TESTIMONY OF JOHN D. WALKE

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HEARING ON H.R. 3797, THE "SATISFYING ENERGY NEEDS AND SAVING THE ENVIRONMENT ACT"

BEFORE THE SUBCOMMITTEE ON ENERGY AND POWER,

ENERGY AND COMMERCE COMMITTEE

U.S. HOUSE OF REPRESENTATIVES

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Thank you, Chairman Whitfield and Vice Chairman Olson, and Ranking Member Rush for the opportunity to testify today. My name is John Walke, and I am clean air director and senior attorney for the Natural Resources Defense Council ("NRDC"). NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 2.4 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing. I have worked at NRDC since 2000. Before that I was a Clean Air Act attorney in the Office of General Counsel for the U.S. Environmental Protection Agency

(EPA). Prior to that I was an attorney in private practice where I represented corporations, industry trade associations and individuals.

H.R. 3797, the "Satisfying Energy Needs and Satisfying the Environment Act" (hereinafter "H.R. 3797" or "the waste coal bill") is a badly flawed bill that would weaken air pollution standards for waste coal plants and increase dangerous and deadly pollution under two of the most important Clean Air Act ("CAA") rules ever adopted for coal-burning power plants. The bill will increase emissions of harmful sulfur dioxide and particulate matter air pollution, as well as hazardous air pollution, in states with waste coal plants. This will impose additional, avoidable health hazards on Americans.

The legislation unjustifiably anoints winners and losers among coal-burning power plants, weakening standards for power plants that burn waste coal while saddling power plants that burn other types of coal in the same states with additional burdens. H.R. 3797 even deprives some of these other coal plant operators of valuable economic assets to which they are entitled under current law. I urge members of the Committee to vote against this harmful and baseless legislation.

I. H.R. 3797 Favors Waste Coal Burners With Weaker Standards at the Expense of All Other Coal-Burning Power Plant Operators and Americans' Health and Air Quality.

Section 2(b) of H.R. 3797 unaccountably picks winners and losers under EPA's signature interstate air pollution program, the "Cross State Air Pollution Rule" ("CSAPR").[1] It does so by favoring waste coal-burning power plants at the expense of all other in-state power plants that generate electricity with non-waste coal or oil. This political favoritism upends the neutral, performance-based legal system that Congress has maintained for interstate air pollution for 39 years.

Under CAA section 110's interstate air pollution transport program, states and EPA are tasked with reducing air pollution from upwind states that significantly affect the ability of downwind states to meet national health-based air quality standards. See CAA § 110(a)(2)(D); 76 Fed. Reg. 48,207, *et seq.* (Aug. 8, 2011). Both upwind and downwind states also have independent obligations to reduce unhealthy air pollution levels within their own borders. 76 Fed. Reg. at 48,210. In CSAPR, EPA quantifies upwind states' emission reduction responsibilities based upon eliminating significant contributions to downwind states' unhealthy air. *Id.* It is important to understand certain crucial features of CSAPR to realize how severely H.R. 3797 overturns the rule's neutral, protective and emissions-based regime with states at the helm, and replaces it with blunt political favoritism and weaker standards, with U.S. EPA at the helm.

[1] U.S. EPA, Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals; Final Rule, 76 Fed. Reg. 48,208, *et seq*. (August 8, 2011) ("CSAPR").

