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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

February 1, 2016

To: Subcommittee on Energy and Power Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: 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"

On Wednesday, February 3, 2016, at 10:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Energy and Power will hold a 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."

I. H.R. _, THE "BLOCKING REGULATORY INTERFERENCE FROM CLOSING KILNS (BRICK) ACT"

A. Background

1. *Clean Air Act Section 112*

Section 112 of the Clean Air Act requires the Environmental Protection Agency (EPA) to set technology-based standards to reduce toxic air pollutants. Toxic air pollutants, which are also known as 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.[1]

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

In the 1990 Clean Air Act Amendments, Congress established a new approach to regulating air toxics. Congress directed EPA to take a technology-based approach to the suite of air toxics rather than the chemical-by-chemical, risk-based approach that had largely failed to address toxic air pollution during the Clean Air Act's first 20 years. Congress's focus was on achieving substantial reductions in air toxics relatively quickly using readily available technology. It directed EPA to follow the technology-based standards with additional standards, where needed to protect health, as determined through risk assessments.[2]

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 – or 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.[3] For new sources, the emission standard must be at least as stringent as the emission control achieved by the best-controlled similar source.[4] These minimum emissions levels are known as the MACT floor.

EPA must apply MACT standards to major sources, but may establish less stringent standards for sources that emit lower levels of pollution, which are termed "area sources."[5] Major sources are those that emit 10 or more tons per year (tpy) of any single air toxic or 25 tpy of any combination of air toxics.[6] In lieu of applying MACT, for area sources EPA may require the use of "generally available control technologies or management practices." EPA also has the authority under section 112 to set a health-based standard for pollutants for which a health threshold has been established.[7]

The Clean Air Act requires EPA to establish emission standards for source categories on a specified schedule and to complete standards for all source categories by 2000.[8] Facilities must comply with emissions limits within three years, or four years if the state or federal permitting authority determines an additional year is necessary to install pollution controls at an existing facility.[9]

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[2] Clean Air Act § 112(f).

[3] *Id.* at § 112(d)(3).

[4] *Id.* at §112(d)(3).

[5] *Id.* at §112(d)(5).

[6] *Id.* at §112(a)(1).

[7] *Id.* at §112(d)(4).

[8] *Id.* at § 112(e)(1).

[9] *Id.* at § 112(i)(3).

2. *EPA's Final Brick and Structural Clay Products Rule and Final Clay Ceramics Rule*

Standards for Brick and Structural Clay Products and Clay Ceramics were originally issued on May 16, 2003, but were subsequently challenged and the D.C. Circuit Court vacated them on March 13, 2007.[10] In response to a lawsuit, EPA developed a new proposal and on September 24, 2015, EPA issued a final rule covering the Brick and Structural Clay Products industry, and the Clay Ceramics industry.[11]

The brick and structural clay products production process consists of preparing the raw materials (primarily clay and shale), forming the processed materials into bricks and shapes, and drying and firing the bricks and shapes. The clay ceramics production process consists of processing clay, shale, and other additives, forming the processed materials into tile and sanitary ware shapes, and drying, glazing, and firing the tile and sanitary ware shapes.

Within the Brick and Structural Clay Products industry, there are 44 major sources of pollution – 36 of which are small businesses[12] – that manufacture face brick, structural brick, brick pavers, other brick products, clay pipe, roof tile, extruded floor and wall tile, and other extruded dimensional clay products. For this category, EPA set a health-based standard for acid gases (i.e., hydrogen fluoride, hydrogen chloride, and chlorine); and technology-based standards for non-mercury metals (or particulate matter as a surrogate) and mercury.[13]

Within the Clay Ceramics rule, there are two categories of units: (1) tile units and (2) sanitary ware units. None of the units in the tile unit category are major sources.[14] Accordingly, there will not be any costs or emissions reductions for these units.[15] For sanitary ware units only one company owns units that are major sources and therefore will be the only company that will incur costs.[16]

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[10] U.S. EPA, *Fact Sheet: Final Amendments to the Air Toxics Standards for Brick and Structural Clay Products Manufacturing and Clay Ceramics Manufacturing*, p. 2 (Sept. 24, 2015) (online at www3.epa.gov/airtoxics/brick/20150924fs.pdf).

[11] U.S. EPA, *National Emissions Standards for Hazardous Air Pollutants (NESHAP) for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing*, 80 Fed. Reg. 65470 (Oct. 26, 2015) (final rule).

