

Dissenting Views on H.R. 3797, the “Satisfying Energy Needs and Saving the Environment (SENSE) Act”

H.R. 3797, the “Satisfying Energy Needs and Saving the Environment (SENSE) Act,” represents an effort by the Republicans to give special breaks under two Clean Air Act rules to power plants that use waste coal to generate electricity. The rules – the Cross State Air Pollution Rule (CSAPR) and the Mercury and Air Toxics Standards (MATS) rule – are two of the most important rules for protecting public health from toxic air pollutants like mercury and sulfur dioxide. If this bill were to become law, waste coal facilities would be able to pollute at a higher rate than other power plants.

I. BACKGROUND

A. EPA’s Cross-State Air Pollution Rule

To help 28 states in the eastern, central, and southern United States meet the health-based ambient air quality standards for fine particulate matter (PM_{2.5}) and ozone, the Environmental Protection Agency (EPA) issued the Clean Air Interstate Rule (CAIR) in March 2005. Under the rule, upwind states were required to reduce sulfur dioxide (SO₂) and nitrogen oxides (NO_x) emissions.¹ This rule was promulgated pursuant to Clean Air Act section 110(a)(2)(D)(i)(I), which is known as the “good neighbor provision.” CAIR was overturned by the D.C. Circuit Court of Appeals in 2008.²

EPA promulgated CSAPR as a replacement for CAIR on July 6, 2011.³ CSAPR requires states in the eastern, central, and southern United States to reduce power plant emissions that cause air quality problems in other states.

The timing of CSAPR's implementation has been affected by a number of court actions.⁴ On April 29, 2014, the U.S. Supreme Court issued an opinion reversing an earlier D.C. Circuit decision that had vacated the rule. Subsequently, on October 23, 2014, the D.C. Circuit lifted its

¹ U.S. EPA, *EPA Announces Landmark Clean Air Interstate Rule – Major Step Forward in Eliminating ‘Smog’ Days in New England* (Mar. 10, 2005) (online at yosemite.epa.gov/opa/admpress.nsf/dc614f1d30c3fd66852572a000657b5a/ff502720c7a5c8d2852570ca006ab475!OpenDocument).

² *State of North Carolina v. EPA* (D.C. Cir. 2008) (on petitions for rehearing); *State of North Carolina v. EPA*, Reply in Support of Petition for Rehearing or Rehearing En Banc (Nov. 17, 2008).

³ U.S. EPA, *Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals; Final Rule*, 76 Fed. Reg. 48208 (Aug. 8, 2011) (final rule) (hereinafter “*Cross-State Air Pollution Rule*”).

⁴ On December 30, 2011, CSAPR was stayed prior to implementation. On August 21, 2012, CSAPR was vacated. *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Aug. 21, 2012) (online at [www.cadc.uscourts.gov/internet/opinions.nsf/19346B280C78405C85257A61004DC0E5/\\$file/11-1302-1390314.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/19346B280C78405C85257A61004DC0E5/$file/11-1302-1390314.pdf)).

prior CSPAR stay.⁵ The D.C. Circuit also granted EPA's request to delay the rule's compliance deadlines by three years. Accordingly, CSAPR Phase 1 implementation began in 2015, with Phase 2 beginning in 2017.⁶ In December 2015, EPA proposed the CSAPR Update Rule to address interstate transport of air pollution under the 2008 ozone National Ambient Air Quality Standards (NAAQS).⁷

In the CSAPR rules, EPA provides a multi-step process to address the requirements of the good neighbor provision. Under that process, if EPA determines that a downwind state expects to have problems attaining or maintaining an air quality standard, EPA would then look at which upwind states are contributing to these identified problems. EPA would then set up an "emissions budget" for those upwind states found to have emissions that significantly contributed to problems in a downwind state. A given state's emissions budget represents the allowable amount for emissions, after identifying and accounting for those emissions contributing significantly to nonattainment by a downwind state.⁸

Once a state's emissions budget was established, EPA set up a tradable allowance program for the power plants covered by CSAPR. Power plants within a state were allocated emissions allowances that could be traded – subject to some requirements – as needed to comply with the rule. Alternatively, states had the option of developing their own state implementation plan (SIP) to meet the rule's required emissions reductions.⁹

