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ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

September 12, 2017

To: Subcommittee on Environment Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Legislative Hearing on H.R. 1917, the "Blocking Regulatory Interference from Closing Kilns (BRICK) Act of 2017;" H.R. 1119, the "Satisfying Energy Needs and Saving the Environment (SENSE) Act;" H.R. 453, the "Relief from New Source Performance Standards Act of 2017;" and H.R. 350, the "Recognizing the Protection of Motorsports (RPM) Act of 2017"

On **Wednesday, September 13, 2017, at 10:00 a.m. in room 2123 of the Rayburn House Office Building**, the Subcommitee on Environment will hold a legislative hearing on: H.R. 1917, the "Blocking Regulatory Interference from Closing Kilns (BRICK) Act of 2017;" H.R. 1119, the "Satisfying Energy Needs and Saving the Environment (SENSE) Act;" H.R. 453, the "Relief from New Source Performance Standards Act of 2017;" and H.R. 350, the "Recognizing the Protection of Motorsports (RPM) Act of 2017."

I. H.R. 1917, THE BLOCKING REGULATORY INTERFERENCE FROM CLOSING KILNS (BRICK) ACT

H.R. 1917, the Blocking Regulatory Interference from Closing Kilns (BRICK) Act, was introduced by Rep. Bill Johnson (R-OH) on April 5, 2017. The bill is identical to legislation considered last Congress.[1] For background information on section 112 of the Clean Air Act (CAA) and the Environmental Protection Agency's (EPA) Brick and Clay rules, please see the memo from the February 3, 2016 Energy and Power Subcommittee hearing here.

Subsection 2(b) of the bill delays implementation of the final Brick and Structural Clay Products rule and the final Clay Ceramics Manufacturing rule, or any subsequent rule, by

[1] H.R. 4557, Blocking Regulatory Interference from Closing Kilns (BRICK) Act of 2016. All Democratic Committee materials are available here.

extending all compliance deadlines based on pending judicial review. Subsection (c) establishes a uniform time period for all compliance deadline extensions, starting 60 days after the final rule appears in the Federal Register, and ending when "judgment becomes final, and no longer subject to further appeal or review."

The bill 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 for as long as litigation remains pending. This would encourage frivolous challenges and additional appeals in order to extend the ultimate compliance deadlines. Previous attempts to grant blanket compliance extensions for EPA rules have been met with similar criticism.[2] Massachusetts Assistant Attorney General, Melissa Hoffer has noted, for example, 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." AAG Hoffer additionally warned that a blanket extension would "create powerful incentives for frivolous litigation in an effort to stall and avoid compliance."

The bill's proponents argue that legislation is needed to delay implementation of EPA's 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.

In response to a petition from Kohler, EPA agreed to reconsider portions of the Clay Ceramincs rule in 2016. Petitions for reconsideration of the Brick Rule were denied by the agency. The brick industry's legal challenge to the rule is still pending before the D.C. Circuit.[3]

II. H.R. 1119, THE SATISFYING ENERGY NEEDS AND SAVING THE ENVIRONMENT (SENSE) ACT

H.R. 1119, the Satisfying Energy Needs and Saving the Environment (SENSE) Act, was introduced by Rep. Rothfus (R-PA) on February 16, 2017. The SENSE Act seeks to provide special consideration under EPA's Cross-State Air Pollution Rule (CSAPR) and Mercury and Air Toxics Standards (MATS) for existing power plants that convert coal refuse into energy. It

[2] House Committee on Energy and Commerce, Subcommittee on Energy and Power, *Hearing to Examine EPA's Proposed 111(d) Rule for Existing Power Plants and the proposed Ratepayer Protection Act*, 114th Cong (April 14, 2015).(democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Hoffer-EP-Ratepayer-Protection-2015-04-14.pdf).

[3] *See, e.g.,* EPA Denies Reconsideration of Brick Industry Air Standards, *Bloomberg BNA*, May 18, 2016 (www.bna.com/epa-denies-reconsideration-n57982072578/); Trump EPA Defends Brick MACT in Rare Legal Support of Obama-Era Rule, *InsideEPA*, Apr. 28, 2017 (insideepa.com/daily-news/trump-epa-defends-brick-mact-rare-legal-support-obama-era-rule).

is identical to legislation considered last Congress.[4] For background information on coal refuse, and EPA's MATS and CSAPR rules, please see the memo from the February 3, 2016 Energy and Power Subcommittee hearing here.

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 sulfer dioxide (SO_2) emissions allowances under Phase 2; in the absence of this provision, Phase 2 allowance allocations would likely have decreased for these units. Subsection 2(b)(2) prohibits EPA from 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 makes drastic changes to the CSAPR program that would create inequities in the market, remove economic incentives for coal refuse plants to reduce their pollution, and impede states' rights to determine how to best comply with the requirements of the rule. Further, if a state did wish to grant additional allowances to coal refuse plants, it can already do so through the state implementation plan (SIP) process. There is also a concern that this provision could block EPA from approving a SIP that *does not* give additional allowences to coal refuse units.

Section 2(c) relates to the treatment of coal refuse facilities under MATS.[5] Specifically, section 2(c)(2)(v) provides an additional compliance option for the hydrogen chloride (HCl) and SO_2 standard, allowing coal refuse facilities – or a group of facilities – to capture and control only 93 percent of SO_2 emissions.

Proponents argue that coal refuse plants are unable to meet the current HCl and SO_2 limits and need an alternative pathway to comply with the MATS rule. However, a less stringent SO_2 standard is not necessary since existing technology is capable of controlling 99 percent of HCl and 96 percent of SO_2.[6] In fact, the D.C. Circuit already rendered a decision on this argument, and rejected the assertion that coal refuse plants are incapable of achieving these MATS requirements.[7] It is not known how many facilities would opt for the additional compliance option in secton 2(c), but the end result is likely to be additional air pollution.

