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On Behalf of the Sierra Club

Hearing on “Big Relief for Small Business: Legislation Reducing Regulatory

Burdens on Small Manufacturers and Other Job Creators”

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Thank you Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee for this opportunity to testify before you. My name is Alexandra Teitz, Principal, AT Strategies, LLC, and I am here today representing the Sierra Club. I have practiced clean air law for over two decades, first as an attorney in the Office of General Counsel at the U.S. Environmental Protection Agency, and, for many years, as a Senior Counsel to this Committee.

The Sierra Club is the nation’s oldest and largest grass-roots environmental non-profit organization, with over 826,000 members nationwide. The Club’s purposes are to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth’s ecosystems and resources; to educate and enlist humanity in the protection and restoration of the quality of the natural and human environment; and to use all lawful means to

carry out these objectives. Sierra Club members are greatly concerned about air quality, and the Club has a long history of involvement in air quality related activities on both the local and national levels.

Today's hearing considers four bills that would modify Clean Air Act regulations, or the Act itself, to allow specified entities to emit more pollution into the air. Of especial concern, one bill – the SENSE Act – would weaken the Cross-State Air Pollution Rule and the Mercury Air Toxics Standards rule for coal-fired power plants, two of the most important and effective pollution control requirements in place today.¹ These bills would result in more smog, more fine particle pollution, and more toxic air pollution, such as acid gases. The effects would be real and harmful—more asthma attacks, more kids in emergency rooms, more bronchitis, more heart attacks, and more pneumonia, among other health impacts.

In addition, the bills embody a fundamentally unfair, and deeply troubling, approach to regulation. In passing these bills, Congress would grant favors to special interests, picking winners and losers, and, with slim rationales for the proposed legislative actions, Congress would overturn evidence-based scientific and technical decisions made by EPA, States, and courts after extensive open processes.

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. 48208 (Aug. 8, 2011); 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-Fired Electric Utility, Industrial-Commercial- Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; Final Rule*, 77 Fed. Reg. 9304 (Feb. 16, 2012).

Since Congress passed the Clean Air Act in 1970, we have made significant progress in cleaning up our air by following a basic principal—we hold polluting entities responsible for their pollution. Generally, where air pollution is harmful and can be controlled, we require polluters to take reasonable actions to reduce their emissions. Determinations of what is harmful and what is reasonable are made by EPA and State regulators, as authorized by law, and based on science, analysis, and an open public process.

But these bills take a different approach. They would create loopholes in the requirements for a few favored entities—waste-coal plants, brick manufacturers, manufacturers of residential wood heaters, and manufacturers of certain aftermarket auto parts. The loopholes are neither necessary nor justified, but the bills would allow these specific entities to meet looser standards, delay their clean-ups, or avoid regulation altogether. One of these bills would bypass part of our court system—just for brick manufacturers—by staying the effective date of air toxics standards for the brick industry until all challenges are resolved, effectively eliminating the courts’ current authority to grant or reject a stay request in the ongoing litigation.

In granting special breaks to these entities, Congress would overrule decisions and authorities of States and the courts, as well as EPA. By shifting clean-up responsibilities to sources of pollution with higher clean-up costs, Congress would interfere in the markets, create inefficiencies, and raise costs across-the-board. And since there is no way to legislate away the harm from pollution, the American people, and particularly our kids and seniors, would have to pay for these special breaks with their health. It doesn’t make sense, and it doesn’t seem fair.

I. H.R. 1119, the Satisfying Energy Needs and Saving the Environment (SENSE) Act, weakens two critical clean air rules by creating loopholes for favored industries, worsening air quality and harming public health.

A. The Cross-State Air Pollution Rule and the Mercury and Air Toxics Standards are two of the most important and effective regulations adopted by EPA to reduce air pollution that harms Americans' health.

