TESTIMONY OF JOHN D. WALKE

FEDERAL CLEAN AIR DIRECTOR

NATURAL RESOURCES DEFENSE COUNCIL

LEGISLATIVE HEARING ON

H.R. ___, THE CLEAN AIR AND ECONOMIC ADVANCEMENT REFORM ACT &

H.R. ___, THE CLEAN AIR AND BUILDING INFRASTRUCTURE IMPROVEMENT ACT

BEFORE THE SUBCOMMITTEE ON ENVIRONMENT

COMMITTEE ON ENERGY AND COMMERCE

U.S. HOUSE OF REPRESENTATIVES

June 11, 2025

Thank you, Chairman Griffith and Ranking Member Tonko for the opportunity to testify today. My name is John Walke, and I am the Federal Clean Air Director and a 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 3 million members and online activists nationwide, served from offices in New York, Washington, Santa Monica, San Francisco, and Chicago.

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. Having worked on air pollution issues for the entirety of my career, I believe today's two bills are harmful to U.S. air quality and Americans' health and welfare. Both bills would weaken the Clean Air Act and would fail to improve air quality or public health. Both are unjustified. The Subcommittee and Committee should not advance the "Clean Air and Economic Advancement Reform Act" (CLEAR Act) or the "Clean Air and Building Infrastructure Improvement Act."

I. INTRODUCTION

All Americans want safe, clean air. All members of Congress want the same. That consensus should unite us, not divide us. Today's draft bills, unfortunately, are divisive because they end Americans' legal right to safe, clean air that the Clean Air Act has guaranteed for 55 years. How has the law guaranteed that? By ensuring safe air quality is based on medical science, not money or markets.

And how do the draft bills eliminate the legal right to safe, clean air? First, one of the bills would eliminate the obligation to establish health standards for air pollutants like smog and soot based solely on medical science and what is required to protect public health with an adequate margin of safety for vulnerable groups like children and the elderly—*without* any consideration of profits for regulated companies or economic impacts from implementation. In doing so, the draft bill would overrule a unanimous Supreme Court decision by the late Justice Antonin Scalia that requires clean air health standards to be based solely on medical science and health considerations, not compliance costs.[1]

And second, the same bill for the first time would authorize EPA to consider company profits and compliance costs to set the least protective, least safe standards under consideration. Again, overruling Justice Scalia's unanimous Supreme Court decision in *American Trucking v. Whitman.*[2] The consequences are predictable: Americans would be denied safe, clean air that the Clean Air Act has guaranteed for 55 years based solely on what medical science considers unsafe for people to breathe, including the most vulnerable Americans. For the first time, Congress would authorize EPA to expose American communities to unhealthy levels of smog and soot and sulfur dioxide and even toxic lead pollution, by prioritizing corporate compliance costs, profits, energy, or other non-safety factors.

This is not hard for Americans to get: safe air should be defined based on medical science, not money or markets.

The draft bills also weaken the Clean Air Act and worsen clean air safeguards in other respects that will make Americans sicker, and keep the United States' air more polluted, for longer. This is also the consensus of the leading public health and air quality experts in the country, who in 2017 and 2024 criticized and opposed earlier drafts of both bills with near-identical elements to today's draft bills.[3]

I submit the following testimony as a clean air expert and attorney for 32 years in the spirit of identifying elements that weaken the law and worsen clean air protections. I do so guided by the certainty that all Americans deserve the right to safe, clean air. And the certainty that all Americans want lawmakers to continue to guarantee that right, along with strong, effective, timely safeguards against harmful air pollution.

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[1] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001) (noting that the text of § 109(b) "unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA").
[2] *Id.*
[3] *See*, *e.g.*, Open Letter to U.S. Senators Opposing the Ozone Standards Implementation Act of 2017 (May 22, 2017) *available at* https://www.naccho.org/uploads/downloadable-resources/Health-Groups-Oppose-S.-263-the-Smoggy-Skies-Act.pdf.

II. BACKGROUND

A. The National Ambient Air Quality Standards-Setting Process

National ambient air quality standards (NAAQS) establishing medical science-based health and welfare standards for air pollution have been the foundation of the Clean Air Act—the very heart of this historically successful law—since 1970: "The Clean Air Act Amendments of 1970 first introduced the requirement to establish enforceable NAAQS. … The 1970 amendments "carrie[d] the promise that ambient air in all parts of the country shall have no adverse effects upon any American's health." 116 Cong. Rec. 42,329, 42,381 (Dec. 18, 1970) (remarks of Senator Muskie)."[4]

Primary NAAQS, often called the health standards, "must be set to be 'requisite to protect the public health' with 'an adequate margin of safety.' 42 U.S.C. § 7409(b)(1). To ensure that the NAAQS keep pace with scientific understanding and continue to provide the necessary protection, EPA must review and revise as appropriate the underlying air quality criteria and the NAAQS themselves at least every five years. *Id.* § 7409(d)(1). Any primary NAAQS that EPA promulgates under these provisions must be adequate to protect public health and provide an adequate margin of safety, in order to prevent not only any known or anticipated adverse health effects from polluted air, but also those that are scientifically uncertain or that research has not yet uncovered. 88 Fed. Reg. at 5562."[5]

"Further, the statute makes clear that there are significant limitations on the discretion granted to EPA in setting the NAAQS. In exercising its judgment, EPA must err on the side of protecting public health and may not consider cost or feasibility in connection with establishing the level of the NAAQS and its other elements (*e.g.*, indicator, the form of the standard, and averaging time). The D.C. Circuit Court summed up EPA's mandate succinctly: Based on these comprehensive [air quality] criteria and taking account of the 'preventative' and 'precautionary' nature of the [Clean Air A]ct, the Administrator must then decide what margin of safety will protect the public health from the pollutant's adverse effects—not just known adverse effects, but those of scientific uncertainty or that 'research has not yet uncovered.' Then, and without reference to cost or technological feasibility, the Administrator must promulgate national standards that limit emissions sufficiently to establish that margin of safety. *Am. Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998) (citations omitted); *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 464-71 (2001)." *Id.* "Because EPA must set the NAAQS to provide an adequate margin of safety for all, the NAAQS must be set at a level that protects against adverse effects in vulnerable subpopulations, such as children, the elderly, pregnant women, the socially disadvantaged, and