A. H.R. 3797 attacks state rights and prerogatives under the Clean Air Act.

The Clean Air Act and CSAPR give upwind states like Pennsylvania or West Virginia the legal right to craft their own "state rules to achieve the required amount of emission reductions from sources selected by the state," allotted in amounts chosen by the state. 76 Fed. Reg. at 48,209; CAA § 110(a)(2)(D).[2] This means upwind states may choose to reduce emissions from coal- and oil-burning power plants like the federal plan's design, *id.* at 48,219, or these states may decide to cut emissions from some other mix of emitters in the state. *Id.* at 48,209. Upwind states may choose to grant more emissions allowances within their overall emissions budget to some sources, such as waste coal plants, and less to others. Or states may choose to follow the more neutral, emissions based framework in the federal plan, one that more equitably allocates emissions allowances based upon cost-effectiveness criteria rooted in the cost per ton of technologies already widely deployed. See generally *id.* at 48,249-48,265. To my knowledge, *all* upwind states covered by CSAPR have chosen to achieve the required emissions reduction from power plants that burn oil and coal, including waste coal where relevant, rather than from other sources like manufacturers, for example. Moreover, these states are allocating emissions allowances based upon the neutral, emissions-based formula in the federal plan that is founded on highly cost-effective technologies, rather than some other approach the states might have selected. Again, this includes states with waste coal plants like Pennsylvania and West Virginia. It is worth emphasizing these were state choices.

[2] For an upwind state like Pennsylvania, for example, the Commonwealth's coal-burning power plants emit air pollution that contributes significantly to unhealthy air pollution levels in states as far away as Connecticut, Michigan, Wisconsin and Georgia—as well as Pennsylvania itself, of course.

H.R. 3797 would wrest control away from states to make these basic decisions for the first time in the 39-year history of the Clean Air Act's interstate air pollution program. The legislation would overturn each of the aforementioned choices, rights and prerogatives resting with states under the Clean Air Act. Incredibly, the bill first dictates which emissions allowance decisions upwind states must accept with respect to waste coal plants and, as a result, non-waste coal- and oil-burning power plants, decisions contrary to state choices in every upwind state under CSAPR.

Second, after deposing the role of states, the bill goes on to place the *U.S. EPA Administrator* in charge of decisions that the Clean Air Act today reserves to states:

- "In carrying out CSAPR, the *Administrator shall provide that*, for any compliance period, the allocation (whether through a Federal implementation plan *or State implementation plan*)"; H.R. 3797, sec. 2(b)(1)(B) (emphasis added);
- "any sulfur dioxide allowance allocation provided *by the Administrator* to a coal refuse electric utility steam generating unit"; H.R. 3797, sec. 2(b)(1)(C) (emphasis added);
- "*the Administrator* shall carry out subparagraph (A) by proportionally reducing, as necessary, the unit-specific sulfur dioxide allowances from each [non-waste coal] source…" H.R. 3797, sec. 2(b)(2)(B) (emphasis added).

The first bullet makes clear that H.R. 3797 intends to dictate outcomes favoring waste coal plants not just in Federal plans, but in "State implementation plans" where states have made different allocation choices. Even more amazing, the third bullet makes clear that the bill authorizes the U.S. EPA Administrator to reduce CSAPR allowances to other in-state, non-waste coal plants, an authority that the Administrator does not possess today to override different, principled state

choices. The bill and an accompanying fact sheet from the bill's primary sponsor[3] offer no defensible justification for this attack on the rights and prerogatives of states under the Clean Air Act. Indeed, it remains unclear exactly why the bill's co-sponsors intend to transfer so many longstanding state rights to the federal government.

To be clear, it is entirely appropriate for the federal Clean Air Act to require upwind states to abate unhealthy levels of air pollution that blow into downwind states and significantly impair their air quality and harm public health. But within that smart system of protections, it is also appropriate to grant upwind states the flexibility and prerogative to determine from what sources those reductions are best secured, and how to achieve those reductions most effectively, equitably and cost-effectively. H.R. 3797 overrides those state flexibilities and prerogatives. And in doing so, the legislation allows unhealthy levels of sulfur dioxide pollution to increase above a state's total budget level, worsening air quality in both upwind and downwind states.

B. H.R. 3797 allows unhealthy levels of sulfur dioxide pollution to increase above a state's total budget level, worsening air quality in upwind and downwind states.

Section 2 of H.R. 3797 exercises its core favoritism for waste coal plants over all other coal-burning electricity generators by allowing waste coal plants to continue to pollute at their higher, unhealthy Phase I sulfur dioxide allowance levels. H.R. 3797, sec. 2(b)(1)(B). Recognizing this outcome to be plainly dirtier than current law, the legislation then bars the EPA Administrator from increasing the total budget of sulfur dioxide allowance allocations in states with waste coal plants. *Id.*, sec. 2(b)(1)(A). In doing so, the bill *purports* to ensure no increase in

[3] *The Satisfying Energy Needs and Saving the Environment (SENSE) Act*, Representative Keith Rothfus (PA-12).

overall sulfur dioxide levels in upwind or downwind states. As explained below, however, this effort fails.