Coal-fired power plants have long been the single largest industrial source of air pollution in the United States, emitting nitrogen oxides (NO_x), sulfur dioxide (SO₂), mercury and other metals, such as arsenic and nickel, and hydrogen chloride and other acid gases, as well as carbon dioxide. These pollutants constitute or form ozone (when combined with volatile organic compounds), fine particulate pollution (PM_{2.5}), toxic air pollutants, acid rain, and greenhouses gases. The resulting harms to human health from ozone and fine particulate pollution are well known and include aggravation of asthma, bronchitis and other lung diseases, heart attacks, stroke, and premature death. Toxic air pollutants are linked to other serious harms to human health including damage to the brain and nervous system, and cancer. Environmental effects of pollution from these plants include acidification of lakes, damage to crops and forests, and reduced visibility from haze. These pollutants cause their effects both locally and far downwind of their sources.

Since the passage of the Clean Air Act in 1970, EPA has worked to reduce pollution from coal-fired power plants. Despite real progress on pollution other than greenhouse gases, these plants continue to be the largest industrial source of air pollution, and they are often the least expensive source of pollution reductions. Thus, as EPA and States work to achieve healthy air for all Americans, reducing emissions from coal-fired power plants remains a large and essential part of the solution. The Cross-State Air Pollution Rule and the Mercury and Air Toxics Standards, both issued in 2011, are two of the most recent actions to cost-effectively tackle coal-fired power plant pollution that harms Americans' health.

The Cross-State Air Pollution Rule, also known as the Good Neighbor Rule, requires 27 upwind States to reduce the SO₂ and NO_x emissions that are contributing to unhealthy air in downwind States. While the rule provides each upwind State an emissions budget, allocated among emission sources, as required under the Clean Air Act, the rule also allows each State to develop its own approach to identifying covered sources and achieving the required level of reductions. Consistent with the Clean Air Act and guiding D.C. Circuit and Supreme Court decisions, the Cross-State rule uses the pre-existing SO₂ and NO_x trading programs to achieve the State budgets, and no State has chosen to substitute a different approach. These trading programs are a market-based approach that achieves the needed pollution reductions from the power sector in a highly cost-effective manner by allowing the sources to decide where to make the reductions. After extensive litigation and a judicial stay of the rule, Phase 1 of the rule began in 2015, and Phase 2, with tighter limits, began in 2017.²

² U.S. EPA, *Rulemaking To Amend Dates in Federal Implementation Plans Addressing Interstate Transport of Ozone and Fine Particulate Matter*, 79 Fed. Reg. 71663 (Dec. 3, 2014).

The benefits of the Cross-State Rule far outweigh its costs. Each year, this rule prevents up to 34,000 premature deaths, 19,000 cases of acute bronchitis, 15,000 nonfatal heart attacks, 19,000 hospital and emergency room visits, 1.8 million days of missed work or school and 400,000 cases of aggravated asthma.³

The Mercury and Air Toxics Standards rule requires coal-fired power plants to meet numeric emissions limits for mercury, other metals, and acid gases. EPA set the limits based on the reductions that can be achieved using “a range of widely available and economically feasible technologies, practices and compliance strategies.”⁴ The Clean Air Act provides that existing sources must comply within three years of the rule’s effective date (i.e., in 2015) and States may extend this deadline for an additional year as needed for sources to install technology. Invoking a provision of the Act meant for standards governing “mining waste operations” (rather than power plants) the States of Pennsylvania and West Virginia have asked waste-coal plants in those States to achieve full compliance with the standards by April 2019, three full years later than almost every other coal-fired power plant.⁵

The Mercury and Air Toxics Standards also provide benefits that far outweigh the costs. EPA estimates that for every dollar spent to reduce pollution under this rule, American families receive up to \$9 in health benefits.⁶ EPA estimated that in 2016, the rule would avoid up to

³ U.S. EPA, 76 Fed. Reg. 48,215, 48,309.

⁴ U.S. EPA, *Fact Sheet: Mercury and Air Toxics Standards for Power Plants* (<https://www.epa.gov/sites/production/files/2015-11/documents/20111221matssummaryfs.pdf>).

⁵ See, e.g., Order Granting a Petition to Object to a Permit, In re. Scrubgrass Generating Co., LP, Power Plant, Pet. No. III-2016-5 (EPA May 12, 2017).