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[4] Comments by environmental nongovernmental organizations on the Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 88 Fed. Reg. 5558 *et seq.* (Jan. 27, 2023), EPA-HQ-OAR-2015-0072, https://www.nrdc.org/sites/default/files/2023-03/epa-pm-naaqs-proposal-coalition-comments-20230328.pdf ("NGO Particulate Matter Comments").
[5] *Id.* at 5.

people with heart and lung disease and other pre-existing health conditions. The D.C. Circuit has repeatedly found that if a certain level of a pollutant 'adversely affects the health of these sensitive individuals, EPA must strengthen the entire national standard.' *American Lung*, 134 F.3d at 389 (citation omitted); *accord Coal. of Battery Recyclers Ass'n v. EPA*, 604 F.3d 613, 618 (D.C. Cir. 2010); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 524 (D.C. Cir. 2009). Thus, EPA must build into the NAAQS an adequate margin of safety for these sensitive subpopulations. *See Am. Farm Bureau Fed'n*, 559 F.3d at 525-26."[6] The drafters of the 1970 Clean Air Act Amendments made clear that the millions of people subject to respiratory ailments are entitled to the protection of the NAAQS: "Included among those persons whose health should be protected by the ambient standard are particularly sensitive citizens such as bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed to the ambient environment." S. Rep. No. 91-1196, at 10 (1970). As the D.C. Circuit has explained:

> In its effort to reduce air pollution, Congress defined public health broadly. NAAQS must protect not only average healthy individuals, but also "sensitive citizens"—children, for example, or people with asthma, emphysema, or other conditions rendering them particularly vulnerable to air pollution.

Am. Lung Ass'n, 134 F.3d at 390 (citations omitted); *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 684 F.3d 803, 810 (D.C. Cir. 2012). NAAQS must 'be set at a level at which there is "an absence of adverse effect" on these sensitive individuals.' *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1153 (D.C. Cir. 1980)."[7]

Following establishment of protective standards based on health considerations and medical science alone, the Clean Air Act and state laws work together to meet or "attain" those standards in the most effective and cost-effective ways—taking into account economic and technological feasibility across statutory programs.[8]

B. Clean Air Progress Coupled with Strong Economic Growth

The Clean Air Act has been a remarkably successful and cost-effective law *because* its foundation is clean air standards based on health considerations and medical science alone. From 1980 to 2023, the "criteria air pollutants" that the Clean Air Act regulates have dropped by impressive amounts: 75% reductions in smog-forming nitrogen oxides, 58% reductions in smog-forming volatile organic compounds (VOCs), and 62% reductions in direct fine particle pollution ($PM_{2.5}$).[9]

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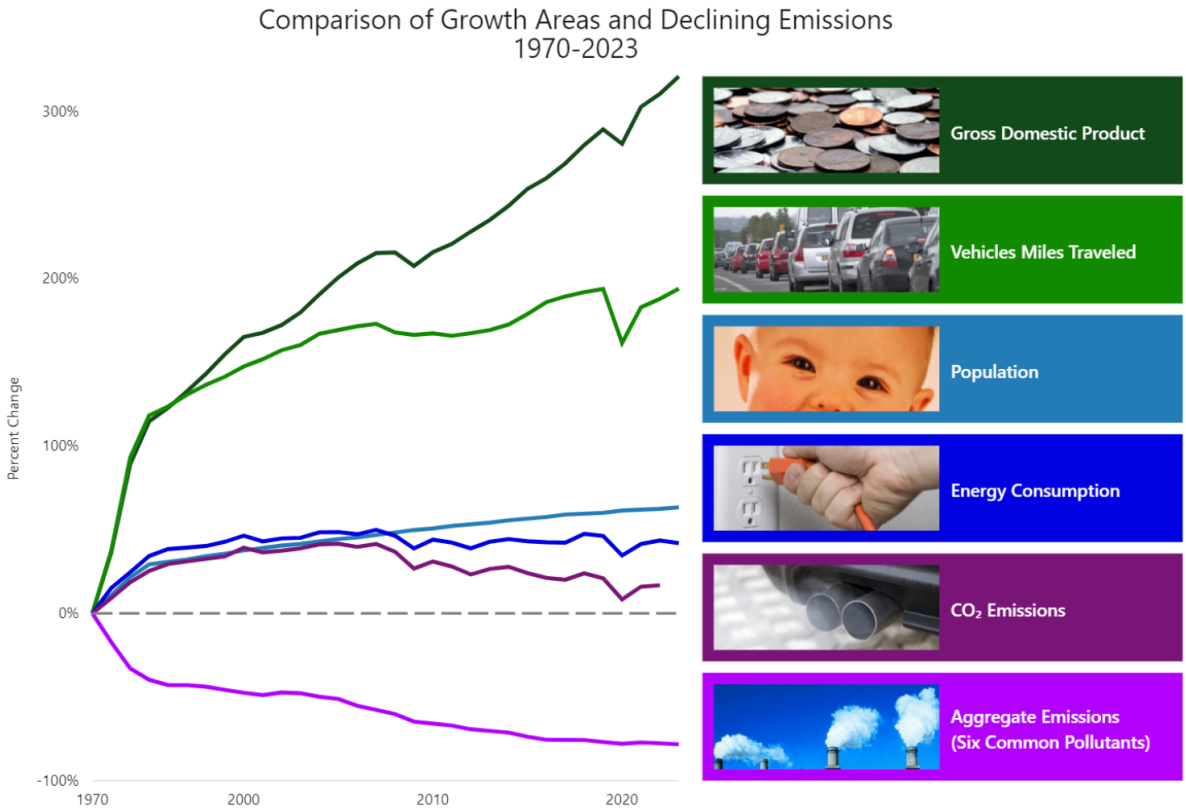
[6] *Id.* at 6–7.
[7] *Id.*
[8] *See*, *e.g.*, 42 U.S.C. §§ 7410(a)(2), 7470-7479, 7501-7515.
[9] *See, e.g.,* https://www.epa.gov/air-trends/air-quality-national-summary.

