So we have as an example, a single

conflict which involved an air pollution limit and the response of this bill as a result or I guess of that one incident is to waive every requirement that could be considered ``environmental'' without even knowing what we are waiving necessarily in advance. That is not, in my opinion, a narrowly tailored approach.

Again, Ms. McCarthy, does this make sense to you? From your experience, can you explain anything having to do with this?

Ms. {McCarthy.} I would just explain--the only thing I can tell you is I believe this bill was well-intended to address reliability concerns. We share those concerns and we have made that very clear. But I do not believe that the Mirant case that is being cited actually was the result of any inherent conflict in the use of 202(c). I believe that that--it is actually a good example of how the agencies worked together and with the State agency to address the reliability concern and to ensure that that facility operated to the extent that we could in compliance with environmental regulations. And in fact, the company could have, and for the most part did. It had one problem because it did not, according to the Virginia DEQ, follow the operating and maintenance procedures outlined in those administrative orders. So it was a very successful application of these

laws. It had no inherent conflict. It didn’t ask the generator to make decisions between maintaining their responsibilities under 202(c) and 113(a), our administrative order in compliance with environmental regulations.

Mrs. {Capps.} So what we do have is a history of negotiations, when potential conflicts are anticipated, that there is a history within the regulators and EPA to come together and to work--to iron things out, to go back and forth and to have a discussion, and that is what is not reflected in this language. In my opinion, I think we can do better than this legislation. I hope the Chairman will decide to work to address some of the serious concerns that we have about this legislation before scheduling a markup.

I would yield back my time.

Mr. {Whitfield.} Thank you, Ms. Capps. At this time I recognize the gentleman from Nebraska--Mr. Terry is not here. So Ms. McMorris Rodgers is recognized for 5 minutes for questions.

Mrs. {McMorris Rodgers.} Thank you. Thank you, Mr. Chairman.

Well, I wanted to start by just having the committee put up that slide again, because I noticed something else was missing. The slide from the--President Obama’s approach to energy independence. I didn’t see hydropower listed. We

have already heard it is the largest source of renewable energy, 8 percent--7 to 8 percent right now. I am even under the impression that Department of Energy has included it as--that they have a goal of doubling hydropower. So I guess I just want to ask the question, what is the role between the Department of Energy and the White House as far as our energy goals moving forward, and where is hydropower?

Ms. {Hoffman.} The Department of Energy closely coordinates with the White House. We have a very strong program, and looking at R&D in the hydropower area, we have had a lot of activities looking at the technical potential of hydropower and consider it a strong part of our portfolio. It is--the research is conducted under the Office of Electric--Energy Efficiency and Renewable Energy.

Mrs. {McMorris Rodgers.} So am I to conclude that President doesn’t see a future role for hydropower and that he is actually picking wind and solar over hydropower as a renewable source of energy?

Ms. {Hoffman.} I am sorry, say that again?

Mrs. {McMorris Rodgers.} Well, am I to conclude that President Obama doesn’t see a role for hydropower moving forward, and that he is picking wind and solar as the renewable sources moving forward?

Ms. {Hoffman.} Hydropower is an important part of the

Administration. I guess I have to look at--that is a campaign website and it is part of our portfolio at the Department of Energy and the research and development that we are working on.

Mrs. {McMorris Rodgers.} Okay, so we will keep working to get hydropower listed. Okay. We will keep working on that.

I wanted to move over to Commissioner Moeller, because on the previous topic we are hearing--on Olson’s bill, the testimony from EPA and DOE today is saying that they don’t believe the legislation is necessary to address the potential conflict between Section 202(c) of the Federal Power Act and the environmental laws and regulations. So I would like to ask, do you agree with EPA and DOE that the legislation isn’t necessary to address the conflict?

Mr. {Moeller.} Thank you, Congresswoman. I am speaking today in terms of myself and my fellow Commissioners, that everyone supports the concept behind this bill. Personally, I support the bill. I think it has been used--this authority, very rarely. But the fundamental conflict is there. If someone is being asked to run, they are being asked to choose between violating one law or the other, and I just don’t think that is fair to put a generator in that position.

Again, I think it has been and hopefully may never be used again, but having it as one of our tools in the toolbox for reliability I think is important. We are entering an unprecedented nature of transitioning our fuel supply in this country on the electricity side away from coal, and as that happens, there will be a variety of local impacts that will be profound, and hopefully we will be working very hard over the next few years to minimize any impacts or disruptions from that. But just in case, when it is peak load, when it is usually very hot and there is an air inversion zone and health and safety is tied to the ability of people to have their air conditioning running, it might just mean that there are occasions where ordering a generator to run to keep people alive is worth the tradeoff temporarily of the provisions of the Clean Air Act.

Mrs. {McMorris Rodgers.} So I understand FERC held a technical conference last November to consider the potential reliability implications of EPA’s power sector regulations, so I would like to ask, do you believe EPA’s new and forthcoming power sector regulations pose a threat to reliability due to the expected retirement and retrofitting of a significant portion of the Nation’s coal-fired generation fleet?

Mr. {Moeller.} Well it has to do with timing and very

localized impacts. You heard Administrator McCarthy talk about the fourth year and the fifth year, and that is a pretty complicated topic because there are different conditions on the fifth year. But we have to do a lot within the next 5 years to make sure that this transition is workable. We are trying to work on it with--at FERC to try and develop a relationship with the EPA so we can advise them more formally on reliability impacts and the regulations.

I am concerned. I think you can look to what is going to happen in Oregon, Ohio, in the new future as to where this new set of issues comes together in a very challenging way over the next 3 years, and I think we will be talking a lot about that over the summer.

Mrs. {McMorris Rodgers.} Thank you. I yield back.

Mr. {Whitfield.} Thank you. At this time, I recognize the gentleman from Michigan, Mr. Dingell, for 5 minutes.

Mr. {Dingell.} Mr. Chairman, thank you. I commend you for this hearing, and I congratulate my colleagues on the committee for bringing this matter to the committee’s attention.

These questions are for Patricia Hoffman, but before I do so, I would like to quote from Oliver Twist and Charles Dickens. We have here a situation before us where it appears--and I quote now--``The law is an ass.''

Having said these things, is--these questions are to Patricia Hoffman. Yes or no, is the Department of Energy currently required to consult with an environmental entity such as EPA when issuing an emergency order under Section 202(c)? Yes or no?

Ms. {Hoffman.} We are not required. We do consult with EPA as our past exchanges--

Mr. {Dingell.} Just yes or no, please. Yes or no.

Ms. {Hoffman.} No, we are not required.

Mr. {Dingell.} Okay. An emergency order may be declared for other causes. Other causes is a broad term that could include any number of scenarios. Could an emergency order under H.R. 4273 effectively waive a utility for any reason from liability of ever complying with an environmental regulation such as the Mercury or Air Toxics Standards? Yes or no?

Ms. {Hoffman.} No, our order cannot waive--

Mr. {Dingell.} Do you believe that there will be enough electricity generation for utilities to maintain their services to rate payers while working to comply with EPA regulations? Yes or no?

Ms. {Hoffman.} I can’t answer yes or not to that. That will be dependent on local--

Mr. {Dingell.} Then can you tell us what your thinking

is on that?

Ms. {Hoffman.} That will be a very site regional specific question.

Mr. {Dingell.} Okay. Would the Department of Energy want to make a comment on that? Okay, would EPA want to make a comment on that?

Ms. {McCarthy.} Not at this time, no. Thank you.

Mr. {Dingell.} Okay. So you haven't got an answer to the question.

Now, within the ISO region there are nearly 10,000 megawatts from coal units that are already complying with the Mercury and Air Toxics Standards, and the Cross Air State Pollution Rule. Some utilities have said that stricter EPA regulations would create a reliability problem in the future, due to the amount of time it takes to install technology to comply with these rules. Do you believe that utilities with coal units can comply with a new mercury rule within the 3 years stipulated by EPA or within 4 years if they receive an extra year from the local permitting authority? Please answer yes or no. This is to Gina McCarthy.

Ms. {McCarthy.} Yes.

Mr. {Dingell.} All right. Now can you assure us that reliability will not be in jeopardy during this time period? Yes or no? I will take it from both EPA and Department of

Energy.

Ms. {Hoffman.} No, we cannot assure that reliability--

Mr. {Dingell.} Thank you. The other agency, please?

Ms. {McCarthy.} I can assure you that there are systems in place that will make that happen, yes.

Mr. {Dingell.} Now, what outreach has EPA done to public utility commissions or public service commissions to talk about new pending rules and regulations? Would you submit that for the record, please?

Now, when working on a disaster-type scenario such as a hurricane, how quickly can EPA issue an administrative consent order relating to any EPA-related issues?

Ms. {McCarthy.} It is case specific. We can issue them very quickly or we can have a more deliberate process.

Mr. {Dingell.} I would like a written answer. Would you be more specific on that--

Ms. {McCarthy.} Yes.

Mr. {Dingell.} --if you please? Now, these questions are for Philip Moeller, Commissioner, FERC. Mr. Moeller, to what extent can utilities plan for reliability-related emergencies that might fall under Section 202(c)?

Mr. {Moeller.} I believe as part of general reliability concerns they spend an enormous amount of time. Planning for reliability contingencies specific to 202(c)--

Mr. {Dingell.} Would you submit that?

Mr. {Moeller.} --I think it would be very plant specific, based on how they will have to comply with the EPA regulations over the next 3 to 4 to 5 years.

Mr. {Dingell.} Thank you. Would you please submit that for the record?

Mr. {Moeller.} Certainly.

Mr. {Dingell.} I want to get an understanding here what happened, and help me, please. This is to all three agencies. Is this statement factual? You have a situation here of where you are functioning under the law. EPA issues one order. The Department of Energy issues a different order, and we find, lo and behold, that the utility is caught in between. Is there any--first of all, is there any relief to be given to the utility under existing law? Yes or no?

Ms. {Hoffman.} I assume you are referring from fines and--

Mr. {Dingell.} We talk about this awful situation we have before us. Go ahead if you--please, Ms. McCarthy?

Ms. {McCarthy.} Just a matter of correction, the instance that we are talking about on Mirant wasn’t conflicting orders. The issue was that the company decided not to continue to run. EPA issued a 202(c), then we worked with the company, DOE, and the State to issue an

administrative order that allowed--

Mr. {Dingell.} Now the two agencies--and I apologize to you, Mr. Chairman. The two agencies behaved very well, but the State of Virginia finally ultimately fined them under its delegated responsibilities under the Clean Air Act. Is that right?

Ms. {McCarthy.} They didn't fine them for complying with those orders, they fined them because they did not comply with the operation and maintenance requirements of those orders.

Mr. {Dingell.} Okay. Is there any relief that can be given to a utility under these circumstances? Do you have any agreements between the different agencies on giving relief, or on coordinating your decisions? And can you tell me you don't need statutory authority on this? Please respond in writing.

Mr. Chairman, thank you.

Mr. {Whitfield.} Thank you. The gentleman's time is expired. At this time, I recognize the gentleman from Texas, Mr. Olson, for 5 minutes.

Mr. {Olson.} I thank the Chairman, and my first question is for Ms. McCarthy. Nice to see you again, ma'am. Thanks for coming today.

Ms. {McCarthy.} You too, Mr. Olson.

Mr. {Olson.} I am sure you agree on this, but in the event of a true emergency, DOE has the authority to compel power plants to operate to avoid a blackout under Section 202(c), even if that means violating an environmental permit issued by EPA. You mentioned Mirant's situation that happened in 2005, right across the river from here, about 2 miles from here. But you made no mention of another case that happened in 2005 with Mirant in San Francisco, California. In that case--I mean, I will get into some details with the next panel about what happened out there, but the bottom line was Mirant was fined over seven figures, not some 30,000, seven figures, millions of dollars, because they were ordered by the regulator to keep the grid up and running, and because of that they see their permits under EPA, and the City of San Francisco sued them. I mean, do you agree that blackouts could potentially create the greatest environmental threat and public safety hazard, like uncontrolled sewage, heat stroke, and controlled industrial--uncontrolled industrial processes?

As I mentioned in my opening statement, a 7-month-old infant died this past week in Sugarland, Texas. He was in a car, 90 degree heat for a couple of hours. That was--the parents made a terrible mistake, but if our State has another drought heat wave like they did this past summer, 100 degrees

every day in Houston, Texas, unprecedented. The hottest August on record. If that happens again and the power goes out, infants all across southeast Texas and elderly people all across southeast Texas, their lives will be at risk.

Would you agree that--I mean, again, blackouts could potentially create the greatest environmental threat and public safety hazards? Yes or no? Losing power in my State, the biggest threat, as opposed to something rolling on behind and fining Mirant for the things they did to keep the power up?

Ms. {McCarthy.} I would agree that reliability has prime concern here, yes.

Mr. {Olson.} Okay, thank you for that.

And another question for Mr. Moeller. Thank you for coming today, sir, as well. You have been critical of EPA's power sector rulemaking and its effect on grid reliability. Has the EPA adequately addressed your concerns that you raised in your testimony here before this Subcommittee last September with regard to the implementation timeline?

Mr. {Moeller.} Well, Congressman, my main concern has been about the timing of the regulations. I am not an epidemiologist so I haven't gotten into the actual regulations themselves, but the concern is over the fourth year and the fifth year of compliance, and whether that is

enough. And the fifth year is particularly challenging because it requires a generator to agree to certain things that can make it quite vulnerable again, perhaps, to citizen or other lawsuits.

So it is really about the timing and the focus on local reliability needs that are very load pocket specific in this country, and I can give you examples of those. We are working with the EPA to try and come up with a more formal arrangement so that we can advise them. We have not come to resolution yet, but that is because it is still sitting within the Commission. But to me, it is about timing, and the concern about the fourth and the fifth year and very local reliability impacts.

Mr. {Olson.} Well, it sounds like you believe that there will be reliability emergencies in localized areas if EPA’s rules are implemented as planned without flexibility.

Mr. {Moeller.} I am not sure about emergencies, but I think we can anticipate severe challenges to change out fuel supply, add transmission, build new power plants in a very short amount of time.

Mr. {Olson.} Yes or no answer, and my legislation will fix this problem? Yes or no?

Mr. {Moeller.} I support your legislation.

Mr. {Olson.} Thank you.

Mrs. Hoffman, my last round of questions is for you. I asked you about Secretary Chu, whether he was supportive of efforts to revenue any potential conflict between federal laws, and this is what he said in a hearing last month. ``I am very supportive. We don’t want to order a generator to continue to be online to supply emergency backup power and face federal--from another branch. We are very eager to work through those issues.'' Were you aware of that statement by Secretary Chu?

Ms. {Hoffman.} Yes, sir, I am.

Mr. {Olson.} And you probably have expressed your concerns that there is no neutral body conducting a very specific plant reliability analysis. I believe there is overwhelming acknowledgement from your department, from FERC, from EPA, and from others that without some flexibility, there will be reliability issues.

If I can talk a little bit about in the time I have got here about private generators--not about private generators but about the public municipality generators. Does DOE’s jurisdiction extent to public municipality-owned power?

Ms. {Hoffman.} I do not believe. I will check that for the record, but I do not believe the jurisdiction is over municipalities.

