114TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
114–445

SATISFYING ENERGY NEEDS AND SAVING THE ENVIRONMENT ACT

MARCH 7, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UPTON, from the Committee on Energy and Commerce, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3797]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 3797) to establish the bases by which the Administrator of the Environmental Protection Agency shall issue, implement, and enforce certain emission limitations and allocations for existing electric utility steam generating units that convert coal refuse into energy, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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59–006

PURPOSE AND SUMMARY

H.R. 3797, the Satisfying Energy Needs and Saving the Environment (SENSE) Act, was introduced by Rep. Keith Rothfus on October 22, 2015. The legislation addresses the application of the Environmental Protection Agency's (EPA) Cross-State Air Pollution Rule (CSAPR) and Mercury Air Toxic Standards (MATS) rules, issued pursuant to sections 110 and 112 of the Clean Air Act, to electric generating units that utilize coal refuse to generate electricity and serve critical environmental cleanup and remediation purposes. Key provisions of H.R. 3797 include the following:

- The bill would provide for limited modifications with respect to the Cross-State Air Pollution Rule by allocating additional sulfur dioxide allowances to coal refuse-to-energy facilities.
- The bill would provide for limited modifications with respect to the Mercury and Air Toxics Rule for these coal refuse facilities by providing for alternative compliance options with respect to sulfur dioxide and hydrogen chloride emissions standards.

BACKGROUND AND NEED FOR LEGISLATION

This legislation seeks to ensure that innovative, environmentally beneficial facilities that use coal refuse as fuel, can continue to operate and will not be forced to shut down, due to unachievable requirements included in the Environmental Protection Agency's Cross-State Air Pollution Rule (CSAPR)[1] and the Mercury and Air Toxics Standards (MATS).[2]

Coal refuse is the aboveground waste product of coal mining found near many abandoned mines in Pennsylvania and other coal mining areas.[3] Coal refuse piles pose a number of environmental and safety threats, and the cost of addressing coal refuse has been estimated by State environmental regulators to be approximately $2 billion dollars in Pennsylvania alone, the most impacted State.

[1] On July 6, 2011, the Environmental Protection Agency (EPA) finalized the CSAPR. This rule was promulgated pursuant to section 110 of the Clean Air Act (CAA) and requires reductions in sulfur dioxide (SO_2) and nitrogen oxide (NO_X) emissions from electric generating units located in the 28 States covered by the rule.

[2] On February 16, 2012, EPA finalized the MATS rule. This rule was promulgated pursuant to section 112 of the Clean Air Act and requires reductions in emissions of mercury and other air toxics, as well as certain acid gases from power plants. On June 29, 2015, the U.S. Supreme Court ruled that EPA erred when the agency concluded that costs did not need to be considered in the MATS rule. EPA is still in the process of responding to this decision, and on November 20, 2015, proposed a supplemental finding concluding that consideration of costs would not have altered EPA's original rule.

[3] As the bill's sponsor, Rep. Rothfus testified at the Subcommittee on Energy and Power's February 3, 2016 hearing on the bill:

> [T]he coal industry has been a central part of Pennsylvania's economy for many years. Unfortunately, historic mining activity littered Pennsylvania and a few other states with large piles of coal refuse (sometimes called waste coal), which is essentially a mix of lower quality coal, rocks, and dirt that remain after the mining and processing of coal. Before technology was invented to make use of this material, it accumulated in open spaces alongside cities and towns, close to schools and neighborhoods, and in fields across coal country.

Coal refuse-to-energy facilities are specialized power plants developed to recycle the coal refuse by using it as an energy source to generate affordable, reliable electricity. There are 19 coal refuse-to-energy facilities, including 14 in Pennsylvania. In addition to creating an estimated 1,200 direct and 4,000 indirect jobs in areas, many of which are in economically distressed, these facilities have thus far removed 214 million tons of coal refuse from the environment, at no expense to taxpayers.[4] As Rep. Rothfus testified at the Subcommittee on Energy and Power's February 3, 2016 hearing on H.R. 3797:

> [The] coal refuse-to-energy industry has been a leader on solving this problem. With advanced technology, this industry has been able to use this previously worthless material to generate affordable and reliable energy. In the process, they have removed over 200 million tons of coal refuse in Pennsylvania alone and remediated many formerly-polluted sites. Thanks to the hard work of the dedicated people in this industry, landscapes have been restored, rivers and streams have been brought back to life, and towns across coal country have been relieved of unsafe and unsightly waste coal piles.
>
> And it is important to note that private sector leadership on this issue has saved taxpayers millions of dollars in cleanup costs. It has also created hundreds of family-sustaining jobs in areas that have been economically distressed for many years. These jobs and the communities they support are at risk today, unless we stand up to defend them.

Similarly, at the hearing, the Chairman of the Western Pennsylvania Coalition for Abandoned Mine Reclamation, Dennis Beck, testified that "[t]hese waste plants are a great example of ingenuity, cutting-edge technology and concern for the environment."