Percent Change in Emissions

Pollutant	1980 vs 2023	1990 vs 2023	2000 vs 2023	2010 vs 2023
Carbon Monoxide	-76	-71	-59	-28
Lead*	-99	-88	-78	-36
Nitrogen Oxides (NO_x)	-75	-73	-69	-55
Volatile Organic Compounds (VOC)	-58	-46	-26	-5
Direct PM_{10}	-62	-27	-24	-14
Direct $PM_{2.5}$	---	-28	-35	-11
Sulfur Dioxide	-94	-93	-90	-76

That success in reducing harmful emissions and improving Americans' health has occurred during periods of impressive U.S. economic growth and steady population growth:



(Charts taken from https://www.epa.gov/air-trends/air-quality-national-summary)

In fact, the Clean Air Act, in section 812, requires EPA to undertake regular studies and report on the impacts of the Act. In the first twenty years of the Clean Air Act, EPA estimated that the

benefits of the Act exceeded its costs by approximately 42:1.[10] From 1990-2010, EPA undertook a prospective study, and, after an "extensive peer review during which independent panels of distinguished economists, scientists, and public health experts provided in-depth assessment and advice throughout the study's design, implementation, and documentation*",* the Agency concluded that:

> in the year 2010 the Amendments of 1990 will prevent 23,000 Americans from dying prematurely and avert over 1,700,000 incidences of asthma attacks and aggravation of chronic asthma. In addition, in 2010, they will prevent 67,000 incidences of chronic and acute bronchitis, 91,000 occurrences of shortness of breath, 4,100,000 lost workdays, and 31,000,000 days in which Americans would have had to restrict activity due to air pollution related illness. Plus, 22,000 respiratory-related hospital admissions would be averted, as well as 42,000 cardiovascular (heart and blood) hospital admissions, and 4,800 emergency room visits for asthma.[11]

The most recent prospective study, done in 2011, followed up on this work and examined the period from 2010 to 2020. EPA found that their "central benefits estimate exceeds costs by a factor of more than 30 to one, and the high benefits estimate exceeds costs by 90 times. Even the low benefits estimate exceeds costs by about three to one."[12] Looking forward to 2020, the report found that "[in] 2020, the Clean Air Act Amendments will prevent over 230,000 early deaths. Most of the economic benefits (about 85 percent) are attributable to reductions in premature mortality associated with reductions in ambient particulate matter."

Economists studying the Clean Air Act and its costs and benefits have reached another revealing conclusion that has proven true time and time again: "One defining feature of the research on the costs of the Clean Air Act is that predicted costs of the regulations are often higher than the costs that actually occur."[13]

There is still much work to be done, however. Over 156.1 million Americans live in areas that suffer unsafe levels of ozone (smog) pollution or fine particle ($PM_{2.5}$) pollution or both.[14] Over

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[10] U.S. EPA, "The Benefits and Costs of the Clean Air Act, 1970 to 1990," prepared for U.S. Congress, October 1997 *available at* https://www.epa.gov/sites/default/files/2015-06/documents/contsetc.pdf.
[11] U.S. EPA*,* "The Benefits and Costs of the Clean Air Act Amendments of 1990," prepared for U.S. Congress, November 1999, EPA-410-R-99-001*available at* https://www.epa.gov/sites/default/files/2015-07/documents/fullrept.pdf.
[12] U.S. EPA, "Benefits and Costs of the Clean Air Act 1990-2020, the Second Prospective Study," March 2011, *available at* https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-2020-second-prospective-study.
[13] Janet Currie & Reed Walker, What Do Economists Have to Say about the Clean Air Act 50 Years after the Establishment of the Environmental Protection Agency?, 33 J. of Econ. Perspectives 3, 19 (2019), https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.33.4.3.
[14] American Lung Association, *State of the Air 2025 Report* (2025), at 12, *available at* https://www.lung.org/research/sota/key-findings.

88,000 Americans die prematurely every year due to just fine particle pollution, according to the renowned Global Burden of Disease report.[15] Hazardous air pollution (regulated outside the NAAQS program) causes cancer, brain damage, birth defects, infertility, heart diseases and a wide range of other chronic conditions including premature death.[16]

C. H.R. 806 – Ozone Standards Implementation Act of 2017

This Subcommittee held a hearing in March 2017 on a bill called the "Ozone Standards Implementation Act of 2017," whose key elements were substantially similar to features of today's two draft bills.[17]

The nation's leading public health organizations[18] criticized and opposed the Senate version of the 2017 bill for worsening safeguards against ozone (smog) pollution, weakening the Clean Air Act, and eliminating Americans' right to safe, clean air based on medical science alone. The same critiques applied to the counterpart House version, H.R. 806:

- "The Smoggy Skies Act also reaches far beyond implementation of the current ozone standards. It permanently weakens the Clean Air Act and future air pollution health standards for all criteria pollutants. Specifically, the Smoggy Skies Act weakens implementation and enforcement of all lifesaving air pollution health standards, including those for carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide. It would also permanently undermine the Clean Air Act as a public health law."
- "The Smoggy Skies Act would lengthen the review period of the air pollution health standards from once every five years to once every ten years for all criteria pollutants. As the science continues to evolve, the public deserves that their protections be based on the