Mr. {Olson.} And I have got a conflict here. My staff

has told me that DOE's regs say yes, they are. You do have jurisdiction over them--

Ms. {Hoffman.} I am sorry.

Mr. {Olson.} --but the DOE staff says no.

Ms. {Hoffman.} Yes, it is. I am sorry.

Mr. {Olson.} There you go. My staff said the difference between DOE's regs and DOE's staff. But the Courts haven't ruled on this. The amendments to the Energy Policy Act of 2005 exempt rule electric co-ops and municipality-owned power for Part II of the Federal Power Act, which includes Section 202(c). So would they have to voluntary--they would have to voluntarily comply, correct, right now?

Ms. {Hoffman.} It is my understanding yes, they would.

Mr. {Olson.} Okay. I guess I am out of time. I yield back the balance of my time.

Mr. {Whitfield.} Thank you. At this time, I recognize the gentleman from Pennsylvania, Mr. Doyle, for 5 minutes.

Mr. {Doyle.} Thank you, Mr. Chairman.

So let us see here. Since 1978, there has been six times that DOE has issued a 202 order, and four of those times involved transmission lines. Only twice generators, right? So only two times since 1978 has this been ordered to a generator to provide power to the grid. In both those

instances, in the 2001 case in California, the company Mirant was subject to a citizen lawsuit by the City of San Francisco, and environmental groups for exceedance of the 877 hour operating limit, and was forced to settle the lawsuit at significant expense, and in 2005 during its operation as directed by DOE, the Potomac River plant was forced to exceed its 3-hour max limit on February 23 of 2007, and the Virginia DEQ issued a notice of violation and subsequently fined Mirant for NAQS exceedances that were a result of Mirant's compliance with the DOE order to run for reliability.

I want to ask a couple questions to Ms. Hoffman. Ms. Hoffman, do you believe if this bill becomes law that the DOE will be inclined to offer more 202 orders? Will there be some incentive here for you to use this 202 section more often than you currently use it?

Ms. {Hoffman.} We do have a concern that there may be an incentive, but from experience that has been demonstrated from the Mirant power plant example, the process that has been in place is that the order has to take in consideration an environmental considerations, and we have been working very closely with EPA--

Mr. {Doyle.} But I am asking you, is DOE--you issue the order, right?

Ms. {Hoffman.} Yes.

Mr. {Doyle.} Are you somehow incentivized--do you think the DOE--

Ms. {Hoffman.} Oh, DOE? No.

Mr. {Doyle.} Yeah. No, I am asking, are you going to be--

Ms. {Hoffman.} Oh, I am sorry, I thought you were--

Mr. {Doyle.} --incentivized to issue more 202 orders as a result of this bill?

Ms. {Hoffman.} No, sir.

Mr. {Doyle.} Okay, that is the point I want to make. So twice in 30-some years, you have asked a generator to come online, and there is nothing in this bill that is going to incentivize the DOE to use this section more often than you currently use it.

Ms. {Hoffman.} No, sir.

Mr. {Doyle.} Okay, thank you.

Also, I want to talk about the 2005 order. Now, we know EPA has no authority in 202, but you routinely work, in the two instances that this has ever happened, with the EPA to minimize environmental risk. In 2005, Section 202 was used by Secretary Bodman in the Bush Administration, and did this order include any environmental requirements?

Ms. {Hoffman.} Yes, it did.

Mr. {Doyle.} So there is a history in the rare

instances that this is used, that even though you are not required to by statute, you do work with EPA cooperatively to minimize environmental risk?

Ms. {Hoffman.} Yes, sir.

Mr. {Doyle.} Thank you. Let me ask you another thing. I want to get to this thing about how this somehow incentivizes power companies to not comply with the 5-year rule. I mean, there seems to be the implication here that certain power companies will be incentivized not to comply with the MATS rule and make their necessary upgrades over this 5-year period what, in the hopes that they get a 202 order? I mean, think about how far-fetched that is, that you know, as someone who supports the MATS rule, and a lot of what EPA is doing, what is trying to be suggested here is that these power companies will say well gee, we don’t have to comply with this, you know, this 5-year period to upgrade our facilities. We will just hang out here and hope DOE gives us a 202 order. I mean, come on. Let us not make statements or implications that just defy all logic. As a member who sits up on this Committee and defends the EPA and what you are trying to do with these standards, to say to this Committee that somehow power companies are going to use this as some sort of incentive to not make these upgrades-- look. They have to make the upgrades even if there is a 202

rule, is that correct? They still got to make the upgrades, right?

Ms. {Hoffman.} Yes, sir.

Mr. {Doyle.} So if power plants want to operate under the laws we are passing right now, they are going to have to comply with this 5-year period to make these upgrades. How are they skirting this? I mean, what are the chances of a company that says we are not going to make these upgrades because we might get a 202 order, what are the chances they are going to get a 202 order? Twice in 38 years?

I understand the concerns that you have, and I share those concerns, but it seems to me that there has got to be a practical way to say to generators in these ultra-rare instances that this occurs, twice in 30-some years, that they are not put in a situation where they have to pick which law to violate. That is all we are trying to do very narrowly with this bill. If the EPA or the DOE has some constructive language that they want to talk to us about before markup, I am receptive to hearing about it, but the implication that somehow power companies are going to use this to start the law I think is far-fetched and a stretch, and the idea that somehow the public health is being endangered because twice in 38 years this order was given--I yield back.

Mr. {Whitfield.} Thank you, Mr. Doyle. At this time I

recognize the gentleman from Virginia, Mr. Griffith, for 5 minutes.

Mr. {Griffith.} First let me ask, do you believe--thank you, Mr. Chairman. Do you believe that we are going to have more problems and more 202 orders issued as opposed to twice in 30 years because of the policies of the EPA, Ms. Hoffman?

Ms. {Hoffman.} I believe there is a potential for some emergency conditions to exist, but there are--if the plant operators truly be transparent and follow the procedures, then I think we can minimize any of those cases.

Mr. {Griffith.} But because of the power plants that are run by coal that we have already seen that are shutting down, et cetera, is the reason that you made those statements and that you think there are going to be more 202 orders is because of some of the policies that are being brought about by the EPA under this Administration?

Ms. {Hoffman.} I think there are a lot of things occurring in the United States right now. We are trying to build transmission, we have an increased direction on natural gas, the building of natural gas--

Mr. {Griffith.} All right. And I wish I had--

Ms. {Hoffman.} All of those have to be taken into consideration.

Mr. {Griffith.} And I wish I had more time, and of

course, we don’t have the natural gas lines going to all the power plants that may close down, and so a lot of these power plants cannot retrofit. That is also correct, is it not? Yes or no?

Ms. {Hoffman.} Yes.

Mr. {Griffith.} And so part of your concern is the same concern that we heard from Mr. Moeller earlier, is that, you know, we are just not sure it is all going to get done, even in the best case scenario, it is all going to get done in time, but we are not going to have some situations where we have energy emergencies like Mr. Olson was talking about because of the policies and the timelines put together by the Administration’s EPA. Isn’t that your--in the end, isn’t that what you are saying? Yes or no? If there is going to be some slippage because of some of these policies?

Ms. {Hoffman.} There are concerns of potential impact--

Mr. {Griffith.} Okay, I am going to take that as yes and I have got to move on.

Let me switch gears. Mr. Moeller, if I might, and you may have to give me answers later because I am asking you about a bill that is not technically before us, but it does deal with hydropower, and I will address it generally to both you and Mr. Wright. Does FERC currently require private property rights to be considered when issuing a license under

the Federal Power Act, and what about when the Commission is reviewing shoreline management plan--the shoreline management plans? Now let me give you some background so you understand. I represent the 9th District. My colleague, Robert Hurt, represents the 5th District of Virginia. He has Smith Mountain Lake, I have Claytor Lake. We have huge shoreline management issue situations, and there is a feeling by the folks there that the private property owners along the shores and in the case of at least Smith Mountain Lake, because I used to do title work in that area, some of the owners actually own the underlying land and AEP has the right to flood, and there are concerns about that.

So the question is--because Mr. Hurt has a bill in to make it clear--but does FERC currently require private property rights to be considered when issuing a license?

Mr. {Moeller.} We have spent a lot of time on Smith Mountain Lake, but Jeff--Mr. Wright is much closer to it than I am on a daily basis. I think we will probably want to get back to you in writing, but I will--

Mr. {Griffith.} And that is fine, because you should not have expected these questions today and I appreciate that. But if you could get back to me, because my big concern is that if we don’t take these things into consideration, some of the folks there are worried that their

docks and maybe even boathouses may be impacted, and even though there may be the authority there, do we not have then a taking--if the shoreline management plan does not take into consideration a taking for which either the government or--I guess it would be the government would be responsible for then reimbursing these folks for the damage to their property, not only the damage of the taking of that particular dock or boathouse, but also the obvious diminution in value of their property rights. So if you all could think about that and get some answers back to me, I would greatly appreciate it. And I would ask also if you all believe that private property is, in fact, a local economic interest, which would be covered, I think, under some of the current language.

Mr. {Moeller.} Private property rights are a very significant part of whenever we do a relicensing on shoreline management plans, and related to titles they get very complicated, but I think we try to do our best to manage the various uses of a project that of course respects private property rights.

Mr. {Griffith.} And I appreciate that. Last but not least, I think the bill we have before us is a good step on small hydropower generation, which is interesting it is not in the plan along with coal. You know, it is kind of

interesting, I have got coal and I have got hydro, and both of them are not considered ``all of the above'' by the Administration. What--can you tell me, what are the biggest barriers to greater hydropower development in the United States? Either one of you can take it.

Mr. {Wright.} Right now, I think one of the biggest barriers to licensing are problems with mandatory conditions we have from other State, federal, tribal. We are compelled under the Federal Power Act to include mandatory conditions from the land management agencies, Fish and Wildlife Service, National Marine Fishery Service. We have to wait on the Clean Water Act permits that are delegated to State governments. Even exemptions, the conduit exemptions, the 5 megawatt exemptions, are subject to mandatory conditions from State and federal fish and wildlife agencies.

Mr. {Griffith.} Thank you very much, and regrettably my time is up. Mr. Chairman, if you want to give Mr. Moeller time to respond I am happy with that, but my time is up.

Mr. {Shimkus.} [Presiding] Your time is up.

Mr. {Griffith.} I yield back. Thank you.

Mr. {Shimkus.} The--Mr. Moeller with have other opportunities with other questions. Mr. McKinley--Mr. ``Coal Ash'' is recognized for 5 minutes.

Mr. {McKinley.} I am curious. Back when former

Chairman Dingell raised a question back to both of you, I want to make sure I heard it right because of my hearing impairment. Did he say to you, Ms. Hoffman, can you assure us of reliability or that there would not be a blackout or brownout? How was that worded again? Can you share with me how that question came? And you said no, you could not assure, but Gina--Ms. McCarthy, she--you said yes, you could. So what was the question?

Ms. {Hoffman.} We could not absolutely assure that we cannot prevent--

Mr. {Dingell.} Will the gentleman yield?

Mr. {McKinley.} Yes, sir, I yield to you.

Mr. {Dingell.} And I thank the gentleman for his courtesy. Can you assure us that reliability will not be in jeopardy during this time period? Please answer yes or no.

Mr. {McKinley.} Okay, thank you.

Mr. {Dingell.} And I thank the gentleman.

Mr. {McKinley.} So having--there was a yes--there was a no and a yes. So Mr. Moeller, do you agree with the EPA that they can give us that assurance?

Mr. {Moeller.} Well I never make any assurances on reliability, so no.

Mr. {McKinley.} So between the two of you, you heard her just testify that she could, and my question to you, from

your position you are not--Ms. McCarthy, I will get back to you.

Ms. {McCarthy.} Okay.

Mr. {McKinley.} So Mr. Moeller?

Mr. {Moeller.} We are working hard to make sure that we have a process with the EPA that deals with the timing issues. We haven't resolved that yet. It is of great concern to me that we have the proper process that allows our reliability experts to weigh in on the individual load pocket situations where a major plant, or maybe even a minor plant, is shut down but because of where it is in the grid, it is necessary perhaps to maintain voltage support for that part of the grid.

Mr. {McKinley.} So if I could take from the former Chairman, the answer is yes or no, do you agree that she could make that statement that she can assure us?

Ms. {McCarthy.} Mr. McKinley, I did not make that statement.

Mr. {McKinley.} You did not?

Ms. {McCarthy.} I did not.

Mr. {McKinley.} I misunderstood. I thought you said yes.

Ms. {McCarthy.} I said there were processes in place to address those issues.

Mr. {McKinley.} I am sorry?

Ms. {McCarthy.} I assured the gentleman--

Mr. {McKinley.} Could you speak a little closer to your mic?

Ms. {McCarthy.} I am sorry. I am sorry to interrupt, but I did not make assurances and EPA is not in the reliability business, and I understand that.

Mr. {McKinley.} Well that is for sure you are not.

Ms. {McCarthy.} What I said was that there are processes in place to address reliability concerns as they arise.

Mr. {McKinley.} Okay. I just thought your answer back to Chairman Dingell was yes.

Ms. {McCarthy.} I think I made it very clear that I assured him that there were processes in place to address issues relating to reliability.

Mr. {McKinley.} Okay. Now the last time, Ms. McCarthy, you were here, there was a discussion between you and the DOE and it was about some of the new regs that were out, especially with the discharge, and you seem taken back by the fact that DOE had just reduced spending. You were saying how carbon capture and the like--but DOE had just cut the funding for research on that. Have you found out--have you done--have you raised the question about why did they cut back on

carbon capture?

Ms. {McCarthy.} I am sorry, I don’t--I do recollect that issue coming up and I know it was related to the Greenhouse Gas New Source Performance Standard, but I do not have any further information at this point to share with you.

Mr. {McKinley.} I hesitate--with all due respect, I hesitate to ask you to eventually get back to us, because I am still waiting since last January for information from your office. But if you could, please, I would like to understand your position. If you are pushing for carbon capture but yet DOE is cutting funding and research, I think it is a contradiction here. The left hand doesn’t know what the right hand is doing, and it is something that affects us on energy policy.

Ms. {McCarthy.} Congressman, if there is something that we owe you at any length in time in terms of response, I will take care of that immediately, but I will say that the rule that you are referencing is based on technologies that we believe is available today.

Mr. {McKinley.} And that was one of the questions we asked.

Ms. {McCarthy.} Yes.

Mr. {McKinley.} Show me where one plant that has that commercially available, when MIT is doing it--MIT’s carbon

capture initiative right now is underway to try to get to a point, but you are representing that it is a commercially-- you said that it was commercially available when we asked. Name one plant in America that has a facility like this. You said you will get back to us.

Ms. {McCarthy.} I apologize.

Mr. {McKinley.} I am still waiting.

Ms. {McCarthy.} We will get back to you right away.

Mr. {McKinley.} Can you name one now?

Ms. {McCarthy.} I am terrible with names. They all sound so nice when you name utilities. No.

Mr. {McKinley.} You beat the bell.

Mr. {Shimkus.} The gentleman’s time is expired--

Mr. {McKinley.} We will talk again.