Despite the extraordinary environmental benefits of these facilities, the EPA has included certain emissions limits in the agency's CSAPR and MATS regulations that are not achievable for all coal refuse-to-energy plants. If these facilities shut down, the communities served by them will lose the electricity, jobs, and environmental cleanup provided by these coal refuse-to-energy plants.

What the legislation would do

The bill includes limited provisions that would allow these innovative coal refuse-to-energy facilities to generate affordable, reliable energy and continue their essential environmental remediation work in a responsible manner.

Specifically, the bill would, with respect to the CSAPR, allocate additional sulfur dioxide (SO_2) allowances to coal refuse-to-energy facilities. The allowances would be reduced elsewhere in the program so the overall cap does not change. The bill would, with respect to MATS, create an alternative means of demonstrating compliance with the hydrochloric acid (HCl) standard by using SO_2 as

[4] In Pennsylvania, coal refuse-to-energy facilities are recognized in the Pennsylvania Alternative Energy Portfolio Standards Act. *See* Testimony of Vince Brisini, Director of Environmental Affairs for Olympus Power, LLC, testifying on behalf of ARIPPA, a trade association representing the coal refuse energy industry, Preliminary Transcript available at *http://docs.house.gov/meetings/IF/IF03/20160203/104366/HHRG-114-IF03-Transcript-20160203.pdf*.

a proxy and assuming that a 93 percent reduction in SO_2 demonstrates compliance with the HCl standard.

At the hearing on H.R. 3797, concerns were raised that the bill would choose "winners and losers," and that it favored coal refuse plants at the expense of other facilities. In response, Mr. Brisini testified that in this rulemaking EPA has effectively chosen "winners and losers," and stated:

> I find it really interesting that we keep hearing this—well, this SENSE Act picks winners and losers when in fact the federal implementation plan picked the winners and losers and they happened to pick in CSAPR the bituminous coal-fired refuse plants to be the losers in the CSAPR phase two allocation. . . . And they also picked the bituminous coal-fired refuse plants to be the loser in MATS because, as I have said all along, the anthracite refuse plants can meet the alternative 0.2 standard. . . . That is because the sulfur content of the coal refuse in the anthracite region is lower. It is not because the technology is different or they have anything special and it is part of the problem when you lump all of these things together not recognizing the technical and the differences in these kinds of fuels.

In addition, at the hearing, some suggested that coal refuse-to-energy facilities can meet the requirements of the MATS rule, citing the District of Columbia Court of Appeals decision in *White Stallion v. Environmental Protection Agency*.[5] The court in that case, declined to create a subcategory for coal refuse plants, finding that there were plants that could achieve the HCL and SO_2 standards in the MATS rule. Notwithstanding the court's holding, Mr. Brisini testified that as a practical matter only two coal refuse plants are capable of meeting the limits. He specifically testified: "There are actually two bituminous plants that can meet the hydrochloric acid [requirements]. No other plants, whether they are bituminous coal refuse anthracite coal refuse, they don't do it."

Finally, at the hearing, suggestions were made that the legislation was unnecessary because States could provide relief to coal refuse facilities by reallocating allowances under CSAPR. Mr. Brisini testified, however, that States would be unlikely to provide timely relief because this would involve a lengthy process requiring approval from EPA:

> Now, as far as the authority to exempt or I can do a surgical reallocation tomorrow, no, they can't. This is a FIP. This is a federal implementation plan, and to change that federal implementation plan you need a new state implementation plan. EPA has up to 18 months to respond to a federal implementation plan change. So the idea that I can come in there and fix this tomorrow is not true and I will say it that bluntly.[6]

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[5] *See White Stallion Energy Center, LLC v. Environmental Protection Agency*, Case No. 12–1100, U.S. Court of Appeals for the District of Columbia Circuit (April 15, 2014).

[6] Mr. Brisini further testified that "Now, as far as the idea that [the legislation] is usurping states' rights I find that interesting because the federal government just did that in the FIP."

HEARINGS

The Subcommittee on Energy and Power held a hearing on HR 3797 on February 3, 2016. The hearing was entitled, "H.R. 3797, the Satisfying Energy Needs and Saving the Environment (SENSE) Act and H.R. ____, the Blocking Regulatory Interference from Closing Kilns (BRICK) Act" and witnesses included the following:

- The Honorable Keith J. Rothfus, U.S. House of Representatives, Pennsylvania;
- Davis Henry, President and CEO, Henry Brick;
- Creighton "Butch" McAvoy, President, McAvoy Brick Company;
- Vincent Brisini, Director of Environmental Affairs for Olympus Power;
- Dennis Beck, Chairman of the Western Pennsylvania Coalition for Abandoned Mine Reclamation; and,
- John Walke, Senior Attorney and Clean Air Director, Natural Resources Defense Council.

