Summary of Testimony by John D. Walke, Natural Resources Defense Council

The "Promoting New Manufacturing Act," is a problematic bill that would result in permitting loopholes, red tape and unintended burdens on industry. Even worse, the bill could exacerbate air pollution problems nationwide, causing harm to public health.

Sections 2 and 4 of the bill demand that EPA study and report to Congress on permitting information that the agency largely does not possess. State and local officials perform the vast majority of preconstruction permitting under the Clean Air Act today. If Congress desires this permitting information, it is most efficient to request it of the permitting entities themselves – the states and local agencies that are tasked with issuing the permits.

Section 3 of the bill would allow preconstruction permitting to proceed in violation of national health standards if EPA does not issue implementing regulations or guidance that might not even be warranted. If EPA adopts a new or revised national ambient air quality standard and the agency has not published final implementing regulations or guidance concurrently, this bill would grant amnesty from national health standards during preconstruction permitting. This provision represents a radical departure from the Clean Air Act, 37 years of permitting practice and responsible public health safeguards. Newly permitted facilities could even be allowed to operate in violation of national health standards, while other permitted industries and the public would pay the price for the new facility's amnesty and excessive pollution. Lastly, this legislation manages to violate all five Congressional declarations of the purposes behind the Clean Air Act's preconstruction permitting program in attainment areas.

The bill's stated goal is to "provide[] for greater transparency and timeliness in obtaining permits required under the Clean Air Act." Today's so-called "Promoting New Manufacturing Act" does not achieve these goals, yet manages to create new burdens and threaten air quality. I urge the subcommittee to reject this legislation.

TESTIMONY OF JOHN D. WALKE

CLEAN AIR DIRECTOR

NATURAL RESOURCES DEFENSE COUNCIL

HEARING ON H.R.___, THE "PROMOTING NEW MANUFACTURING ACT"

BEFORE THE SUBCOMMITTEE ON ENERGY AND POWER,

ENERGY AND COMMERCE COMMITTEE

U.S. HOUSE OF REPRESENTATIVES

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Thank you, Chairman Whitfield and Vice Chairman Scalise, and Ranking Member Rush for the opportunity to testify today. My name is John Walke, and I am clean air director and 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 1.3 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing. 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.

H.R. ____, the "Promoting New Manufacturing Act," is a deeply flawed bill that would authorize amnesty from national clean air health standards, create red tape and impose unintended burdens on local businesses. It does this while failing to expedite preconstruction

permitting for the targeted facilities, and instead opening up those facilities to new legal liabilities, higher costs and regulatory delays. These objectionable substantive elements are coupled with the legislation's false premises and lack of factual foundation for its central approach. NRDC opposes this misconceived legislation and we urge the Subcommittee not to advance the bill.

I will now summarize the bill's provisions and the many problems and concerns raised by its content.

Section-by-Section Analysis

I begin by examining and critiquing the most troubling provisions in the bill, in Section 3. Then I will turn my attention to sections 2 and 4.

Section 3: False Premises and Unjustified Amnesty

Section 3 creates an unjustified amnesty from new or revised national clean air health standards during preconstruction permitting for industrial facilities undertaking new construction or modifications. The bill could be read further to authorize subsequent *operation* by such facilities while violating the Clean Air Act's core health standards. This would harm air quality, the health of surrounding communities, and impose unfair burdens and costs on local businesses in the same area as the facility receiving amnesty. Even if the bill does not intend to exempt facilities from health standards during operation, the result still would be to create unintended consequences and increase facility costs as compared to current law.

Section 3(a): False Premises

Section 3(a) mandates that when EPA revises a national ambient air quality standard (NAAQS), the agency must simultaneously issue corresponding implementing regulations and guidance documents, including information relating to preconstruction permits. Past practice with EPA regulations and guidance, as well as preconstruction permitting conducted by state and local agencies, demonstrates that the requirement imposed by section 3(a) is counter-productive and unnecessary. Indeed, section 3 begins with false premises and then proceeds to worsen and weaken the Clean Air Act's preconstruction permitting programs.