⁶ U.S. EPA, *Fact Sheet: Consideration of Cost in the Appropriate and Necessary Finding for the Mercury and Air Toxics Standards for Power Plants* (https://www.epa.gov/sites/production/files/2016-05/documents/20160414_mats_ff_fr_fs.pdf).

11,000 premature deaths, 2,800 cases of chronic bronchitis, 4,700 heart attacks, 130,000 cases of aggravated asthma, 5,700 hospital and emergency room visits, 6,300 cases of acute bronchitis, 140,000 cases of respiratory symptoms, and 540,000 days when people miss work.⁷

B. The SENSE Act increases air pollution, overrides State authorities, and picks winners and losers by allowing favored sources to pollute more, while penalizing other cleaner sources.

1. The SENSE Act increases air pollution, harming the health of America's children and seniors.

The SENSE Act picks one favored type of coal-fired power plant— those burning waste-coal—and allows those plants to continue emitting at higher levels indefinitely. For SO₂ pollution regulated under the Cross-State Rule, the bill does this by requiring EPA to give coal refuse plants allowances equivalent to their allowances under Phase 1 of the Cross-State Rule, rather than giving these plants the smaller quantities of allowances they would receive under Phase 2 of the rule or subsequent iterations of the rule. For air toxics regulated under the Mercury and Air Toxics rule, the bill allows waste-coal plants to meet a less stringent numeric limit for acid gases that apparently would allow these plants to avoid operating pollution control technology. By writing both of these loopholes into law, the SENSE Act prevents the standards from ever being strengthened, even as technology improves and costs fall.

⁷ 81 Fed. Reg. 24,420, 24,427 (April 25, 2016).

With respect to Cross-State Rule, although the SENSE Act provides for the possibility that some of the additional SO₂ pollution allowed by the bill could be offset, there is no assurance that the environment would be held harmless, and any offsets would come at the expense of other coal-fired power plants. If and when coal-fired power plants in a State reduce emissions through conversion to gas or shut-down, their allowances would be seized to offset the increased allowances awarded to waste-coal plants in that State.

Specifically, the bill directs the Administrator to provide SO₂ allowances to waste-coal plants at Phase 1 levels indefinitely, including under subsequent revisions to the Cross-State rule.⁸ Although §2(b)(2)(A) of the SENSE Act bars the Administrator from increasing the total SO₂ budget for States with waste-coal plants, §2(b)(2)(B) then directs the Administrator to implement this directive for the 2017-2020 compliance periods by reducing allowance allocations for coal plants in the relevant State that shut down or convert to natural gas in a prior compliance period. At best, the language is ambiguous regarding whether EPA may offset the increased pollution from waste-coal plants by reducing allowance allocations to other plants, other than those that convert or shut-down, leaving it up to EPA and the courts to interpret. The bill makes no provision for maintaining the SO₂ budget if there are an insufficient number of allowances available from plants that convert or shut-down, or for maintaining the SO₂ budget in compliance periods after 2020. As this concern was highlighted during action on the bill in the last Congress, but has not been addressed, presumably the sponsors intend to allow air pollution to increase.

⁸ SENSE Act, section 2(b).

In addition to allowing more pollution from waste-coal plants, by seizing SO₂ emissions allowances from other coal plants that convert to gas or shut down, the SENSE Act disincentivizes other coal plants from cleaning up, which will also allow higher levels of pollutants other than NO_x and SO₂ (which should be less affected, given the Cross-State Rule's emissions caps).

With respect to the Mercury and Air Toxics Standards, there is no provision to offset any of the increased toxic air pollution caused by the bill's alternative looser air toxics standards.

We do not know how many additional asthma attacks, respiratory diseases, heart attacks, strokes and other health harms would be associated with the SENSE Act, as there has been no detailed technical analysis of the effect of the changes it would make. But there is no question that the bill would result in higher levels of air pollution that are already harming Americans' health.

2. The SENSE Act overrides State authorities and local decision-making under the Cross-State Rule.

Under the Clean Air Act's successful and much lauded cooperative federalism approach, EPA has the authority to require States to reduce their emissions, but States have the authority to decide *how* to reduce their emissions, unless they refuse to act. The SENSE Act would override this long-standing and sensible balance between state and federal authority, which has been at the heart of the Clean Air Act since its adoption in 1970.

