

## Committee on Energy and Commerce

### DISSENTING VIEWS

#### *H.R. 1119, the Satisfying Energy Needs and Saving the Environment (SENSE) Act*

We oppose H.R. 1119, the “Satisfying Energy Needs and Saving the Environment (SENSE) Act,” which gives special breaks and preferences under the Clean Air Act (CAA) to power plants that use waste coal to generate electricity. These preferences would allow them to emit more pollution than other power plants, including other coal-fired facilities. The Mercury and Air Toxics Standards (MATS) rule is one of the most important rules for protecting public health from toxic air pollutants like mercury and sulfur dioxide (SO<sub>2</sub>). H.R. 1119 directly undermines this important public health regulation. The legislation would also prevent the Environmental Protection Agency (EPA) from strengthening emission standards for these plants, even if future technology could achieve lower emissions, or if clear evidence of harm to public health or the environment is present.

#### BACKGROUND

Section 112 of the CAA requires the EPA to set technology-based standards to reduce air toxics. These hazardous air pollutants (HAPs) are known or suspected to cause cancer and other serious health effects, such as reproductive or birth defects or neurological effects, as well as adverse environmental effects. EPA rulemakings aim to reduce the release of 187 HAPs including mercury, cadmium, lead, benzene, and dioxin.<sup>1</sup> EPA takes a technology-based approach to regulating HAPs in order to achieve substantial reductions in air toxics relatively quickly using readily available technology.

Section 112 requires EPA to develop regulations for distinct source categories – like power plants – that set specific emission limits based on levels already being achieved by similar facilities. These regulations are known as Maximum Achievable Control Technology (MACT) standards, and the CAA required EPA to complete them for all source categories by 2000. EPA sets minimum emissions levels, known as the MACT floor, based on the best-performing sources in a category.

Power plants are by far the largest U.S. source of mercury air pollution. They also release other heavy metals, such as arsenic, chromium, and nickel, which can cause cancer and other serious health effects. In 2012, EPA issued the MATS rule, which established the first national standards to address power plant emissions of mercury and toxic air pollution.<sup>2</sup> The

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<sup>1</sup> Environmental Protection Agency, *About Air Toxics* (<https://www.epa.gov/urban-air-toxics/about-urban-air-toxics>) (accessed Jan. 9, 2018).

<sup>2</sup> Environmental Protection Agency, *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. 9304 (Feb. 16,

MATS rule established MACT standards for HAPs emitted from coal- and oil-fired power plants, limiting the emissions of heavy metals and acid gases<sup>3</sup> from these sources. To achieve these reductions, the MATS rule set 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. Existing sources had three years with the possibility for a one year extension – or until April 2015 and 2016 respectively – to comply with the rules.<sup>4</sup>

A number of groups submitted comments on the MATS rule urging EPA to create a separate subcategory for waste coal units.<sup>5</sup> In the final MATS rule, EPA noted that HAP emissions from waste coal units are not sufficiently different from emissions from coal-fired power plants to warrant further subcategorization.<sup>6</sup> But in fact, waste coal facilities are some of the best-performing units, and were used in setting the MACT floor for the MATS rule.

A subset of U.S. power plants burn waste coal as their primary fuel source. This waste coal is a byproduct of coal mining, physical coal cleaning, and other coal preparation operations, containing matrix materials, clay and other organic and inorganic materials.<sup>7</sup> Waste coal is primarily found in large piles near abandoned mines, and once burned the resulting ashes are used in mine reclamation projects.<sup>8</sup> The majority of these power plants are in Pennsylvania; however, a few are located in other states, including West Virginia and Utah.

After EPA denied its petition to change the MATS rule for waste coal burning plants, the Anthracite Region Independent Power Producers Association challenged the agency's decision in the D.C. Circuit. The case is still pending. In April the court granted the Trump Administration's request for additional time to consider the appeal so that EPA could reconsider its position on the MATS rule.<sup>9</sup>

#### *SUMMARY OF THE SENSE ACT*

Section 2(b) of the SENSE Act relates to the treatment of waste coal facilities under MATS. This section provides an additional compliance option for the hydrogen chloride (HCl)

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2012) (final rule) ([www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-806.pdf](http://www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-806.pdf)) (hereinafter "*MATS Final Rule*").

