

TESTIMONY OF JOHN D. WALKE  
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COMMITTEE HEARING ON “NEW SOURCE REVIEW PERMITTING CHALLENGES FOR  
MANUFACTURING AND INFRASTRUCTURE”  
BEFORE THE SUBCOMMITTEE ON ENVIRONMENT,  
COMMITTEE ON ENVIRONMENT AND COMMERCE  
U.S. HOUSE OF REPRESENTATIVES

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Thank you, Chairman Shimkus and Ranking Member Tonko for the opportunity to testify today. My name is John Walke, and I am 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 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. Having worked on air pollution issues for the entirety of my career, I have done a great deal of work relating to the New Source Review (NSR) provisions of the Clean Air Act (CAA). I believe the NSR provisions of the Act strike a responsible balance, requiring new and

modified stationary sources of air pollution to protect our nation's air quality through appropriate pollution controls and other measures. I would like to thank the subcommittee for the opportunity to testify, and I look forward to your questions.

Any proposed NSR "reform" first should answer one simple question: will it let industry pollute more? Unfortunately, the answer to that question in my experience, is usually yes. Most of the changes to the NSR safeguards that industry commenters are seeking from the Trump administration, for example, would let industry pollute more, by significantly higher amounts, and in the process, evade air pollution controls and pollution offsets.

If the answer to that question is no, other questions deserve asking: will the proposed reform make the safeguards less transparent or accountable to Americans? Will it make the protections less enforceable by regulators and citizens? Will the reform make the program more flexible or cost-effective for industry, while still fully preserving the health and environmental safeguards? Will it facilitate economic growth without harming air quality or Americans' health?

Insufficient political attention and concern are being given to the problems with *attacks* on clean air safeguards, like New Source Review. Those problems include increased air pollution; violations of national clean air health standards; greater health risks for Americans, including more asthma attacks, heart attacks, strokes and even premature deaths; more hospitalizations and missed school days for our children; hazier skies over America's national parks; reduced regulatory and public transparency and accountability for pollution increases; and amnesty from lawbreaking.

New Source Review (NSR) is a Clean Air Act pre-construction permitting program—with requirements for modern pollution controls, offsets of any remaining emissions increases, air-quality impact analyses, and public participation—that imposes those requirements only

when industrial facilities significantly *increase* emissions of regulated air pollutants like fine particulate matter (PM<sub>2.5</sub>) pollution, sulfur dioxide, or precursors to smog, such as nitrogen oxides or volatile organic compounds.

Accordingly, so-called NSR “reforms” that industry lobbyists and political critics are seeking generally fall into one or more of the following categories:

(1) evasion of requirements, to allow significant emissions *increases* to occur without requiring modern pollution controls, offsets, air quality analysis or public participation;

(2) weaker requirements, to nominally meet NSR requirements but in a weaker fashion than today’s law allows—for example, worse pollution controls; pollution increases that violate national health standards; offset of more dangerous air pollution with less dangerous pollutants; increased air pollution near communities, nominally offset by pollution decreases very far from a community; and

(3) amnesty from applicable requirements, through failure to enforce those requirements or attempts to re-characterize those requirements, in a way that allows significant emissions *increases* to evade control and other safeguards.

The Trump administration has issued a deregulatory report targeting these New Source Review safeguards that flatly mischaracterizes their statutory purpose and requirements: “New Source Review (NSR) is a preconstruction permitting program intended to ensure that new and modified stationary sources of air pollution *do not significantly degrade air quality*.”<sup>1</sup> That characterization is erroneous and/or incomplete. The broader purposes of the NSR program (in areas meeting and not meeting national clean air health standards) include: application of best available control technology, or lowest achievable emission rate control technology; air quality

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<sup>1</sup> U.S. EPA, *Final Report on Review of Agency Actions That Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783* (Oct. 25, 2017), at 2 (“13783 Report”).

impact analyses to ensure national health standards will not be violated in areas with safe air already; protection of air quality in national parks and wilderness areas; adoption of air quality monitoring; and offset of remaining emissions following application of LAER controls in areas with unsafe air quality, in increasing offset ratios, generally in the same nonattainment area, with some exceptions. See 42 U.S.C. § 7475 & § 7503.