COMMITTEE CONSIDERATION

On February 11, 2016, the Subcommittee on Energy and Power met in open markup session to consider H.R. 3797 and forwarded the bill to the full Committee, without amendment, by voice vote.

On February 25, 2016, the Committee on Energy and Commerce met in open markup session to consider H.R. 3797. During the markup, two amendments were offered and rejected by record vote. A motion by Mr. Upton to order H.R. 3797 reported to the House, without amendment, was agreed to by a record vote of 29 ayes and 22 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. The following reflects the record votes taken during the Committee consideration:

COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 44

BILL: H.R. 3797, the "Satisfying Energy Needs and Saving the Environment Act" or the "SENSE Act"

AMENDMENT: An amendment to H.R. 3797, offered by Mr. Pallone, No. 2, to strike sections 2 (a)(6), 2(a)(8), and 2(b) and amend section 2(a)(7).

DISPOSITION: NOT AGREED TO, by a roll call vote of 22 yeas and 29 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Pallone	X		
Mr. Barton		X		Mr. Rush	X		
Mr. Whitfield		X		Ms. Eshoo	X		
Mr. Shimkus		X		Mr. Engel	X		
Mr. Pitts		X		Mr. Green			
Mr. Walden		X		Ms. DeGette	X		
Mr. Murphy		X		Ms. Capps	X		
Mr. Burgess		X		Mr. Doyle	X		
Mrs. Blackburn		X		Ms. Schakowsky	X		
Mr. Scalise				Mr. Butterfield	X		
Mr. Latta		X		Ms. Matsui	X		
Mrs. McMorris Rodgers		X		Ms. Castor	X		
Mr. Harper		X		Mr. Sarbanes	X		
Mr. Lance		X		Mr. McNerney	X		
Mr. Guthrie		X		Mr. Welch	X		
Mr. Olson		X		Mr. Lujan	X		
Mr. McKinley		X		Mr. Tonko	X		
Mr. Pompeo		X		Mr. Yarmuth	X		
Mr. Kinzinger		X		Ms. Clarke	X		
Mr. Griffith		X		Mr. Loebsack	X		
Mr. Bilirakis				Mr. Schrader	X		
Mr. Johnson		X		Mr. Kennedy	X		
Mr. Long		X		Mr. Cardenas	X		
Mrs. Ellmers		X					
Mr. Bucshon		X					
Mr. Flores		X					
Mrs. Brooks		X					
Mr. Mullin		X					
Mr. Hudson		X					
Mr. Collins		X					
Mr. Cramer		X					

02/25/2016

COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 45

BILL: H.R. 3797, the "Satisfying Energy Needs and Saving the Environment Act" or the "SENSE Act"

AMENDMENT: An amendment to H.R. 3797, offered by Mr. Engel, No. 2, to provide that the subsection on the application of CSAPR to certain coal refuse electricity utility steam generating units shall not apply with respect to a State if the Governor of the State, or head of the authority that implements CSAPR for the State, makes a determination, and notifies the Administrator, that implementation of the subsection will increase the State's overall compliance costs for CSAPR.

DISPOSITION: NOT AGREED TO, by a roll call vote of 22 yeas and 29 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Pallone	X		
Mr. Barton		X		Mr. Rush	X		
Mr. Whitfield		X		Ms. Eshoo	X		
Mr. Shimkus		X		Mr. Engel	X		
Mr. Pitts		X		Mr. Green			
Mr. Walden		X		Ms. DeGette	X		
Mr. Murphy		X		Ms. Capps	X		
Mr. Burgess		X		Mr. Doyle	X		
Mrs. Blackburn		X		Ms. Schakowsky	X		
Mr. Scalise				Mr. Butterfield	X		
Mr. Latta		X		Ms. Matsui	X		
Mrs. McMorris Rodgers		X		Ms. Castor	X		
Mr. Harper		X		Mr. Sarbanes	X		
Mr. Lance		X		Mr. McNerney	X		
Mr. Guthrie		X		Mr. Welch	X		
Mr. Olson		X		Mr. Lujan	X		
Mr. McKinley		X		Mr. Tonko	X		
Mr. Pompeo		X		Mr. Yarmuth	X		
Mr. Kinzinger		X		Ms. Clarke	X		
Mr. Griffith		X		Mr. Loebsack	X		
Mr. Bilirakis				Mr. Schrader	X		
Mr. Johnson		X		Mr. Kennedy	X		
Mr. Long		X		Mr. Cardenas	X		
Mrs. Ellmers		X					
Mr. Bucshon		X					
Mr. Flores		X					
Mrs. Brooks		X					
Mr. Mullin		X					
Mr. Hudson		X					
Mr. Collins		X					
Mr. Cramer		X					

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COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 46

BILL: H.R. 3797, the "Satisfying Energy Needs and Saving the Environment Act" or the "SENSE Act"