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[15] Cohen AJ, *et al.*, Estimates and 25-year trends of the global burden of disease attributable to ambient air pollution: an analysis of data from the Global Burden of Diseases Study 2015 (May 13, 2017).
[16] *See generally Notice of Source Category Listings for the Specific Pollutants (Section 112(c)(6))*, ENVTL. PROT. AGENCY, https://www3.epa.gov/airtoxics/112c6/112c6fac.html (hereinafter "EPA Listing Notice") ("Hazardous air pollutants are also known as air toxics; these are pollutants which are known or suspected to cause cancer or other serious health effects such as birth defects or reproductive effects."); 42 U.S.C. § 7412.
[17] *See* H.R. 806, ''Ozone Standards Implementation Act of 2017,'' https://democrats-energycommerce.house.gov/sites/evo-subsites/democrats-energycommerce.house.gov/files/BILLS-115-HR-806ih.pdf; *see generally* https://democrats-energycommerce.house.gov/committee-activity/hearings/hearing-on-hr-806-ozone-standards-implementation-act-of-2017.
[18] The groups were the Allergy & Asthma Network, Alliance of Nurses for Healthy Environments, American Lung Association, American Public Health Association, American Thoracic Society, Asthma and Allergy Foundation of America, Center for Climate Change and Health, Children's Environmental Health Network, Health Care Without Harm, National Association of County & City Health Officials, National Environmental Health Association, National Medical Association, Physicians for Social Responsibility, and Trust for America's Health. *See* May 22, 2017 Letter opposing S.263, the "Ozone Standards Implementation Act of 2017," from Allergy & Asthma Network *et al.* to U.S. Senators, https://www.naccho.org/uploads/downloadable-resources/Health-Groups-Oppose-S.-263-the-Smoggy-Skies-Act.pdf.

> most up-to-date science, certainly not a schedule that is twice as long as they currently have under the law."

At the 2017 hearing before this subcommittee addressing H.R. 806, a witness from the California Air Resources Board summarized well why the backward steps in today's draft legislation are both unnecessary and harmful:

> [The legislation] would inappropriately insert control costs into EPA's science-based process for setting air quality standards. How healthful the air is to breathe is not determined by the cost to clean it up. It is a question of science and what air pollution does to the human body.
>
> H.R. 806 would mean more people would breathe dirty air longer. It would unwisely mandate that we ignore the air pollution impacts of weather conditions made worse by man-made climate change.
>
> It would push off deadlines, erode requirements for incremental progress, and undermine the Clean Air Act's requirements for comprehensive air quality strategies.[19]

Clean air is fully compatible with economic growth, as the CARB witness testified:

> At the same time we have been cleaning the air, California's economy has continued to grow and prosper. Last year, California grew to be the world's sixth largest economy. In 2016, California nonfarm employment increased by 2.6 percent, compared to 1.7 percent nationwide. In 2009, the California clean energy industry generated $27 billion dollars and employed 123,000 people. By 2020, we expect it will grow to over $140 billion with 345,000 employed.

And despite the state's continuing air pollution challenges, and fully compatible with its continuing progress delivering safer air to its citizens, California's economy is now the *fourth* largest in the world.[20]

The White House Office of Management and Budget has confirmed that "[p]rojections of the health impact of reducing particulate matter exposure are often a major part of the total

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[19] Ozone Standards Implementation Act of 2017: Hearings on H.R. 806 Before the Subcomm. on Env't of the H.R. Comm. on H.R. Comm. on Energy and Com., 115th Cong. (2017) (statement of Kurt Kaperos).,https://democrats-energycommerce.house.gov/sites/evo-subsites/democrats-energycommerce.house.gov/files/Testimony-Karperos-ENV-Hrg-HR-806-Ozone-Stds-2017-03-22.pdf.

[20] *See, e.g.,* Governor Gavin Newsome, *California is Now the 5th Largest Economy in the World* (Apr 23, 2025) https://www.gov.ca.gov/2025/04/23/california-is-now-the-4th-largest-economy-in-the-world/#:~:text=According%20to%20the%20IMF's%202024,to%20surpass%20California%20by%202026

monetized benefits of regulations summarized in OMB's annual reports."[21] That is for the total monetized benefits of *all* regulations issued under *all* U.S. regulatory laws across *all* federal agencies and departments, making the Clean Air Act more than arguably the most cost-effective and one of the most successful U.S. regulatory laws. The medical science-based, health-based air quality standards are the very foundation of that success.

D. H.R. 7650 – the Air Quality Standards Implementation Act of 2024

In 2024, an even bigger coalition of public health groups led by the Allergy and Asthma Network reiterated their objections to the substantially similar bill, H.R. 7650, the "Air Quality Standards Implementation Act of 2024."[22] Forty-eight of the nation's leading health and environmental organizations, including NRDC, also opposed H.R. 7650 for the same reasons.[23] The latter organizations noted that the "legislation would weaken the Clean Air Act radically without a single improvement, rob Americans of their 54-year right to healthy air based on medical science, and delay life-saving health standards already years overdue." *Id.*

Disappointingly, industry letters supporting H.R. 7650 did not so much as acknowledge that the bill eliminated Americans' right to safe, clean air based on medical science alone, or acknowledge that the bill overturned the leading Supreme Court decision and multiple D.C.

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[21] Office of Management and Budget, "2018, 2019,and 2020 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act," at 6, Appendix C, *available at* https://bidenwhitehouse.archives.gov/wpcontent/uploads/2021/01/2018_2019_2020-OMB-Cost-Benefit-Report.pdf.

