

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

November 13, 2017

To: Subcommittee on Environment Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Markup of H.R. 1917, the “Blocking Regulatory Interference from Closing Kilns Act of 2017”; H.R. 453, the “Relief from New Source Performance Standards Act of 2017”; H.R. 350, the “Recognizing the Protection of Motorsports Act of 2017”; and H.R. 1119, the “Satisfying Energy Needs and Saving the Environment Act”

On Wednesday, November 15, 2017, at 10:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Environment will markup the following bills: H.R. 1917, the “Blocking Regulatory Interference from Closing Kilns Act of 2017;” H.R. 453, the “Relief from New Source Performance Standards Act of 2017;” H.R. 350, the “Recognizing the Protection of Motorsports Act of 2017;” and H.R. 1119, the “Satisfying Energy Needs and Saving the Environment Act.” These bills were the subject of an Environment Subcommittee legislative hearing on September 13, 2017.

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

H.R. 1917, the Blocking Regulatory Interference from Closing Kilns (BRICK) Act, was introduced by Representative Bill Johnson (R-OH) on April 5, 2017.¹ 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](#).

¹ All Democratic Committee materials for H.R. 4557, Blocking Regulatory Interference from Closing Kilns (BRICK) Act of 2016, are available [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 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’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. It has the potential to encourage frivolous challenges and additional appeals in order to extend the ultimate compliance deadlines. 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. Nevertheless, this bill would disregard existing judicial process by granting unconditional blanket extensions of compliance deadlines.

To date, no one has petitioned the court to stay the effectiveness of the Brick and Clay rules. However, the brick industry’s legal challenge of the rule is still pending before the D.C. Circuit. On November 3, 2017, EPA asked the court to indefinitely postpone the industry’s lawsuit, since the agency is reconsidering the Brick and Clay rule, which is expected to be finalized by August 2019.²

II. 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 Representative Peterson (D-MN) on January 11, 2017. 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, which the bill extends 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 public health concerns. Because wood stoves and wood heaters are very long-lived appliances, delay of standards by three years will likely result in many more inefficient appliances being installed and generating pollution for many years into the future.

The public health benefits of the EPA rule far exceed its costs of implementation and operation. Federal emission standards for residential wood-fueled appliances have not been

² Respondents’ Notice of Action on Brick/Clay Rule and Unopposed Motion to Sever and Hold in Abeyance Industry Petitions, *Sierra Club, et al. v. United States Environmental Protection Agency*, D.D.C. (No. 15-1487).

updated since 1988. EPA's rule, finalized in March 2015, established new standards incorporating "best systems of emission reduction" that are now available in the industry.³

Additionally, some states have already implemented laws and regulations to institute stricter standards and encourage faster transition to more efficient, cleaner burning appliances. A number of companies are already producing and selling wood stoves and heating appliances that are compliant with EPA's 2020 standard. A three-year delay in implementing the federal rule is unnecessary, and rewards the companies that failed to invest in development of cleaner appliances at the expense of public health.

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

The CAA requires that EPA certify that vehicles and engines meet specific emissions standards designed to control pollution. The CAA prohibits anyone from removing or disabling these emissions control systems, or from selling or installing parts that would "bypass, defeat, or render inoperative" a vehicle's emissions controls.⁴ Vehicles manufactured and used solely for professional competition are exempted from such requirements.⁵

Amateur racers frequently modify their vehicles for use as race cars by installing aftermarket products to improve performance. Some of these products are emissions control defeat devices that result in increased pollution, and would be prohibited under the CAA. As a practical matter, however, operation of these modified vehicles is not always limited to the race track, meaning they are also emitting illegal levels of pollution when they are driven on streets and highways.

On January 6, 2017, Representative McHenry (R-NC) introduced H.R. 350, the Recognizing the Protection of Motorsports (RPM) Act of 2017. The bill amends section 203 of the CAA to exempt actions for the purpose of modifying a motor vehicle into a vehicle used solely for competition, from CAA anti-tampering penalties.⁶ The bill also changes the CAA definition of a motor vehicle, to exclude vehicles used solely for competition, including those converted from motor vehicles.

Proponents argue that legislation is needed to protect amateur racing from EPA enforcement actions against individuals who have converted their vehicles into race cars. These concerns, however, are misplaced. EPA has never enforced this provision of the CAA against individual vehicle owners, nor does it have sufficient resources to make this an enforcement

³ U.S. 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. 13672).

⁴ CAA § 203(b)(3).

⁵ 40 CFR § § 1042.620 and 1068.235.