<sup>3</sup> Acid gases include compounds such as hydrochloric acid and hydrofluoric acid.

<sup>4</sup> Environmental Protection Agency, *Mercury and Air Toxics Standards (MATS) Basic Information* ([www.epa.gov/mats/basic-information-about-mercury-and-air-toxics-standards](http://www.epa.gov/mats/basic-information-about-mercury-and-air-toxics-standards)).

<sup>5</sup> See note 2, at 9396-9397.

<sup>6</sup> *Id.* at 9395.

<sup>7</sup> *Id.* at 9484.

<sup>8</sup> *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222, at 1250 (D.C. Cir. Apr. 15, 2014).

<sup>9</sup> *D.C. Circuit sides with Trump EPA, delays mercury litigation*, Greenwire (Apr. 28, 2017) ([www.eenews.net/greenwire/stories/1060053772/](http://www.eenews.net/greenwire/stories/1060053772/)).

and SO<sub>2</sub> standard, allowing waste coal facilities to capture and control 93 percent of SO<sub>2</sub> emissions. This standard is weaker than the standard required of other power plants.

Proponents argue that waste coal plants are unable to meet the current HCl and SO<sub>2</sub> limits and need an alternative pathway to comply with the MATS rule. However, existing technology is capable of meeting the standard.<sup>10</sup> The D.C. Circuit already rendered a decision on this argument, rejecting the assertion that waste coal plants are incapable of achieving these MATS requirements.<sup>11</sup> Contrary to what is alluded to in the majority's report, the CAA is not designed to merely maintain the status quo. In setting up this program, Congress intended for the law to push all facilities within an industrial sector to make the necessary upgrades to reduce their pollution in line with the best performing units.

It is not known how many facilities would opt for the new compliance option envisioned in this bill, but the end result is likely to be additional air pollution. The SENSE Act also picks winners and losers. By giving waste coal facilities license to pollute more than they should, it shifts the burden of reducing emissions to other sources in the state, most likely coal-fired units. Furthermore, the bill would lock in this weaker standard for the foreseeable future. A small number of waste coal units would be allowed to avoid controlling harmful pollution in perpetuity, regardless of any subsequent developments in control technologies or new information on the health and environmental effects of their pollution.

#### CONCLUSION

We oppose H.R. 1119 and the legislative remedy offered by this bill. It comes as no surprise that the majority is once again offering legislation to undermine CAA 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 by granting them unnecessary and unwarranted regulatory relief.

All of this is being done for no other reason than to benefit 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

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<sup>10</sup> Environmental Protection Agency, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards*, at 2-8 – 2-9 (Dec. 2011) ([www3.epa.gov/ttn/ecas/regdata/RIAs/matsriafinal.pdf](http://www3.epa.gov/ttn/ecas/regdata/RIAs/matsriafinal.pdf)).

<sup>11</sup> In response to questions during the February 3, 2016 hearing, John Walke from the Natural Resources Defense Council explained “when 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.” House Committee on Energy and Commerce, Subcommittee on Energy and Power, *Hearing on H.R. 3797, the SENSE Act and H.R. \_\_\_, the BRICK Act*, 114th Cong (Feb. 3, 2016) ([democrats-energycommerce.house.gov/committee-activity/hearings/hearing-on-hr-3797-the-satisfying-energy-needs-and-saving-the-0](http://democrats-energycommerce.house.gov/committee-activity/hearings/hearing-on-hr-3797-the-satisfying-energy-needs-and-saving-the-0)).

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operations – cleanup of these piles can and should be done without undue transfer of mercury, SO<sub>2</sub> and other pollutants from the land to the air.

None of this is necessary. There are waste coal plants that meet the MATS requirements today, and there is technology available to enable waste coal plants to comply with the requirements of this rule. 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.



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Committee on Energy and Commerce



Paul D. Tonko  
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