AMENDMENT: A motion by Mr. Upton to order H.R. 3797 favorably reported to the House, without amendment. (Final Passage)

DISPOSITION: AGREED TO, by a roll call vote of 29 yeas and 22 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Pallone		X	
Mr. Barton	X			Mr. Rush		X	
Mr. Whitfield	X			Ms. Eshoo		X	
Mr. Shimkus	X			Mr. Engel		X	
Mr. Pitts	X			Mr. Green			
Mr. Walden	X			Ms. DeGette		X	
Mr. Murphy	X			Ms. Capps		X	
Mr. Burgess	X			Mr. Doyle		X	
Mrs. Blackburn	X			Ms. Schakowsky		X	
Mr. Scalise				Mr. Butterfield		X	
Mr. Latta	X			Ms. Matsui		X	
Mrs. McMorris Rodgers	X			Ms. Castor		X	
Mr. Harper	X			Mr. Sarbanes		X	
Mr. Lance	X			Mr. McNerney		X	
Mr. Guthrie	X			Mr. Welch		X	
Mr. Olson	X			Mr. Lujan		X	
Mr. McKinley	X			Mr. Tonko		X	
Mr. Pompeo	X			Mr. Yarmuth		X	
Mr. Kinzinger	X			Ms. Clarke		X	
Mr. Griffith	X			Mr. Loebsack		X	
Mr. Bilirakis				Mr. Schrader		X	
Mr. Johnson	X			Mr. Kennedy		X	
Mr. Long	X			Mr. Cardenas		X	
Mrs. Ellmers	X						
Mr. Bucshon	X						
Mr. Flores	X						
Mrs. Brooks	X						
Mr. Mullin	X						
Mr. Hudson	X						
Mr. Collins	X						
Mr. Cramer	X						

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COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee made findings that are reflected in this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

H.R. 3797 would provide for limited modifications to CSAPR for coal-refuse-to-energy facilities by allocating additional SO_2 allowances to coal refuse-to-energy facilities, and limited modifications to MATS for these coal refuse facilities by providing for alternative compliance options.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 3797 would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

EARMARK, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives, the Committee finds that H.R. 3797 contains no earmarks, limited tax benefits, or limited tariff benefits.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 4, 2016.

Hon. FRED UPTON,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3797, the SENSE Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jon Sperl.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 3797—SENSE Act

H.R. 3797 would require the Environmental Protection Agency (EPA) to provide greater flexibility to certain power plants that are

subject to emissions limitations under EPA's Cross-State Air Pollution Rule (CSAPR) and the Mercury and Air Toxics Standards for Power Plants (MATS). Affected power plants generate electricity by burning coal refuse (a waste byproduct of coal) as their primary fuel source.

The bill would require EPA to allocate to plants using coal refuse in 2017 and subsequent years the same number of emissions allowances for sulfur dioxide that have been previously allocated to those plants, rather than reducing allowances for those plants. The legislation also would prohibit those plants from transferring unused allowances to other entities and would allow coal refuse operators to bank those allowances for use in future years. The bill would not change the total number of allowances allocated to each state under the CSAPR.

In addition, H.R. 3797 would require EPA to permit operators of plants using coal refuse to comply with an alternative emissions standard for sulfur dioxide that is less stringent than the current MATS.

Based on information from EPA about the costs of modifying its existing regulations to comply with this legislation, CBO estimates that implementing H.R. 3797 would have an insignificant cost to EPA. Because enacting H.R. 3797 would not affect direct spending or revenues, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 3797 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 3797 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Jon Sperl. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 3797 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting H.R. 3797 specifically directs to be completed no specific rulemakings within the meaning of 5 U.S.C. 551 that would not otherwise be issued by the agency.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

The legislation includes the following provisions:

Section 1. Short title

This section provides the short title of "Satisfying Energy Needs and Saving the Environment Act" or the "SENSE Act".

Section 2. Standards for coal refuse power plants

This section would modify the standards as they apply to coal refuse power plants.

Section 2(a) provides definitions for the following terms: administrator, boiler operating day, coal refuse, coal refuse electric utility steam generating unit, coal refuse-fired facility, Cross-State Air Pollution Rule, electric utility steam generating unit, and Phase I of CSAPR.

Section 2(b) provides less restrictive sulfur dioxide emissions allocations under CSAPR for coal refuse electric utility steam generating units.

Section 2(c) provides an alternative compliance means for HCl and SO_2 under MATS for coal refuse electric utility steam generating units.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation does not amend any existing Federal statute.

DISSENTING VIEWS

H.R. 3797, the "Satisfying Energy Needs and Saving the Environment (SENSE) Act," represents an effort by the Republicans to give special breaks under two Clean Air Act rules to power plants that use waste coal to generate electricity. The rules—the Cross State Air Pollution Rule (CSAPR) and the Mercury and Air Toxics Standards (MATS) rule—are two of the most important rules for protecting public health from toxic air pollutants like mercury and sulfur dioxide. If this bill were to become law, waste coal facilities would be able to pollute at a higher rate than other power plants.