The third step of the bill's approach requires the EPA Administrator to proportionally reduce the unit-specific sulfur dioxide allowance allocations from each non-waste coal source in an upwind state covered by a CSAPR source that:

1) is located in a state with one or more waste coal units;
2) "permanently ceases operation, or converts its primary fuel source from coal to natural gas, prior to the relevant compliance period"; and
3) otherwise receives sulfur dioxide allowances under CSAPR for such period.

H.R. 3797, sec. 2(b)(2)(B)(i)-(iii).

This approach is fatally flawed because the second condition could easily fail to occur; there is no guarantee or evidence that in states with waste coal plants, any non-coal waste-burning units will necessarily cease operation or convert to natural gas. Yet upon its passage, the bill immediately confers the legal right upon waste coal plants to pollute at their higher Phase I CSAPR sulfur dioxide levels during the rule's second phase. H.R. 3797, sec. 2(b)(1)(B). Operators of non-waste coal-burning units that do not cease their operation or switch the units to natural gas will continue to have the legal right to pollute at the Phase II sulfur dioxide allowance levels without any allowances being reduced.

What this means is that H.R. 3797's prohibition on increasing the overall state budget or sulfur dioxide allowance allocations (sec. 2(b)(2)(A)) would become a fictional constraint—*no* constraint in the real world on sulfur dioxide emissions *exceeding* the overall state emissions budget. The Administrator need not take any steps to increase a state's total sulfur dioxide

allowances. See sec. 2(b)(2)(A). Instead, simple operation of the bill in the real world would increase sulfur dioxide levels above a state's total pollution budget. Neither waste coal plant operators nor non-waste coal plant operators in this very realistic scenario would be acting inconsistently with the bill. The result would be more polluted air in the upwind state and affected downwind states, due to H.R. 3797's flawed design and the permission it grants waste coal plants to emit higher levels of sulfur dioxide pollution than the law allows today.

C. H.R. 3797 robs valuable allowances from non-waste coal plant operators that make cleaner decisions, deterring cleaner generation and penalizing other in-state coal-burning power plant operators.

For situations where a non-waste coal plant operator does cease operation of a CSAPR-covered unit, or converts the unit to natural gas combustion, H.R. 3797 penalizes the non-waste coal plant operator by reducing valuable sulfur dioxide allowances that the operator is entitled to hold or trade or sell under current law. Section 2(b)(2)(B). The bill does this evidently in order to try to offset the increased sulfur dioxide emissions that H.R. 3797 authorizes waste coal plant to emit above the CSAPR Phase II allowance levels under current law. Section 2(b)(1)(B). This especially harmful and indefensible element of H.R. 3797 has the perverse effect of rewarding dirtier operations by waste coal plants, and penalizing less polluting decisions by coal plant operators. Switching to natural gas will produce fewer nitrogen oxide, sulfur dioxide and particulate matter emissions than either coal or waste coal combustion. Moreover, in some situations when a coal-burning unit permanently ceases operation, lost electricity generation will be made up from cleaner renewable energy resources like wind or solar energy, conservation and energy efficiency, or demand response resources. H.R. 3797 would prop up dirtier electricity

generation and higher air pollution levels from waste coal plants, at the expense of cleaner generation and better air quality.