[22] *See* Letter from health stakeholders to Chair Carter and Ranking Member Tonko, March 5, 2024, https://www.congress.gov/118/meeting/house/116939/documents/HMKP-118-IF18-20240306-SD072.pdf (joined by Allergy & Asthma Network, Alliance of Nurses for Healthy Environments, American Heart Association, American Lung Association, American Public Health Association, American Thoracic Society, Asthma and Allergy Foundation of America, Asthma & Allergy Foundation of America – Michigan Chapter, Children's Environmental Health Network, Climate Psychiatry Alliance, Health Care Without Harm, Medical Students for a Sustainable Future, MI Air MI Health, Michigan Clinicians for Climate Action, Montana Health Professionals for a Healthy Climate, National Association of Pediatric Nurse Practitioners, National Environmental Health Association, National Hispanic Health Foundation, National Hispanic Medical Association, National League for Nursing Oncology, Advocates United for Climate and Health – International, Physicians for Social Responsibility, Physicians for Social Responsibility Maine, Public Health Institute, Respiratory Health Association, San Francisco Bay Physicians for Social Responsibility, Texas Physicians for Social Responsibility, Virginia Clinicians for Climate Action, and Washington Physicians for Social Responsibility).

[23] *See* Letter from environmental organizations to members of the U.S. House of Representatives, March 5, https://www.congress.gov/118/meeting/house/116939/documents/HMKP-118-IF18-20240306-SD072.pdf.

Circuit decisions. Accordingly, these industry letters did not defend or even address the bill's harmful outcomes, avoiding its dangerous implications altogether.[24]

III. The Clean Air and Economic Advancement Reform Act (Draft)

The draft "Clean Air and Economic Advancement Reform Act" (draft CLEAR Act) retains the central objectionable elements of H.R. 806 and H.R. 7650, so the criticisms directed at those bills remain true for the draft CLEAR Act:

> [T]he legislation would abolish the Clean Air Act's exclusive consideration of health and medical science to determine how much air pollution is unsafe for people to breathe. For the first time, Congress would authorize EPA to expose American communities to unhealthy levels of smog and soot and sulfur dioxide and even toxic lead pollution, by prioritizing corporate compliance costs, profits, technological feasibility or other non-safety factors. The medically-based health standards that the Clean Air Act has been founded on for [55] years instead could become a political football weakened by polluters' predicted compliance costs—costs that often are overestimated.[25]

The draft CLEAR Act would impose these harmful results by drastically weakening the 55-year-old Clean Air Act and taking away Americans' legal right to safe, clean air, in addition to the following weakening amendments to the Clean Air Act:

- Sec. 2(a): authorizes delay in the NAAQS review-and-revise-as-appropriate process from five-year intervals to 10-year intervals (*see infra*, sec. III.A.);
- Sec. 2(b): specifies that a "range of levels of air quality for an air pollutant are requisite to protect public health with an adequate margin of safety" (*see infra*, sec. III.B.);
- Sec. 2(b): authorizes the EPA Administrator to "consider likely attainability of the standard"—rather than just what is "requisite to protect public health with an adequate margin of safety"—when establishing and revising the primary (health) NAAQS (*see infra*, sec. III.B.);
- Sec. 2(c): delays state air pollution control measures to meet national health standards by one year, and delays federal air pollution cleanup and control measures to meet national health standards by one additional year, forcing Americans to breathe unsafe air pollution for longer than the Clean Air Act allows today;
- Sec. 2(d): eliminates additional air pollution control measures (called "contingency measures") for areas suffering the worst smog levels in the U.S. (extreme nonattainment

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[24] *See*, *e.g.*, Letter from the National Association of Manufacturers to Chair Carter and Ranking Member Tonko, March 6, 2024, https://www.congress.gov/118/meeting/house/116939/documents/HMKP-118-IF18-20240306-SD072.pdf.

[25] *See* Letter from environmental organizations to members of the U.S. House of Representatives, March 5, https://www.congress.gov/118/meeting/house/116939/documents/HMKP-118-IF18-20240306-SD072.pdf.

areas), when those areas fail to make reasonable further progress toward meeting the ozone health standard;

- Sec. 2(e): weakens additional air pollution control measures required in areas suffering unsafe ozone (smog) levels, by adding a new factor ("economic feasibility") to diminish the effectiveness of the control measures;
- Sec. 2(f): weakens additional air pollution control measures required in areas suffering unsafe particulate matter levels, by adding two new factors ("technological achievability" and "economic feasibility") to diminish the effectiveness of the control measures;
- Sec. 3(a): expands the exemptions from clean air health standards for "exceptional events" that the current Clean Air Act specifically says are *not* exceptional events, such as "a meteorological event involving high temperatures or lack of precipitation";
- Sec. 3(a): amends the Clean Air Act unnecessarily, by redundantly allowing so-called "prescribed burns" to be "exceptional events" exempt from clean air health standards, when EPA always has defined prescribed fires to be exceptional events (and no litigant has challenged that sensible decision);
- Sec. 3(a): adopts a new, unjustified exemption for States that fail to submit clean air cleanup plans, or fail to submit plans that meet Clean Air Act requirements, concerning areas with unsafe air quality—*if* 'the State would have avoided such deficiency or would have attained the health standard,' but for 'emissions from outside the nonattainment area.' Unaccountably, this would allow a state to avoid sanctions or fees for failing to meet clean air health standards or Clean Air Act requirements due to 'emissions from outside the nonattainment area' that originate in the *same state*, either from an attainment area or another nonattainment area, when those emissions are subject to control by the same state or a local air quality district in that state. There is no justification for this treatment. By the same token, there is no justification for industrial sources in severe and extreme nonattainment areas to avoid section 185 fees (42 U.S.C. § 7511d) due to emissions that originate in the *same state*, either from an attainment area or another nonattainment area, when those emissions are subject to control by the same state or a local air quality district in that state. These unjustified changes will weaken Clean Air Act measures designed to speed the delivery of safe, clean air for Americans;
- Sec. 4(a): reduces the number of members of EPA's Clean Air Scientific Advisory Committee who are medical and health experts, in favor of geographic representation among state officials with greater expertise implementing air quality standards than setting them. Nothing in any prior hearing on these bills demonstrated that CASAC or the NAAQS standard-setting process is improved by replacing medical experts with state officials from "geographically diverse areas" of the country; and
- Sec. 4(b): eliminates Americans' right to safe, clean air; lets EPA set unsafe standards, downgraded due to corporate profits, compliance costs and economics; then lets EPA lie to Americans that air quality is safe (*see infra*, sec. III.B.).

