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ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE

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MEMORANDUM

May 10, 2016

To: Subcommittee on Energy and Power Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Markup of H.R. 4775, "Ozone Standards Implementation Act," and H.R. 4979 "Advanced Nuclear Technologies Development Act of 2016"

On **Wednesday, May 11, 2016, at 5:00 p.m. in room 2123 of the Rayburn House Office Building**, the Subcommittee on Energy and Power will convene a markup for the purpose of delivering opening statements on H.R. 4775 and H.R. 4979. The Subcommittee will reconvene on **Thursday, May 12, 2016, at 10:00 a.m. in room 2123 Rayburn House Office Building**.

I. H.R. 4775, THE "OZONE STANDARDS IMPLEMENTATION ACT OF 2016"

The Subcommittee on Energy and Power held a legislative hearing on H.R. 4775, the "Ozone Standards Implementation Act of 2016," on April 14, 2016, which was the third hearing this Congress on the Environmental Protection Agency's (EPA's) ozone standard. On June 12, 2015, the Subcommittee on Energy and Power held a hearing on EPA's proposed ozone standard with Acting Assistant Administrator for Air and Radiation, Janet McCabe. On June 16, 2015, the Subcommittees on Energy and Power and Commerce, Manufacturing and Trade held a joint hearing on the rule's potential impact on manufacturing. For further background information, please see the memos from the previous hearings.

A. EPA's Revision To The National Ambient Air Quality Standards For Ozone

The Clean Air Act (CAA) requires EPA to set national ambient air quality standards (NAAQS) for certain pollutants that endanger public health and the environment. EPA sets primary NAAQS at concentration levels sufficient to protect the public health with an "adequate margin of safety." For certain pollutants emitted from "numerous and diverse sources", the primary NAAQS identify the level of ambient air pollution that is "safe" to breathe. While costs

are not considered in establishing these standards, costs can be considered in developing plans to achieve the necessary reductions in air pollutants to meet these standards. These health-based standards are the cornerstone of the Clean Air Act.

On October 1, 2015, EPA issued a final rule tightening the ozone NAAQS from 75 ppb (parts per billion) to 70 ppb.[1] This decision was based on the review of thousands of studies showing ozone's effects on public health and welfare. The revised standard is consistent with the recommendations of the independent Clean Air Scientific Advisory Committee (CASAC), which had concluded that the science supports a standard within a range of 70 ppb down to 60 ppb.[2]

B. Analysis and Impact of H.R. 4775

H.R. 4775 would drastically alter the CAA to weaken air quality protections, allow more pollution, and threaten public health. Most of the changes specifically target the 2015 ozone NAAQS, however, the bill also undercuts the NAAQS process for all other air pollutants. These proposed changes would undermine significantly the features of the CAA that have driven important progress in improving air quality and public health.

The overall effect of the proposed changes included in H.R. 4775 is to delay the implementation of health-based air quality standards, make it more difficult to achieve more protective standards, and impose cost and technological feasibility considerations on the standard-setting process. The bill would also fundamentally alter those CAA provisions that ensure EPA's decisions to protect public health are informed by the most up-to-date scientific data, findings, and knowledge about air pollutants and their health and environmental impacts.

Section 2

Section 2 of the bill would make two key changes to deadlines in the CAA. First, section 2(a) would drastically extend deadlines associated with implementing the 2015 ozone NAAQS by up to eight years.[3] As a result, the outdated ozone standard, which CASAC and the EPA Administrator found to be insufficient to protect public health, would remain in effect. This section also decreases the amount of time states have to develop and submit their state implementation plans (SIPs) demonstrating how they will bring nonattainment areas into

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[1] U.S. Environmental Protection Agency (EPA), *National Ambient Air Quality Standards for Ozone*, 80 Fed. Reg. 65292 (Oct. 26, 2015) (final rule) (hereinafter "ozone NAAQS").