The first important point is there are statutory deadlines for reviewing and revising, as necessary, national clean air health standards. Section 109 of the Clean Air Act requires EPA to update these standards every five years. 42 U.S.C. § 7409. EPA regularly misses this statutory deadline already and this legislation would only make that situation worse by imposing additional and unnecessary requirements on the agency to adopt implementation rules and guidance at the same time as revised health standards. This can only result in more delays and deny Americans even longer the health benefits from updating national standards consistent with the latest scientific and medical understandings.

There is no statutory requirement to issue NAAQS implementation rules or guidance, nor should there be. In many cases, such requirement would be simply illogical and a waste of time and resources. EPA publishes implementation rules and guidance documents in response to anticipated state questions and challenges. Many times, the very substance of these rulemakings is conceived through meetings with state and local permitting authorities and other stakeholders. The requirements of section 3(a) would short-circuit this process by which EPA responds to

states' concerns and questions regarding new aspects of implementation. It would require the agency to undertake rulemakings regardless of the need for such action, prior to fully hearing from states or understanding questions as they arise during the course of implementation.

History shows that EPA does not always publish implementation rules or guidance if the Agency believes such exercises to be unnecessary. This is especially true for preconstruction permitting requirements, which have been a well-developed feature of the Clean Air Act's regulatory landscape for decades. The one-size-fits-all bill shows no regard for this historic reality or common sense, instead mandating that EPA always adopt implementation rules or guidance documents whenever health standards are adopted or revised. I discuss below how section 3(b) of the bill couples this misunderstanding with a poison pill that harms the public while creating new uncertainties and burdens for regulated entities.

There are examples of revisions to ambient air quality standards, such as the 2011 carbon monoxide NAAQS,[1] in which EPA did not even believe it necessary to issue any implementation rules or guidance, much less on the topic of preconstruction permitting. The revised NO2 NAAQS is another example of this.[2]

Then there are examples of NAAQS revisions, such as the 2008 lead NAAQS, in which EPA issued guidance[3] but did not consider it necessary or warranted to adopt implementation rules. The guidance addressed prevention of significant deterioration (PSD) and nonattainment

[1] Review of National Ambient Air Quality Standards for Carbon Monoxide, 76 Fed. Reg. 54294 (Aug. 31, 2011) (to be codified at 40 C.F.R. pts. 50, 53, and 58).
[2] Primary National Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. 6474 (Feb. 9, 2010) (to be codified at 40 C.F.R. pts. 50 and 58).
[3] Memorandum from Scott L. Mathias, Interim Director, U.S. EPA Air Quality Policy Division, to Regional Air Division Directors, July 8, 2011 *available at* http://www.epa.gov/airquality/lead/pdfs/20110708QAguidance.pdf.

new source review (NSR) preconstruction permitting requirements only in an unremarkable, explanatory fashion that merely summarized longstanding regulations and practices. See, note 3, at 1-2. The guidance nowhere indicated that it was creating new requirements or furnishing new information concerning preconstruction permitting. Nor did it suggest in any respect that the guidance was necessary to understand how to undertake preconstruction permitting following the revisions to the lead standards. Instead, the guidance merely repeated in a single document information what was readily available already in EPA regulations and various pre-existing guidance.

When and if EPA does issue implementation rules or guidance, the bill does not make clear what would happen if EPA deemed it unnecessary to discuss preconstruction permitting in an implementation rule or guidance document. It is far from certain that EPA would directly address preconstruction permitting in any such rulemaking.

For starters, the preconstruction program regulations have set forth the core requirements covering all NAAQS pollutants, both existing and newly revised, for more than two decades. Second, the Clean Air Act already requires that "new or revised NAAQS apply to preconstruction permit applications as soon as the new or revised standards become effective, except in limited circumstances."[4] Each preconstruction permit, whether it be a PSD permit or a nonattainment NSR permit, requires a case-by-case analysis of the air quality impacts of the permit.

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[4] Memorandum from Majority Staff to Members, Subcommittee on Energy and Power, House Committee on Energy and Commerce, May 19, 2014, at 3, *available at* http://docs.house.gov/meetings/IF/IF03/20140521/102241/HHRG-113-IF03-20140521-SD002.pdf (hereinafter "Majority Memo").