Mr. {Shimkus.} And there are none.

Ms. {McCarthy.} Okay.

Mr. {McKinley.} Thank you very much.

Mr. {Shimkus.} The Chair recognizes the gentleman from Oregon, Mr. Walden, for 5 minutes.

Mr. {Walden.} I thank the gentleman.

I know when the President was running for office, President Obama said that, you know, his idea on coal was to end up with--

Mr. {Shimkus.} Would the gentleman yield?

Mr. {Walden.} Yes.

Mr. {Shimkus.} I didn’t see my colleague from the neighboring State here, so you are recognized, Mr. Sarbanes, for 5 minutes.

Mr. {Walden.} I will yield back and start over at a later date.

Mr. {Shimkus.} You need to rework your statement anyway. You were humming around, so--

Mr. {Sarbanes.} Thank you, Mr. Chairman. I appreciate it.

I am still getting my head around the issues here, but I certainly understand why a power plant or a company that is exercising its best efforts to try to make transitions and take steps to meet environmental standards, if something occurs that forces them to exceed to reliability requirement and therefore, they are put into conflict with some of these standards that they would, under those circumstances, expect to get some protection from liability and other exposure, because they are exercising all the best efforts and doing the things that we want them to do. But I can also see situations where there be an incentive to drag one’s feet potentially--and this could be done consciously or unconsciously perhaps--thereby creating a situation where a crisis would occur in terms of reliability if you were unable

to continue on. And that is the dynamic, the tension here that we are looking at, because we want to offer some protection where you genuinely put in this position of having to continue on and maybe violate some standards. At the same time, we don’t want people to be able to gain the system in some ways. And I would appreciate it, Ms. McCarthy, if you could maybe speak a little bit more to any concerns you might have about that, or examples we have seen where that kind of thing has occurred and could occur in the future if there was a real broad blanket exemption or reliability protection put in place.

Ms. {McCarthy.} Thank you, Congressman. I would say that I don’t disagree with the stated goals as you articulated them. All I will say is I don’t believe that there any inherent conflict that warrants Congress to be concerned at this point, and there is no conflict in the application of the laws and the regulations as we have managed them under these laws. And I would say that in one instance you had a company that was provided a 202(c) order, as well as a 113(a) order. The combination of those was to provide a sure pathway to address reliability and a clear pathway to stay in compliance with environmental regulations. It was very successfully done. The company failed, according to the Virginia DEQ, to actually comply with those

effectively and they were fined a minimal amount. We are dealing with a company that had compliance problems before, a company that continues to have compliance problems. I am sorry, not a company, a facility. The current owner was just fined in February almost $300,000 for six violations of pollution standards. So it was not unusual. It is unfortunate that they did not fully comply, but I don’t think we would be sitting here now had they, and I don’t think that warrants congressional action.

Now in terms of the problem with what might this signal be, we all agree that the DOE 202(c) order is a last resort. Our only concern is that that last resort be not turned into a path of least resistance, because right now we have great activity in energy among our energy colleagues in terms of planning for compliance under MATS, making sure that they address any reliability issues, working with the three agencies that you see represented here. I just don’t want this to change that dynamic and to make them understand that a 202(c) order could be available to them with no planning, with no advanced action, with no working with their environmental regulators or energy regulators, and provide them an opportunity to do nothing in the interim, and then to cause a reliability problem as a result.

Mr. {Sarbanes.} Well, I think it is a fair concern, and

we just need to be careful that the fix that we are attempting to design here is not overbroad with respect to the original problem that has been raised.

Ms. {McCarthy.} Congressman, can I make one correction? Just for Mr. Olson, the Potrero Utility incident was not related to 202(c). It was not a 202(c) issue, which is why we believe that the Mirant issue is the only one that is relevant in here, and in fact that isn’t a problem in and of itself.

Mr. {Sarbanes.} Thank you. I yield back.

Mr. {Shimkus.} Gentleman’s time is expired. Chair recognizes the gentleman from Oregon now.

Mr. {Walden.} Are you sure about that?

Mr. {Shimkus.} Mr. Walden. I am not sure, but we are going to try.

Mr. {Walden.} All right. I thank the gentleman--Chairman.

Families in America are really struggling with the cost of energy, whether it is trying to fuel up their vehicle so they can go to the grocery store or take their kids to school or after school activities. This is--the Obama Administration is one that I think has a horribly misguided energy policy. It is not ``all of the above.'' That was actually something Republicans talked about for a long time.

Our only failure was that we didn’t trademark that saying in time. But the President is on his website--and I assume he doesn’t disown his own website, since it is his website. And it talks about all our energy resources and then leaves out 57 percent of the energy side of energy. No coal and no hydro is listed here. That is about 57 percent or more of America’s energy. He seems to think the future of energy is Solyndra. To quote, ``The true engine of economic growth for our country will always be companies like Solyndra. The future is here at Solyndra. We are poised to transform the way we use power, the way we power our homes, our cars, and our businesses.'' This is part of why a lot of Americans who are actually paying the bills and living in the real world in the middle class are concerned about the direction of this President and this Administration and his failed economic policies that have left us in a horrible situation with the smallest workforce since 1981. Those of us with kids who are about to graduate from college are figuring where they are going to live on the hide-a-bed in the basement because they are moving back home. It is a real problem.

And then you go back to his comments in, I believe, San Francisco when he was running for office when he said, ``Let me sort of describe my overall policy. What I have said is that we will put a cap and trade system in place that is as

aggressive, if not more aggressive, than anybody else’s out there.'' This is President Obama running. ``I was the first to call for 100 percent auction of the cap and trade system, which means that every unit of carbon gas emitted will be charged to the polluter. That will create a market in which whatever technologies that are out there that are being presented, whatever power plants that are being built, that they would have to meet the rigors of that market and the ratcheted down caps that are being placed imposed every year.'' So if somebody wants to build a coal powered plant, they can, it is just that it will bankrupt them because they are going to be charged a huge sum for all that greenhouse gas that is being emitted. This is President Obama again. ``This will also generate billions of dollars we can invest in solar wind, biodiesel, and other alternative energy approaches. The only thing I said with respect to coal, I haven’t been some coal booster. What I have said is that for us to take coal off the table,'' and this is as he said it, ``ideological matter as opposed to saying if technology allows us to use coal in a clean way, we should pursue it. So if somebody wants to build a coal power plant they can, it is just that it will bankrupt them.'' Barack Obama, running for office.

Now, we know by his own website he doesn’t think coal or

hydro are part of an ``all of the above'' energy strategy. Coming from the Pacific Northwest, we actually think hydro is pretty important. And actually, a lot of our electricity comes from coal. We also have wind. We are now trying to figure out how to integrate wind into the grid and into a hydro grid. It is a very difficult process. In some parts of the country we now have negative energy pricing, where we are paying energy providers not to produce energy at certain times because we have a surplus. Taxpayers and ratepayers begin to wonder about that policy.

We have a great record in the Northwest on saving energy through conservation. We are very proud of that. I drive a hybrid on both coasts. I try and do my part. I can and I do. But this Administration’s policies are taking this country off the edge and driving up energy prices.

The Keystone Pipeline, another example where we could be working with our partners across the border in Canada, not only to create American jobs but to use North American energy and bring it here and refine it here and create jobs, and the President stands in the way of that, President Obama.

And so it is--I am just going to tell those of you and the agencies--Ms. Hoffman, you said earlier that you coordinate--the Department of Energy coordinates closely with the White House on Energy issues. I assume that means you

also coordinate closely with the White House on energy issues like Solyndra. You must have. We have other committees looking into that and trying to figure out just how closely all that got coordinated. But at the end of the day, some of us actually believe in an ``all of the above'' energy policy. We are deeply concerned that EPA has the lowest number predicting in terms of gigawatts that are going to come off the grid as a result of the Obama Administration’s policies. I think my colleague here is going to talk about that a little bit.

We got to have a different direction. Part of us are concerned about the grid and its reliability because of the policies coming from this Administration. My time is expired.

Mr. {Shimkus.} I thank the gentleman for his questions. Chair now yields to Mr. Waxman for--

Mr. {Waxman.} Thank you.

Mr. {Shimkus.} Would the Ranking Member--Chairman Upton, before I got here, said that he would give you 5 minutes for an opening statement and then a round of questions.

Mr. {Waxman.} That was very gracious of him, Mr. Chairman, and what I would prefer to do is to have my opening statement made part of the record and proceed now for 5

minutes.

Mr. {Shimkus.} That--we would greatly appreciate that. Without objection, so ordered.

Mr. {Waxman.} Thank you.

[The prepared statement of Mr. Waxman follows:]

********** COMMITTEE INSERT **********

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Mr. {Shimkus.} And the Ranking Member is recognized for 5 minutes.

Mr. {Waxman.} Thank you very much. Section 202(c) of the Federal Power Act gives the Secretary of Energy the authority to order a utility to generate or transmit electricity in an emergency situation. This authority is really a last resort. Only a handful of orders have been issued over the years. There has only been, at most, one case where DOE ordered required actions that led to noncompliance with environmental requirements, and even in that case it is not clear that noncompliance was necessary. One reason we rarely face this conflict is that potential issues are worked out with the regional grid operators and the environmental regulators. If that is insufficient, both DOE and EPA are involved in addressing potential conflicts. With enforceable environmental requirements in place, operators have a strong incentive to minimize the extent of any noncompliance with such requirements.

But this bill would change all that. It would allow DOE to waive liability for all environmental violations, eliminating the current incentives for operators to minimize noncompliance. The bill also removes EPA’s important role in the process.

Ms. Hoffman, does DOE have the expertise to determine the appropriate environmental safeguards that should apply to a generation plant ordered to run under a 202(c) order?

Ms. {Hoffman.} DOE has the capability to do NEPA assessments and NEPA follow the requirements under the National Environmental Policy Act. What would--DOE relies on EPA and the environmental organizations is to look at is their need to develop an administrative compliance order.

Mr. {Waxman.} So you would--you could consult with EPA?

Ms. {Hoffman.} Yes, sir. We do and we have.

Mr. {Waxman.} If you choose--even if you do choose to consult with EPA, nothing in this bill requires that, nor does this bill require you to incorporate any of their suggestions. Right now, if a utility wants protection from liability for noncompliance with an environmental requirement, it must go to EPA and obtain an administrative order or enter into a consent decree. Ms. McCarthy, how would EPA handle a request from a company concerned that compliance with a 202(c) order would violate a Clean Air requirement?

Ms. {McCarthy.} We actually enter into a discussion with that company. We enter into a discussion with the State and the local community, and we make sure that we design any relief in a way that mitigates any environmental concerns and

to the extent possible complies with environmental laws and regulations.

Mr. {Waxman.} Is this a process that can be completed quickly, if necessary?

Ms. {McCarthy.} It is.

Mr. {Waxman.} That process gives everyone the assurance that the company is doing its best to minimize the extent of environmental harm, but this bill would simply waive all environmental requirements for companies operating under a 202(c) order. Ms. McCarthy, with a free pass from all environmental requirements, would a company have any incentive to talk to EPA?

Ms. {McCarthy.} Not that I am aware of.

Mr. {Waxman.} In the example cited by GenOn, the company was operating under an administrative order. It was not at risk of EPA enforcement. Ms. McCarthy, if this bill were limited to situations where an EPA administrative order or consent decree were in place, would that ameliorate some of your concerns about the effects of this bill?

Ms. {McCarthy.} Some of the concerns would indeed be ameliorated by such a change.

Mr. {Waxman.} If we were trying to balance reliability needs and environmental protections, I just think it would make sense to cut environmental--I just think it doesn’t make

sense to cut environmental regulators out of the process. I think what we have here are legitimate concerns. We ought to look at them carefully, balance them, so that we don't go too far.

And with that, I want to work with my colleagues on this Subcommittee to see if we can achieve those goals. I yield back my time.

Mr. {Shimkus.} Chairman--Ranking Member yields back his time. Chair now recognizes Chairman Emeritus, Mr. Barton, for 5 minutes.

Mr. {Barton.} Thank you, Mr. Chairman, for holding this hearing in the series of continuing hearings on our Nation's energy policy.

My first question is just to ask each of the senior officials whether their agency supports or opposes these two bills. Ms. Hoffman, does the Department of Energy support both bills, oppose both bills, undecided?

Ms. {Hoffman.} We don't have a position at this time on both bills.

Mr. {Barton.} On either?

Ms. {Hoffman.} On either bill.

Mr. {Barton.} What about you, Ms. McCarthy, what is EPA's position?

Ms. {McCarthy.} The Administration doesn't have an

official position, nor does EPA.

Mr. {Barton.} So you all are neutral also?

Ms. {McCarthy.} We have raised concerns with the bill, but we--

Mr. {Barton.} But officially you are--

Ms. {McCarthy.} We have no official position at this time.

Mr. {Barton.} Neutral. What about the FERC, Mr. Chairman?

Mr. {Moeller.} I was allowed to speak for my colleagues to say that the four of us support the concept behind 4273, and I will let Mr. Wright address the--

Mr. {Barton.} Well, I just want to kind of get a baseline on where the Administration is, and apparently the Administration is neutral, according to the Department of Energy rep, the Department of EPA--the agency of EPA, and the Commission.

I think it is a true statement what Ms. McCarthy said in her written testimony and what Mr. Waxman just alluded to, that there haven’t been many cases in the past where we had to invoke this Section 202(c), and I think that is primarily for two reasons. Number one, we tended to have fairly substantial reserve margins so there has never really been an operating emergency, or not very frequently, and number two,

until very recently most of the electricity generated in the United States was generated under State regulatory--under State issues where they have a regulated power market. They don’t have an open market like we have now in Texas where it is basically a merchant power market. But as the EPA continues to issue more and more stringent environmental regulations, those reserve margins are going down. And as more and more States open up their markets to competition, the economic consequence of that is always that you take the older, less efficient plants out of operation so you don’t--and you are not able to keep a reserve margin in what used to be called the rate base.

So I think it is timely that these two bills, especially the first bill, H.R. 4273, have been put into play because in the future, I think you are going to see situations where reserve margins are not adequate and where you are going to have potential for blackouts. I have been told by several authorities, both in the private sector and the public sector in Texas, that we are going to have rolling blackouts this summer if we have heat like we did last summer. And last summer, there were deaths in Dallas, Texas, from the heat when some of our less robust populations air conditioners were stolen and the people couldn’t--didn’t the mobility nor the ability to call for help and they suffered the fatal

consequences.

So Ms. McCarthy, in your written testimony you speak that--about a concern, to use your term, that if H.R. 4273 were to become law, that it could have a possible negative health consequence. Do you not agree that if you have a blackout for any extended period of time in an area that is having a high heat situation, that that is a higher potential for health than giving some sort of emergency operation to an older power plant that might violate for a small amount of time some very stringent environmental law?

Ms. {McCarthy.} I would absolutely agree that maintaining electricity reliability, it is critical. But that is why we have been working so closely with the regional transmission organizations, planning entities, including ERCOT, to try to understand the concerns and to address them in a way that maintains flexibility, that maintains reliability, and that is cost effective. And we believe we are working on those issues, and very effectively.