A. Timing of NAAQS Reviews

As noted above, "[t]o ensure that the NAAQS keep pace with scientific understanding and continue to provide the necessary protection, EPA must review and revise as appropriate the underlying air quality criteria and the NAAQS themselves at least every five years. 42 U.S.C. § 7409(d)(1)." NGO Particulate Matter Comments, at 5. Let us be clear what the reality has been, however, in sharp contrast to this five-year statutory review-and-revise-as-appropriate timeline.

Take the example of the ozone NAAQS reviews. EPA last updated the ozone health standard in 2015, when it was strengthened from a level of 75 parts per billion (ppb) in the air to 70 ppb. 80 Fed. Reg. 65,292 *et seq.* (Oct. 26, 2015). Following an abbreviated and inadequate review, the Trump EPA refused to strengthen the ozone health and welfare standards in a last-minute decision on December 23, 2020, despite clear evidence that both failed to protect Americans' health, ecosystems and the environment. 85 Fed. Reg. 87,256 *et seq.* (Dec. 31, 2020).

And now, EPA under the current administration has quietly announced the agency will not complete its next review of the ozone health and welfare standards until *2030*.[26] This 10-year period following the 2020 standards review defies the law's five-year deadline. The delay also flies in the face of a strong consensus among EPA's clean air science advisors in 2023 that: (1) the 2015 ozone health standard of 70 ppb is insufficiently protective of air quality, and should be lowered to between 55 and 60 ppb to protect public health with an adequate margin of safety; and (2) the ozone welfare standard should be strengthened to improve protections for agricultural crops and trees.[27]

Just as justice delayed is justice denied, safe air delayed is safe air denied. Americans have been forced to continue to breathe unsafe ozone levels lower than 70 ppb, and been denied safe, cleaner air under the law's current five-year review cycles for two basic reasons: (1) delays, a cumbersome process, and changes in administrations have turned that five-year cycle into closer to an eight- to ten-year cycle in the real world; and (2) political refusals by various administrations to follow the medical science and law have resulted in the continuation of unprotective standards and forced Americans to breathe unsafe air for as long as *15 years and longer*. The current ozone health and welfare standards reveal both of these forces at play. And

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[26] U.S. EPA, Integrated Review Plan for the National Ambient Air Quality Standards for Ozone and Related Photochemical Oxidants Volume 1: Background Document, (cont.) *available at* https://www.epa.gov/system/files/documents/2024-12/o3_irp-vol-1_final_1.pdf, at 2-2 (Table 2-1).

[27] Letter from CASAC to Administrator Regan, Re: CASAC Review of the EPA's Policy Assessment (PA) for the Reconsideration of the Ozone National Ambient Air Quality Standards (External Review Draft Version 2) EPA-CASAC-23-002, June 9, 2023, pgs. 2-3 *available at* https://casac.epa.gov/ords/sab/r/sab_apex/casac/activity?p18_id=2636&clear=18&session=5978292504897#doc ("All of the CASAC members,[] except for one, conclude that the scientific evidence indicates that the level of the current primary standard is not sufficiently protective of public health… All of the CASAC members, [] except one, recommend a revised NAAQS level in the range of 55 to 60 ppb to be protective of public health.")

bear in mind, these are the realities with a *five-year* statutory review deadline. By doubling the five-year statutory deadline to ten years, Sec. 2(a) of the draft CLEAR Act would only make matters worse, ensuring delays beyond ten years, because an insufficiently funded and under-staffed EPA also has a consistent history of missing ten-year statutory deadlines.[28]

B. The Draft CLEAR Act Eliminates Americans' Right to Safe, Clean Air; Lets EPA Set Unsafe Standards, Downgraded Due to Profits & Economics; then Lets EPA Lie to Americans That Air Quality is Safe.

The Clean Air Act always has directed EPA to set a primary health standard (either their establishment or revision) for each criteria air pollutant based on what is "requisite to protect the public health," "allowing an adequate margin of safety." 42 U.S.C. § 7409(b)(1). Under that longstanding legal standard, it is not permissible, or even coherent, for there to be a *range* of standards in which each and all are "requisite to protect the public health," "allowing an adequate margin of safety." The statutory terms "requisite" and "adequate margin of safety" foreclose standards less protective than the statutory test, *even if* an EPA Administrator or CASAC is considering a range. By declaring that a "range of levels of air quality for an air pollutant" *could be* "requisite to protect public health with an adequate margin of safety," Sec. 2(b) of the draft CLEAR Act (and its earlier iterations) weakens the existing Clean Air Act. The draft CLEAR Act departs from the Clean Air Act's insistence on there being *one* health standard that *defines* safe, clean air under the law and for all Americans, based on the weight of the scientific record before EPA and CASAC—not based on the convenience or practice of presenting the Administrator with a range of standards to consider. It is simply not the case that past 'ranges' of standards considered by CASAC and former Administrators satisfied the singular statutory standard based on the scientific records for those rulemakings.