We are not aware of any specific examples in which EPA, state or local permitting authorities were unable to issue preconstruction permits to new construction or modifications following revisions to ambient air quality standards. Moreover, we know of no situations in which EPA implementation rules or guidance were deemed necessary to the issuance of preconstruction permits following revisions to national health standards. Instead, EPA has revised NAAQS repeatedly over the course of nearly four decades since the preconstruction permitting programs were added to the Clean Air Act, and EPA, state and local permitting agencies have been capable of issuing preconstruction permits.

Finally, NRDC opposes Section 3(a) to the extent it is intended to create any new private right of action if EPA does not issue implementing regulations or guidance at the same time as the updated NAAQS. Construing the provision in such a way would thwart the substantive statutory goal of the NAAQS program, and would be functionally equivalent to creating another avenue for substantive review of the NAAQS, in addition to those already provided by the Clean Air Act. Since such a private right of action is already provided for under section 109 of the Act, interpreting section 3(a) thusly would only delay and hinder EPA's progress in meeting its statutory obligations.

Considering the lack of factual foundation and absence of demonstrated need, this legislation is particularly unwarranted and misconceived. To be clear, however, this lack of need is far outweighed by the active harm and weakening of the Clean Air Act that the bill would produce.

Section 3(b): Amnesty From National Clean Air Health Standards

Section 3(b) is the most troubling and harmful provision of the bill. If EPA adopts a new or revised national ambient air quality standard and the agency has not published final implementing regulations or guidance concurrently—whether needed or not (see *supra*)—the bill's response is to grant amnesty from those national health standards during preconstruction permitting. See section 3(b).

This amnesty represents a radical departure from the Clean Air Act, 37 years of permitting practice and responsible public health safeguards. Only stationary sources that model *violations* of the new or revised national health standards during the air quality impacts analysis stage of preconstruction permitting[5] will benefit from this bill or even have need for it. Newly constructed or modified sources that model *compliance* with new or revised air quality standards do not need amnesty from such standards—nor would these companies likely welcome the public stigma associated with being granted amnesty from health standards. So the bill is *only* granting amnesty as a practical matter to *violators* of national health standards. There is no defensible public policy or legal justification for this amnesty.

As discussed in the Congressional Purposes section of this testimony (*infra* at 14-16), the very objectives of the preconstruction permitting program are to ensure that newly constructed or modified stationary sources:

- will *not* violate national health standards;
- will *not* consume all "increment" in an airshed that is meant to be available to allow equitable growth by all companies in that area;
- will *not* interfere with a state's plan for maintaining attainment of national health standards or attaining those standards; and

[5] 42 U.S.C. § 7475(a)(6).

- will *not* worsen air quality in national parks or so-called "class I areas."

Preconstruction permitting is supposed to ensure that newly constructed or modified stationary sources:

- will be subject to best available control technology (which this legislation does not affect); and
- will undertake any and all pollution control measures to ensure there will be no violations of national health standards, no excessive consumption of "increment" in the airshed, no inequitable impact on other local businesses, and no adverse impacts on national parks or class I areas.[6]

The legislation turns these understandings and practices upside down during the preconstruction permitting process, by granting amnesty to facilities that run afoul of all of these longstanding, statutory purposes.

The bill also suffers from vagueness concerning the important question of whether a facility granted amnesty from national health standards during preconstruction permitting is *also* allowed to *operate* in ongoing violation of these health standards. Whatever the resolution of this vagueness, however, it is clear that the bill weakens the current Clean Air Act and longstanding safeguards, while perversely subjecting the company in question to severe legal vulnerabilities *or* subjecting other local businesses to unfair added burdens.

What is this vagueness? Section 3(b) provides that a revised NAAQS "shall not apply to the *review and disposition* of a preconstruction permit until the Agency has published such final regulations and guidance." Section 3(b) (emphasis added). This provision suffers from vagueness concerning whether newly constructed or modified sources are allowed to *operate* in violation of

[6] *See* 42 U.S.C. § 7475(a) & (d).

a new or revised national health standard. This section could be read either to (1) authorize ongoing NAAQS violations until EPA issues implementing rule or guidance that may or may not be warranted; or (2) not authorize facility operation in violation of the NAAQS, in which case the amnesty that the bill creates is temporary and limited to the preconstruction permitting phase.

