April 1, 2014

Dear Senator,

We, the undersigned, are Member Scholars with the Center for Progressive Reform (CPR), a research and education organization working to protect health, safety, and the environment. Collectively, we have several decades of experience in studying, writing about, and teaching administrative law in law schools across the United States. Based on this experience, we are extremely troubled by S.J. Res. 30, a Congressional Review Act (CRA) "resolution of disapproval" that seeks to block the Environmental Protection Agency's (EPA) proposed Clean Air Act New Source Performance Standard (NSPS) to limit greenhouse gas emissions from future fossil-fueled power plants (79 Fed. Reg. 1430 (Jan. 8, 2014)).

As you are aware, the CRA creates a process for Congress to review and potentially block *final* agency rules before they can take effect. By attempting to subject a proposed rule—as opposed to a final rule—to this process, S.J. Res. 30 is contrary to the statutory language and could raise questions as to the legitimacy of any resolution of disapproval.

The authors of the CRA had good reason to limit its review and disapproval process to final rules only. To apply this process to the EPA's proposed rule would short-circuit the general rulemaking process established under the Administrative Procedure Act (APA) and the more specific procedural requirements of the Clean Air Act, defeating the ability of the public and regulated entities to meaningfully participate in the development of this regulatory policy and contributing to the exact kind of "regulatory uncertainty" that many of supporters of S.J. Res. 30 have criticized in the past.

For nearly 70 years the APA-mandated rulemaking process has required agencies generally, and for more than 40 years the Clean Air Act has required the EPA in particular, to follow a straightforward process that draws on the expertise of agency professionals—including members of science review committees and the National Academy of Sciences—and on the diffuse knowledge and experiences of public stakeholders for ensuring regulations are legally sound and informed by relevant science and data. When the EPA publishes a proposed rule, it must include the factual data on which the proposed rule is based, the methodologies used in obtaining and analyzing the data, and the major legal interpretations and policy considerations underlying the proposed rule. This gives the public a full opportunity to review and assess the proposal and to comment on its legal and evidentiary basis. In addition, the EPA must provide an opportunity for a public hearing on the proposal, make a transcript of that hearing, and keep the docket

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open for thirty days for submission of additional or rebuttal views. In drafting any final rule, the EPA must consider the comments made and new information provided, respond to each significant comment and new information provided, and explain any major change. The rule may not be based on any information or data not contained in the public docket. If comments warrant drastic enough changes, the EPA may decide to incorporate them into a second proposal and undergo a second round of public review and comment before it can issue a final rule. Careful judicial review ensures that agencies adhere to this process closely. If a final rule is not consistent with law or supported by the evidence in the rulemaking record, or if an agency fails to adequately respond to a public comment, a reviewing court can set the rule aside, forcing the agency to start over the process from the beginning.

The EPA's proposed NSPS to limit greenhouse gas emissions from future fossil-fueled power plants that is the target of S.J. Res. 30 illustrates how the APA rulemaking process, as augmented by the Clean Air Act, was intended to work. The EPA published its first proposed NSPS in April of 2012. After considering public comments on this first proposal, and in response to other public outreach efforts, the EPA determined that it was necessary to withdraw the initial proposal and proceed instead with a second proposal, which it published this past January. The EPA is currently taking and considering public comment on this new proposal and undertaking extensive outreach to public stakeholders. This public comment and outreach will no doubt prompt the agency to further refine its proposal, and could conceivably lead to even a third proposal—exactly as intended under the APA and the Clean Air Act. Nevertheless, S.J. Res. 30 threatens to cut this process short, preventing the public from meaningfully participating in the development of this critical rule.

It is even conceivable that if the rulemaking process is permitted to run its course, the EPA might issue a final rule that the supporters of the S.J. Res. 30 might actually endorse. This eventuality would never be realized, however, if S.J. Res. 30 is adopted.

To make matters worse, the supporters of S.J. Res. 30 could hardly have chosen a worse target for their attempted misuse of the CRA's accelerated review and disapproval process. The CRA provides that any rule that is the subject of a successful resolution of disapproval "may not be reissued in substantially the same form," and the rulemaking agency is prohibited from issuing a new rule that is substantially the same "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." 5 U.S.C. §801(b)(2). Thus, if S.J. Res. 30 is successful, it would not just block the EPA's proposed NSPS; it could also chill the development of all future proposals aimed at limiting greenhouse gas emissions from future power plants. As the overwhelming majority of scientists agree, time is quickly running out on averting the worst consequences of climate disruption; we simply cannot afford any unnecessary delays of rulemakings that address the largest sources of greenhouse gas emissions, including fossil-fueled power plants. Because S.R. Res. 30 targets a proposed rule, this chilling effect would have particularly damaging consequences. As noted above, a primary purpose of rulemaking machinery is to enable agencies both to apply their own expertise and gather the expertise of others to develop policy. Applying the CRA to block a final rule is problematic insofar as it prevents agencies from performing this function with regard to future rulemaking that is substantially the same as the rejected rule, but this damage is at least mitigated by the fact that the agency had a chance to explore the issues and develop a complete record in the initial, completed rulemaking. In contrast, applying the CRA to a proposed rule is far worse, since it would block the rulemaking agency from ever completing its policy analysis of the problem at

issue. In this way, agency efforts both to understand critical policy challenges and to determine how to tackle them would remain locked in an indefinite limbo.

If Congress and the President do feel compelled to adopt legislation blocking the EPA's proposed NSPS, then it should do so by going through the normal legislative process, rather than the accelerated process provided for under the CRA. If Congress is intent upon cutting short the deliberative and public process of rulemaking, it should at least subject the issue to the full legislative process, which would allow for opportunities for full committee consideration, debate, and amendments. The CRA does not authorize circumvention of this process.

In light of the above considerations, we strongly urge that Congress not subject the EPA's proposed NSPS to limit greenhouse gas emissions from future fossil-fueled power plants to the CRA process. At your request, we are happy to provide additional information about the rulemaking process and the CRA's role in it. We thank you for taking these views under consideration.

Sincerely,

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