[12] *See*, U.S. EPA, *Regulatory Impact Analysis: Final Brick and Structural Clay Products NESHAP*, p. 2-9 – 2-10 (Jul. 2015) (online at www3.epa.gov/airtoxics/brick/20150928ria.pdf).

[13] U.S. EPA, *NESHAP for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing*, 80 Fed. Reg. 65470 (Oct. 26, 2015) (final rule).

[14] *Note*: all are considered synthetic area sources, which means they have voluntarily become minor sources.

[15] *See*, U.S. EPA, *NESHAP for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing*, p. 207 (Sept. 24, 2015) (online at www3.epa.gov/airtoxics/brick/20150924fr.pdf).

[16] *Note*: all of the rest of the units are minor sources. *Id.* at 210.

B. Summary and Analysis

Section 2 of the discussion draft delays implementation of the final Brick and Structural Clay Products rule and the final Clay Ceramics Manufacturing rule, by extending all compliance deadlines based on pending judicial review. Under subsection (b), the compliance or submission date extension applies to "any final rule to address national emission standards for hazardous air pollutants (NESHAP) for brick and structural clay products manufacturing or clay ceramics manufacturing under 112 of the Clean Air Act," or any subsequent rule.[17]

Subsection (c) establishes a uniform time period for all compliance deadline extensions. Under the legislation, the time period starts 60 days after the final rule appears in the Federal Register, and ends when "judgment becomes final, and no longer subject to further appeal or review."[18]

The discussion draft's proponents likely will argue that legislation is needed to delay implementation of the Brick and Clay rules until all legal challenges are resolved by the courts. However, legal challenges to final EPA rules are routine and courts have the power on their own to stay the effectiveness of regulations under court challenge. The discussion draft throws out the existing judicial process by legislatively granting a blanket extension for any compliance deadline, regardless of the merits of the legal challenge or the final outcome. Under the legislation, EPA's Brick and Clay rules would automatically be delayed by however much time it takes to conclude litigation, providing encouragement both for frivolous challenges and additional appeals in order to extend the ultimate compliance time. Previous attempts to grant blanket compliance extensions for EPA rules have been met with similar criticism.[19]

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[17] H.R.__, the "Blocking Regulatory Interference From Closing Kilns (BRICK) Act" at § 2(b).

[18] *Id.* at § 2(c).

[19] *See, e.g.,* H.R. 2042, the Ratepayer Protection Act. At the April 14, 2015 legislative hearing, Massachusetts Assistant Attorney General, Melissa Hoffer, pointed out that the current judicial process for delaying a rule "has withstood the test of time, and ensures that courts will undertake a careful balancing of interests before granting a stay of agency action," and she further explained that the blanket extension in the discussion draft would "create powerful incentives for frivolous litigation in an effort to stall and avoid compliance with the Clean Power Plan." (online at democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Hoffer-EP-Ratepayer-Protection-2015-04-14.pdf).

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

A. Background

1. *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, EPA issued the Clean Air Interstate Rule (CAIR) in March 2005. Under the rule, upwind states were required to reduce sulfur dioxide (SO_2) and nitrogen oxides (NO_x) emissions.[20] 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.[21]

EPA promulgated the Cross-State Air Pollution Rule (CSAPR, pronounced "Casper") as a replacement for CAIR on July 6, 2011.[22] 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.[23] However, on April 29, 2014, the U.S. Supreme Court issued an opinion reversing an earlier D.C. Circuit decision that had vacated the rule, and on October 23, 2014, the D.C. Circuit lifted the previous CSPAR stay.[24] 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

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[20] 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.

[21] *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).

[22] 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) (hereinafter "*Cross-State Air Pollution Rule*").

[23] 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).

[24] *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).

2015, with Phase 2 beginning in 2017.[25] In November 2015, EPA proposed the CSAPR Update Rule to address interstate transport of air pollution under the 2008 ozone NAAQS.

In the CSAPR rules, EPA provides a multi-step process to address the requirements of the good neighbor provision. In summary, if EPA determined that a downwind state is expected to have problems attaining or maintaining an air quality standard, EPA looked at which upwind states contributed to these identified problems. If an upwind state was found to have emissions that significantly contributed to problems in a downwind state, then EPA set up an "emissions budget" for that upwind state. A state's emissions budget represents the allowable amount of emissions, after accounting for the emissions that were identified as significantly contributing to the nonattainment of a downwind state.[26]

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.[27]

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

Section 112 of the Clean Air Act requires 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.[28] 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 harms.

