

ONE HUNDRED TWELFTH CONGRESS
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Opening Statement of Rep. Henry A. Waxman
Ranking Member, Committee on Energy and Commerce
Hearing on “H.R. 4273, Resolving Environmental and Grid Reliability Conflicts Act of
2012, and Discussion Draft of
H.R. ____, the Hydropower Regulatory Efficiency Act of 2012”
Subcommittee on Energy and Power
May 9, 2012

Today, we will be considering two pieces of legislation. One is a thoughtful bipartisan bill. I believe the other bill is well-intentioned, but it has some serious problems that need to be addressed.

The first piece of legislation is a bipartisan discussion draft that will facilitate the development of new, environmentally responsible hydropower projects. It was introduced by Ms. McMorris-Rogers and Ms. DeGette.

Their staffs have worked closely with the Committee staff to produce this discussion draft. We have had extensive discussions with interested stakeholders and agencies. It has been a good, cooperative process that has produced balanced, bipartisan legislation. The discussion draft is supported by both hydropower developers and environmentalists.

The second piece of legislation is the Olson bill. This bill would shield utilities complying with a Department of Energy emergency order from any liability for noncompliance with any federal, state, or local environmental law or regulation resulting from actions taken to comply with the DOE order.

I understand the basic concern expressed by proponents of the Olson bill. Nobody wants to force a company to choose between complying with a DOE order and complying with environmental laws.

In reality, this type of conflict rarely, if ever, arises. Over the years, the Secretary of Energy has issued just a handful of section 202(c) emergency orders. Only two of those orders required generation facilities to run for reliability purposes. An actual conflict between a DOE order and environmental requirements may have happened, at most, one time.

In essence, the bill's supporters argue that Congress needs to legislate now to avoid a repeat of a problem that may have occurred just once, six years ago.

The larger concern with this bill, however, is that it is far broader than the narrow issue it purports to address.

Under current law, if a utility is ordered by DOE to run a power plant for reliability purposes and it anticipates that it may violate an environmental requirement administered by EPA, the utility would need to negotiate with EPA for an administrative order or consent decree, which would protect the company against any EPA enforcement action. That's what Mirant did with the Potomac River plant back in 2006.

EPA plays an important role in minimizing environmental impacts when a unit must run for reliability reasons. But under this bill, a utility has no incentive to reach an agreement with EPA to minimize the environmental impacts of operating under a DOE order.

That's because all potential liability for environmental violations would be waived by the issuance of the DOE order. EPA's role is eliminated. And the public is left with no assurance that unnecessary pollution will be avoided. This bill is drafted in a way that creates the potential for a big loophole in environmental protections.

The bill does include some non-binding language encouraging DOE to narrowly tailor its emergency orders. But that language is not mandatory. It provides no guarantee that the orders will minimize environmental impacts.

The liability waiver contained in this bill is very broad. It waives liability under every federal, state, or local environmental law or regulation. It doesn't just apply to the Clean Air Act. It would completely waive any liability for failing to comply with the Clean Water Act, the Endangered Species Act, and any other federal law you can think of that could be characterized as an environmental law. It also clearly waives liability under a host of state and local laws. And there is no time limit on the liability waiver.

This approach creates an incentive for electric utilities to delay installation of required pollution controls, betting that at the end of the day DOE will have to issue an order to keep the lights on and shield the power plant from liability for its illegal pollution. This poses a serious threat to the recently finalized mercury air toxics rules as well as other important rules.

Under the bill, DOE could order a coal plant to run that generates coal ash that it places in an impoundment. If that impoundment bursts, as it did in Kingston, Tennessee, the spill could blanket nearby communities, pollute miles of streams and rivers, and cost over a billion dollars to clean up.

Under the language of this bill, the company operating that plant could be shielded from any liability for the damage. I think we can all agree that would be a terrible outcome.

I look forward to examining these issues with our witnesses.