B. Clean Air Act Section 112

Section 112 of the Clean Air Act requires the EPA to set technology-based standards to reduce air toxics. These hazardous air pollutants (HAPs) are known or suspected to cause cancer or other serious health effects, such as reproductive or birth defects or neurological effects, or adverse environmental effects. EPA rulemakings aim to reduce the release of 187 HAPs including mercury, cadmium, lead, benzene and dioxin.¹⁰ EPA takes a technology-based

⁵ *EPA v. EME Homer City Generation, L. P.*, No. 12-1182, Slip Op. (2013) (online at www.supremecourt.gov/opinions/13pdf/12-1182_553a.pdf); Order Granting EPA's Motion to Lift the Stay of the Transport Rule, *EME Homer City Generation, L. P. v. EPA*, No. 11-1302 (D.C. Cir.) (online at www3.epa.gov/airtransport/CSAPR/pdfs/CSAPR_Stay_Lift.pdf).

⁶ U.S. EPA, *Cross-State Air Pollution Rule (CSAPR)* (accessed Jan. 31, 2016) (online at www3.epa.gov/crossstaterule/).

⁷ U.S. EPA, *Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, 80 Fed. Reg. 75706 (Dec. 3, 2015) (proposed rule).

⁸ U.S. EPA, *Cross-State Air Pollution Rule Presentation* (Dec. 15, 2011) (online at www3.epa.gov/crossstaterule/pdfs/CSAPRPresentation.pdf); U.S. EPA, *FACT SHEET: The Cross-State Air Pollution Rule: Reducing the Interstate Transport of Fine Particulate Matter and Ozone* (July 18, 2011) (online at www3.epa.gov/crossstaterule/pdfs/CSAPRFactsheet.pdf).

⁹ *Id.*

¹⁰ U.S. Environmental Protection Agency, *About Air Toxics* (online at www.epa.gov/oar/toxicair/newtoxics.html).

approach to regulating HAPs in order to achieve substantial reductions in air toxics relatively quickly using readily available technology. EPA also follows the technology-based standards with additional standards where needed to protect health, as determined through risk assessments.¹¹

Section 112 requires EPA to develop regulations for distinct source categories (e.g., power plants, boilers, and cement kilns) that set specific emission limits based on the emission levels already being achieved by similar facilities. These regulations are known as Maximum Achievable Control Technology (MACT) standards. For existing sources, the emission standard must be at least as stringent as the average emissions achieved by the best-performing 12 percent of sources in that source category. For new sources, the emission standard must be at least as stringent as the emission control achieved by the best-controlled similar source.¹² These minimum emissions levels are known as the MACT floor.

C. EPA's Mercury and Air Toxics (MATS) Rule

Section 112 of the Clean Air Act directs EPA to complete a study of the hazards to public health reasonably anticipated to occur as a result of toxic air pollution from power plants. EPA completed the study and concluded that it was appropriate and necessary to regulate HAPs from power plants.¹³ Power plants are by far the largest U.S. source of mercury emissions into the air, and they also release other toxic metals, such as arsenic, chromium and nickel, which can cause cancer and other serious health harm.

EPA's finding triggered a requirement for the Agency to finalize regulations to control toxic air pollution from power plants. In 2012, EPA issued the MATS rule, which established the first national standards to address power plant emissions of mercury and toxic air pollution.¹⁴ There were no federal standards requiring power plants to limit their emissions prior to this rule – despite the availability of proven control technologies, and the passage of more than 20 years from enactment of the 1990 Clean Air Act Amendments.¹⁵

¹¹ Clean Air Act § 112(f).

¹² *Id.* at § 112(d)(3).

¹³ U.S. EPA, *Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units – Final Report to Congress, Volume 1* (Feb. 1998).

¹⁴ U.S. EPA, *National Emission Standards for Hazardous Air Pollutants from Coal-and Oil-fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, 77 Fed. Reg. 9034 (Feb. 16, 2012) (final rule) (online at www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-806.pdf) (hereinafter “*MATS Final Rule*”).