The bill also promotes dirtier waste coal plant emissions at the expense of the valuable economic assets held by in-state power plant operators that burn oil or coal but not waste coal. A brief explanation of CSAPR's allowance allocation and trading system is warranted. Under CSAPR, EPA and upwind states allocate sulfur dioxide allowances to an existing coal-burning electric generating unit "equal to its share of the state's historic heat input for all the covered units in the program, except where that allocation would exceed its maximum historic emissions." 76 Fed. Reg. at 48,285. Covered sources, in turn, are "required to hold sufficient allowances . . . to cover the emissions from all covered units at the source during the control period." *Id.* at 48,284. Importantly, "[b]anking of allowances for use or trading in future years is allowed." *Id.* at 48,271. Moreover, "the retention of unused [CSAPR] allowances allocated for a given control period [is allowed] for use or trading in *a later control period*." *Id.* at 48,342 (emphasis added). This system incentivizes the owner-operator of a coal-burning electric generating unit under CSAPR to "overcomply with the budgets and build up a bank of allowances under the programs for future flexibility." *Id.* at 48,280. These flexibilities include using the valuable allowances for other units owned by that same owner-operator or trading the allowances. *Id.*

In CSAPR-covered states with waste coal plants, such as Pennsylvania and West Virginia, H.R. 3797 strips all other in-state coal plant operators of valuable allowance assets if the operators shut down a coal unit or switch it to natural gas combustion. Sec. 2(b)(2)(B). This creates a stark inequity between waste coal plant operators who are *both* allowed to pollute at higher Phase I CSAPR allowance level during Phase II, *and* continue to use or transfer

allowances they hold (at the same facility), versus all other in-state coal- or oil-burning unit operators that face 'reduction' of their unit-specific sulfur dioxide allowances if a unit is shut down or converted to natural gas. These eliminated allowances may no longer be used at the same facility or banked or traded to other facilities. Neither H.R. 3797 nor its sponsor's fact sheet attempts to explain or justify this basic inequity, choosing instead to ignore it.

H.R. 3797 could have chosen to spread this inequity even-handedly, proportionally reducing all remaining sulfur dioxide allowance allocations in an upwind state, to cover the dirtier emissions levels the legislation authorizes for waste coal plants. The result would have been substantially smaller allowance reductions from any given CSAPR unit in a state with waste coal plants. Instead, as discussed above, the bill's design actually *targets* cleaner generation decisions for the reduction of allowances and elimination of valuable assets by the owners and operators making those decisions. Indeed, were this legislation to become law, the bill would create immediate disincentives to repowering coal units to natural gas or shutting down older, inefficient units. This is bad public policy and another reason why members of this Committee should not approve H.R. 3797.

II. H.R. 3797 Harms Americans' Heath and Air Quality by Letting Waste Coal Plants Emit Excessive Levels of Dangerous, Hazardous Air Pollution.

Section 2(c) of H.R. 3797 targets its weakening amendments at EPA's signature program to reduce hazardous air pollution from oil- and coal-burning power plants under the Clean Air Act—the Mercury and Air Toxics Standards. EPA projects that this year MATS will avoid 130,000 asthma attacks, especially among children; 4,700 heart attacks; 540,000 days when

people otherwise would miss work; and up to 11,000 premature deaths.[4] H.R. 3797 adds an alternative, more lax emission standard for sulfur dioxide emissions to the two more protective emissions standards for hydrogen chloride and sulfur dioxide that coal waste plants already may choose between under MATS. Sec. 2(c)(2)(A)(v). Under MATS, coal waste plants must meet either an emission standard for hydrogen chloride of 0.002 pounds per million Btu (equivalent to 0.02 pounds per megawatt-hour), or a sulfur dioxide emission standard of 0.20 pounds per million Btu (equivalent to 1.5 pounds per megawatt-hour). See 77 Fed. Reg. at 9,367-8 (tables 3 and 5). H.R. 3797 codifies these same emissions standards for compliance "at the election" of operators of waste coal plants. Sec. 2(c)(2)(A).[5]

H.R. 3797 weakens MATS to allow increased hazardous air pollution emissions in a section of the legislation that creates an alternative emission standard for sulfur dioxide. Waste coal plant operators may elect to meet this more lax standard rather than the more stringent sulfur dioxide and hydrogen chloride limits in MATS. The bill says that coal waste plant operators may elect to meet a sulfur dioxide emission standard "that is no more stringent than capture and control of 93 percent of sulfur dioxide across the generating unit or group of generating units…."