Under the Cross-State Rule, upwind States, including Pennsylvania and West Virginia, had the opportunity to adopt State-specific programs to allocate extra allowances to waste-coal plants, but chose not to do so. The SENSE Act not only overrides the current approach, but also eliminates State authority to determine how to reduce air pollution going forward, by specifying and preserving allowance allocations for these plants in law for the indefinite future. Further, the bill would direct the EPA Administrator to reduce allowance allocations to other coal-fired power plants, again overriding State authorities.

3. The SENSE Act picks winners and losers, distorting the market and raising costs of clean-up under the Cross-State Rule.

The SENSE Act picks winners and losers in the market for electricity production, distorting market participants' choices and raising costs across the board. First, the SENSE Act advantages waste-coal plants over other coal plants simply by allowing them to emit more pollution, thereby reducing their operating costs.

Second, the SENSE Act specifically penalizes coal-fired power plants (other than waste-coal plants) that reduce emissions. In recent years, many coal-fired power plants with multiple units have achieved compliance with pollution limits by shutting down one or more units or converting one or more units to other fuels. The plants have used the then-excess allowances to purchase electricity from new cleaner sources, such as renewables, or to help finance the conversion or cover emissions at the remaining coal-fired units. Under this bill, however, these

options might no longer be available to some plants, making clean-up more expensive and likely slowing air pollution reductions. As the prior administration noted in its Statement of Administration Policy on this bill in the last Congress, the SENSE Act's approach creates an uneven playing field, economically advantages some coal plants over others, and reduces compliance choices for coal plants not fueled with waste-coal.⁹

Finally, the bill also bars waste-coal plants from trading any of their SO₂ allowances in the market, which distorts their economic incentive to reduce emissions, and raises the costs of SO₂ reductions across the board.¹⁰

4. The SENSE Act creates a loophole in the Mercury Air Toxics Rule already rejected by the courts.

Waste-coal plants are entirely capable of meeting the Mercury and Air Toxics Standards rule's acid-gas standards, and the courts have already rejected their claims to the contrary. EPA established the rule's standards based on the actual emissions of power plants—including coal-waste plants—reported before the rule went into effect. In the rulemaking, EPA specifically considered whether waste-coal plants should be treated differently from others, and determined that there was no justification for such an approach.¹¹ As EPA noted when it finalized the rule,

⁹ Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy, H.R. 3797 – Satisfying Energy Needs and Saving the Environment (SENSE) Act* (March 14, 2016).

¹⁰ *See id.*

¹¹ 77 Fed. Reg. 9303, 9395 (Feb. 16, 2012).

the best-performing waste-coal plants demonstrated acid gas emissions well below EPA's standard.¹²

Based on this record, the court of appeals for the D.C. Circuit upheld EPA's decision on this point, unanimously rejecting waste-coal-plants' request for special treatment.¹³ Indeed, of the nineteen plants that EPA examined before finalizing the rule, eight—over 40 percent—had acid gas emissions below EPA's standard, even before making any investment in compliance.¹⁴ The technologies used to reduce emissions at the best performing plants, such as spray-dry absorbers or scrubbers, can readily be used at the other plants as well, and new, lower-cost technologies have emerged as well.¹⁵ While some waste-coal plants have raised concerns about their ability to re-sell their coal ash if certain sorbent-injection technologies are used to reduce acid gases, waste-coal plants have demonstrated their ability to avoid those problems by installing alternative technologies or utilizing different sorbents that do not contaminate fly ash.¹⁶ Plants may also avoid fly ash contamination by reconfiguring existing control systems.¹⁷

C. The loopholes in the Cross-State Rule and Mercury and Air Toxics Standards provided by the SENSE Act are not justified.

¹² EPA Response to Comments Vol. 1 at 587.

¹³ *White Stallion v. E.P.A.*, 748 F.3d 1222, 1250 (D.C. Cir. 2014).

¹⁴ EPA Resp. Brief at 94-95.

