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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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Majority (202) 225-2927
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MEMORANDUM

July 16, 2018

To: Subcommittee on Environment Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Subcommittee Markup of H.R. 3128, "To Amend Section 111 of the Clean Air Act to Clarify When a Physical Change in, or Change in the Method of Operation of, a Stationary Source Constitutes a Modification, and For Other Purposes."

On **Tuesday, July 17, 2018, at 1:00 p.m. in room 2322 of the Rayburn House Office Building**, the Subcommittee on Environment will hold a markup of H.R. 3128, "to amend section 111 of the Clean Air Act to clarify when a physical change in, or change in the method of operation of, a stationary source constitutes a modification, and for other purposes." The majority is expected to offer an Amendment in the Nature of a Substitute (AINS) which is almost identical to the Discussion Draft that was the subject of the Subcommittee's May 16, 2018, legislative hearing.

I. H.R. 3128, TO AMEND THE CLEAN AIR ACT TO CLARIFY WHEN A PHYSICAL CHANGE IN, OR CHANGE IN THE METHOD OF OPERATION OF, A STATIONARY SOURCE CONSTITUTES A MODIFICATION, AND FOR OTHER PURPOSES

On June 29, 2017, Rep. Morgan Griffith (R-VA) introduced H.R. 3128, which would make significant changes to the Environmental Protection Agency's (EPA) New Source Review (NSR) program. The Environment Subcommittee held an oversight hearing on the NSR program on February 14, 2018, and a legislative hearing on a Discussion Draft, also authored by Rep. Griffith, on May 16, 2018. A number of provisions in the Discussion Draft mirror the goals and policy changes of EPA's recent NSR memoranda. Please see the Democratic committee memos from the prior hearings for further background information on the NSR program and EPA's recent policy changes.

II. ANALYSIS OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

The AINS makes a number of significant changes to the Clean Air Act (CAA), creating loopholes in the law that would allow major emitting facilities to avoid NSR pollution control requirements and increase air pollution emissions.

Section 2 of the AINS changes how emission increases are calculated when determining whether a project is subject to the requirements of the NSR program, from a calculation of actual emissions to a calculation of the capacity to emit based on the "maximum hourly emission rate." This is a weaker test, leading to pollution controls being required "only if a polluter ever managed to exceed, implausibly, its vastly higher capacity to emit air pollution, measured from some point in the plant's past."[1] Switching to this rate-based threshold would ensure that virtually no facility would be required to install pollution control equipment even if modifications, including capacity expansion, resulted in far more annual pollution. Operators would be able to avoid controls as long as they did not increase the rate of pollution.

Section 2 also excludes projection designed to control pollution or to restore, maintain, or improve the reliability or safety of the facility from the definition of a modification subject to NSR. The AINS exempts projects that reduce any air pollutant even if other, possibly more dangerous, pollutants are increased as a result.[2] The immunity for reliability and safety projects is potentially even more expansive. The only limit to that loophole is a determination by the EPA Administrator that an increase in the maximum achievable hourly emissions rate of an air pollutant "would cause an adverse effect on human health or the environment." In the event a change at a reliability or safety project increases its maximum hourly emissions rate of a pollutant, the Administrator could *still* relieve the project from installing required pollution controls. This requirement creates a very high legal bar for the Administrator to meet with respect to a single facility.

In Sections 3 and 4, the AINS excludes from the definition of a modification projects at a specific facility that do not result in a significant emissions increase or net emissions increase. These sections create a loophole that would allow an operator to avoid NSR pollution control requirements with accounting gimmicks that ignore emissions increases from an entire facility.[3] Also, since there is no agreed upon definition of what level of pollution increase would be considered "significant," enforcement of this provision would be virtually impossible.

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[1] House Committee on Energy and Commerce, Subcommittee on Environment, Statement of John Walke, Natural Resources Defense Council, Hearing on New Source Review Permitting Challenges for Manufacturing and Infrastructure, 115th Cong. (Feb. 14, 2018) (emphasis added).

[2] This change would overturn a D.C. Circuit Court of Appeals decision against a similar policy from the Bush Administration. *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

[3] Sections 3 and 4 are similar to the project netting loophole included in EPA's March 13th memo on project emissions accounting, as discussed in the Democratic memo from the May 16, 2018, hearing.