¹⁵ U.S. EPA, *Mercury and Air Toxics Standards (MATS) Basic Information* (accessed Jan. 31, 2016) (online at www3.epa.gov/mats/basic.html).

EPA's MATS rule establishes MACT standards for HAPs emitted from coal- and oil-fired power plants, limiting the emissions of heavy metals and acid gases¹⁶ from these sources. The final rule will prevent 90 percent of the mercury in coal burned at power plants from being released.¹⁷ To achieve these reductions, the MATS rule sets numeric emissions limits for mercury, particulate matter (as a surrogate for other heavy metals), and acid gases for all existing and new coal-fired and oil-fired units.

The MATS rule also establishes work practice standards, rather than numeric emissions limits, to reduce emissions of certain organic HAPs, including dioxin/furan, that are a product of inefficient combustion. These work practice standards merely require utilities to perform annual maintenance and inspection at covered units to improve efficiency.¹⁸

Existing sources had three years – or until April 16, 2015 – to comply with the rule. In the final rule, EPA made it clear that the option of a fourth year – until April 16, 2016 – for compliance would be broadly available.¹⁹

During the MATS rulemaking process, EPA identified several power plants that, based on the data available, exhibited the ability to achieve all of the MACT standards for existing sources.²⁰ Among those sources are both pulverized coal and circulating fluidized-bed power plants, and power plants burning bituminous coal, subbituminous coal, lignite, and coal refuse (or waste coal). The EPA has also noted that there are waste coal units that have installed add-on control technology that will allow them to be in compliance with MATS requirements.²¹

A number of groups submitted comments on the MATS rule urging EPA to create a separate subcategory for waste coal units.²² However, in the final MATS rule, EPA noted that the HAP emissions from waste coal units are not sufficiently different from emissions from coal-

¹⁶ Heavy metals such as mercury, arsenic, and chromium, and acid gases such as hydrochloric acid (HCl) and hydrofluoric acid (HF).

¹⁷ U.S. EPA, *Fact Sheet: Mercury and Air Toxics Standards for Power Plants* (Dec. 2011) (online at www.epa.gov/airquality/powerplanttoxics/pdfs/20111221MATSummaryfs.pdf).

¹⁸ *Id.*

¹⁹ U.S. EPA, *Mercury and Air Toxics Standards (MATS) Basic Information* (accessed Jan. 31, 2016) (online at www3.epa.gov/mats/basic.html); U.S. EPA, *MATS Final Rule*, 77 Fed. Reg. 9304, at 9410 (“We believe that the permitting authorities have the discretion to use this extension authority to address a range of situations in which installation schedules may take more than 3 years”).

²⁰ U.S. EPA, *MATS Final Rule*, 77 Fed. Reg. 9304, at 9397.

²¹ U.S. EPA, *EPA's Responses to Public Comments on EPA's National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units*, p. 761 (Dec. 2011) (online at www3.epa.gov/airtoxics/utility/mats_rtc_chapters_foreword-1-2-3-4_121611.pdf).

²² U.S. EPA, *MATS Final Rule*, 77 Fed. Reg. 9304, at 9396-9397.

fired power plants to warrant further subcategorization or a separate MACT floor.²³ This approach was upheld by the D.C. Circuit Court of Appeals which concluded that "... EPA reasonably decided that separate standards for coal-refuse-fired [circulating fluidized bed power plants] were not warranted."²⁴

D. Use of Waste Coal

As noted above, a subset of power plants in the U.S. burn waste coal as their fuel source. This waste coal is a byproduct of coal mining, physical coal cleaning, and other coal preparation operations, and also contains matrix materials, clay and other organic and inorganic materials.²⁵ Waste coal is primarily found in large piles near abandoned mines, and once burned the resulting ashes are used in mine reclamation projects.²⁶ The majority of these power plants are in Pennsylvania; however, some are located in other states like West Virginia and Utah.