[2] CASAC noted that the decision about what standard provides the adequate margin of safety required by the Clean Air Act is a policy judgment left to the Administrator. *See* U.S. Environmental Protection Agency, *Overview of EPA's Updates to the Air Quality Standards for Ground-Level Ozone* (Oct. 1, 2015) (online at www.epa.gov/sites/production/files/2015-10/documents/overview_of_2015_rule.pdf).

[3] State recommendations on nonattainment areas would not be due to EPA until October 26, 2024, and EPA would have until October 26, 2025, to finalize designations. SIPs would then be due to EPA by October 26, 2026.

attainment, from three to four years after EPA finalizes area designations, to only one year. At the Subcommittee hearing, Ali Mirzakhalili, Director of the Division of Air Quality for Delaware's Department of Natural Resources and Environmental Control, testified that "by arbitrarily extending the compliance deadlines, it would leave the old, outdated ozone standard in effect. This action would not only provide citizens with a false sense of 'health' security, but also unnecessarily subjects them to serious health and welfare problems, including premature mortality."[4] He further explained that delaying implementation of the standard wouldn't make the air quality problems of nonattainment areas go away: "In order to solve air pollution we need to reduce air pollution.[5]

Second, section 2(b) adds an unnecessary provision to grandfather pending preconstruction permits under the old ozone standard. EPA already included such a provision in the final rule for the 2015 ozone NAAQS to help ensure a smooth transition to the new standard, so this section of the bill is not needed.[6] However, the language in section 2(b) would go far beyond the reasonable timeframes in the rule by exempting from complying with the 2015 ozone NAAQS any preconstruction permits completed before October 26, 2025 or having a draft permit or preliminary determination published before December 26, 2025.

Section 3

Section 3 of H.R. 4775 contains changes to the CAA that would undermine the development, implementation and maintenance of the law's air quality standards which are essential to protecting public health. In its written testimony, EPA noted that, "These changes would introduce uncertainty into a long-standing, proven approach for protecting public health and welfare."[7]

First, section 3(a) extends the review period for all criteria air pollutant NAAQS from every five years to every ten years. A NAAQS review cycle of ten years would subvert the purpose of these standards, which is to establish a level of emissions that adequately protects

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[4] Delaware Department of Natural Resources and Environmental Control, *Prepared Written Testimony of Ali Mirzakhalili, Director, Division of Air Quality before the House Committee on Energy and Commerce Subcommittee on Energy and Power at a hearing entitled "H.R. 4775, Ozone Standards Implementation Act of 2016"* (Apr. 14, 2016) (online at democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/Testimony-Mirzakhalili-Ozone-Hearing-2016-04-14.pdf).

[5] House Committee on Energy and Commerce, Subcommittee on Energy and Power, *Hearing entitled "H.R. 4775, Ozone Standards Implementation Act of 2016"*, 114th Cong. (Apr. 14, 2016).

[6] U.S. EPA, *National Ambient Air Quality Standards for Ozone*, 80 Fed. Reg. 65292 at 65433 (Oct. 26, 2015) (final rule).

[7] U.S. EPA, *Prepared Statement for the Record of Janet McCabe, Acting Assistant Administrator, Office of Air and Radiation for the House Committee on Energy and Commerce Subcommittee on Energy and Power at a hearing entitled "H.R. 4775, Ozone Standards Implementation Act of 2016"* (Apr. 14, 2016).

public health based on the latest scientific knowledge. The current five-year cycle provides a reasonable amount of time for the development and review of new studies, and EPA is only required to make changes to a NAAQS if the latest information supports doing so to protect public health with "an adequate margin of safety."