Mr. {Barton.} Well I appreciate that, and my time is about to expire. I do want to say, Mr. Chairman, I strongly support both of these bills. You know, obviously they are subject to tweaking and being improved, but I think the concept in both bills is noble and I hope that the Subcommittee moves them, the full Committee moves them, and

that we can work with our friends in the Senate and on the House floor to get these to the President’s desk. I see no downside to either of these bills and I see a huge positive upside.

Mr. {Shimkus.} The Ranking Member--Chairman Emeritus yields back his time. Chair now recognizes himself for 5 minutes.

Thank you all for being here. You know, there was a Christian book published years ago called ``Evidence that Demands a Verdict.'' It was laying out the facts, historical accuracies, and just makes a claim that people need to make a decision. The evidence of this Administration’s attack on coal is clear. I mean, we talked about it the last time you were here, Ms. McCarthy, about all the five rules and regs, MERC, Boiler MACT, cooling towers, shutting down plants now. Greenhouse gas had just come out a day or two before, no new coal-fired power plants. We have the President’s statement that I played last hearing about his--what he--what his desire was to do as President of the United States for coal. Now we have Obama II, the second term, no coal in his ``all of the above'' energy. It is clear--the evidence is clear that this Administration has a deep seeded hatred for coal and electricity generated by that coal. And of course, we don’t even talk about the Region 5 administrator and his

crucifixion statement.

So we just can’t go that way. I mean, you just can’t keep coming here and saying yeah, we really do like coal. Everything is going to be okay, because the evidence outweighs any public statements of no, we really do like it. Everything will be okay. We had a great hearing last year on reliability, and I want to put the bar chart up. Mr. Walden sort of mentioned it. The bar chart is an analysis of EPA rules and regs, and what the effect is going--on electricity generation around this country. The smallest little bitty bar, the 10 gigawatt, that is the EPA’s analysis. Everything else is--the closest one--well, there is one close to that, the--Citibank is 15, but everything else is 25. EEI is 75.

So this isn’t a debate really--Chairman Emeritus Barton was right. When you have an oversupply of electricity, one, you have low prices, but it mitigates this problem. When supply is going to be constrained based upon these rules, we are going to see this happening a lot. So this is one of the few times we are trying to get ahead of the curve, not talk about problems of the past. Even if EPA is right and it is only 10 gigawatts, that is a lot of base load offline because of regulations.

Now in that hearing, as I recall, DOE agreed with EPA, and my question to you, Ms. Hoffman, was who did that

analysis under the DOE?

Ms. {Hoffman.} The DOE’s study that was done was by Policy International, and the Department of Energy.

Mr. {Shimkus.} Policy, the policy sector. Don’t you have an electricity sector group?

Ms. {Hoffman.} Yes.

Mr. {Shimkus.} Why would you have the policy folks do the analysis, and not the experts in DOE on electricity?

Ms. {Hoffman.} The study was done because it was a coordination across multiple agencies and the policy sector took the lead on that study. Our office--

Mr. {Shimkus.} Because it is a policy position, not one based upon science?

Ms. {Hoffman.} It was done based on modeling and analysis of information and data that was available.

Mr. {Shimkus.} I think we are awaiting a response in writing on this question. I think it was asked to be responded by mid-April, and we have yet to see it. Can you ensure that that gets to us to address this issue?

Ms. {Hoffman.} I will, sir.

Mr. {Shimkus.} Because the problem is this. I believe at least--I believe 40, which is probably the medium of this, which is four times more the EPA, which gives us four times more, so maybe we only had two. Now we may have eight. And

then what happens?

Let me go to--my time is rapidly moving by. Let me just ask Ms. McCarthy, what are some of the tools you have? Let me go quicker than this. Is one tool the consent order?

Ms. {McCarthy.} Yes.

Mr. {Shimkus.} How quickly can it--can a consent order be activated?

Ms. {McCarthy.} A consent order is not just action by EPA, but it also needs to go to the courts as well. So it is a more lengthy process than an administrative order.

Mr. {Shimkus.} And how--the 2005 case that we are--how long did that take?

Ms. {McCarthy.} The 2005 case I believe took 6 months for the agency to do an administrative order--

Mr. {Shimkus.} So that is not really a timely response to fix a problem.

Ms. {McCarthy.} It--that was a situation that had no advanced warning. I don’t want the Committee to believe that that is--

Mr. {Shimkus.} Like an emergency.

Ms. {McCarthy.} --in place under the--

Mr. {Shimkus.} Like an emergency.

Ms. {McCarthy.} Say that again?

Mr. {Shimkus.} Like an emergency. That is when no

advance--

Ms. {McCarthy.} Well it happened--

Mr. {Shimkus.} No advanced notice, that is why it is an emergency situation.

Ms. {McCarthy.} That is exactly why under the--

Mr. {Shimkus.} That is why we can’t wait 6 months.

Ms. {McCarthy.} We established--

Mr. {Shimkus.} Let me ask another question. An administrative consent order, does it protect the company from citizen lawsuit liability in all cases?

Ms. {McCarthy.} It does not.

Mr. {Shimkus.} Thank you. My time is expired. I will now like to recognize my colleague, Mr. Scalise, for 5 minutes.

Mr. {Scalise.} Thank the gentleman from Illinois, the Chairman for yielding, and for raising these questions. I think it is important as we look at the legislation at hand, and I am strong supporter of both pieces of legislation. I think Mr. Olson and Doyle and others brought a strong bipartisan bill to address a serious problem that we have seen out there, especially as it relates to emergencies. I think from testimony today it shows that while these are isolated, that people that produce power for our country are unfortunately posed with a dilemma in the event of an

emergency. And we are here for that reason, and again, with a very strong bipartisan group of cosponsors on the legislation, because I think there is the recognition that if a company is placed in this decision, you want them to be able to act based on what is best for consumers, while not being concerned that if they follow the order that they are given, they are going to be sued on the other side just for complying with the order.

And so Ms. McCarthy, in your testimony--and this is following up on Mr. Shimkus's comments--you say the EPA believes that the Executive Branch already has sufficient tools to address issues that may arise, and that was the reason you gave for--one of the reasons you gave for the lack of need for this legislation, but yet, you just admitted in your testimony and your answer to Mr. Shimkus that the tools that you have, even including a consent order, do not prevent some outside lawsuit being brought forward. And so how can you say that the legislation is not necessary and you have the tools when, in fact, you don't maintain those tools to prevent outside lawsuits that we are trying to prevent just because somebody complied with an order?

Ms. {McCarthy.} We have issued administrative orders, last year alone, 1,300. We are dealing with an instance here in which we have a tool that is very reliable, a tool that is

well thought out--

Mr. {Scalise.} What tool are you talking about, consent orders?

Ms. {McCarthy.} The administrative order. A consent order is used very effectively as well, but the administrative order, which is what is in question here, is for all practical purposes a significant protection for both the generator involved and a significant source of protection for the community in terms of reducing pollution as the result of the need to comply with reliability and address reliability concerns.

Mr. {Scalise.} So the consent order, the ability for you to issue those orders--and I will ask the question again. Does that ability that you have, the tool that you have, prevent a third party lawsuit from coming forward on the same issue?

Ms. {McCarthy.} I am sorry. You are using different terms. I just want to make sure I am answering your question correctly. A consent order does go to the court and does offer that protection.

Mr. {Scalise.} How long does that take?

Ms. {McCarthy.} And administrative order does not directly, but--

Mr. {Scalise.} A consent order--when you say consent

order provides that protection, does the consent order prevent a third party lawsuit?

Ms. {McCarthy.} No.

Mr. {Scalise.} That is the question.

Ms. {McCarthy.} A consent decree does. An administrative order, for practical purpose, does but it legally--there is a risk of civil action. It has almost never happened and in times--

Mr. {Scalise.} Well, we are talking about almost never, but we are only talking about select emergencies, which is what this bill is specifically dealing with. And so when you say there is still that risk there, you know, on one hand you are saying you have got the tools in your tool chest, but then you--

Ms. {McCarthy.} It is impractical--

Mr. {Scalise.} But you just acknowledged that there still is a risk. What we are trying to do is remove that risk. That is what the bill is being brought forward to address, is to address the risk that you are acknowledging exists.

Ms. {McCarthy.} I understand that. The only thing I think that we are disagreeing with is whether or not this tool is--the law is crafted effectively to address that issue while still minimizing the extent that pollution will be

emitted and significantly protecting public health, which we believe the current system actually does.

Mr. {Shimkus.} Well let me ask you this question, because Commissioner Moeller earlier in his testimony said that all four current FERC Commissioners support the concept behind this legislation that we are discussing so that generators are not in the position of having to choose whether to violate Section 202(c) of the Federal Power Act, or whether to violate environmental regulations. So I guess how would you respond to his testimony that all four Commissioners, including the Chairman, support this?

Ms. {McCarthy.} I would join--

Mr. {Scalise.} I think that this is actually solving a problem.

Ms. {McCarthy.} I would join in the chorus that reliability is essential to maintain, and that generators shouldn’t be put in a position of having to choose with compliance between two orders. What I would suggest, however, is that they are not put in that position now. They never have been, and I don’t anticipate that they will be as a result of any actions that--

Mr. {Scalise.} But you did acknowledge that there is that risk that we are addressing--and I think it is the question, on one had you are saying you support the concept

behind it, maybe you have some differences in how it is drafted, but then in your testimony ``EPA believes that the Executive Branch already has sufficient tools to address issues that may arise, yet later as we were talking, you acknowledged that there are risks still even with your tools. There are still risks.

Ms. {McCarthy.} If there is a legal risk in practical terms, it has not happened.

Mr. {Scalise.} And we are just making sure that not only in practical terms but in legal terms it doesn’t happen by removing the risk. By removing risk--

Ms. {McCarthy.} I understand.

Mr. {Scalise.} --you actually give everybody the comfort that they can go and do what they need to provide power without that risk.

Ms. {McCarthy.} I understand that. We just want to make sure that the cure is commensurate with what you find--

Mr. {Scalise.} And that is why I think you have got a broad bipartisan group of members that came together to make sure that cures right.

One final question I want to ask you before my time expires. Earlier in the year, Mr. Terry, I believe it was, on our Committee had asked Administrator Jackson who was before our Committee if EPA would start posting petitions on

your website so that we could see the petitions that are being brought forward, and Administrator Jackson acknowledged that yes, she would start posting and said it was easy to do, and yet still to this day there are no postings. Can you tell us why, months later, that still hasn't happened and do you have any kind of timeframe of when we will start being able to get that public information out in a transparent manner so that people can see this on the website?

Ms. {McCarthy.} I will make sure that I take your concern back, and we will respond to that right away.

Mr. {Scalise.} I appreciate that and I yield back the balance of my time.

Mr. {Shimkus.} Gentleman yields back his time.

Mr. {Walden.} Mr. Chairman, just to follow up on.

Mr. {Shimkus.} Is there objection for 1 minute for Mr. Walden? Without objection, so ordered. You are recognized for 1 minute.

Mr. {Walden.} Because I asked the same question of Administrator Jackson, and she committed that she would do that and make that change, and I have been busy on other matters, and so I would share in what Mr. Scalise raised regarding Mr. Terry, and would appreciate a response.

Ms. {McCarthy.} I will make sure I--

Mr. {Walden.} Because she indicated it wouldn't be a

problem and you would get right on it, so--

Ms. {McCarthy.} I will bring that back. Thank you.

Mr. {Walden.} Thank you.

Mr. {Shimkus.} I thank my colleague, and Chair now recognizes my colleague from Kansas, Mr. Pompeo, for 5 minutes.

Mr. {Pompeo.} Thank you, Mr. Chairman. I have been waiting 16 months to say this.

I agree with Mr. Doyle. I read the objections Ms. Hoffman and Ms. McCarthy have, and you are concerned that you will create an incentive for power plants to sort of do nothing and hope they will get an order. It doesn’t hold much weight for me, much concern, and I think the likelihood of that happening is pretty low.

Are there any other concerns that you all have besides that one that--I didn’t read them, but are there concerns besides that concern of a generator sort of gaining the systems and hoping on hope that they get one of these orders to keep them in the clear?

Ms. {Hoffman.} I don’t have any other concerns. I think part of the process is making sure that we work diligently through the process in such that the Executive Order, the 202(c) order is clear under the terms of reliability event is happening, and how long and the duration

of that event, as well as any administrative order is clear on the terms and conditions under which a power plant would operate.

Mr. {Pompeo.} I appreciate that. Thank you.

Ms. McCarthy, are there concerns other than that, that risk?

Ms. {McCarthy.} The only other concern is that I believe it is extremely important for EPA and the States to be engaged in this decision and have a clear role to minimize pollution when you are addressing a reliability problem.

Mr. {Pompeo.} All right, thank you. I appreciate that.

Let me try and get--I listened to the colloquy between, Ms. McCarthy, you and Mr. Scalise. There have only been two, and we are concerned that this might happen, this disconnect. I will describe to you why I think folks are concerned about it, and it has to do, I think, with the increased likelihood as these regulations come into place that we see this issue arise more and more. You and I back in February talked about Utility MACT and whether suppliers had said yes, we can actually build this darn thing that is compliant. I asked you if you had a certification from suppliers that they could. I was hearing they couldn’t get these plants financed because no supplier would come in and say we can actually do that in the real world. At that point, you said you had no

written guarantees from suppliers. Have you received any since then, since the time we spoke back in February, that they can build MATS and Utility MACT compliant facilities?

Ms. {McCarthy.} We are actually looking at that issue, and as you might guess, we have received petitions to look at that issue, so we will be addressing it.

Mr. {Pompeo.} I appreciate that. I just want to talk about one of the petitions that came from Institute of Clean Air Companies, representing a lot of the folks who are going to be tasked with actually doing this work. They are very, very concerned that they can’t build these plants, and this starts to get to this reliability risk that I think now exists more than it may have in the years that we talk about there being very few of these 202(c) orders required.

Ms. {McCarthy.} I really appreciate the fact that this concern has been raised about new facilities. I just want to clarify that it is not a concern about the existing facilities continuing to operate.

Mr. {Pompeo.} That is correct. Their petition relates to particularly mercury measurement, the capacity to measure mercury in an accurate and timely way.

Ms. {McCarthy.} We will definitely be taking a look at that. Thank you.

Mr. {Pompeo.} Great, thank you.

With that, I yield back the balance of my time, Mr. Chairman.

Mr. {Shimkus.} The gentleman yields back his time. The Chair now recognizes the late-coming Mr. Gardner, who is trying to get to his seat, for 5 minutes for questions.

Mr. {Gardner.} Thank you, Mr. Chairman. Thank you for recognizing me, and thank you to the witnesses. I won’t take long with my questions this morning.

To Ms. McCarthy, thank you very much for being here.

Tristate is a wholesale electric power supplier in Colorado that is owned by the 44 cooperatives generating, transmitting electricity, and has come to my office many--multiple times trying to talk about their compliance with EPA’s Utility MACT standards, and whether it would likely cost Tristate about $1 million. That is their estimate, that it would likely cost them $1 billion. This is partly due to the fact that they will have to install three FCRs which remove nitrogen oxide at the Tristate Craig facility in Craig, Colorado, and so I would like to ask you to confirm this because I know you don’t have the numbers in front of you, but I am asking you to comment on the rural co-ops which are nonprofits and member-owned. And so the first question is do you agree that some customers will see increases in their rates due to some of the rules EPA is trying to

implement?