¹⁵ "Circulating Fluidized Bed Scrubber vs. Spray Dry Absorber," Power Engineering International (August 19, 2015) (available at <http://www.powerengineeringint.com/articles/print/volume-23/issue-8/features/circulating-fluidized-bed-scrubber-vs-spray-dryer-absorber.html>).

¹⁶ EPA Response to Comments Vol. 1 at 587 (describing use of "polishing" controls rather than dry sorbent injection; 77 Fed. Reg. at 9412 (noting availability of non-sodium based sorbents, e.g. hydrated lime).

¹⁷ 77 Fed. Reg. at 9413 (noting that by placing fabric filter "downstream" of injection system to capture sorbent, plants may ensure that "fly ash ... remain[s] uncontaminated.").

The rationale for this legislation rests on two false premises: first, that waste-coal plants cannot meet current air pollution control requirements without shutting down; and second, that the appropriate response is to sacrifice public health by allowing continued unhealthy pollution.

In fact, as discussed above, waste-coal plants, just like other coal-fired power plants, have multiple affordable technological options for meeting the pollution limits in the Cross-State Rule and Mercury and Air Toxics Standards.

But even if it were the case that these plants would be uncompetitive if they were held to the same pollution control requirements as other coal-fired power plants, there is no reason why Americans' health should be sacrificed. In effect, the SENSE Act would subsidize these plants to help them compete against other electricity producers, but hide the costs of the subsidy by converting them to health burdens and forcing American families to bear them.

II. H.R. 1917, the Blocking Regulatory Interference from Closing Kilns (BRICK) Act of 2017, unjustifiably delays reductions in toxic air pollution from brick manufacturers, exposing American families to more dangerous pollution for years to come.

A. The Clean Air Act requires EPA to issue regulations to reduce toxic air pollution from industry, including brick and structural clay manufacturers.

The Clean Air Act aims to reduce Americans' exposure to toxic air pollutants, which are specifically listed metals and chemical compounds that are known or suspected to cause cancer, birth defects, neurological effects or other serious health effects. EPA must set standards by specified deadlines to control toxic air pollutants from each industry sector responsible for this pollution.

Brick and structural clay manufacturing emits toxic mercury, other hazardous metals, dioxins, hydrogen fluoride and hydrogen chloride, which are associated with various acute and chronic health disorders, including cancer. EPA initially identified this industry as a source of toxic air pollutants in 1992.¹⁸ This triggered a requirement for EPA regulate these emissions as expeditiously as practicable, and no later than 2000, but EPA was not able to not complete the rule until 2003.¹⁹ The requirements were further delayed when the D.C. Circuit vacated the rule in 2007, finding the standards insufficiently stringent to meet the Clean Air Act's requirements.²⁰ EPA completed a new rule in September 2015, and manufacturers are required to meet the standards by September 2018, or September 2019, if a facility needs an additional year to install

¹⁸ U.S. EPA, *Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990*, 57 Fed. Reg. 31576 (July 16, 1992).

¹⁹ U.S. EPA, *National Emissions Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing; and National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing*, 68 Fed. Reg. 26690 (May 16, 2003).

²⁰ *Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007).

pollution controls.²¹ EPA estimates that the final Brick and Structural Clay Products rule will reduce nationwide air toxics emissions by approximately 375 tons per year.²²

B. The BRICK Act lets brick manufacturers continue to pollute until all their lawsuits are exhausted, overriding the court's authority to offer such relief only when justified under longstanding legal standards.

The BRICK Act uses manufacturer's lawsuits against the air toxics standards as an excuse to allow manufacturers to emit uncontrolled pollution for years to come. The Court of Appeals for the D.C. Circuit has the authority to stay the effectiveness of a rule pending the court's review, but usually the regulations remain in effect while legal challenges are ongoing.²³ Case-law provides standard criteria that the court uses to determine whether a request to stay a rule during litigation is justified, taking all the relevant considerations into account. The court may stay a rule if it finds that the party seeking the stay has demonstrated that: (1) it is likely to prevail on the merits of the appeal; (2) without relief, it will be irreparably harmed; (3) issuance of the stay would not substantially harm other parties interested in the proceedings; and (4) the stay would favor the public interest.²⁴

Here, none of the industry litigants have even asked the court to stay the Brick and Structural Clay Products rule, presumably because they recognize that they do not meet the legal

²¹ U.S. EPA, NESHAP for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing; Final Rule, 80 Fed. Reg. 65470 (Oct. 25, 2016).