I. BACKGROUND

A. EPA's Cross-State Air Pollution Rule

To help 28 states in the eastern, central, and southern United States meet the health-based ambient air quality standards for fine particulate matter ($PM_{2.5}$) and ozone, the Environmental Protection Agency (EPA) issued the Clean Air Interstate Rule (CAIR) in March 2005. Under the rule, upwind states were required to reduce sulfur dioxide (SO_2) and nitrogen oxides (NO_X) emissions.[1] This rule was promulgated pursuant to Clean Air Act section 110(a)(2)(D)(i)(I), which is known as the "good neighbor provision." CAIR was overturned by the D.C. Circuit Court of Appeals in 2008.[2]

EPA promulgated CSAPR as a replacement for CAIR on July 6, 2011.[3] CSAPR requires states in the eastern, central, and southern United States to reduce power plant emissions that cause air quality problems in other states.

The timing of CSAPR's implementation has been affected by a number of court actions.[4] On April 29, 2014, the U.S. Supreme Court issued an opinion reversing an earlier D.C. Circuit decision that had vacated the rule. Subsequently, on October 23, 2014, the D.C. Circuit lifted its prior CSPAR stay.[5] The D.C. Circuit also granted EPA's request to delay the rule's compliance deadlines by

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[1] U.S. EPA, *EPA Announces Landmark Clean Air Interstate Rule—Major Step Forward in Eliminating 'Smog' Days in New England* (Mar. 10, 2005) (online at *yosemite.epa.gov/opa/admpress.nsf/dc614f1d30c3fd66852572a00065 7b5a/ff502720c7a5c8d2852570ca006ab475!OpenDocument*).

[2] *State of North Carolina* v. *EPA* (D.C. Cir. 2008) (on petitions for rehearing); *State of North Carolina* v. *EPA*, Reply in Support of Petition for Rehearing or Rehearing En Banc (Nov. 17, 2008).

[3] 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) (final rule) (hereinafter "*Cross-State Air Pollution Rule*").

[4] On December 30, 2011, CSAPR was stayed prior to implementation. On August 21, 2012, CSAPR was vacated. *EME Homer City Generation, L.P.* v. *EPA*, No. 11–1302 (D.C. Cir. Aug. 21, 2012) (online at *www.cadc.uscourts.gov/internet/opinions.nsf/19346B280C78405C852 57A61004DC0E5/$file/11-1302-1390314.pdf*).

[5] *EPA* v. *EME Homer City Generation, L.P.*, No. 12–1182, Slip Op. (2013) (online at *www.supremecourt.gov/opinions/13pdf/12-1182_553a.pdf*); Order Granting EPA's Motion to Lift the Stay of the Transport Rule, *EME Homer City Generation, L.P.* v. *EPA*, No. 11–1302 (D.C. Cir.) (online at *www3.epa.gov/airtransport/CSAPR/pdfs/CSAPR_Stay_Lift.pdf*).

three years. Accordingly, CSAPR Phase 1 implementation began in 2015, with Phase 2 beginning in 2017.[6] In December 2015, EPA proposed the CSAPR Update Rule to address interstate transport of air pollution under the 2008 ozone National Ambient Air Quality Standards (NAAQS).[7]

In the CSAPR rules, EPA provides a multi-step process to address the requirements of the good neighbor provision. Under that process, if EPA determines that a downwind state expects to have problems attaining or maintaining an air quality standard, EPA would then look at which upwind states are contributing to these identified problems. EPA would then set up an "emissions budget" for those upwind states found to have emissions that significantly contributed to problems in a downwind state. A given state's emissions budget represents the allowable amount for emissions, after identifying and accounting for those emissions contributing significantly to nonattainment by a downwind state.[8]

Once a state's emissions budget was established, EPA set up a tradable allowance program for the power plants covered by CSAPR. Power plants within a state were allocated emissions allowances that could be traded—subject to some requirements—as needed to comply with the rule. Alternatively, states had the option of developing their own state implementation plan (SIP) to meet the rule's required emissions reductions.[9]

B. Clean Air Act Section 112

Section 112 of the Clean Air Act requires the EPA to set technology-based standards to reduce air toxics. These hazardous air pollutants (HAPs) are known or suspected to cause cancer or other serious health effects, such as reproductive or birth defects or neurological effects, or adverse environmental effects. EPA rule makings aim to reduce the release of 187 HAPs including mercury, cadmium, lead, benzene and dioxin.[10] EPA takes a technology-based approach to regulating HAPs in order to achieve substantial reductions in air toxics relatively quickly using readily available technology. EPA also follows the technology-based standards with additional standards where needed to protect health, as determined through risk assessments.[11]

Section 112 requires EPA to develop regulations for distinct source categories (e.g., power plants, boilers, and cement kilns) that set specific emission limits based on the emission levels already being achieved by similar facilities. These regulations are known as Maximum Achievable Control Technology (MACT) standards. For existing sources, the emission standard must be at least as stringent as the average emissions achieved by the best-performing 12

[6] U.S. EPA, *Cross-State Air Pollution Rule* (CSAPR) (accessed Jan. 31, 2016) (online at *www3.epa.gov/crossstaterule/*).