Ms. {McCarthy.} We actually have modeled some slight increases in energy and they differ region to region.

Mr. {Gardner.} And so those rates would increase. How do you propose the nonprofits comply with these rate increases, apart from passing on these costs to the rate payers?

Ms. {McCarthy.} Mr. Gardner, I would indicate that our analysis that we did with the Mercury and Air Toxics Standard indicated that the energy prices would likely fall within the range of what we have seen in 1990 and historic fluctuations. We saw between 1 and 3 percent increases, which means about--for an American family about $3 a month increase on their electricity bill.

Mr. {Gardner.} And so that is just the only way they can do that is to pass those increased costs onto their rate payers?

Ms. {McCarthy.} I have trouble answering that question because I don’t live in the energy world, but my understanding is that compliance can be achieved by lower demand as well as increased generation, fuel switching, and the number of techniques.

Mr. {Gardner.} Thank you. Yield back my time.

Mr. {Shimkus.} Would the gentleman yield to me for just

one moment?

Mr. {Gardner.} Yes, I yield.

Mr. {Shimkus.} I think that is the point that we are trying to drive home. You are right, Ms. McCarthy, you do not live in the energy world, but then you make extrapolations on gigawatt issues that are reliability concerns based upon a chart I saw. DOE rolls over in acceptance of your electricity generation or lack thereof analysis, and when you have the people in the field who are disputing that analysis on the gigawatt issue, we are debating with an environmental agency, not our Department of Energy. And if the analysis was close to what industry, financial people, FERC, EEI say, then we would cut some leeway, but the Administration’s proposal--actually the environmental rules and the effect on the electric grid of 10 gigawatts is laughable. And so we--you can do all the analysis on emittance you want, but we reject the premise that you all are experts in electricity generation, cost of building plants, and developing those.

You still have a couple minutes. This allows me to ask Mr. Moeller--make a point. Congressman Griffith mentioned a lake facility and property, of course, Vicky Hartzler would be happy if I would mention Lake of the Ozarks and those issues of those, which is commutable distance in my district,

but you all have been somewhat helpful in easing some of the concerns. I think there are still some issues out there, and we would hope that you would--

Mr. {Dingell.} Mr. Chairman.

Mr. {Shimkus.} Yes, sir.

Mr. {Dingell.} We have not addressed the question of whether or not there are rights to judicial review of these different questions, and if so, how they are applied. Could I ask just a couple yes or no questions on this?

Mr. {Shimkus.} The time is my colleague from Colorado.

Mr. {Dingell.} Well, I don’t want to intrude on his time.

Mr. {Gardner.} I would be happy to yield to the gentleman from Michigan if the gentleman--

Mr. {Shimkus.} I am done.

Mr. {Dingell.} Well, you are all very kind and I thank you.

These are for Ms. Hoffman and DOE. Is an order under Section 202(c) currently subject to judicial review, yes or no?

Ms. {Hoffman.} Yes.

Mr. {Dingell.} Yes. Can somebody file suit now to stop an emergency order as being antithetical to the public interest either for health safety or other reasons, yes or

no?

Ms. {Hoffman.} They have to seek a rehearing.

Mr. {Dingell.} Now, would it still be subject to review if the Olson bill were to be adopted?

Ms. {Hoffman.} Yes.

Mr. {Dingell.} Today there is a question whether DOE can actually order a generator to violate a law administered by EPA or another agency. If this bill were to be signed into law, would this action put a thumb on the scale in the eyes of the court that Congress intends Section 202(c) to trumpet environmental laws? This goes to Ms. McCarthy.

Ms. {McCarthy.} My understanding is that it would give essentially a pass on environmental laws with the exception of OSHA.

Mr. {Dingell.} Is there in any statute or any regulation or in any cooperative management between the sundry departments down there a provision which requires consultation, or which permits consultation between DOE, EPA, and/or the State agencies which were participants in these matters as we went through the case that we are discussing today?

Ms. {McCarthy.} I am sorry. I don’t believe there is any written requirement for that--

Mr. {Dingell.} Okay.

Ms. {McCarthy.} --but because environmental laws have not been preempted for compliance purposes, that DOE consultation always includes EPA to ensure that we are not conflicting the generators who have to comply with 202(c).

Mr. {Dingell.} Now does EPA--do both of the agencies, EPA and DOE have to consult, or may they consult, or may they not consult? What is the law on that?

Ms. {McCarthy.} We have to consult to the benefit of the generator to ensure that we are providing them a clear pathway--

Mr. {Dingell.} Is that required by both agencies or not?

Ms. {Hoffman.} It is not required. The law does not have any statement, the existing law or--

Mr. {Dingell.} Now if they do not consult or if they do consult, is that appealable by any party or other person not a party.

Ms. {Hoffman.} No.

Mr. {Dingell.} No. Mr. Chairman, I thank you for your courtesy and I thank my colleague. Thank you very much.

Mr. {Shimkus.} We thank the Chairman Emeritus. I think your questions are very helpful. We would like to now again thank the first panel for your time and your due diligence in answering our questions.

We would like now to ask the second panel to join us. Okay, we are almost getting there. If we could ask folks to take their seats and get the door in the rear closed. We want to thank the second panel. Obviously we have two groups, the first three on reliability, the second from the hydro issue. Many of you are well-experienced at congressional hearings and testimony. Your full statement will be submitted for the record. You will have 5 minutes and I will recognize you left to right, and then--recognize you left to right, and we can begin.

First I would like to recognize the Honorable Betty Ann Kane, Chairman of the D.C. Public Service Commission. Again, your full statement is in the record. You have 5 minutes. Welcome.

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^STATEMENTS OF THE HONORABLE BETTY ANN KANE, CHAIRMAN, D.C. PUBLIC SERVICE COMMISSION; DEBRA RAGGIO, VICE PRESIDENT, GOVERNMENT AND REGULATORY AFFAIRS, AND ASSISTANT GENERAL COUNSEL, GENON ENERGY, INC.; STEPHEN BRICK, CONSULTANT, ON BEHALF OF ENVIRONMENTAL INTEGRITY PROJECT; ANDREW MUNRO, DIRECTOR, CUSTOMER SERVICE DIVISION, GRANT COUNTY PUBLIC UTILITY DISTRICT, ON BEHALF OF NATIONAL HYDROPOWER ASSOCIATION; KURT JOHNSON, PRESIDENT, COLORADO SMALL HYDRO ASSOCIATION; AND MATTHEW RICE, COLORADO DIRECTOR, AMERICAN RIVERS

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^STATEMENT OF BETTY ANN KANE

} Ms. {Kane.} Thank you very much, Mr. Chairman, and members of the Committee. I am very pleased to have the opportunity to be here this morning to discuss our comments on the Resolve Environmental and Grid Reliability Conflicts Act of 2012.

As we understand it, the intention of the bill is to more clearly define the situations in which emergency orders may be issued under the Federal Power Act, and to limit the liability of electric generators when obeying such an order. This bill speaks directly to a very difficult and challenging

experience of the D.C. Public Service Commission in its efforts to ensure electric reliability service in the Nation’s capital. We believe that--I will speak of the experience and describe how enactment of the bill could prevent such situations in the future, and hopefully could lead to a more timely resolution of these kinds of conflicts.

My attorney is always happy to say that nothing that I say in my testimony or in answering questions has any relationship to any open case currently before the D.C. Commission.

The D.C. Commission is an independent agency of the government of the District of Columbia. It was actually first established by Congress in 1913. We are coming up on celebrating our centennial next year, and reaffirms the Home Rule Charter Agency under the District’s Self-Government Act. It is a quasi-judicial regulatory agency, and like our fellow Public Utility Commissions in the other 50 States, our statutory responsibility is to ensure the provision of safe, affordable, and adequate natural gas, electricity and telecommunications services. Specifically in relation to this legislation, we have a responsibility under district law and through our oversight of the Potomac Electric Power Company to ensure that the Nation’s capital has an adequate supply of electricity at all times.

In the summer of 2005, a situation arose, which has been alluded to. At that time, we were served--the city was served by three must-run power plants, one of which--none of which were actually owned by Pepco. We are a restructured state. One of these--all three of them are must-run units. One of these plants, which at the time was owned by the Mirant Company, an independent power provider, the Potomac River Generating Station, on August 22, 2005, issued a press release, suddenly announcing it was going to shut down the plant in just 2 days. This plant is located in the City of Alexandria, just across the river from the District. It doesn’t supply electricity to anyone in Virginia. It is connected to the District’s power grid through several transmission lines that run under the river. We understand that Mirant announced its shutdown of the plant in response to emissions abatement concerns which had been raised by the Virginia Department of Environmental Quality, acting under the federal Clean Air Act, and Mirant said that it could not satisfy the Department’s concerns at any level of output. Apparently it had tried some reductions previously.

The D.C. Commission immediately responded to this announced shutdown by filing an emergency petition on August 24, asking the Federal Energy Regulatory Commission and the Department of Energy to order the plant to continue to

operate. The continued operation was critical to ensuring that the downtown sectors of the District, including the White House, the Capitol, and other important federal as well as District government agencies had adequate access to electric supplies. This was in the summer.

The plant was shut down for 28 days. Finally, on September 21, 2005, the company voluntarily resumed operations at a reduced level. I was not on the Commission at the time, but my staff tells me that every day during the hot summer period at the end of the summer that the plant was not operating, they prayed for mild weather. The federal agencies did not respond for several more months. The Secretary of Energy issued an order in December of 2005, which directed the continued operation of the plant to ensure reasonable electricity reliability, but also said that the company shall utilize pollution control equipment and measures that maximize--to the maximum extent possible reduce the magnitude and duration of any exceedance of the air quality standards. The Federal Energy Regulatory Commission issued its order in January, 2006, and that directed Pepco and RTO PJM to come up with an immediate plan, as well as a long-term plan for transmission to ensure electric reliability in the District. And finally, EPA issued its administrative compliance order on June 1, 2006, about 10

months after the initial shutdown.

There were some extensions of the DOE order so that transmission could be--capacity could be installed. The Commission itself issued an order ordering building of new transmission lines. But during the time that the lines were being built and the DOE order was still in effect, the plant was operating in order to supply electricity when needed, and during that time the plant was fined $52,000 while it was--by EPA while it was--excuse me, by Virginia while it was operating under the DOE order.

We believe that the resolving legislation would relieve must-run generators from having to pay such fines while they are operating under an emergency order from another agency under Section 202(c) of the Power Act, and we--therefore, we support the legislation. We also hope that the bill could be useful in assuring that emergency orders could be obtained in sufficient time to compel a generating plant to continue operating. As I said, for the 28 days that we were without the plant operating, electricity reliability was in peril, and it was another 118 days from the first shutdown until we got the DOE order, making them--ordering them to resume operation. Only the voluntary decision of the plant’s owner shortened the period of heightened risk.

This was not a comfortable experience for the

Commission, and it should not be a comfortable experience for the Commission. No State agency wants to be in a position to have to go to a federal agency and ask them to do something that is going to cause a company to violate what another federal agency ordered them to do, or what another State has ordered them to do. And we believe that the legislation can help resolve that conflict while supporting the obligation of State utility commissions to carry out their responsibility for the reliability and safety of electric transmission, distribution, and supply systems under their jurisdiction.

Thank you, and I would be happy to answer any questions.

[The prepared statement of Ms. Kane follows:]

********** INSERT 5 **********

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Mr. {Shimkus.} Thank you. I would now like to recognize Ms. Debra Raggio, Vice President, Government and Regulatory Affairs, and Assistant General Counsel for GenOn Energy, Incorporated. Welcome. You are recognized for 5 minutes.

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^STATEMENT OF DEBRA RAGGIO

} Ms. {Raggio.} Good morning, Chairman and members of the Subcommittee. I appreciate the opportunity to testify in support of H.R. 4273, the Resolving Environmental and Grid Reliability Conflicts Act of 2012, which I would call a good government and truly bipartisan piece of legislation. I thank Congressmen Olson and Doyle for working together in such a bipartisan fashion, along with Congressmen Green, Gonzalez, Sullivan, Terry, and Barton, who are also cosponsors on this Subcommittee.

To begin with, I would like to share four observations on the legislation.

First, there currently is a conflict of law, and notwithstanding Ms. McCarthy’s statement, a generator can be ordered to run by the Department of Energy, and if the generator has no choice but to violate an environmental limit in following the order, the company can be subject to fines, as well as lawsuit liability. The situation is fundamentally unfair, and it also creates potential reliability issues during an emergency.

Second, this is not a one company issue. I am testifying for GenOn because we have experienced this

conflict firsthand, but it could happen to any generator. Accordingly, the legislation is widely supported by various participants in the industry. These groups and companies don't always agree on all issues. It includes APPA, NRECA, EPSA, EEI, and companies like Exelon, NRG, Alliant Energy, Ameron, We Energies, as well as GenOn. This is quite a diverse group of companies. In addition, as you heard, all four FERC Commissions and Secretary of Energy Chu have recognized the need to remedy the conflict.

Third, the legislation is not anti-environmental or anti-EPA. I believe it does not impact compliance with any recent EPA regulations, or provide an avenue for a generator to shirk its responsibilities. Environmental compliance is paramount, but reliability during an emergency is paramount as well, and that reliability could be threatened by a company questioning whether to follow the DOE order and run during an emergency, or not run and comply with its environmental limits. Under this legislation, a company is only protected if it has no choice but to violate an environmental limit when it runs as directed by the Department of Energy for an emergency. There is no environmental hall pass here. Rather, if a company runs as ordered by DOE during an emergency, it will just not be sued or fined for an unavoidable environmental violation.

Fourth, the legislation is not intended as a criticism of EPA or DOE. Both agencies have to manage their own statutory mandates. It is simply a fact that those mandates may conflict during a reliability emergency. This wasn't an intent that they conflict, but they do. Therefore, a statutory fix is needed, otherwise a company is stuck in the middle of the two conflicting mandates.

Today, Section 202(c) of the Federal Power Act gives DOE the authority to require a generator to operate only in the event of a true emergency as needed to meet and serve the public interest. Twice, Mirant Corporation, a predecessor company to GenOn, was required to run for reliability, and both times we had no choice but to violate the environmental limit to keep the lights on. In both situations, we were subject to fines or citizen lawsuit liability. Any generator, coal, gas, or otherwise, could face this situation. For example, a company could be ordered by DOE to run for cyber security reasons, or a dual fuel gas plant could be ordered to run on oil because gas is unavailable. The company may have no choice but to exceed an environmental limit in order to comply with the order. There needs to be clear government directive to run in the event of a true emergency. In such event, the government should want a company to salute and operate as directed by DOE to keep the

lights on. A company should not be running to court for an answer during an emergency. The emergency could require a very quick response, and a court may not be able to act in time. This conflict needs to be decided by the legislature, not by a court, especially during an emergency.