Were the provision read to authorize ongoing NAAQS violations during *operation* of a newly constructed or modified facility, the bill would create an unprecedented loophole for facility owners or operators to knowingly violate national health standards for air pollutants. This means that a new plant, with a lifetime of sixty or more years, would knowingly be exempted from complying with health-based standards that EPA has determined to be necessary to protect public health with an adequate margin of safety. This would have obvious and inexcusable consequences for air quality in the area, and the health of local communities surrounding the violating facility.

But the legislation also would impose harms on *other* local businesses. Existing businesses in the same airshed as the facility granted amnesty would need to undertake additional pollution control measures in order to offset that facility' excessive emissions and NAAQS violations. In the parlance of the Clean Air Act, this single exempt facility would be consuming more than its fair share of pollution "increments," or the amount of an available emissions inventory before emissions in the total airshed violate national health standards.[7] The Clean Air Act still would require EPA, state and local officials to attain national health standards and to avoid interfering with the maintenance of attainment in areas that meet NAAQS.[8] The only way to do this would be to crack down on *other* businesses in the airshed, to prevent NAAQS

[7] 42 U.S,C. § 7473 (b); §7475(a)
[8] *Id.*

violations (caused by the single exempt facility) and to ensure there is no interference with maintenance of attainment. Imposing additional costs and control obligations on existing businesses in order to grant amnesty to a newly constructed facility is inequitable and punitive. And the costs to retrofit these existing businesses with additional control measures surely would be less cost-effective than planning incremental additional controls for the newly constructed facility during preconstruction permitting.

In similar fashion, for nonattainment areas that fail to comply with newly revised NAAQS already, the bill's amnesty would only make it more difficult for state and local officials to deliver clean air to their citizens, and more difficult for other local businesses to grow while making up for the statutory amnesty granted newly constructed or modified facilities.

Were the provision read not to authorize ongoing violations of national health standards during operation (the better reading of section 3(b), in NRDC's view), there still would be harmful impacts and consequences that NRDC can only believe are unintended. Under this reading, even while the bill grants a facility amnesty from new or recently revised NAAQS during preconstruction permitting, the background statutory prohibition on violating current NAAQS continues to govern the facility's operation.[9] This is because the facility is only exempt from newly adopted or revised NAAQS during "review and disposition" of a preconstruction permit. Section 3(b).

As explained earlier, any facility undertaking new construction or modifications that avails itself of this bill's amnesty would model violations of the newly revised NAAQS during

[9] *See*, *e.g.*, 42 U.S.C. §§ 7410(a), 7661a(a).

its air quality impact analysis.[10] Section 3(b) would grant the facility amnesty from a revised NAAQS only during preconstruction permitting. The facility then would begin and complete construction with pollution control measures inadequate to comply with the newly revised, more protective NAAQS.

Following that, the facility would wish to begin operation—but doing so would violate the newly revised health standards, based on the Clean Air Act prohibition on any facility operating in violation of national health standards. The bill thus creates unintended consequences that confront the facility owners or operators with terrible choices:

1. either operate the facility in knowing violation of the Clean Air Act, and face possible criminal liability for knowing violations;[11]
2. curtail operation immediately in order to avoid knowing NAAQS violations; or
3. undertake costly retrofits of pollution control measures or offsets in order to comply with the revised NAAQS. Such control measures could have been adopted more cost-effectively and intelligently, of course, during preconstruction permitting, had the bill not unwisely granted amnesty from the NAAQS during preconstruction permitting.

We can see no justification for imposing these terrible choices on facility owners or operators. Nor can we see any justification for doing damage to the Clean Air Act and its preconstruction permitting programs in the manner that Section 3(b) so clearly would.

Section 2: Regulatory Burdens, on the Wrong Party

[10] *See supra* at 7-8.
[11] 42 U.S.C. § 7413(c)(1) (imposing criminal liability for knowing violations of Clean Air Act requirements).