[7] U.S. EPA, *Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, 80 Fed. Reg. 75706 (Dec. 3, 2015) (proposed rule).

[8] U.S. EPA, *Cross-State Air Pollution Rule Presentation* (Dec. 15, 2011) (online at *www3.epa.gov/crossstaterule/pdfs/CSAPRPresentation.pdf*); U.S. EPA, FACT SHEET: *The Cross-State Air Pollution Rule: Reducing the Interstate Transport of Fine Particulate Matter and Ozone* (July 18, 2011) (online at *www3.epa.gov/crossstaterule/pdfs/CSAPRFactsheet.pdf*).

[9] *Id.*

[10] U.S. Environmental Protection Agency, *About Air Toxics* (online at *www.epa.gov/oar/toxicair/newtoxics.html*).

[11] Clean Air Act § 112(f).

percent of sources in that source category. For new sources, the emission standard must be at least as stringent as the emission control achieved by the best-controlled similar source.[12] These minimum emissions levels are known as the MACT floor.

C. EPA's Mercury and Air Toxics (MATS) Rule

Section 112 of the Clean Air Act directs EPA to complete a study of the hazards to public health reasonably anticipated to occur as a result of toxic air pollution from power plants. EPA completed the study and concluded that it was appropriate and necessary to regulate HAPs from power plants.[13] Power plants are by far the largest U.S. source of mercury emissions into the air, and they also release other toxic metals, such as arsenic, chromium and nickel, which can cause cancer and other serious health harm.

EPA's finding triggered a requirement for the Agency to finalize regulations to control toxic air pollution from power plants. In 2012, EPA issued the MATS rule, which established the first national standards to address power plant emissions of mercury and toxic air pollution.[14] There were no federal standards requiring power plants to limit their emissions prior to this rule—despite the availability of proven control technologies, and the passage of more than 20 years from enactment of the 1990 Clean Air Act Amendments.[15]

EPA's MATS rule establishes MACT standards for HAPs emitted from coal- and oil-fired power plants, limiting the emissions of heavy metals and acid gases[16] from these sources. The final rule will prevent 90 percent of the mercury in coal burned at power plants from being released.[17] To achieve these reductions, the MATS rule sets numeric emissions limits for mercury, particulate matter (as a surrogate for other heavy metals), and acid gases for all existing and new coal-fired and oil-fired units.

The MATS rule also establishes work practice standards, rather than numeric emissions limits, to reduce emissions of certain organic HAPs, including dioxin/furan, that are a product of inefficient combustion. These work practice standards merely require utilities to perform annual maintenance and inspection at covered units to improve efficiency.[18]

Existing sources had three years—or until April 16, 2015—to comply with the rule. In the final rule, EPA made it clear that the option of a fourth year—until April 16, 2016—for compliance would be broadly available.[19]

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[12] *Id.* at § 112(d)(3).

[13] U.S. EPA, *Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units—Final Report to Congress, Volume 1* (Feb. 1998).

[14] 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*, 77 Fed. Reg. 9034 (Feb. 16, 2012) (final rule) (online at *www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-806.pdf*) (hereinafter "MATS Final Rule").

[15] U.S. EPA, *Mercury and Air Toxics Standards* (MATS) *Basic Information* (accessed Jan. 31, 2016) (online at *www3.epa.gov/mats/basic.html*).

[16] Heavy metals such as mercury, arsenic, and chromium, and acid gases such as hydrochloric acid (HCl) and hydrofluoric acid (HF).

[17] U.S. EPA, *Fact Sheet: Mercury and Air Toxics Standards for Power Plants* (Dec. 2011) (online at *www.epa.gov/airquality/powerplanttoxics/pdfs/20111221MATSsummary fs.pdf*).

[18] *Id.*

[19] U.S. EPA, *Mercury and Air Toxics Standards (MATS) Basic Information* (accessed Jan. 31, 2016) (online at *www3.epa.gov/mats/basic.html*); U.S. EPA, *MATS Final Rule*, 77 Fed. Reg.