II. H.R. 3797, THE SATISFYING ENERGY NEEDS AND SAVING THE ENVIRONMENT (SENSE) ACT

A. Summary of the SENSE Act

Section 2(b) relates to the treatment of waste coal facilities under CSAPR. The section requires the EPA Administrator to ensure that power plants using waste coal derived from bituminous coal would maintain the same allocation of Phase 1 SO₂ emissions allowances under Phase 2. Section 2(b)(1)(C) prohibits these waste coal plants from trading or banking the additional SO₂ emissions allowances. Section 2(b)(2) prohibits the EPA Administrator from increasing a state's emissions budget in Phase 2 to account for the extra allowances allocated to waste coal units.

Section 2(c) relates to the treatment of waste coal facilities under MATS.²⁷ Specifically, section 2(c)(2)(v) provides an additional compliance option for the hydrogen chloride (HCl) and SO₂ standard, allowing waste coal facilities – or a group of waste coal facilities – to capture and control 93 percent of SO₂ emissions.

B. Issues Raised by the SENSE Act

The CSAPR provisions in section 2(b) raise a number of concerns. First, in the absence of the bill, Phase 2 SO₂ emissions allowance allocations would likely have decreased for all, or at least most, of the existing waste coal units. Second, preventing any increase to a state's

²³ *Id.* at 9395.

²⁴ *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222, at 1250 (D.C. Cir. Apr. 15, 2014).

²⁵ U.S. EPA, *MATS Final Rule*, 77 Fed. Reg. 9304, at 9484.

²⁶ *White Stallion Energy Center* at 1250.

²⁷ *Note*: section 2(c) is not limited just to waste coal units burning bituminous coal.

emissions budget, as this section would do, is ostensibly to limit the impact of the resulting increased pollution from waste coal facilities on downwind states. However, the result of this provision would be that other power plants in a given state that are covered by CSAPR will have to cut their emissions to make up the difference. Third, this section gives the EPA Administrator a number of new authorities that the Clean Air Act currently reserves to states by tasking the Administrator with providing and allocating CSAPR emissions allowances.

In essence, section 2(b) picks winners and losers – tipping the scales in favor of bituminous waste coal units, at the expense of all other covered units within a state. This provision would artificially reallocate emissions allowances, alter the CSAPR trading system, create inequities in the market, and impede a state’s right to determine how to best comply with the requirements of the rule. In submitted testimony, EPA noted that the bill’s changes to the CSAPR program “would remove economic incentives to reduce emissions at coal refuse plants,” and ultimately would result in “a less efficient and more costly compliance with CSAPR.”²⁸

Further, if a state wishes to allocate additional allowances to waste coal plants, it can already do so through the SIP process. During the subcommittee legislative hearing, John Walke from the Natural Resources Defense Council noted, “States today have the authority to differently allocate allowances within the emitters in their state... So if Pennsylvania wants to incentivize waste coal energy production, they can do so by reallocating sulfur dioxide allowances within the electric sector.”²⁹ EPA also raised concerns with this provision since it “would potentially deny states control over allocations of allowances by rendering any submitted state plan with a different allocation to these units unapprovable” by the Agency.³⁰

The MATS provisions in section 2(c) also raise a number of concerns. It is not known how many facilities would opt for the bill’s new compliance option, but the end result is likely additional emissions of air pollutants. Proponents argue that waste coal plants are unable to meet the current HCl and SO₂ limits and need an alternative pathway to comply with the MATS rule. However a less stringent SO₂ standard is not necessary since existing technology is capable of

²⁸ House Committee on Energy and Commerce, Subcommittee on Energy and Power, Written Statement of Janet McCabe, Acting Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency (EPA), *Legislative Hearing on H.R. 3797, the Satisfying Energy Needs and Saving the Environment Act (SENSE) Act and H.R. _____, the Blocking Regulatory Interference from Closing Kilns (BRICK) Act*, 114th Cong. (Feb. 3, 2016) (online at docs.house.gov/meetings/IF/IF03/20160203/104366/HHRG-114-IF03-20160203-SD004.pdf) (hereinafter “*Subcommittee Legislative Hearing*”).

²⁹ Subcommittee Legislative Hearing, Response to Questions of John Walke, Natural Resources Defense Council (online at democrats-energycommerce.house.gov/committee-activity/hearings/hearing-on-hr-3797-the-satisfying-energy-needs-and-saving-the-0).