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[4] U.S. EPA, *Fact Sheet: Mercury and Air Toxics Standards for Power Plants*, http://www3.epa.gov/mats/pdfs/20111221MATSsummaryfs.pdf .

[5] This feature in itself weakens the federal Clean Air Act, by codifying these static emission standards in perpetuity for waste coal plant operators alone. Under today's Clean Air Act, Maximum Achievable Control Technology ("MACT") standards like MATS for power plants must be reviewed 8 years following their adoption to determine (1) whether the technology-based standards should be strengthened, and (2) whether the standards continue to impose residual risks to the public that require revisions to provide an ample margin of safety to protect public health. See 42 U.S.C. § 7412(f)(2). Under the Act's hazardous air pollution control program since its adoption in 1990, Congress did not consider the first MACT generation standards to be static and immutable; Congress intended the protection of public health with an ample margin of safety to be the program's highest priority. *Id.* H.R. 3797 would overthrow this longstanding system on behalf of waste coal plants, and accord them static and permanent emission standards without regard to whether waste coal plant emissions continue to impose risks and public health hazards.

Sec. 2(c)(2)(A)(v). Contrast this with current law, in MATS, where EPA observed that some waste coal plant already were meeting either the rule's sulfur dioxide standard or hydrogen chloride standard or both.[6] EPA went on to note that "[c]urrent wet scrubber technology is capable of removing at least 99 percent of HF and HCl emissions while simultaneously achieving *96 percent SO_2 [sulfur dioxide] removal.*" U.S. EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards, EPA-452/R-11-011, at 2-8, 2-9 (December 2011) (emphasis added).

When waste coal plant owners filed lawsuits challenging the Mercury and Air Toxics Standards, claiming it was "virtually impossible" to meet the acid gas and sulfur dioxide limits, the U.S. Court of Appeals for the D.C. Circuit had little trouble rejecting these arguments unanimously. *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222, 1250 (D.C. Cir. April 15, 2014). The judges pointed to clear evidence that waste coal plants *already* were meeting these limits. *Id.* EPA had evidence demonstrating that 8 out of 19 waste coal units with data already could meet the rule's acid gas standard or alternative sulfur dioxide standard. Indeed, the court noted that some of these already-compliant plants are "among the best performers" in achieving hydrogen chloride reductions among *all* coal-burning units under the rule.[7] EPA went on to identify pollution controls that waste coal-burning units already were using to meet the standards.[8]

[6] 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, December 2011, at 587.
[7] Brief of Respondent EPA, *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222, 1250 (D.C. Cir. April 15, 2014), pgs. 94-5.
[8] *Id.*

With neither the facts nor the law supporting the arguments of waste coal operators, and a federal appeals court easily rejecting their claims, waste coal plant operators are resorting to outright political favoritism by seeking passage of H.R. 3797. The legislation would ignore the clear facts found by both the executive and judicial branches, facts contrary to the same claims that waste coal plant operators are pushing again, this time in Congress. The bill would overturn the unanimous decision of the D.C. Circuit rejecting the waste coal industry's complaints, a decision whose relevant reasoning the Supreme Court did not even question. H.R. 3797 would unjustifiably allow higher levels of sulfur dioxide emissions and the hazardous air pollutants for which the sulfur dioxide standard serves as a proxy. This outcome is harmful for Americans living in states with these waste coal plants and harmful for Americans living downwind from these plants.[9] This too is bad public policy and another reason why members of this Committee should not approve H.R. 3797.

[9] We have long known that sulfur dioxide emissions from coal burning "can also contribute to high local ambient concentrations of sulfur dioxide." See, *e.g.*, World Bank Group, *Pollution Prevention and Abatement Handbook*, at 231 (July 1998), http://www.ifc.org/wps/wcm/connect/5cb16d8048855c248b24db6a6515bb18/HandbookSulfurOxides.pdf?MOD=AJPERES; CSAPR, 76 Fed. Reg. 48,209, *et seq.* Long-range transport of sulfur dioxide emissions contributing to acid rain and a host of health hazards is equally well understood. See CSAPR, *id.*