Second, section 3(b) changes the long-standing criteria for establishing an air quality standard from one that is based solely on protecting public health to one that includes a consideration of the "technological feasibility" of the standard. This proposal has already been debated and rejected by the courts."[8] Delaware's Director of Air Quality testified that:

> "removing this important 'firewall' separating the setting of the standards from their implementation, the public will never know what level of air quality is truly safe. Imagine an oncologist discovering, through the best medical tests, that her patient has cancer but, because the treatment is not 'feasible,' she tells the patient he simply has a bad case of the flu. The diagnosis is not dependent on the feasibility of the treatment."[9]

In its written statement, EPA further notes that such a change:

> "would undermine the health-based decision-making which has been central to the success of the NAAQS. Setting a primary NAAQS is about defining what clean, healthy air is. The current NAAQS implementation process allows for consideration of costs as well as technical feasibility. Despite repeated assertions that achieving clean air was just not feasible, American ingenuity has consistently risen to the challenge and made our country the leader in both clean air and clean air technology. That approach has been very successful for both the health of Americans and our economy."[10]

Third, section 3(c) requires that, before establishing or revising any NAAQS, the Administrator must request, and CASAC must provide, advice on any adverse public health, welfare, social, economic, or energy effects resulting from meeting that standard. This section is virtually identical to a provision in existing law, but notably the CAA does not make this

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[8] EPA notes that it "cannot consider the economic or technological feasibility of attaining ambient air quality standards, although such factors may be considered to a degree in the development of state plans to implement the standards." U.S. EPA, *National Ambient Air Quality Standards for Ozone*, 80 Fed. Reg. 65292 at 65445 (Oct. 26, 2015) (final rule).

[9] Delaware Department of Natural Resources and Environmental Control, *Prepared Written Testimony of Ali Mirzakhalili, Director, Division of Air Quality before the House Committee on Energy and Commerce Subcommittee on Energy and Power at a hearing entitled "H.R. 4775, Ozone Standards Implementation Act of 2016"* (Apr. 14, 2016) (online at democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/Testimony-Mirzakhalili-Ozone-Hearing-2016-04-14.pdf).

[10] U.S. EPA, *Prepared Statement for the Record of Janet McCabe, Acting Assistant Administrator, Office of Air and Radiation for the House Committee on Energy and Commerce Subcommittee on Energy and Power at a hearing entitled "H.R. 4775, Ozone Standards Implementation Act of 2016"* (Apr. 14, 2016).

information a prerequisite for a NAAQS revision.[11] Doing so would inject the consideration of costs into the standard setting process. As noted earlier, NAAQS standards are based solely on protecting public health; however, other criteria can be considered by states when developing a SIP.

Fourth, section 3(d) would create a loophole in the preconstruction permitting process, by establishing arbitrary procedural requirements for EPA to follow when setting a new air quality standard. If EPA does not issue rules and guidance concurrently with an updated NAAQS, then a new or expanding facility can apply for a preconstruction permit based on the old air quality standard, which is not adequate to protect public health. In effect, this bill could give new sources of pollution "amnesty" from new air quality standards leaving existing facilities with a burden to do more to reduce their emissions if the area is near or in nonattainment. This would worsen air quality, particularly in communities downwind of the facility, undermine the basic framework of the CAA, raise the economy-wide cost of cleaning up pollution, and undercut public confidence in permitting programs that are designed to protect public health.

As a practical matter, it is not always feasible or advisable for EPA to issue concurrent implementation regulations and guidance when revising a NAAQS. Most guidance develops organically as result of consultation with state and local air agencies and affected sources after they begin the process of implementing the NAAQS and ask EPA questions. Requiring EPA to issue unnecessary or premature rules and guidance, as the bill would do, could complicate the ability of EPA, the states, and regulated parties to meet their legal obligations and create greater regulatory uncertainty. Further, state and local permitting agencies do not need concurrent EPA rules and guidance to begin processing preconstruction permits under a new air quality standard, because it is well established that they have decades of experience managing this program with existing tools at their disposal.[12]

Fifth, section 3(e) would exempt extreme nonattainment areas, from having to establish contingency measures if they fail to make progress toward achieving the ozone standard. Without these contingency measures, there would be no incentive for extreme nonattainment areas to even attempt controlling their emissions. This may result in the area not meeting the ozone standard indefinitely or having to make any progress toward achieving the standard.