Sections 2(a) and (b) of the bill wrap EPA in red tape and consume limited agency resources, in order to compile information mostly in the possession of state and local agencies rather than EPA. Subsection 2(a) requires that the Administrator gather and publish the total number of preconstruction permits issued only during the Obama Administration. This focus initially suggests a partisan political messaging exercise rather than a real public policy need.

The Administrator must also include data on (1) how many permits were issued within one year after an application was filed, and (2) the average time it takes the U.S. EPA to review a permit decision. Subsection 2(b) requires that all of this information be published no later than 60 days after the date on which the bill becomes law, and requires that the agency publish updates annually.

As an initial matter, it is entirely unclear whether EPA even has access to all of the information that this bill would require. The background memo accompanying this bill acknowledges as much, stating that "[a]lthough *the majority of the major NSR permits are issued by State and local permitting authorities*, EPA also may be the permitting authority in certain States."[12] In fact, EPA notes that:

> *Most NSR permits are issued by state or local air pollution control agencies*. EPA establishes the basic requirements for an NSR program in its federal regulations. *States may develop unique NSR requirements and procedures tailored for the air quality needs of each area* as long as the program is at least as stringent as EPA's requirements. A state's NSR program is defined and codified in its State Implementation Plan (SIP).[13]

[12] See Majority Memo, at 2 (emphasis added).
[13] U.S. EPA, New Source Review, *Where you Live available at* http://www.epa.gov/nsr/where.html (last visited May 19, 2014) (emphasis added).

Indeed, a chart accompanying EPA's statement indicates that 42 of the 50 states have state New Source Review Programs that they operate themselves.[14] Of the remaining eight states, four of the states still oversee some portion of the NSR program. Only four of the other states are so-called "delegated" states, meaning that they have no unique state NSR authority and are delegated federal authority to issue permits on behalf of EPA in a form of legal agent relationship. In light of the fact that more than 80% of states oversee their own preconstruction permitting, EPA simply may not have immediate access to all of the information that Section 2 would demand, and certainly would face serious challenges gathering it within sixty days. Moreover, since EPA is not the permitting authority for the vast majority of the country, this exercise is more appropriately directed at state and local permitting authorities.

For similar reasons, directing EPA to provide statistics on the length of time EPA's Environmental Appeals Board takes to review permits provides only a small sliver of information on permit appeal proceedings. Just like initial permitting decisions, most permit appeals are undertaken through state administrative proceedings and state judicial bodies. Requiring this information from EPA will not provide Congress with the information it appears to be seeking, nor will it reveal much about the overall scope of preconstruction permitting under the Clean Air Act.

Moreover, the requirement in Section 2(b)(1) that EPA provide this information within 60 days would burden the Agency with an information collection exercise involving information largely outside its possession. Again, this is information that EPA may not have, regarding permits that it is not responsible for issuing. The time constraints provided in the bill would make collecting the information very challenging or even impossible. These inquiries are more

[14] *Id.*

appropriately directed to state and local officials, who make these permitting decisions and have firsthand knowledge of how well or poorly the permit process is working within their individual state or locality. The natural question then would become whether it makes sense to saddle these resource-constrained state and local governments with Congressional red tape with no clear public policy benefit—taking resources and attention away from implementing and enforcing laws that safeguard Americans' health. We do not believe this makes sense.

Section 4: Additional Red Tape

Like Section 2, Section 4 wraps EPA in more red tape with no clear benefit for public health, clean air or even economic growth, due to the bill's misplaced target. The section requires that "EPA annually submit a report to Congress on actions being taken by the agency to expedite the process for issuing preconstruction permits."[15] As with Section 2, the provision contains a short timeframe in which EPA is supposed to collect the information required by Section 4's report (120 days). The Section also requires EPA to report on permitting decisions, the vast majority of which are undertaken by state and local governments. EPA permits individual facilities infrequently, and it makes little sense for Congress to require this information from EPA, rather than from individual state and local permitting authorities. The question becomes again whether it makes sense to saddle resource-constrained state and local governments with Congressional red tape with no clear public policy benefit. We do not think this makes sense.

Nor should Congress add these additional burdens to a federal EPA already constrained by increasingly severe budget cuts and workforce reductions. In Fiscal Year 2011, House

[15] *See* Majority Memo at 4.