²² *Id.* at 65512.

²³ See *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 11, (1942).

²⁴ See *Virginia Petroleum Jobbers Assoc. v. Federal Power Commission*, 259 F. 2d. 921 (1958).

criteria. This is manifestly not a situation where justice requires that the underlying rule be stayed while the litigation plays out.

Nonetheless, the BRICK Act would intervene, effectively removing the court's authority to grant or deny a stay by preemptively staying the rule for the duration of litigation over the rule. Under the Clean Air Act, manufacturers were supposed to have cleaned up their toxic air pollution by 2004 at the latest. But now, after a 13-year delay and an additional 13 years of air pollution, the BRICK Act would allow manufacturers to continue to pollute uncontrolled.

The BRICK Act also incentives just the kind of frivolous litigation that Congress has expressed concern about in other contexts. Because the rule would remain stayed for as long as manufacturers are in court, and because a single set of lawsuits on behalf of the whole industry is clearly less expensive than installing pollution controls across an entire industrial sector, manufacturers would have an overwhelming economic incentive to exhaust every possible legal avenue, no matter how dubious the claim.

Finally, the BRICK Act sets a terrible precedent. To the extent that this bill encourages Congress to intervene to stay other regulations while legal challenges play out, the BRICK Act paves the way to imposing substantial additional strains on our already over-burdened courts, forcing the U.S. government to waste taxpayer dollars defending frivolous and unfounded legal claims, and sacrificing Americans' health due to years of additional unnecessary pollution.

III. H.R. 453, the “Relief from New Source Performance Standards Act of 2017,” delays cleaner-burning wood stoves until 2023, exposing communities to years of additional unhealthy fine particle pollution.

A. The Clean Air Act requires EPA to set air pollution control standards for new sources of pollution, including new residential wood heaters.

Smoke from residential wood heaters can pose serious health concerns, particularly in communities where many people depend on burning wood for heat. The most harmful pollutant in the smoke is particle pollution, but it also contains carbon monoxide, volatile organic compounds, which combine with other pollutants to form smog, black carbon, and toxic air pollutants such as benzene. As noted above, particle pollution (including black carbon) and smog harm human health by causing aggravation of asthma, bronchitis and other lung diseases, heart attacks, stroke, and premature death. At low levels of exposure, carbon monoxide can cause problems for people with certain types of heart disease.²⁵ Benzene is known to cause cancer.²⁶

Under section 111 of the Clean Air Act, the New Source Performance Standards provisions, EPA must set standards for new sources of air pollution that may endanger public health to assure that the sources control pollution to the extent achievable, based on demonstrated approaches. This sensible and effective program recognizes that it is often easier

²⁵ U.S. EPA, *What are the harmful effects of CO?* (<https://www.epa.gov/co-pollution/basic-information-about-carbon-monoxide-co-outdoor-air-pollution#Effects>).

²⁶ U.S. EPA, *Benzene* (updated 2012) (<https://www.epa.gov/sites/production/files/2016-09/documents/benzene.pdf>).

and more cost-effective to build-in pollution controls with a new facility or product, compared to retrofitting existing facilities or products. In addition, pollution reductions from a new source produce benefits for the full lifetime of that source.

In 2015, EPA strengthened the pollution control requirements for new residential wood heaters, based on technology improvements that allow manufacturers to build wood heaters that produce far less air pollution.²⁷ The standards will cut fine particle pollution and VOCs from new wood heaters by almost 70%, and will cut carbon monoxide pollution by 62%.²⁸ These significant improvements will especially benefit communities where wood smoke is a major contributor to particle pollution. The standards will also tend to make the heaters more efficient, allowing homeowners to use less wood. EPA noted that the rule has an usually large net benefit of more than 100 times the cost of the rule, due to the costly health impacts of wood smoke and the relative affordability of pollution reductions from new wood heaters.²⁹

EPA included multiple provisions in the rule to help manufacturers achieve the new standards, including phasing in the new limits to give manufacturers five years to comply fully. Manufacturers do not have to meet the final standards until 2020.