During the MATS rulemaking process, EPA identified several power plants that, based on the data available, exhibited the ability to achieve all of the MACT standards for existing sources.[20] Among those sources are both pulverized coal and circulating fluidized-bed power plants, and power plants burning bituminous coal, subbituminous coal, lignite, and coal refuse (or waste coal). The EPA has also noted that there are waste coal units that have installed add-on control technology that will allow them to be in compliance with MATS requirements.[21]

A number of groups submitted comments on the MATS rule urging EPA to create a separate subcategory for waste coal units.[22] However, in the final MATS rule, EPA noted that the HAP emissions from waste coal units are not sufficiently different from emissions from coal-fired power plants to warrant further subcategorization or a separate MACT floor.[23] This approach was upheld by the D.C. Circuit Court of Appeals which concluded that ". . . EPA reasonably decided that separate standards for coal-refuse-fired [circulating fluidized bed power plants] were not warranted."[24]

D. Use of waste coal

As noted above, a subset of power plants in the U.S. burn waste coal as their fuel source. This waste coal is a byproduct of coal mining, physical coal cleaning, and other coal preparation operations, and also contains matrix materials, clay and other organic and inorganic materials.[25] Waste coal is primarily found in large piles near abandoned mines, and once burned the resulting ashes are used in mine reclamation projects.[26] The majority of these power plants are in Pennsylvania; however, some are located in other states like West Virginia and Utah.

II. H.R. 3797, THE SATISFYING ENERGY NEEDS AND SAVING THE ENVIRONMENT (SENSE) ACT

A. Summary of the SENSE Act

Section 2(b) relates to the treatment of waste coal facilities under CSAPR. The section requires the EPA Administrator to ensure that power plants using waste coal derived from bituminous coal would maintain the same allocation of Phase 1 SO_2 emissions allowances under Phase 2. Section 2(b)(1)(C) prohibits these waste coal plants from trading or banking the additional SO_2 emissions allowances. Section 2(b)(2) prohibits the EPA Administrator from increasing a state's emissions budget in Phase 2 to account for the extra allowances allocated to waste coal units.

9304, at 9410 ("We believe that the permitting authorities have the discretion to use this extension authority to address a range of situations in which installation schedules may take more than 3 years").

[20] U.S. EPA, *MATS Final Rule*, 77 Fed. Reg. 9304, at 9397.

[21] U.S. EPA, *EPA's Responses to Public Comments on EPA's National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units*, p. 761 (Dec. 2011) (online at *www3.epa.gov/airtoxics/utility/mats*_rtc_chapters*_foreword-1-2-3-4_121611.pdf*).

[22] U.S. EPA, *MATS Final Rule*, 77 Fed. Reg. 9304, at 9396–9397.

[23] *Id.* at 9395.

[24] *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222, at 1250 (D.C. Cir. Apr. 15, 2014).

[25] U.S. EPA, *MATS Final Rule*, 77 Fed. Reg. 9304, at 9484.

[26] *White Stallion Energy Center* at 1250.

Section 2(c) relates to the treatment of waste coal facilities under MATS.[27] Specifically, section 2(c)(2)(v) provides an additional compliance option for the hydrogen chloride (HCl) and SO_2 standard, allowing waste coal facilities—or a group of waste coal facilities—to capture and control 93 percent of SO_2 emissions.

B. Issues raised by the SENSE Act

The CSAPR provisions in section 2(b) raise a number of concerns. First, in the absence of the bill, Phase 2 SO_2 emissions allowance allocations would likely have decreased for all, or at least most, of the existing waste coal units. Second, preventing any increase to a state's emissions budget, as this section would do, is ostensibly to limit the impact of the resulting increased pollution from waste coal facilities on downwind states. However, the result of this provision would be that other power plants in a given state that are covered by CSAPR will have to cut their emissions to make up the difference. Third, this section gives the EPA Administrator a number of new authorities that the Clean Air Act currently reserves to states by tasking the Administrator with providing and allocating CSAPR emissions allowances.

In essence, section 2(b) picks winners and losers—tipping the scales in favor of bituminous waste coal units, at the expense of all other covered units within a state. This provision would artificially reallocate emissions allowances, alter the CSPAR trading system, create inequities in the market, and impede a state's right to determine how to best comply with the requirements of the rule. In submitted testimony, EPA noted that the bill's changes to the CSAPR program "would remove economic incentives to reduce emissions at coal refuse plants," and ultimately would result in "a less efficient and more costly compliance with CSAPR."[28]

Further, if a state wishes to allocate additional allowances to waste coal plants, it can already do so through the SIP process. During the subcommittee legislative hearing, John Walke from the Natural Resources Defense Council noted, "States today have the authority to differently allocate allowances within the emitters in their state. . . . So if Pennsylvania wants to incentivize waste coal energy production, they can do so by reallocating sulfur dioxide allowances within the electric sector."[29] EPA also raised concerns with this provision since it "would potentially deny states control over allocations of allowances by rendering any submitted state plan with a different allocation to these units unapprovable" by the Agency.[30]

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

[28] House Committee on Energy and Commerce, Subcommittee on Energy and Power, Written Statement of Janet McCabe, Acting Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency (EPA), *Legislative Hearing on H.R. 3797, the Satisfying Energy Needs and Saving the Environment Act (SENSE) Act and H.R. ____, the Blocking Regulatory Interference from Closing Kilns (BRICK) Act*, 114th Cong. (Feb. 3, 2016) (online at *docs.house.gov/meetings/IF/IF03/20160203/104366/HHRG-114-IF03-20160203-SD004.pdf*) (hereinafter "*Subcommittee Legislative Hearing*").