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[4] H.R. 3797, the Satisfying Energy Needs and Saving the Environment Act (SENSE) Act. All Democratic Committee materials are available here.

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

[6] U.S. 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).

[7] In response to questions during the Februsry 3, 2016 hearing, John Walke from the Natural Resources Defense Council explained, "It is simply incorrect to suggest that coal waste plants burning any type of coal waste are incapable of achieving either the HCl or the SO_2 standard in

After EPA denied its petition to change the MATS rule for coal refuse plants, the Anthracite Region Independent Power Producers Association (ARIPPA) challenged the Agency's decision in the D.C. Circuit. The case is still pending. However, in April the court agreed to delay its consideration indefinitely, after the Trump Administration asked for additional time to reconsider its positon on the MATS rule.[8]

III. H.R. 453, THE RELIEF FROM NEW SOURCE PERFORMANCE STANDARDS ACT OF 2017

H.R. 453, the "Relief from New Source Performance Standards Act of 2017" was introduced by Rep. Peterson (D-MN) in January. The bill delays the Step 2 compliance date for three categories of wood-fueled heaters – new residential wood stoves, new residential hydronic heaters, and new forced air furnaces. The current compliance date for these appliances is 2020. The bill extends the compliance date by three years.

As the use of these appliances has expanded, emissions associated with inefficient wood burning in older stoves and heating devices have also grown. Wood smoke contains coarse and fine particulate matter, carbon monoxide, volatile organic compounds (VOCs), and toxic pollutants such as benzene and formaldehyde. Residential wood smoke can increase fine particulate pollution to levels that cause serious health concerns. Because wood stoves and wood heaters are very long-lived appliances, delay of standards by three years will result in many more polluting, inefficient appliances being installed and generating pollution for many years into the future.

Some states have already implemented laws and regulations to institute stricter standards and encourage faster transition to more efficient, cleaner burning appliances. Federal emission standards for residential wood-fueled appliances have not been updated since 1988. EPA's rule, finalized in March 2015, established new standards which incorporated "best systems of

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the existing MATS rule," and that "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 (February 3, 2016) (https://democrats-energycommerce.house.gov/committee-activity/hearings/hearing-on-hr-3797-the-satisfying-energy-needs-and-saving-the-0).

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

emission reduction" now available in the industry.[9] The public health benefits of the rule far exceeded the cost of implementation.

There are a number of companies producing and selling wood stoves and heating appliances that are compliant with EPA's 2020 standard. Delay of the standard implementation for three years is unnecessary and rewards the companies that failed to invest in development of cleaner appliances at the expense of public health.

IV. H.R. 350, THE RECOGNIZING THE PROTECTION OF MOTORSPORTS ACT OF 2017

A motor vehicle is defined under the Clean Air Act (CAA) as any self-propelled vehicle designed for transporting persons or property on a street or highway. While motor vehicles have to meet certain emission standards, those with engines used solely for professional competition do not have such requirements. Nor do those with nonroad engines that are used solely for competition.[10]

Amateur racers frequently modify their vehicles for use as race cars by adding emission control defeat devices. These devices are used to improve the car's performance for racing, but result in increased tailpipe emissions.

EPA was concerned about vehicles modified for racingthat were also being driven on the road and proposed a clarification in 2015.[11] EPA explained that it was just restating current law: motor vehicles that drive on the roads must have certified compliant engines and equipment.

EPA's proposed clarification was unclear and created confusion. It led amateur race enthusiasts to believe they would be fined for modifying vehicles they were using for racing. In response to numerous comments opposing the clarification, EPA withdrew the proposal and the current regulation exempting competition vehicles remains in place.

In January 2017, Rep. McHenry (R-NC) introduced H.R. 350, the "Recognizing the Protection of Motorsports Act of 2017." The bill amends Section 203 of the CAA to exempt motor vehicles that are used solely for competition (i.e. race cars) from penalties for altering a vehicle's design or adding or altering a device on a vehicle that results in increased emission of air pollutants. Proponents of the bill are concerned that regardless of the withdrawal of the

[9] Environmental Protection Agency, *Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces* (Mar. 16, 2015) (80 Fed. Reg. 50, P. 13672-13753).

[10] 40 CFR § § 1042.620 and 1068.235.

[11] Environmental Protection Agency; and National Highway Traffic Safety Administration, Department of Transportation, *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles – Phase 2* (Jul. 13, 2015) (80 Fed. Reg. 133, P.40138-40765).

proposed clarification, EPA will bring enforcement actions against individual race car owners and that such enforcement will discourage amateur racing.

Opponents of the bill are concerned with dual use cars (racing and on-road). They suggest that if these cars are "solely" for racing, they should not be registered for on-road driving, similar to what occurs with vehicles used in professional racing. In addition, EPA has never enforced this provision of the CAA against individual vehicle owners. Enforcement cases have been initiated against companies manufacturing defeat devices for use in motor vehicles that are not exclusively used for racing.

V. WITNESSES

The following witnesses have been invited to testify:

Ryan Parker
President and CEO
Endicott Clay Products

Vincent Brisini
Director of Environmental Affairs
Olympus Power, LLC

Frank Moore
President
Hardy Manufacturing Company, Inc.

Steve Page
President and General Manager
Sonoma Raceway

Alexandra E. Teitz
Principal
AT Strategies, LLC
On behalf of Sierra Club

Dr. Rebecca Bascom
Professor
Penn State College of Medicine
On behalf of the American Thoracic Society