Republicans proposed to reduce EPA's budget by $3 billion, a 29% reduction from 2010 levels.[16] In each subsequent year for 3 years, House Republicans have proposed to cut EPA's budget by at least $1 billion.[17] EPA's budget has gone down by over two billion dollars since the Agency's Fiscal Year 2010 budget of $10.2 billion.

Finally, EPA already has informed federal courts that it currently lacks the resources to carry out existing laws. In *WildEarth Guardian v. EPA*, No. 13-1212, 2014 WL 1887372 (May 13, 2014), EPA informed the public that it "must prioritize its actions in light of limited resources and ongoing budget uncertainties, and at this time, cannot commit to conducting the process to determine whether coal mines should be added to the list of categories under" the Clean Air Act. *WildEarth Guardian*, at *1. Petitioners challenged that decision in court, arguing that constrained resources were not a legitimate reason for denying their rulemaking petition and failing to enforce the law. The court disagreed, finding that "'[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities,'[ ], which means that EPA has discretion to determine the timing and priorities of its regulatory agenda." *Id.* at *1 (*citing Massachusetts v. EPA*, 549 U.S. 497, 527 (2007)). EPA already operates in a resource-constrained budgetary environment; adding paperwork and reporting exercises to the Agency's existing statutory duties to protect Americans' health would only exacerbate EPA's failure to adopt health standards by statutory deadlines or sometimes at all.

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[16] Lauren Morello et al. *Republicans Gut EPA Climate Rules, Slash Deeply Into Climate Research, Aid and Technology Programs* N.Y. TIMES, Feb. 14, 2011 *available at* http://www.nytimes.com/cwire/2011/02/14/14climatewire-republicans-gut-epa-climate-rules-slash-deep-87716.html?pagewanted=all.

[17] Amy Harder, *EPA faces third straight year of cuts*, NAT'L. JOURNAL, Feb 13, 2012 *available at* http://www.govexec.com/oversight/2012/02/epa-faces-third-straight-year-cuts/41185/.

The Bill Contravenes the Congressional Declarations of Purpose for Clean Air Act Preconstruction Permitting

Finally, this legislation manages to violate all 5 Congressional declarations of the purposes behind the Clean Air Act's preconstruction permitting program in attainment areas. These purposes are set forth in Clean Air Act § 160, codified at 42 U.S.C. § 7470.

First, the bill authorizes actual and potential adverse effects to public health and welfare in attainment areas, by allowing new construction and modifications to violate national health standards for air pollution. In doing so, the legislation allows NAAQS attainment and maintenance of attainment to be threatened and even contravened. See 42 U.S.C. § 7470(1).

Second, the bill will harm and diminish the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special regional natural, recreational, scenic, or historic value by allowing new construction or modification to violate national standards for air pollution. See 42 U.S.C. § 7470(2); Section 3(b).

Third, the bill fails to ensure that any potential economic growth will occur in a manner consistent with the preservation of existing clean air resources, because on its face the bill allows new construction to violate national standards for air pollution and consume any remaining "increment" intended to preserve existing clean air resources. Again, this allows NAAQS attainment and maintenance of attainment to be threatened and even contravened. See 42 U.S.C. § 7470(3).

Fourth, the bill allows emission sources to interfere with the implementation plans in place to prevent significant deterioration of air quality in other states. The bill does so by allowing new construction or modifications to violate national standards for air pollution,

thereby ensuring that new construction or modifications in one state will harm the maintenance and attainment efforts of those states downwind. See 42 U.S.C. § 7470(4).

Finally, the bill will ensure that decisions to permit increased air pollution will not be made after careful evaluation of all the consequences of such a decision and after procedural opportunities for informed public participation in the decision-making process, but rather as a mere formality with little insight into the relevant situation at the site of the emission source. See 42 U.S.C. § 7470(5).

The legislation turns these Congressional purposes upside down during the preconstruction permitting process, by granting amnesty to facilities that run afoul of all of these longstanding, statutory purposes.

For these reasons, NRDC urges the Subcommittee members not to advance this harmful legislation.