The legislation gives no additional authority to DOE. They have the authority currently. Nor does it take authority away from EPA, which does not have jurisdiction under the Federal Power Act. It merely prevents a company from being fined or sued for complying with a federal order.

Thank you very much for the opportunity to speak with you about this issue, and I am very pleased to answer any questions you might have.

[The prepared statement of Ms. Raggio follows:]

********** INSERT 6 **********

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Mr. {Shimkus.} Thank you for saving us some time and yielding back.

The Chair now recognized Mr. Stephen Brick. He is a consultant on behalf of the Environmental Integrity Project. Sir, you are welcome. Your written statement is in the record, and you are recognized for 5 minutes.

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^STATEMENT OF STEPHEN BRICK

} Mr. {Brick.} Thank you, Mr. Chairman, and good morning. My name is Steve Brick, and I appear today on behalf of the Washington-based Environmental Integrity Project, a nonprofit--I am sorry--a nonprofit organization advocating for more effective enforcement of environmental law. I am an independent consultant, having worked for more than 30 years on various energy and environmental policies. During that time, I have represented public utility commissions, State and federal environmental agencies, a wide range of nonprofit groups, and various private industries. I appreciate the opportunity to address the Subcommittee.

I have two concerns with the proposed legislation. First, I think it is unnecessary. U.S. DOE emergency orders have been issued only rarely, and we expect this to continue in the future. Existing systems and regulations can and are being adapted to address grid reliability environment conflicts.

Second, the legislation grants an environmental hall pass anytime DOE issues an emergency order. Environmental regulators, either U.S. EPA or its designee, would be cut out of the process. Environmental controls of all sorts could be

turned off during emergency situations with impunity. In addition, the emergency order could become an avenue for exempting older fossil plants from making required upgrades. This would result in unacceptable environmental degradation, and would potentially distort power markets.

The problem that the legislation purports to fix is not unfolding in an emergency fashion. Power sector and its regulators are dealing with the intersection of three factors. First, significant levels of pending fossil plant retirements; second, new federal air regulations affecting the electric power sector; and third, a need to maintain the reliability of the Nation’s electric transmission system. None of these factors is a surprise.

The Nation’s power plant fleet is aging, and as new, more efficient capacity has been built, it has become widely understood that some older plants would retire. The Utility Mercury and Air Toxics Standards finalized in December, 2011, have been under consideration for over 2 decades, so the electric power sector has had more than adequate time to prepare. Transmission system reliability has been a utility concern for many decades. Plant retirements and new environmental regulations are already being considered within established transmission planning processes.

The changes to the emergency provisions of the Federal

Power Act proposed in the bill are the wrong response to our actual situation. We are not faced with an emergency, nor is it in the public interest to resolve all potential conflicts in emergency mode. Such a practice would unnecessarily tip the balance away from environmental protection.

I firmly believe that there are legitimate concerns about the reliability impacts of projected power plant retirements, but these already being addressed by regional transmission organizations, power plant owners, economic and environmental regulators, and the public. Environmental factors can be incorporated into existing planning and regulatory processes in an orderly fashion, ensuring that the health and resource benefits of all environmental regulations are achieved while maintaining grid reliability.

In the very rare instance of a DOE emergency order, two things can be done to mitigate the environmental impact. First, require that all existing environmental controls continue to operate. This is needed to prevent environmental backsliding. Second, condition emergency orders arising from retirement deferrals using the following procedure. First, specify the transmission situations under which the power plant will be needed to protect reliability; second, determine the environmental consequences of the projected operation; third, assess options for completing transmission

upgrades needed to permit retirement; and fourth, limit waivers from environmental regulations to those few hours of operation needed to address reliability shortfalls identified in the analysis. Under this approach, plant operation would be strictly limited to the specific reliability conditions. Deferred retirements should be limited to one two-year period, giving time for transmission owners to complete necessary upgrades or otherwise resolve the emergency.

The operation of plants operating under a deferred retirement scenario should be very low, generally less than 200 hours per year. This procedure allows continued operation of power plants for a limited time under strict reliability conditions to address genuine emergencies. It would not force owners to invest in new pollution control equipment on old plants that they intend to retire. The approach harmonizes reliability and environmental concerns, and it does not require new legislation to be put into effect.

Thank you very much for your time, and I am happy to answer any questions you have.

[The prepared statement of Mr. Brick follows:]

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Mr. {Shimkus.} Thank you, Mr. Brick. Now I would like to recognize Mr. Andrew Munro, Director, Consumer Service Division, Grant County Public Utility District, on behalf of the National Hydropower Association. Sir, you are welcome and you are recognized for 5 minutes.

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^STATEMENT OF ANDREW MUNRO

} Mr. {Munro.} Good morning, Chairman Whitfield and members of the Subcommittee. I am Andrew Munro, immediate past President of the National Hydropower Association, NHA. Thank you for this opportunity to share NHA's perspective on the Hydropower Regulatory Efficiency Act of 2012.

We urge swift markup of the bill and support House passage as soon as possible. We commend the bipartisan leadership shown by the bill's cosponsors. In particular, I wish to thank Congresswoman Cathy McMorris Rodgers, who is from my home State, the other Washington.

My message today is simple. Hydropower is also part of the solution. This message is for President Obama, for Congress, and the American people. This bill supports sustainable hydropower generation that will strengthen our economy, environment, and also our renewable energy supplies. Think about this one statistic. Of the 80,000 dams that currently exist in the United States, just 3 percent are utilized to generate renewable energy. Just 3 percent. The Hydropower Regulatory Efficiency Act puts America on a path to tap this available existing infrastructure and employ hundreds of thousands of American workers.

With a current generation capacity of 100,000 megawatts, hydropower, as you know, is America's largest renewable and represents 7 to 8 percent of all U.S. generation. It also supports a strong economy, employing 300,000 American workers. NHA recently completed a supply chain snapshot that illustrates 2,000 U.S. companies working hydro across the United States.

One of the myths about U.S. hydropower is that there are no new opportunities. In fact, the opposite is true. Hydro has a lot more to offer. According to a Navigant study, 60,000 megawatts of new hydro capacity and 1.4 million cumulative jobs could be created in the next 15 years. Now, these are domestic, good-paying jobs in manufacturing, construction, engineering, and operations. In fact, 75,000 megawatts of hydropower is currently in the FERC queue.

Now, the U.S. hydropower industry is absolutely committed to sustainable growth that is sustainable in every way. We commend the Hydropower Regulatory Efficiency Act because it is a recognized--it employs common sense, balanced terms to support growth with our existing infrastructure. According to the Department of Energy, there is 12,000 megawatts of new hydro that could be developed at existing non-power dams. This would increase U.S. hydro capacity by 15 percent. Let me repeat. Twelve thousand megawatts

without building another new dam. That is enough energy to serve 4.5 million residential customers.

One more data point. Hydropower's attributes, being renewable, reliable, and affordable, was the primary factor for BMW SGL to build a new automotive carbon fibers plant in my utility service territory in Grant County, Washington, with initial investment of $100 million and 80 new local jobs. It was reliable hydropower that was the primary reason for this new manufacturing plant to be built in the United States, and specifically in Grant County, Washington.

Now, NHA's ambitious goal to double sustainable hydropower jobs is achievable, and it is necessary. Further, it aligns with the Department of Energy's Wind and Water Program goal to achieve 15 percent of the Nation's electricity using hydropower by the year 2030.

This bill contains balanced and common sense provisions, and supports a dynamic agenda that is supportive in a bipartisan fashion. Now, I am just going to mention two provisions here quickly. Section 6 requires FERC to investigate a 2-year pilot licensing process for hydro at non-power dams and pump storage--closed lid pump storage projects. NHA appreciates past efforts to improve the licensing process, however, the timelines for this type of sustainable hydro is not on par with, for instance, a gas

plant, which is about a 2-year process. We think makes a great positive step forward without--while still maintaining environmental standards and performance.

We also see significant potential in the low impact small hydro and conduit projects. Due to the lack of economies of scale for these small projects, the licensing costs serve as a financial disincentive. This bill makes another positive step forward for these small low impact projects.

In closing, I wish to highlight the collaborative demonstration--the collaboration demonstrated by two organizations appearing before you today, American Rivers and the National Hydropower Association. For the past several years, we have mutually and purposely called upon our organizations to lead together in how we can help support a sustainable energy future. We hope that this is just the beginning of more collaborations to come, and we invite Congress to join us in supporting this bill for swift passage.

Thank you.

[The prepared statement of Mr. Munro follows:]

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Mr. {Olson.} [Presiding] Thank you, Mr. Munro. Our next guest is Mr. Kurt Johnson. Kurt is the President of the Colorado Small Hydro Association. Mr. Johnson, you have 5 minutes for an opening statement, and please hit the little button there in front of you, sir.

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^STATEMENT OF KURT JOHNSON

} Mr. {Johnson.} Thank you, and I am a PowerPoint guy, so if you could bear with me and look up at the screen. Thank you. I would like to commend the leadership of Congresswomen McMorris Rodgers and DeGette on this bipartisan common sense legislation. It is a long overdue, cost effective, common sense measure, and I am pleased that we are finally making it happen, thanks to the leadership of these members of Congress and this Committee.

Hydropower is not a new idea. Pictured here, this is the Ames Power Station. This is actually about 3 miles from my house. It went online in 1891. Small hydro, typically it is local, it is reliable, it is clean. It was a good idea 120 years ago. It is still a good idea. We can have a lot more of it if we can get the regulatory reform that is being discussed here today.

Small hydro is a job growth opportunity. In Colorado, we have got hundreds of folks currently employed in the industry, and we can get a lot more jobs in Colorado in small hydro if we can get the right policies in place.

Small hydro is an economic development opportunity for rural areas, probably for obvious reasons. Many hydro

projects are located in rural areas. You have a number of job creation benefits initially when you build a project. I might work with carpenters, plumbers, electricians, concrete pourers on project construction. There is also ongoing financial benefit associated, once a given project is in place. A rancher like this might have an electricity bill that he has to pay to spin a center pivot irrigation system. With a small hydro system, that can cover that bill. For larger systems, once you have a hydro plant in place, say at an existing dam, you will have an ongoing revenue source that will lower costs to the water users and create benefits in perpetuity.

Andrew talked about the 80,000 dams nationwide that currently don’t have hydro. In Colorado, various federal and State assessments have estimated that we got a couple thousand. Pictured here are some examples of local projects that I happen to be familiar with and have worked on, existing dams and existing conduits that do not have hydro that are potential economic opportunities to build hydro.

Towns have opportunities for generating hydro power. In the mountains where I live, a typical municipality will have--next slide, please. A typical municipality will have, you know, a water line running a thousand feet up a hill, put various pressure reduction valves to supply the municipal

treatment plant. In most cases--many cases, those can be retrofitted cost effectively with small hydro if you didn't have burdensome regulations impeding the development of these types of small projects.

The current FERC process is basically broken for small hydro permitting. I think the FERC staff has made a valiant effort in recent years within the existing statutory and regulatory framework; however, for particularly small projects the system just plain does not make sense. You can have situations where the cost of complying with FERC regulations exceeds the cost of the hydro equipment itself. It just does not make sense. We in Colorado in the past couple years had a pilot program to seek to streamline FERC licensing or permitting program. To date, we have got two projects that have completed the system, another four that are currently before FERC. We shouldn't have two, we should have 200 a year that are being proved and built in Colorado. I think that experiment has demonstrated that the system is still time consuming and costly.

Basically the system is broken. This next slide shows a picture of the table of contents for what you might expect for typical conduit exemption application. You know, requiring this level of detailed regulations for non-controversial small projects on existing conduits does not

make any sense. It is stifling development. It has stifled development for decades in the past, and it is continuing to do so today. There is enormous costs there. You have projects not built, jobs not created, rural incomes not increased, and harmful additions not avoided simply because of these burdensome regulations for, again, non-controversial small projects. Building a project, you have to run around and get lots of letters from various agencies, which takes a lot of time. Well-intentioned, folks, but nothing necessarily moves fast in government. Small hydro is already pretty complicated for some of the reasons noted here. It is unnecessary to have the kind of permitting requirements added on top of what can already be a complex project development.

The bill being talked about here today created what I describe as Hydro 1040-EZ, which is a brilliant, brilliant, brilliant idea. Again, this is long overdue. This enables small, non-controversial projects to get out of the system quickly and leave FERC’s staff to focus on more important and more controversial projects.

As discussed, the bill will expedite hydro development at existing non-power dams nationwide. The bill also calls for some new resources estimates completed by the Federal Government. They are pictured here. I actually have a copy of a report completed by--last year. These types of resource

assessment reports have led directly to new development and new business for developers like myself. It is sort of the kernel that starts the whole process. It is a really brilliant idea that is included in this bill.

So in summary, I think again, long overdue, common sense, bipartisan reform legislation. I thank the Committee for their work on this issue and would be happy to answer any questions.

[The prepared statement of Mr. Johnson follows:]

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Mr. {Olson.} Thank you, Mr. Johnson. Our last opening statement is to be given by Mr. Matthew Rice. Mr. Rice is the Colorado Director of American Rivers. You have got 5 minutes for your opening statement, and hit the microphone. Thank you.

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^STATEMENT OF MATTHEW RICE

} Mr. {Rice.} Thank you, Mr. Chairman, members of the Committee. Good morning, and thank you for inviting me to testify. My name is Matt Rice, and I am the Colorado Director for American Rivers. I am also a lifelong fly angler, kayaker, and former fly fishing guide. I love rivers and consider myself extremely lucky that my job is to protect them.

American Rivers is the Nation's leading voice for healthy rivers and the communities that depend on them. We believe rivers are vital to our health, safety, quality of life, and to the economies that depend on them. American Rivers supports the Hydropower Regulatory Efficiency Act. We have worked for years trying to improve hydropower's environmental performance, and we recognize that hydropower will be an important part of our Nation's future energy mix, especially given the urgent need to reduce the use of fossil fuels.

The key is getting hydropower right. Even small hydropower can have a huge impact on river health and the future generations that depend on those rivers. Poorly done hydropower has cost species to go extinct and put others,

including some with extremely high commercial value, at great risk. However, there is tremendous potential and growing interest in developing incidental hydropower projects that add new generation to existing dams and conduits. These projects cause less environmental harm than new dam construction, and are the focus of this bill.

After we opened our Colorado office last year, we started working with the Colorado governor’s energy office on a streamlined permitting hydropower pilot program, the result of a Memorandum of Understanding with the Federal Energy Regulatory Commission. Our experience with this innovative program offers some important lessons that are relevant to the Hydropower Regulatory Efficiency Act.

First, giving the public an opportunity to review new hydropower projects does more than protect natural resources. It also offers developers certainty, giving them a clear idea of controversy and viability before they make a big investment.

Second, existing regulations are flexible enough to expediate permitting of good hydropower projects. A typical FERC license can take up to 5 years to secure, but after 16 months of the Colorado program, FERC has issued two exemptions, has four additional projects poised to receive final approval, and one additional project pending

submission. Only two applicants had completed their project design upon enrollment, and both of those applicants have already received exemptions.

The value of the program is even clear when viewed in historical context. In 16 months, seven projects have been approved or are near approval. Only 15 new projects had been approved in Colorado over the past 20 years.