⁶ Penalties for altering a vehicle's design or adding or altering a device on a vehicle that results in increased emission of air pollutants.

priority. Enforcement cases have been initiated against manufacturers of defeat devices for use in motor vehicles that are not exclusively used for racing.

Proponents of the bill also claim the intent of the legislation is to bring federal amateur racing policy in line with the California Air Resources Board's (CARB) regulations. However, CARB is currently updating its racing program due to misuse of the emissions control exemption for non-highway competition vehicles. CARB has specifically found there is "evidence show[ing that] racing vehicles and certified vehicles modified with racing aftermarket parts are often used for non-racing and non-competition purposes."⁷

Ultimately, the RMP Act creates a loophole in the CAA that blocks EPA's ability to enforce against those manufacturing or selling emissions control defeat devices, regardless of how they are used. At the September 13 Environment Subcommittee hearing, Alexandra Teitz testified that the bill grants immunity to manufacturers of defeat devices, so long as the manufacturer says the product is intended for racing.⁸ The intent of the manufacturer is not predictive of, nor does it impact how consumers will use these products. Once they are installed EPA will have little ability to penalize those using a product beyond its intent. By preventing EPA from enforcing against the manufacture and sale of defeat devices, this bill takes away an important tool for stopping illegal vehicle pollution. It is important to note that this is the same authority EPA recently used to detect that a company, H&S Performance, had been manufacturing and selling products which resulted in nearly double the illegal NOx emissions of the Volkswagen diesel scandal.⁹

IV. H.R. 1119, THE SATISFYING ENERGY NEEDS AND SAVING THE ENVIRONMENT ACT

H.R. 1119, the Satisfying Energy Needs and Saving the Environment (SENSE) Act, was introduced by Representative 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 its Mercury and Air Toxics Standards (MATS) for existing power plants that convert coal refuse

⁷ California Air Resources Board, *California Racing Vehicles* (Jul. 18, 2017) (www.arb.ca.gov/enf/racingvehicles/racingvehicles.htm).

⁸ House Committee on Energy and Commerce, Subcommittee on Environment, Testimony of Alexandra Teitz o/b/o Sierra Club *Hearing on Big Relief for Small Business: Legislation Reducing Regulatory Burdens on Small Manufacturers and Other Job Creators*, Sept. 13, 2017 (democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Teitz-EE-Hrg-on-Big-Relief-for-Small-Business-Legislation-Reducing-Regulatory.pdf).

⁹ Union of Concerned Scientists, *Is Your Representative Setting Us Up for Another Dieselgate?* (Oct. 5, 2017) (blog.ucsusa.org/jonna-hamilton/is-your-representative-setting-us-up-for-another-dieselgate).

into energy. 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](#).¹⁰

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 sulfur dioxide (SO₂) emissions allowances under Phase 2. Furthermore, the section prohibits EPA from increasing a state's overall emissions budget in Phase 2. This provision is ostensibly designed to limit pollution on downwind states; however, to do so other power plants would have to radically cut their emissions to make up the difference. This provision picks winners and losers, and makes drastic changes to the CSAPR program that would create inequities in the market. It also removes economic incentives for coal refuse plants to reduce their pollution, and impedes states' rights to determine how to best comply with the requirements of the rule.

Section 2(c) relates to the treatment of coal refuse facilities under MATS.¹¹ This section provides an additional compliance option for the hydrogen chloride (HCl) and sulfur dioxide (SO₂) standard, allowing coal refuse facilities – or a group of facilities – to capture and control only 93 percent of SO₂ emissions. Proponents argue that coal refuse plants are unable to meet the current HCl and SO₂ limits and need an alternative pathway to comply with the MATS rule. However, existing technology is capable of meeting the standard,¹² and the D.C. Circuit already rendered a decision on this argument, rejecting the assertion that coal refuse plants are incapable of achieving these MATS requirements.¹³ It is not known how many facilities would opt for the additional compliance option in section 2(c), but the end result is likely to be additional air pollution.

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

¹⁰ All Democratic Committee materials for H.R. 3797, the Satisfying Energy Needs and Saving the Environment Act (SENSE) Act, are available [here](#).

¹¹ *Note:* section 2(c) is not limited only to coal refuse units burning bituminous coal.

¹² 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).

¹³ 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).

agreed to delay its consideration indefinitely, after the Trump Administration asked for additional time to reconsider its position on the MATS rule.¹⁴

¹⁴ *D.C. Circuit sides with Trump EPA, delays mercury litigation*, Greenwire, (Apr. 28, 2017) (www.eenews.net/greenwire/stories/1060053772/).