Next, Sec. 2(b) of the draft CLEAR Act weakens the Clean Air Act and worsens health protections by authorizing the Administrator to "consider likely attainability of the standard" when establishing or revising primary health standards. It is important to understand that the Clean Air Act reserves the concept of "attainment" ("attainability of the standard") for the *implementation* of health-based standards, not the *establishment or revision* of health-based standards. Indeed, Section 2 of the draft CLEAR Act is titled (misleadingly) "Facilitating State Implementation of National Ambient Air Quality Standards," but the actual legislative text in Sec. 2(b) amends the Clean Air Act's *standard-setting* process in 42 U.S.C. § 7409(b). The actual

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[28] In the 1990 Clean Air Act amendments, Congress directed EPA to adopt hazardous air pollutant standards for all relevant industrial source categories "not later than 10 years after November 15, 1990." 42 U.S.C. § 7412(e)(1)(E). In very many cases, EPA still had not promulgated such standards 10 or even 15 years following the law's statutory deadline of November 15, 2000. *See generally*, National Emissions Standards for Hazardous Air Pollutants, https://www.epa.gov/stationary-sources-air-pollution/national-emission-standards-hazardous-air-pollutants-neshap-8. EPA also has missed a similar eight-year deadline in section 112 of the Act far more often than it has met that deadline, sometimes by 10 years longer than the eight-year deadline. *See* 42 U.S.C. § 7412(d)(6).

text makes clear just how the draft CLEAR Act weakens the Clean Air Act dramatically by authorizing factors unrelated to health, safety and medical science to be considered when setting primary health standards. The draft legislation reinforces this conclusion by importing an implementation concept (attainability) into the process to set and revise standards, thereby allowing 'attainability' to be a legal justification to *retreat* from safe standards.

In this respect, the draft CLEAR Act would eliminate Americans' legal right to safe, clean air based solely on health considerations and medical science just as much as H.R. 806 and H.R. 7650 would have done in previous Congresses. The concept of 'attainability' is of course unrelated to how much air pollution is unsafe for people to breathe. The concept thereby allows EPA to consider a non-safety factor and set unsafe, unprotective air quality standards. Indeed, attainment strategies during NAAQS implementation consider economic, energy and technological factors, and future EPA Administrators could simply choose to consider these currently unlawful factors when "consider[ing] likely attainability of the standards." The draft CLEAR Act slips in non-safety, economic considerations through the backdoor under the guise of 'attainability.'

This is not a novel concept when it comes to avoiding the Clean Air Act's exclusive health foundation. In fact, when corporations filed lawsuits challenging the 2015 EPA ozone health standards, they argued unsuccessfully that EPA should have been required to consider 'attainability' of the standards rather than considering health factors and medical science alone.[29] The D.C. Circuit Court of Appeals unanimously rejected the industry arguments:

> Accepting Petitioners' [attainability] argument would mean that, if the level of background ozone in any part of the country exceeds the level of ozone that is "requisite to protect the public health," EPA must set the NAAQS at the *higher, unhealthy level*. The statutory text leaves no room for this hidden caveat: "[W]hen Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of its statutory authority by taking other factors into account." *Lead Indus.*, 647 F.2d at 1150.

Murray Energy Corp., 936 F.3d at 622-23 (emphasis added). The court then went on to identify three different ways that Congress had addressed attainability concerns in the Clean Air Act's *implementation* programs, not the law's *health standard-setting* program. *Id.* at 623. The court even quoted an earlier D.C. Circuit ruling dating to 1981 holding that "'[a]ttainability and technological feasibility are not relevant considerations in the promulgation of [NAAQS].'" *Id.*, at 623-24 (citing *American Petroleum Institute v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981)). Attainability, technological feasibility and economic factors should remain irrelevant considerations when deciding how much air pollution is unsafe for Americans to breathe and

[29] *See Murray Energy Corp. v. Env't Prot. Agency*, 936 F.3d 597, 622–23 (D.C. Cir. 2019).

truthfully guaranteeing the promise of safe air to all Americans, based solely on what medical science says is unsafe.

The most egregious attacks on the exclusive health foundation of the Clean Air Act, Americans' legal right to safe, clean air, and truth-telling to Americans about air quality are reflected in Sec. 4(b) of the draft CLEAR Act. There, the draft legislation would drastically weaken the Clean Air Act by authorizing the EPA Administrator and CASAC to consider *during* the process to establish or revise any air quality standard "any adverse public health, welfare, social, economic or energy effects" that may result from *implementation* of such standard. As stated previously, the legislation thus would:

> abolish the Clean Air Act's exclusive consideration of health and medical science to determine how much air pollution is unsafe for people to breathe. For the first time, Congress would authorize EPA to expose American communities to unhealthy levels of smog and soot and sulfur dioxide and even toxic lead pollution, by prioritizing corporate compliance costs, profits, technological feasibility or other non-safety factors. The medically-based health standards that the Clean Air Act has been founded on for [55] years instead could become a political football weakened by polluters' predicted compliance costs—costs that often are overestimated.[30]

The draft CLEAR Act accordingly would overturn the Supreme Court's unanimous decision in *American Trucking v. Whitman*,[31] which recognized and guaranteed Americans' legal right to safe, clean air based exclusively on health considerations and medical science. Furthermore, the draft CLEAR Act simultaneously would overturn the D.C. Circuit decisions in *Murray Energy*,[32] *American Petroleum Institute*,[33] *Am. Lung Ass'n v. EPA*,[34] and several others.