²⁷ U.S. EPA, *Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces; Final Rule*, 80 Fed. Reg. 13672 (Mar. 16, 2015).

²⁸ U.S. EPA, *Overview of Final Updates to Air Emissions Requirements for New Residential Wood Heaters* (<https://www.epa.gov/residential-wood-heaters/fact-sheet-overview-final-updates-air-emissions-requirements-new>).

²⁹ See 80 Fed. Reg. 13672, 13674.

B. The “Relief from New Source Performance Standards Act of 2017” would allow wood heater manufacturers to keep making more polluting heaters, resulting in years of additional fine particle pollution and ongoing serious health problems, particularly for communities with many wood stoves.

Despite the ongoing public health harms from wood smoke and the extended compliance period for manufacturers under the rule, H.R. 453 would delay cleaner wood burning heaters for three more years, on top of the five years manufacturers already have to comply. Worse, the damage from H.R. 453 will persist not for three years, but for many more years, or even decades to come, as each new higher-polluting wood heater sold between 2020 and 2023 will continue to emit more pollution over its entire lifespan. Areas such as Fairbanks and Salt Lake City that are struggling with unhealthy levels of particulate pollution driven primarily or partially by wood smoke cannot afford cleaner technology to be further delayed.³⁰

³⁰ EPA has reclassified Fairbanks and Salt Lake City from moderate to serious non-attainment for PM2.5 because the areas have been unable to meet the 2006 health-based standard for PM2.5. U.S. EPA, *Determinations of Attainment by the Attainment Date, Determinations of Failure To Attain by the Attainment Date and Reclassification for Certain Nonattainment Areas for the 2006 24-Hour Fine Particulate Matter National Ambient Air Quality Standards*, 82 FR 21711 (May 10, 2017). For Fairbanks, the PM2.5 exceedances are primarily due to wood-burning heaters. <https://www.epa.gov/newsreleases/epa-proposes-action-fairbanks-alaska-air-quality-plan> (discussing contribution of wood smoke to Fairbanks’ PM2.5 nonattainment). For Salt Lake City, wood smoke is a smaller but non-trivial part of the problem. Utah Dept. of Health, *Wood Smoke and Your Health* (<http://www.health.utah.gov/utahair/pollutants/woodsmoke/>) (identifying residential wood smoke as the source of roughly 5% of PM2.5 emissions from Salt Lake City and other counties).

IV. H.R. 350, the “Recognizing the Protection of Motorsports (RPM) Act of 2017,” undermines protections against tampering with vehicle emissions controls by creating a new loophole for after-market emissions control defeat devices based on their intended use in racing vehicles.

A. The Clean Air Act prohibits tampering with or deploying devices to defeat motor vehicle emissions controls.

Motor vehicles are a major source of health endangering air pollution, emitting nitrogen oxides and VOCs that combine to form smog, as well as particle pollution. Transportation produces more than half of the nitrogen oxides, almost a third of the VOCs, and over one-fifth of the particulate matter air pollution in the United States.³¹ As noted above, smog and particle pollution harm human health by causing aggravation of asthma, bronchitis and other lung diseases, heart attacks, stroke, and premature death.

Section 203(b)(3) of the Clean Air Act prohibits “any person” from removing or rendering inoperative emissions controls on certified motor vehicles, or from selling or installing automotive parts that would “bypass, defeat, or render inoperative” vehicle emissions controls on such vehicles. The VW scandal is the most well known, but far from the only, example of cheating on vehicle emissions controls. In 2015, EPA entered into a consent agreement with a company that had sold after-market defeat devices to bypass emissions controls on several

³¹ U.S. EPA, *Smog, Soot, and Other Air Pollution from Transportation* (<https://www.epa.gov/air-pollution-transportation/smog-soot-and-local-air-pollution>).

popular truck models.³² The company stipulated that it had sold over 100,000 individual defeat devices from 2010-2013, including over 86,000 “performance tuners.”³³ EPA estimated that the emissions impacts of the performance tuners alone is 71,000 tons of NOx emissions.³⁴ To provide some context, this is almost enough to wipe out the 80,000 tons of NOx reductions from power plants achieved through a 2016 rule updating the requirements of the Cross-State Air Pollution Rule.³⁵ This underscores how critical it is that EPA be able to enforce against the manufacture and sale of these defeat devices.