[29] Subcommittee Legislative Hearing, Response to Questions of John Walke, Natural Resources Defense Council (online at democrats-energycommerce.house.gov/committee-activity/hearings/hearing-on-hr-3797-the-satisfying-energy-needs-and-saving-the-0).

[30] Subcommittee Legislative Hearing, Written Statement of Janet McCabe, Acting Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency (EPA) (online at *docs.house.gov/meetings/IF/IF03/20160203/104366/HHRG-114-IF03-20160203-SD004.pdf*).

The MATS provisions in section 2(c) also raise a number of concerns. It is not known how many facilities would opt for the bill's new compliance option, but the end result is likely additional emissions of air pollutants. Proponents argue that waste coal plants are unable to meet the current HCl and SO_2 limits and need an alternative pathway to comply with the MATS rule. However a less stringent SO_2 standard is not necessary since existing technology is capable of controlling 99 percent of HCl and 96 percent of SO_2.[31] At the hearing, Mr. Walke explained that "[i]t is simply incorrect to suggest that coal waste plants burning any type of coal waste are incapable of achieving either the HCl or the SO_2 standard in the existing MATS rule" and that,

> [W]hen the D.C. Circuit in its decision heard the full legal arguments from the trade association for waste coal operators and looked at all the evidence they presented and the evidence in the administrative record that EPA had compiled, they squarely rejected those claims in a three to nothing decision and that decision was left untouched by the Supreme Court in that relevant Respect.[32]

Democratic members offered two amendments during the full committee markup to address the concerns raised by the SENSE Act. Ranking Member Pallone offered an amendment to strike the bill's CSAPR sections, highlighting that the provision is unnecessary since states already have the ability to reallocate emissions allowances to benefit waste coal units if they so choose. Rep. Engel offered an amendment allowing a state to opt-out of the bill's CSAPR provisions if it determined that doing so would lead to an increase in the overall cost of complying with EPA's rule. The Engel amendment highlights EPA's concern that the bill interferes with the CSAPR market and would likely result in less efficient and more costly compliance. Both amendments also address the bill's states' rights issues by preserving a state's ability to determine the best method of compliance with CSAPR, which is currently afforded to them under the Clean Air Act. The Pallone and Engel amendments were each defeated by a party line vote of 22–29.

III. CONCLUSION

We oppose H.R. 3797 and the legislative remedy offered by this bill. It comes as no surprise that the majority is once again offering legislation to undermine Clean Air Act regulations to benefit coal-fired power plants at the expense of public health. What is surprising is that the SENSE Act puts major coal-fired plants at a disadvantage relative to waste coal plants that receive regulatory relief under this legislation. H.R. 3797 undermines states' authorities to develop emission budgets tailored to the specific emission sources in their power and industrial sectors. And, H.R. 3797 un-

[31] U.S. EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards*, at 2–8—2–9 (Dec. 2011) (online at *www3.epa.gov/ttn/ecas/regdata/RIAs/matsriafinal.pdf*).

[32] Subcommittee Legislative Hearing, Response to Questions of John Walke, Natural Resources Defense Council (online at *democrats-energycommerce.house.gov/committee-activity/hearings/hearing-on-hr-3797-the-satisfying-energy-needs-and-saving-the-0*).

dermines the proven market-based approach of using emission credits to achieve improved air quality at the lowest cost.

All of this is being done to benefit the approximately 20 waste coal plants that exist in a handful of states. While these plants address one of coal's major legacy problems—dangerous, polluting piles of coal mine tailings from abandoned coal mining operations—cleanup of these piles can and should be done without undue transfer of mercury, SO_2 and other pollutants from the land to the air.

It is ironic that those who routinely accuse President Obama and his administration of waging a "war on coal" are supporting H.R. 3797, a bill that will place greater emission reduction burdens on coal-fired utilities to allow waste coal facilities to emit more pollutants. The bill also deprives facilities of valuable emission credits that they would otherwise gain under current law for converting to natural gas or otherwise reducing their emissions.

None of this is necessary. The states already have the authority to allocate additional emission allowances to waste coal plants if they choose to do so under CSAPR. This bill imposes a specific allocation solution on the states, a one-size-fits-all solution that allows waste coal plants to emit more pollutants. In addition, there is no evidence that more generous emission allocations are necessary. There are waste coal plants that meet the CSAPR and MATS regulations today and there is technology available to enable waste coal plants to comply with the requirements of these rules. There is no justification for treating them differently from other coal-fired generation facilities.

For the reasons stated above, we dissent from the views contained in the Committee's report.

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Ranking Member, Subcommittee on Energy and Power.

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