Third, the MOU pilot program demonstrated that applicants are not always in the best position to judge whether or not their project will be controversial. Out of 28 applications submitted to the State, only 10 met the criteria for expediated permitting, often because they were too--they were considered too controversial. Those projects can still be permitted, but they will require an additional level of scrutiny to ensure that they are not causing harm. Public review and comment works. The 45-day public review period outlined in Section 4(b) and Section 4(c) of the Act is critically important, because it provides a safeguard to protect against projects that are disguised as conduits, such as an example in Aspen, Colorado, that I cite in my written testimony. However, Section 4 also provides developers with the certainty that truly non-controversial projects can receive expediated review and move forward quickly.

I am proud that the Hydropower Regulatory Efficiency Act

is the result of a spirit of collaboration, both among members from both sides of the aisle, as well as the industry and conservation groups.

Here is why I think the Hydropower Regulatory Efficiency Act gets the balance right. First, the Act encourages appropriate hydropower development, like adding turbines to non-power dams, canals, pipes, or adding updated, more efficient equipment to existing dams.

Second, the Act protects the public interest, providing the 45-day public review period I referenced earlier.

Finally, the Act will help improve the regulatory process while avoiding the stale concept that regulations are the only barriers that need to be removed. At American Rivers, we are not fans of process for its own sake. Time is money for environmental NGOs too. But make no mistake, it is because, not in spite of, our regulatory system that hydropower has fewer environmental impacts today than it did years ago. Getting to these solutions takes careful stud that can, in some cases, still take longer than 2 years. These laws and regulations are there for good reason and work well, but that doesn’t mean they can’t be improved. Our experience with the Colorado program has shown us that there are good projects that can get permitted in 2 years or less. We want good projects to get built faster, but it is not good

for rivers or the industry, frankly, if a bad project gets fast tracked and causes real damage. We are committed to continuing to work with the Committee, the industry, and others to achieve the twin goals of more capacity and better environmental outcomes.

Thank you for the opportunity to testify before this Committee, and I look forward to your questions.

[The prepared statement of Mr. Rice follows:]

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Mr. {Olson.} Thank you, Mr. Rice, and now we will go to member questions for 5 minutes. The first questions will be asked by my colleague from Washington, Ms. McMorris Rodgers.

Mrs. {McMorris Rodgers.} Thank you, Mr. Chairman, and I wanted to direct my questions to Mr. Munro, and thanks again for making the trip from Washington State to be here. Great testimony. I appreciate you highlighting the important role that hydropower is playing in the Pacific Northwest.

I wanted to ask if you would just elaborate a little bit more. You talked about BMW, but we have seen where hydropower really has transformed the economy in Washington State. There are other companies, high tech companies that are locating in the Basin area because of low cost hydropower, reliable. And I just wanted you to at least elaborate a little bit more on what other job creation we have seen in recent years.

Mr. {Munro.} I would be happy to, and thank you. This BMW plant is a great example highlighting how hydropower in itself, because it is reliable, it is a base load, it is available. BMW SGL when they were looking worldwide for their new automotive carbon fiber, which is a lightweight strong plastic material that is going to their new, all electric vehicle, they wanted a life cycle emissions free

resource. It was important for their customers that they have that, and as they looked around the world, the wind was not reliable enough. Hydropower was the renewable that was reliable for them. So they have reiterated to us that that was the very key reason that they ended up locating in Grant County. It was, I think, between us and Quebec, and they decided to go with Grant County in the United States. It is an important local economic development opportunity where a primarily agricultural-based rural populated area. And then we also have Davis Centers, we have Microsoft, Yahoo, that are locating in our service territory because of that renewable and reliable electricity.

Mrs. {McMorris Rodgers.} Great. We often tell the positive story of hydropower and how it transformed Washington State, the whole Columbia Basin project in many ways, and you can even point to Boeing locating Kaiser Aluminum. But it is exciting to see these more recent companies that are expanding because of what hydropower has to offer.

Now a little earlier we where hearing a little about the Administration’s energy independence goals moving forward. Would you just elaborate on the steps that we have taken in recent years and how we got DOE, Department of Energy, to actually commit to a goal of doubling hydropower by 2030? I

was disappointed that it wasn’t listed or included in President Obama’s chart there, but would you just elaborate a little bit more on what we have seen from Department of Energy recently?

Mr. {Munro.} Well we are disappointed as well. We have really been talking to the Administration about having hydropower as part of the overall solution, and we have done our--as an industry, we have taken the time to do our analytics to really study what are the opportunities. It has been, I think, a mindset that we are not going to build a new Hoover Dam. Well that is true, but now what we have found is we have already invested in a lot of infrastructure in the country. We have dams that exist already we can modernize or existing hydropower. There are small low-impact conduit power. So through our jobs studies we have shown that we can expand, support job creation in every State in the country, that also expands renewable energy supplies. We are still trying to get that through to the top levels of the Administration. We are getting support, though, at the lower levels at Department of Energy. We are happy to see that, but we really need everybody to understand and change their thinking about hydro, that we can have both hydropower and fish.

Mrs. {McMorris Rodgers.} Yes. And to Mr. Munro and Mr.

Johnson, if you would just talk a little bit about how hydro can--hydropower can contribute overall to grid security and reliability, which is also on the forefront of Congress's mind.

Mr. {Munro.} And it is an important base load resource. I think in terms of our energy security, it is absolutely essential that if we can expand sustainable hydropower and close--pump storage opportunities, we absolutely ought to do that. Grant PD is an example. We are 100 percent renewable. Most of that is hydro generation. We do have wind. We are also integrating wind in Montana to keep a reliable system. But if after conservation--if we were to develop a resource, it is a combined cycle gas plant, which is fine. That is a base load resource. If there are opportunities, though, where we can develop hydropower, again, that is really the only renewable that is base load that can also provide the same amount of reliability that, say, a gas plant could.

Mr. {Johnson.} It is probably also worth pointing out that it can be distributed in small, and so if you can have distributed base load clean energy, that enhances grid reliability so that, you know, if you have one giant plant that goes down, you got a problem. If you have a number of smaller also base load plants, only one of them goes down, you have less of a problem.

Mrs. {McMorris Rodgers.} Thank you very much, Mr. Chairman. I want to thank Mr. Rice with American Rivers for your testimony and your support of the legislation too, and I yield back.

Mr. {Olson.} Thank you. The Chair recognizes my colleague, Mr. Doyle, from Pennsylvania for 5 minutes of questions.

Mr. {Doyle.} Thank you, Mr. Chairman. Ms. Raggio, the testimony on our first panel seemed to indicate that there are conflicting stories about the 2005 202(c) order. Could you clarify what violation--what the violation was that led to a fine from Virginia DEQ, and how many hours GenOn was actually in violation of environmental regulations, or Mirant?

Ms. {Raggio.} Yes, absolutely. There is some confusion, and I can actually say that I am probably the only one on either panel who lived through it. We ran in accordance with the DOE order. The order took approximately 4 months to be issued. At that time, it was very clear about environmental limits and what we could do. After that, an administrative consent order almost a year after we shut down was imposed, and the DOE order adopted the administrative consent order. We ran under that. Both of those orders had very clear procedural requirements we had and protections we

had to follow, and we followed them all. Throughout the process, DEQ committed, as they did in their comments to DOE, that they did not believe that DOE had the authority and they would enforce against us. We had one, one 3-hour NAQS violation in 2007, and when we did, DEQ was true to their word. They came in, they said you violated, and they issued an NOV. They also said we did not follow certain pollution control requirements in their allegations, but we could not follow those requirements and still be in compliance with the DOE order. But we were in compliance with the ACO, as evidence that EPA did not enforce against us, nor did DOE. So it was an after the fact view back as to what we had done. But to say that we were not fined because we ran under the DOE order is wrong. We would not have had the exceedance but for the order.

Mr. {Doyle.} Thank you for the clarification.

Ms. {Raggio.} Certainly.

Mr. {Doyle.} Mr. Brick, first of all, I want to say that there are many things in your testimony that I agree with, like the fact that legitimate concerns about reliability impacts of projected power plant retirements should be addressed by RTOs. I agree with that.

I am just not sure I understand some of your concerns. You tell us in your testimony ``that the problem this

legislation purports to fix is not unfolding in an emergency fashion.'' I just want to be clear, I don’t believe compliance time for EPA regulations are creating an emergency, and certainly not one that warrants a 202(c) order, but I do think it is foolish to ignore the fact that we are asking for great changes from our electric generating fleet, changes and upgrades that we need, and that I support. The need for those changes, along with lower fuel costs, has already spurred the retirement of over 100 coal-fired plants, and most of those retirements are in my neck of the woods. We just have one tool of last resort for power supply emergencies, and that is the Section 202 order. Do you think that tool has ambiguities about which federal law to follow?

Mr. {Brick.} First of all, let me say I am not a lawyer so--

Mr. {Doyle.} Neither am I, sir.

Mr. {Brick.} You are asking me for a legal opinion when I am not really qualified to give one, but I think it is clear from the testimony that we have heard that there is some potential conflict in the law.

Mr. {Doyle.} And so do you think--if that is the case, do you think it is wise that we try to address and try to fix any ambiguities in our law so the power suppliers know what to expect when a 202 order is issued?

Mr. {Brick.} It isn't--and once again, I am offering you a legal opinion when I don't really have the basis for doing that. It isn't obvious to me that that can't be done perfectly reasonably without making any statutory changes. The agencies know how to talk to each other, and you know, if anything, it seems to me that the single example that we have heard about this morning--and again, I don't have all the facts on that so I can't really talk authoritatively about it. That seems to me to be kind of a bad example, and I would like to think that we have learned from that bad example and we are not going to make that mistake again going forward.

Mr. {Doyle.} Well, we have only had two instances in 34 years and we are 0-2 when it comes from addressing the ambiguities, and I think that is what has us concerned, that in the two instances where we have asked generators to come online, there was a citizen lawsuit in one case and a fine by Virginia DEQ in the other. That is all we are trying to address, these ambiguities in the law. I think, you know, between now and markup time, if we hear any good suggestions how to make it better, we will certainly incorporate them in the bill.

But I want to thank you for your testimony today, and Mr. Chairman, I see that my time is expired.

Mr. {Olson.} I thank my colleague. The Chair yields himself 5 minutes for questions.

My questions are going to be for you, Ms. Raggio. First of all, my colleagues should know that Ms. Raggio's employer, GenOn, was formerly Mirant, which is the poster child of why we are here today. I mean, because they are the ones who were exposed to conflicting regulations putting reliability compliance in direct conflict with environmental regulations, forcing them to choose how to proceed and expose themselves to legal liability.

I realize that these cases are rare. There have only been two as my colleague from Pennsylvania mentioned. But with EPA's regulations, this explosion of regulations, shutting down our coal plants all across the country. We have got--we have pretty good power--excessive power grids, but we have got a very slim margin right now. Just one example from the real world, the Cross State Air Pollution Rule, CSAPR. When EPA announced that they were enacting that rule--in the rulemaking and they included text in that almost immediately Luminant, the largest coal producer in Texas, announced that they would shut down two coal plants. Our State is the fastest growing State in the country. We cannot lose power generators in Texas if we are going to keep our people healthy.

And so Ms. Raggio, I would like to give you an opportunity to respond to all the comments and concerns you have heard, particularly from the prior panel. I mean, you were said to be a repeat offender. I heard that from the EPA witness. Talk about--they mention you might have some perverse incentives if H.R. 4273 becomes law to exceed your permits and not upgrade your facilities in hopes of having some sort of grid crisis where you can, you know, have this done through 202(c). Do you want to set the record straight?

Ms. {Raggio.} Well to the extent we have offended any law, we did it on our own, except for these two situations we weren't ordered to do so. And that is the problem. When a company makes a mistake or acts improperly, it pays the fine and it is enforced against. It is a completely different situation when you are complying with a federal order and then facing those penalties and fines.

I find it confusing how a company could plan its long-term compliance in hopes that DOE would come in and issue a 202(c) order. I almost think that would require some kind of collusion between Department of Energy and the company to circumvent a requirement that gives you a pretty long lead time to comply. It is also an extremely transparent process, compliance right now. My company is deciding right now for 2015 and '16 whether we are going to put on controls to

comply, whether it is economic and affordable to do so, or whether we are going to shut down. It is difficult to see how someone could hide beneath FERC and the ISOs, and the PSCs watching them, and then pop up at the last minute and say we are here, we didn’t put on controls. DOE, save us.

I don’t see that as really credible, although I assume anything is possible.

Mr. {Olson.} Thank you for those answers. If you know that crystal ball, please let me know because we have got the second leg of the Triple Crown coming up, and I am not a horse guy, but--I got a couple questions for you, Chairwoman Kane, and thank you for coming here today. I want to go back to 2005 when the DOE ordered Mirant, the Potomac River Generating Station, to go on the status of must run plant, to operate to protect the electricity supply to Washington, D.C. The generator, at the time being Mirant, complied with the order and was later fined by the Virginia Department of Environmental Quality for a 3-hour NAQS violation. You mentioned in your testimony that everyone was praying for mild weather. Walk me through what could have happened if a blackout occurred in Washington, D.C. Government buildings being shut down, you mentioned the White House, hospitals losing their power, with all these tourists here staying in hotels, maybe needing some sort of medical care. Tell me

what happened if Mirant hadn’t complied and done what they were supposed to do and keep the power up and running.

Ms. {Kane.} It would have created a very, very difficult situation. We depended on that plant for peaking in the hot summer months, and the DOE itself had said in its order that there would have been a blackout, had one of the other lines been down and the plant not be able to operate. And so that is why--DOE also obviously looked at it as a temporary situation. I want to address that, too. It was an emergency we did not take lightly, going to a federal agency and asking them to order a company to run, asking them to essentially oppose the actions of a State. And the Virginia Department of Environmental Quality continued to oppose the petitions and the actions all the way through. But we knew how serious the situation would have been, particularly in the summer, and we then also in response to that acted very quickly ourselves to order the building of additional lines, 269 KB lines and then 239 KB lines so that the plant in the future if there was a problem could be bypassed. But that took--even by waiving--we waived the 6-month filing period, the notice period, we did expedited proceeding. It still took almost 18 months to get all of those--almost 2 years, rather to get the new big lines in place, which was because there were conduits under the river. They could happen more

quickly, but it was a very scary situation, and we know how people react in Washington where there is a power outage just from a thunderstorm, and you can imagine if the whole downtown area, the whole central D.C. area, there was no power available.

Mr. {Olson.} Thank you, ma'am. I am out of time, but I think you would say that violating a 3-hour air quality standard may have averted a greater crisis here in our Nation's capital. I am out of time. I yield to the Ranking Member of the full Committee, Mr. Waxman from California.

Mr. {Waxman.} Thank you very much for yielding to me.

Ms. Raggio, I want to be sure that I understand the concerns that supporters of the Olson bill are trying to address. Your concern is the rare instance where compliance with a 202(c) order will require a company to violate an environmental requirement, is that correct?

Ms. {Raggio.} That is correct.

Mr. {Waxman.} So when operating under a 202(c) order, should a plant be allowed to run without limit, or should it only be allowed to run when needed to address the reliability program--problem?