During the American Trucking litigation, industry challengers argued that language in section 109(d)(2)(c)(iv) of the Clean Air Act already required EPA to consider "adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of NAAQS. They argued that:[35]

> § 109(d)(2)(C)(iv) requires the Clean Air Scientific Advisory Committee to "advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of NAAQS. 42 U. S. C. § 7409(d)(2)(C)(iv). Respondents argue that these provisions make no sense

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[30] *See* Letter from environmental organizations to members of the U.S. House of Representatives, March 5, https://www.congress.gov/118/meeting/house/116939/documents/HMKP-118-IF18-20240306-SD072.pdf.
[31] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 121 S.Ct. 903 (2001).
[32] *Murray Energy Corp. v. Env't Prot. Agency*, 936 F.3d 597, 622–23 (D.C. Cir. 2019).
[33] *American Petroleum Institute v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981).
[34] 134 F.3d 388, 389 (D.C. Cir. 1998).

> unless costs are to be considered in setting the NAAQS. That is not so. These provisions enable the Administrator to assist the States in carrying out their statutory role as primary *implementers* of the NAAQS. [36]

The justices unanimously rejected these industry arguments and all others.

But another key passage in the opinion makes clear exactly *how* the draft CLEAR Act is attempting to weaken the Clean Air Act and eliminate Americans' right to safe, clean air. The Court continued by summarizing another argument by the industry challengers: "Respondents contend that this [CASAC] advice is required to be included in the NAAQS rulemaking record-which, if true, would suggest that it was relevant to the standard-setting process."[37] That's what the draft CLEAR Act does: it makes the CASAC advice regarding "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of NAAQS part of the NAAQS rulemaking record when EPA establishes or revises standards. With that one subtle, damaging, and indefensible change, Sec. 4(b) of the draft legislation would authorize the EPA Administrator to consider any adverse economic, energy or social impacts arising from implementation of air quality standards, *during* the process of setting those air quality standards.

Future EPA Administrators could set unsafe health standards—ones not requisite to protect public health with an adequate margin of safety; allow Americans to continue dying from dangerous air pollution at concentrations that medical science shows to be deadly; fail to protect vulnerable populations like children, the elderly and persons suffering from asthma; then *lie* to Americans that national clean air health standards guarantee safe, clean air for all Americans. The draft legislation would give EPA Administrators the ability to retreat from the safer, science-based air quality standards that met the exclusive, health-based legal test in today's law, after considering (allegedly) adverse economic or energy impacts from *implementing* such standards.

Rather than abolishing Americans' right to safe, clean air, weakening a landmark, 55 year-old public health law so dramatically, and overturning decades of federal caselaw in the process, Congress should decline to pass the CLEAR Act or earlier, harmful versions of the legislation.

IV. The Clean Air and Building Infrastructure Improvement Act (Draft)

The draft Clean Air and Building Infrastructure Improvement Act weakens the Clean Air Act by denying Americans the health benefits of safer air quality standards guaranteed by today's law. Sections 2 and 3 of the draft bill would let new or expanded industrial facilities in communities across the country fail to comply with safer health standards after they have been adopted, if EPA fails to publish final regulations and guidance for implementing the new standard. Section 3 weakens the existing Clean Air Act by simply declaring that the newly strengthened $PM_{2.5}$ health

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[36] *American Trucking*, 531 U.S. at 470.
[37] *Id.*

standard shall not apply to preconstruction permits in two situations where those standards *do apply* to better protect Americans under today's stronger law and regulations. There are several problems with these approaches.

First, the approaches weaken the current Clean Air Act, which does not deny Americans the benefit of safer clean air standards in such situations. The law never has allowed new or expanded facilities to emit at levels that would *violate* safer health standards after those standards have been adopted. Second, addressing section 2 of the draft legislation, EPA never has 'concurrently published final regulations and guidance for implementing' revised air quality standards, to my knowledge, which means one of two things as a practical matter: (1) either EPA will fail to concurrently publish such final regulations or guidance, in which case communities surrounding new and expanding industrial facilities will be unjustifiably harmed by the weaker approach in the draft bill; or (2) EPA will delay adoption of safer air quality standards in order to finalize implementation regulations and guidance, concurrently, in which case *all* Americans will be harmed by the delay. Neither outcome is justified, and neither outcome is permissible under longstanding, existing law.

Finally, there is no historic showing, and no factual record in the two earlier hearings, demonstrating that 'concurrent final regulations and guidance' are even needed to issue preconstruction permits. The preconstruction permitting program has been in the Clean Air Act since 1977 and the implementing regulations in effect since 1981. Its requirements are well-known and do not change with the adoption of new air quality standards, nor do those requirements depend upon new final regulations or guidance for implementing the NAAQS. Rather, Sec. 2 of the bill diminishes concerns over unsafe air quality for the public, and prioritizes occasional industry complaints about meeting strengthened air quality standards before final preconstruction permits are issued. Such complaints do not justify weakening the Clean Air Act and allowing unsafe air pollution levels to be added to American communities.

Sections 2 and 3 weaken the Clean Air Act in other ways. A new Clean Air Act section 109(e)(3)(B) in section 2 of the draft bill, and section 3(b) of the bill, state that "[n]othing in this subsection shall be construed to eliminate the obligation of a preconstruction permit applicant to install best available control technology and lowest achievable emission rate technology, as applicable." But that is a badly incomplete list of the statutory and regulatory obligations that preconstruction permits must contain. Such permits in nonattainment areas also must contain, for example, sufficient offsetting emissions reductions, in varying ratios depending upon the severity of unsafe air quality, in addition to controls satisfying lowest achievable emission rate technology.[38] In attainment areas, preconstruction permits must be accompanied by an air quality impacts analysis in addition to satisfying best available control technology.[39] By indicating

[38] 42 U.S.C. § 7503(a)(1).
[39] 42 U,S.C. § 7475(a)(2).

instead that preconstruction permits need not continue to meet *all* preconstruction permit requirements under the Act and implementing regulations, the draft bill would further weaken the Clean Air Act and worsen air quality and health safeguards. Congress should decline to adopt the draft Clean Air and Building Infrastructure Improvement Act or earlier, harmful versions of the legislation.