Sixth, sections 3(f) and 3(g) would allow states to use both economic feasibility and technological achievability as justification for achieving fewer emission reductions in moderate, serious, or extreme nonattainment areas under the ozone and particulate matter NAAQS. The

[11] Clean Air Act §109(d)(2)(C)(iv).

[12] At a hearing in 2014, on a similar legislative proposal, one witness took issue with what he called the "underlying assumption of the legislation," that "permitting authorities are incapable of managing the pre-construction permitting process" despite "decades of experience showing otherwise." He testified that a "wealth of guidance and tools" exist that the state can use after EPA adopts or revises a NAAQS. He also noted that the state, on occasion, has "found that approaches that we developed during transition were more flexible and protective than those contained in the guidance issued later by EPA." (Energy and Power Legislative Hearing, May 21, 2014, O'Mara testimony)

changes in these sections would lower the bar for achieving reasonable progress toward meeting the standard, leading to fewer emissions reductions in nonattainment areas overall. As a result, states with nonattainment areas would be able to rule out using viable emissions reduction measures, make less progress on improving air quality, and still be in compliance with the requirements of the law.

Finally, 3(h) would expand the list of circumstances that are included in the definition of "exceptional events," to include several common conditions and occurrences that are not, in fact, exceptional.[13] Allowing states to seek relief by claiming additional exceptional events will artificially reduce reporting on the severity of air pollution in the area. It would also all but ensure that areas having stagnant air masses experiencing meteorological inversions, heat waves, or droughts; and that have poor air quality would remain in nonattainment. Further, changing air quality monitoring protocols in ways that lead to underreporting of poor air quality conditions will cause areas with poor air quality to appear much better under conditions of extreme heat and drought. Given how ozone levels are often higher on hotter days, such an expansion of the exceptional events definition would be a significant change.

II. H.R. 4979, THE "ADVANCED NUCLEAR TECHNOLOGY DEVELOPMENT ACT OF 2016"

Nuclear power reactor designers are developing a number of advanced non-light water reactor (LWR) and light-water small modular reactor (SMR) designs employing innovative solutions to technical nuclear power issues.[14] These innovations have the potential to produce nuclear power more efficiently and with less waste than current technologies.

H.R. 4979, The Advanced Nuclear Technology Development Act of 2016, was introduced by Rep. Latta (R-OH) and Rep. McNerney (D-CA) on April 18, 2016. The legislation aims to foster civilian research and development of advanced nuclear energy technologies and enhance the licensing and commercial deployment of such technologies.

The bill calls for the Nuclear Regulatory Commission (NRC) and the Department of Energy (DOE) to enter into a memorandum of understanding (MOU) covering three major areas. First, the MOU would ensure that the two agencies have sufficient technical expertise to support and regulate advanced reactor technology. The MOU would also focus on modeling and simulation using computers and software codes to calculate performance of advanced reactors. Lastly, the agencies would ensure that the facilities are maintained and developed to support innovative reactor technology.

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[13] Section 3(h) removes the exclusion of stagnation of air masses that are not "ordinarily occurring," meteorological inversions, high temperatures or lack of precipitation from the definition of "exceptional events" for purposes of reviewing and handling air quality monitoring data.

[14] U.S. Nuclear Regulatory Commission, *Advanced Reactors and Small Modular Reactors* (online at www.nrc.gov/reactors/advanced.html) (accessed Apr. 25, 2016).

The bill also requires that NRC, not later than 270 days after enactment, put together a plan for developing an efficient, risk-informed, technology-neutral framework for advanced reactor licensing. The plan is required to evaluate a number of subjects, such as the unique aspects of advanced reactor licensing and options to expedite the licensing process. In developing the plan, NRC must seek input from DOE, the nuclear industry, and other public stakeholders.

H.R. 4979 exempts from NRC user fee assessments through 2020 any expenditures authorized for activities related to the development of regulatory infrastructure for advanced nuclear reactor technologies. It also requires the Secretary of Energy to transmit to the appropriate Congressional committees a report evaluating activities intended to facilitate the testing and demonstration of advanced reactors.