Ms. {Raggio.} No, as set forth in the draft legislation, it should only be allowed to run during times necessary to meet the emergency, and be consistent with any

environmental law or regulations and endeavor to minimize adverse environmental impacts.

Mr. {Waxman.} Well, the bill seems to encourage limiting the time of operation to the time of the emergency need, but it is not mandatory. Do you think it ought to be mandatory?

Ms. {Raggio.} It should be whatever you want the agency to be doing.

Mr. {Waxman.} Okay.

Ms. {Raggio.} I think the mandatoriness should be upon the agency in its order, and then the company should have to comply with the order.

Mr. {Waxman.} Should a plant continue to run its existing pollution control equipment during the emergency operation?

Ms. {Raggio.} Absolutely, if you can do both.

Mr. {Waxman.} But the bill doesn’t require this either. I am concerned that the language in this bill is far broader than the issue you say you want to address.

Let me take an example. A plant is operating under a 202(c) order generates coal ash that it places in impoundment. The impoundment bursts, as it did in Kingston, Tennessee. The spill blankets nearby communities, pollutes miles of streams and rivers, and costs over $1 billion to

clean up. Under the language of this bill, the actions of operating the plant and disposing of the waste as required by the order ``result in'' noncompliance with multiple environmental laws. Thus, a company should be shielded from any liability for the damage.

Ms. Raggio, that is not your intent here, is it?

Ms. {Raggio.} Absolutely not, and I actually think that omission would not be considered necessary to comply with the DOE order, so it would not be protected, but that is just my opinion.

Mr. {Waxman.} I fear the sweeping language of the bill provides that any action necessary to comply with the order that results in an environmental violation shall not be subject--not subject to party’s liability, so I am concerned about that language.

Mr. Brick, what are your views on this bill? Is it narrowly tailored? Does it preserve any formal role for the environmental regulators? Is it necessary and sensible?

Mr. {Brick.} As I said at the beginning, I don’t think the bill is necessary. I think that existing processes can and are being used right now to harmonize environmental concerns with reliability concerns. I think that as drafted, it is too broad and I do think, although I completely agree with what I have heard from most people that it is nobody’s

intent, really, to use it as a hall pass, plain language of the bill really does seem to be a hall pass. And in that case, you can conjure any kind of interruption or--of in-plant environmental equipment that might be deemed necessary somehow during the emergency, and I think it would be easy to change the language to restrict it to more reasonable set. Particularly because--and I mean, this is something that hasn’t been said in this hearing. We design these plants and their pollution control equipment to operate under all circumstances, and so I really do, again, without going into all the details on the Potomac case, I really think that represents an exception, and a rare exception as opposed to something that is commonplace in the industry.

Mr. {Waxman.} Would it be safe to say that you don’t think the legislation is necessary, but if we are going to have legislation, it needs to be more carefully tailored?

Mr. {Brick.} Yes.

Mr. {Waxman.} And is it also your view that we need to preserve a formal role for environmental regulators?

Mr. {Brick.} Yes.

Mr. {Waxman.} And in that way, the bill would balance out the concerns you think are already--could be met under existing law, but would it do any harm if we narrowed it down in that way?

Mr. {Brick.} If it were narrowed in the way that you described, I don’t think it would do any harm necessarily.

Mr. {Waxman.} I understand the concern that is motivating the supporters of this bill, but the bill languages goes way beyond what I think is necessary to address that narrow concern, so I agree with your views.

I yield back, Mr. Chairman. Thank you.

Mr. {Olson.} And I thank the Ranking Member of the full Committee. The Chair now recognizes the gentleman from West Virginia, Mr. McKinley.

Mr. {McKinley.} Thank you, Mr. Chairman.

I was curious, Mr. Brick, when I saw you on the panel. You were with the Environmental Integrity Project, and back in August of 2010, you all issued a document called ``In Harm’s Way: Lack of Federal Coal Ash Regulation Endangers Americans and Their Environment''. Were you involved in that study and developing that report?

Mr. {Brick.} No, sir, I am a consultant to EIP and I work for them on electric reliability issues.

Mr. {McKinley.} Okay. I was curious to learn a little bit more of the perspective, because it is--the integrity--when you talk about the Environmental Integrity Project, when you read the report and see how it has been rebuked by other entities, it lessens the credibility of EIP. I was hoping

that you may have--be able to illuminate us, educate us a little bit about how they could be so wrong in their findings. But you are saying you have no awareness of it whatsoever?

Mr. {Brick.} I haven’t even read the report.

Mr. {McKinley.} But if you--I mean, wouldn’t you question if in the report there were things that--in a report of a group that you represent lacked technical data, unfounded and misleading comments not technically possible, statement is unsubstantiated, referenced contaminate levels are incorrect, errors, statement is inappropriate and misleading, unsubstantiated. Wouldn’t that tend to make you uncomfortable with EIP’s ability to testify on any matter, especially on the one on which they wrote a report?

Mr. {Brick.} Sir, all I can say is that I haven’t had anything to do with that particular report, and all I can tell you is that on transmission reliability issues, which I take very seriously, I think I bring the highest level of technical expertise and credibility to EIP. I can’t really make any comment on projects that I haven’t been involved in.

Mr. {McKinley.} But again, I guess my point was that if you had responses like that, wouldn’t you question the integrity of a report that had that kind of rebuff by other environmental groups, specifically the Pennsylvania

Department--if you heard an environmental group making those kind of claims, wouldn’t you question whether or not EIP has legitimate issue, if you read that as--are you an engineer?

Mr. {Brick.} No, sir, I am an environmental scientist.

Mr. {McKinley.} Okay. No sense harming you any further. I think you are representing a group that has lost some integrity in what they have represented, so--

Mr. {Brick.} I am sorry you think so--

Mr. {McKinley.} I look forward--

Mr. {Brick.} --and I am sorry I can’t be more responsive.

Mr. {McKinley.} Maybe you will have someone else from the group come that can answer this, because we are not getting good answers. I was looking forward to chatting with you a little bit about your attack on industry and what it is doing to fly ash around this country. It is unsubstantiated based on incorrect, incorrect tracks. So I apologize if it is just you because you are not the one to do, but we are waiting for the right person to walk through those doors.

Mr. {Brick.} I will send the message along.

Mr. {McKinley.} Thank you very much, and I will yield back my time.

Mr. {Olson.} Thank the gentleman from West Virginia. Chair now recognizes for 5 minutes the gentleman from

Maryland, Mr. Sarbanes.

Mr. {Sarbanes.} Thank you, Mr. Chairman.

Ms. Raggio, in the first panel that we had here, Ms. Capps had asked Ms. Hoffman and Ms. McCarthy if they could describe or tell us the list of laws that would be covered by the liability under the bill, this broad waiver that is in the bill, and they were not able to do that. I wonder if you have a sense or if you could describe some of the federal, State, local environmental laws and regs that would be--would have liability waiver with respect to that.

Ms. {Raggio.} I can’t really speak to all the panoply of laws that are out there facing our power plants. I know there are many. Water, air, solid waste. The issue is really to be broad so that an emergency might impact any of those laws, and a company might be ordered by DOE to take an action that would violate any of those laws. And if you have no choice but to comply, you shouldn’t be fined or hit down or sued. That is the intent. So the broadness was--I believe the intent was to go to covering all of the potential things that could happen in an emergency that none of us can imagine, because it is an emergency and it shouldn’t happen.

But the key is that you can only be protected if taking that action was absolutely necessary to comply with the order, so if you are out there dumping things in the river

and it wasn’t required by the order, there is no protection.

Mr. {Sarbanes.} Of course, the flip side of it being that broad and applying to all laws is that there are many out there that you wouldn’t think would need to be waived under the circumstances that one can imagine, and so you get into this situation where if the bill were interpreted where some of us might have concerns, it might be that, in fact, the Federal Government is getting into the business of saying to a State or locality, you know, we don’t know what the particular regulation or law that you may have on the books is, but whatever it is, it is going to be waived, which is a fairly heavy-handed way to proceed here. And I think that is one of the dangers that we have some concerns about.

Do you know how many different environmental requirements have ever actually posed a conflict with a 202(c) order?

Ms. {Raggio.} I only know it being invoked twice for generation. Our company was impacted both times. It was imposed during 2001 for the California energy crisis. We complied, thinking the DOE order was still in place. It had expired by the summer of 2001, which to me is curious because we were all still in the height of the emergency.

Mr. {Sarbanes.} And was the sort of category of regulation that was in conflict there?

Ms. {Raggio.} Air.

Mr. {Sarbanes.} Air, okay.

Ms. {Raggio.} It was air both times.

Mr. {Sarbanes.} So we have not seen it with respect to, you know, endangered species, drinking water, waste disposal, so we don’t have evidence of that kind of conflict having been presented--

Ms. {Raggio.} Not yet.

Mr. {Sarbanes.} --to this stage.

Ms. {Raggio.} Not yet, no.

Mr. {Sarbanes.} Well, I guess I share Chairman Waxman’s, I guess, anxiety that this might be overbroad, and I also have a sense that if the EPA, for example, is in a position to issue an administrative order in these emergency circumstances that is very tailored to the situation at hand, that they are in a position to kind of limit what the liability protection would apply to.

And so I think we can perhaps refine this going forward. I would like to get your views on that.

Ms. {Raggio.} I just note that the administrative order would not protect us from citizen lawsuit liability, so even if we worked it out with EPA, we could have an environmental group out there that doesn’t care and will sue us.

Mr. {Sarbanes.} Mr. Brick, do you have an opinion on

that?

Mr. {Brick.} If you are asking me do I have an opinion on whether or not an administrative order would still leave them open to some fines--

Mr. {Sarbanes.} Well, it is more do you have an opinion on whether balance can be struck? And your view is that frankly, the status quo allows for that now, but whether this balance can be struck between, you know, our expectations on the environmental side and providing some kind of protection here.

Mr. {Brick.} Yeah. I think in answer to that, yes, I think a balance can be struck and I think the way you strike the balance is--because again, I think these things unfold--even in the emergency situation, it takes 100 days to develop an order. You know the likely environmental organizations to involve in a conversation, get them involved in a conversation and then I think you diminish the chances that you are going to have subsequent legal action.

Mr. {Sarbanes.} Thank you.

Mr. {Olson.} The gentleman yields back. The Chair now recognizes the gentleman from the Commonwealth of Virginia, Mr. Griffith, for 5 minutes of questioning.

Mr. {Griffith.} So Mr. Brick, what do you do when the organizations are involved and one of them, not the Federal

Government, but the State government says yeah, we don't agree?

Mr. {Brick.} I think that any case where there is delegated authority to the State, it is going to be the State air quality agency that should be involved in the conversation about what is going to happen during this reliability conversation.

Mr. {Griffith.} Okay, and here is where it gets really interesting for Ms. Raggio's company. As I understand it, Virginia didn't get that power. We just had the plant. So why would Virginia, which has its power delegated from the Feds, want to help out the District of Columbia and maybe Maryland, I don't know, but help out the District of Columbia when they feel like they may get in trouble? Because here is what I see might have happened, all right? Now I don't know, I didn't study this issue at the time, and maybe I should have because I was Vice Chairman of the Joint Commission of Administrative Rules and Regulations of the Commonwealth of Virginia at that time, as well as being the Majority Leader of the Virginia House of Delegates.

But here is what I suspect, because we ran across this in some other situations where DEQ felt like if they didn't strictly enforce the rules, EPA would come in and take either their power away or their money away. Now, if you are

sitting there and you are not sure what is going to happen either now or in the future, and you are DEQ and you are like you have been trained repeatedly by the EPA, you do what we tell you to do, you follow these rules or we are going to either take the power away or we are going to take your money away from your State, and you don’t want to have to answer to people like me as to why suddenly we lost money and why didn’t you follow the rules? What do you do when you are this lady trying to do what she is supposed to do to help out, under the order, the District of Columbia? That is the reason why this bill is important, because that lady didn’t have any choice in her mind--or her company, I know it wasn’t your decision--but her company didn’t feel like it had any choice, notwithstanding the fact that they were told in advance DEQ is not going to go in that direction. And how do you make all that work? I mean, people--we have heard the testimony today that people think it is not necessary because everybody worked together, but they didn’t work together. In at least 50 percent of the cases that have happened in the last 30 years, they didn’t work together, and in enforcing EPA regulations, the DEQ was authorized and supposed to enforce, the company who provided power to make sure that D.C. didn’t go down the tubes for a period of time gets fined.

Now let me tell you something. Here is my problem, and I think Ms. Raggio would agree with me. That is a sense where every common person in this country--they might say we don’t want the pollution, we don’t want this, we don’t want that, but everybody is going to look at that situation and say that is not just, and part of our jobs as members of Congress--and we fail at this a lot. I have only been here 2 years. I am trying to straighten it out. But we are supposed to set up rules that if you are a citizen of this United States, whether you are a human being or a corporation, if you follow the rules that are coming down, you don’t get punished. You may not agree with the rules, you may come here and lobby to change those rules, but if you are following the rules, you don’t get punished. And we have a situation where without the language like this bill has, somebody was following one set of rules and got punished.

And so my concern is, how do we solve that, Ms. Raggio--and I apologize Mr. Brick, but you opened it up there right t the end. Ms. Raggio, do you see it any different? Is there anything I haven’t covered as to what happened in this situation, and--we have got about a minute. Did you all sense that DEQ was doing this on their own, or because they had it drilled into their minds that they had to enforce these rules or else the EPA might take their authority away

from them somewhere down the road?

Ms. {Raggio.} I sat through the working together process. When this first started, we had EPA, DOE, Virginia DEQ, and Mirant in the room. EPA said before the ACO that they would enforce against us if we violated a NAQS. I turned to DOE and said well then I can’t run under your order because they are going to enforce against me, and then DOE said well then we will put you in jail.

Mr. {Griffith.} Okay, so it is better to face a fine than jail time.

Ms. {Raggio.} I guess. I thought well--

Mr. {Griffith.} I used to represent criminal defendants. It is better.

Ms. {Raggio.} We are all from the same government here. So the Federal Government worked it out and DEQ continued throughout the process saying they did not believe that DOE had the authority to order us to run in violation of their limit. It was a legal issue for them. They filed very clearly in response to the DOE order. I don’t know what their intent was. I don’t know if they felt threatened by EPA. I can’t testify to that, but I can say they were true to their word throughout the whole process.

Mr. {Griffith.} And of course, Virginia citizens didn’t want the pollution, and of course, they weren’t the ones that

were going to have the blackout. So that created another dilemma that should have been at the federal level resolved, and this bill would help take care of that problem, wouldn't it? Yes or no?

Ms. {Raggio.} Yes.

Mr. {Griffith.} I yield back my time. Thank you, Mr. Chairman.

Mr. {Olson.} The gentleman yields back, and seeing no members seeking recognition, we are at the end here. So the Chair wants to thank the witnesses so heartily for coming here and giving us your time, your expertise. We greatly appreciate it, you giving us this opportunity to ask questions of you. For all the members, the record will stay open for 10 days for statements, and without objection, this hearing is adjourned.

[Whereupon, at 12:30 p.m., the Subcommittee was adjourned.]