While there has been some recent controversy about EPA’s interpretation of the section 203(b)(3) language, EPA has made it clear that it is not concerned about vehicles used exclusively for racing. EPA stated that its “focus is not on vehicles built or used exclusively for racing, but on companies that don’t play by the rules and that make and sell products that disable pollution controls on motor vehicles used on public roads. These unlawful defeat devices pump dangerous and illegal pollution into the air we breathe.”³⁶

Furthermore, as a practical matter, EPA has effectively no ability or inclination to enforce motor vehicle requirements against individual vehicle owners, even if they are in violation. With over 240 million light-duty vehicles on the road today, EPA reasonably and appropriately directs

³² Consent Agreement, *In the Matter of H&S Performance, LLC*, U.S. EPA, Environmental Appeals Board, No. CAA-HQ-2015-MSEB 8248, 8 (Dec. 17, 2015) (<https://www.epa.gov/sites/production/files/2016-01/documents/hscafo.pdf>).

³³ *Id.*

³⁴ *Id.*

³⁵ U.S. EPA, *Final Cross-State Air Pollution Rule Update for the 2008 NAAQS* (https://www.epa.gov/sites/production/files/2017-06/documents/final_finalcsaprur_factsheet.pdf).

³⁶ Jalopnik, *The EPA Will Not “Ban Racecars” After All* (April 15, 2016) (<http://jalopnik.com/the-epa-will-not-ban-race-cars-after-all-1771338067>).

its limited regulatory and enforcement resources at the far fewer manufacturers of vehicles and after-market parts.³⁷

B. In the guise of protecting amateur racers, the “RPM Act of 2017” carves a gaping loophole in the Clean Air Act motor vehicle pollution control requirements, blocking EPA from ever enforcing against manufacturers of add-on emissions control defeat devices, regardless of the devices’ use in practice.

The RPM Act adds sweeping new language to the Clean Air Act that would make it impossible, in practice, for EPA to regulate after-market parts manufacturers that produce add-on emissions control defeat devices for vehicles. As proponents of the RPM Act note, there is a long history of amateur racers converting on-road vehicles to vehicles that are used solely for racing, and to our knowledge, EPA has never taken enforcement action against any such modification or vehicle. There are relatively few vehicles used solely for racing, and these vehicles are driven for relatively small periods of time, making their air pollution contributions comparatively insignificant. Narrowly crafted targeted language that applied only to such modifications and vehicles would likely have little adverse effect on motor vehicle emissions, relative to current circumstances.

Unfortunately, the RPM Act is the opposite of narrow and targeted. The Act states that “no action with respect to any device or element of design . . . shall be treated as a prohibited act

³⁷ Bureau of Transportation Statistics, Table 1-11: Number of U.S. Aircraft, Vehicles, Vessels, and Other Conveyances (statistics for light-duty vehicles for 2015) (https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_11.html).

. . . if the action is *for the purpose of* modifying a motor vehicle into a vehicle to be used solely for competition.” The result is that, under the RPM Act, a manufacturer is free to manufacture devices that defeat air pollution controls on vehicles, as long as *the manufacturer* can assert that it intends the devices to be used only on vehicles used solely for racing. Of course, the manufacturer’s intent does nothing to constrain the ultimate use of the device. Moreover, professional vehicle repair shops could modify vehicles to remove air pollution controls under this language, as long as they assert that the intended purpose is that the vehicle is used solely for racing. Yet once the devices are sold or the vehicles are modified, EPA has no practical ability to police individual vehicles to determine whether or not they are driven on the roads. Whatever the intent of the RPM Act, in practice, it would allow a potentially significant increase in unhealthy air pollution from motor vehicles.