EPA's finding triggered a requirement for EPA to finalize regulations to control toxic air pollution from power plants. On December 21, 2011, EPA issued the Mercury and Air Toxics Standards (MATS),[29] which were the first national standards to address power plant emissions of

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

[26] U.S. EPA, *Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS; Proposed Rules*, 80 Fed. Reg. 75706 (Dec. 3, 2015) (online at www.gpo.gov/fdsys/pkg/FR-2015-12-03/pdf/2015-29796.pdf); 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).

[27] *Id.*

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

[29] 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-*

mercury and toxic air pollution. 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.[30]

EPA's MATS rule limits emissions of heavy metals, such as mercury, arsenic, and chromium, and acid gases, such as hydrochloric and hydrofluoric acid, from coal- and oil-fired power plants. The final rule will prevent 90 percent of the mercury in coal burned at power plants from being released.[31] 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.[32]

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.[33]

During the MATS rulemaking process, EPA identified several power plants that, based on the data available, exhibited the ability to achieve all of the standards for existing sources (i.e., mercury, particulate matter, and hydrogen chloride).[34] 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 coal refuse units that have installed add-on control technology that will allow them to be in compliance with MATS requirements.[35]

Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012) (final rule) (online at www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-806.pdf). Hereinafter *"MATS Final Rule"*

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

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

[32] *Id.*

[33] 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").

[34] U.S. EPA, *MATS Final Rule*, 77 Fed. Reg. 9304 at 9397.

[35] 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*,

A number of groups submitted comments on the MATS rule urging EPA to create a separate subcategory for coal refuse units.[36] However, in the final MATS rule EPA noted that the HAP emissions from coal refuse units are not sufficiently different from emissions from coal-fired power plants to warrant further subcategorization.[37] 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."[38]

3. *Use of Coal Refuse*

As noted above, a subset of power plants in the U.S. burn coal refuse 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.[39] Coal refuse is primarily found in large piles near abandoned mines and once burned, the resulting ashes are used in mine reclamation projects.[40] The majority of these power plants are in Pennsylvania, however some are located in other states like West Virginia and Utah.

B. Summary and Analysis of H.R. 3797

H.R. 3797 seeks to provide special considerations under both CSAPR and MATS for existing power plants that convert coal refuse into energy.

Section 2(b) relates to the treatment of coal refuse facilities under CSAPR. Power plants that use coal refuse derived from bituminous coal would maintain the same allocation of Phase 1 SO_2 emissions allowances under Phase 2. In the absence of this provision, Phase 2 allowance allocations would likely have decreased for all, or at least most, of these units. Subsection 2(b)(2) prohibits increasing a state's emissions budget in Phase 2 to account for the extra allowances allocated to coal refuse units. This provision is ostensibly to limit the impact of increased pollution from coal refuse 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 drastically cut their emissions to make up the difference.

In essence, section 2(b) picks winners and losers – tipping the scales in favor of bituminous coal refuse units, at the expense of all other covered units within a state. This provision would artificially reallocate emissions allowances, alter the CSPAR trading system,

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p. 761 (Dec. 2011) (online at www3.epa.gov/airtoxics/utility/mats_rtc_ chapters_foreword-1-2-3-4_121611.pdf).

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

[37] U.S. EPA, *MATS Final Rule*, 77 Fed. Reg. 9304 at 9395.

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

[39] U.S. EPA, *MATS Final Rule*, 77 Fed. Reg. 9304 at 9484.

[40] *White Stallion Energy Center* at 1250.

create inequities in the market, and impede a state's right to determine how to best comply with the requirements of the rule. Further, if a state did wish to allocate additional allowances to coal refuse plants, it can already do so through the SIP process.

Section 2(c) relates to the treatment of coal refuse facilities under MATS.[41] Specifically, section 2(c)(2)(v) provides an additional compliance option for the hydrogen chloride (HCl) and SO_2 standard, allowing coal refuse facilities to capture and control 93 percent of SO_2 emissions. It is not known how many facilities would opt for this additional compliance option, but the end result is likely additional emissions of air pollutants.

III. WITNESSES

The following witnesses are expected to testify:

PANEL I

The Honorable Keith J. Rothfus
Member
U.S. House of Representatives

PANEL II

Davis Henry
President and Chief Executive Officer
Henry Brick

Vincent Brisini
Director of Environmental Affairs
Olympus Power
On behalf of the Anthracite Region Independent Power Producers Association (ARIPPA)

Creighton McAvoy
President
McAvoy Brick Company

Dennis C. Beck
Chairman
Western Pennsylvania Coalition for Abandoned Mine Reclamation

John Walke
Senior Attorney and Clean Air Director
Natural Resources Defense Council

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