³⁰ Subcommittee Legislative Hearing, Written Statement of Janet McCabe, Acting Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency (EPA) (online at docs.house.gov/meetings/IF/IF03/20160203/104366/HHRG-114-IF03-20160203-SD004.pdf).

controlling 99 percent of HCl and 96 percent of SO₂.³¹ At the hearing, Mr. Walke explained that “[i]t is simply incorrect to suggest that coal waste plants burning any type of coal waste are incapable of achieving either the HCl or the SO₂ standard in the existing MATS rule” and that,

[W]hen the D.C. Circuit in its decision heard the full legal arguments from the trade association for waste coal operators and looked at all the evidence they presented and the evidence in the administrative record that EPA had compiled, they squarely rejected those claims in a three to nothing decision and that decision was left untouched by the Supreme Court in that relevant Respect.³²

Democratic members offered two amendments during the full committee markup to address the concerns raised by the SENSE Act. Ranking Member Pallone offered an amendment to strike the bill’s CSAPR sections, highlighting that the provision is unnecessary since states already have the ability to reallocate emissions allowances to benefit waste coal units if they so choose. Rep. Engel offered an amendment allowing a state to opt-out of the bill’s CSAPR provisions if it determined that doing so would lead to an increase in the overall cost of complying with EPA’s rule. The Engel amendment highlights EPA’s concern that the bill interferes with the CSAPR market and would likely result in less efficient and more costly compliance. Both amendments also address the bill’s states’ rights issues by preserving a state’s ability to determine the best method of compliance with CSAPR, which is currently afforded to them under the Clean Air Act. The Pallone and Engel amendments were each defeated by a party line vote of 22 -29.

III. CONCLUSION

We oppose H.R. 3797 and the legislative remedy offered by this bill. It comes as no surprise that the majority is once again offering legislation to undermine Clean Air Act regulations to benefit coal-fired power plants at the expense of public health. What is surprising is that the SENSE Act puts major coal-fired plants at a disadvantage relative to waste coal plants that receive regulatory relief under this legislation. H.R. 3797 undermines states’ authorities to develop emission budgets tailored to the specific emission sources in their power and industrial sectors. And, H.R. 3797 undermines the proven market-based approach of using emission credits to achieve improved air quality at the lowest cost.

All of this is being done to benefit the approximately 20 waste coal plants that exist in a handful of states. While these plants address one of coal’s major legacy problems – dangerous, polluting piles of coal mine tailings from abandoned coal mining operations – cleanup of these piles can and should be done without undue transfer of mercury, SO₂ and other pollutants from the land to the air.

³¹ U.S. EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards*, at 2-8 – 2-9 (Dec. 2011) (online at www3.epa.gov/ttn/ecas/regdata/RIAs/matsriafinal.pdf).

³² Subcommittee Legislative Hearing, Response to Questions of John Walke, Natural Resources Defense Council (online at democrats-energycommerce.house.gov/committee-activity/hearings/hearing-on-hr-3797-the-satisfying-energy-needs-and-saving-the-0).

It is ironic that those who routinely accuse President Obama and his administration of waging a “war on coal” are supporting H.R. 3797, a bill that will place greater emission reduction burdens on coal-fired utilities to allow waste coal facilities to emit more pollutants. The bill also deprives facilities of valuable emission credits that they would otherwise gain under current law for converting to natural gas or otherwise reducing their emissions.

None of this is necessary. The states already have the authority to allocate additional emission allowances to waste coal plants if they choose to do so under CSAPR. This bill imposes a specific allocation solution on the states, a one-size-fits-all solution that allows waste coal plants to emit more pollutants. In addition, there is no evidence that more generous emission allocations are necessary. There are waste coal plants that meet the CSAPR and MATS regulations today and there is technology available to enable waste coal plants to comply with the requirements of these rules. There is no justification for treating them differently from other coal-fired generation facilities.

For the reasons stated above, we dissent from the views contained in the Committee’s report.



Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce



Bobby L. Rush
Ranking Member
Subcommittee on Energy and Power