EPA's 13783 Report goes on to assert that "[i]n some circumstances, the NSR process discourages the construction of new facilities or modifications of existing ones that could result in greater environmental improvements."<sup>2</sup> It is important to recognize that no evidence or data back that claim; it is sheer assertion. The 13783 Report backs neither the 'discouragement' claim nor the 'greater environmental improvements' claim with any proof or verifiable facts.

It is equally important to acknowledge that the 13783 Report credited only commenters that sought to weaken these public health and clean air safeguards. Numerous commenters opposed rolling back the safeguards, but the 13783 Report does not even deign to mention those objections and perspectives by ordinary Americans. *Id.*

Recognize too that the 13783 Report lists only industry recommendations for reforms that would result in: *increases* of harmful emissions in local communities; failures to adopt modern pollution controls that the law requires; evasion of air quality impact analyses and review by regulators and the public; and emissions trading of less dangerous air pollutants for more dangerous pollutants.<sup>3</sup> EPA never has adopted these weakening recommendations previously, because they are unlawful and harmful to air quality and Americans' health.

## **I. Evasion of NSR Requirements to Allow Increases in Harmful Air Pollution That Escape Control, Offsets, Air Quality Impact Analyses & Regulatory/Public Review**

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<sup>2</sup> *Id.*, at 3.

<sup>3</sup> *Id.*, at 3.

**A. H.R. 3127 & 3128 Would Weaken Current Law and Allow Massive Increases in Harmful Air Pollution to Escape Control, Offsets, Air Quality Impact Analyses & Regulatory/Public Review**

Two bills have been referred to the Committee on Energy and Commerce that would eviscerate the Clean Air Act's preconstruction permitting programs for stationary sources of air pollution—H. R. 3127 and H.R. 1328. I will analyze these bills and explain their extremely harmful consequences. The Committee should not allow these irresponsible bills to become law.

**1. H.R. 3127 & H.R. 3128 radically deregulate all significant increases in actual air pollution from air pollution controls unless a polluting facility exceeds an extraordinarily high level called its "maximum achievable hourly emissions rate."**

H.R. 3127 and H.R. 3128 badly fail the test of my simple question: both bills let industry pollute more, by significantly higher amounts, and in the process, evade air pollution controls. H.R. 3127 and H.R. 3128 would overturn four decades of Clean Air Act safeguards concerned with *increases* in *actual* emissions of harmful air pollution. The bills would replace those greater protections with a test for air pollution controls, offsets and air quality impact analysis that would apply only if a polluter ever managed to exceed, implausibly, its vastly higher *capacity* to emit air pollution, measured from some point in the plant's past. By doing so, both bills would allow increases in actual emissions totaling hundreds or even thousands of *tons* from individual facilities to evade pollution controls, offsets, air quality analyses and regulatory/public oversight. H.R. 3127 would do so using a test for capacity increases measured by a facility's "maximum hourly emissions rate," while H.R. 3128 would do so using a substantially similar capacity test measuring increases in a facility's "maximum achievable hourly emissions rate."

The Clean Air Act—and Americans—are rightly concerned with increases in *actual* emissions of harmful air pollutants. Significant increases in actual emissions must be controlled either with Best Available Control Technology (BACT) in areas meeting national health

standards, or Lowest Achievable Emissions Rate (LAER) control technology—as well as the offset of remaining emissions increases—in areas failing to meet those health standards. H.R. 3127 and H.R. 3128 overturn the Clean Air Act’s 40-year concern with actual emissions increases, and also overturn the leading NSR federal court opinion upholding the law’s critical emissions increase requirement.<sup>4</sup> The bills would allow massive increases in actual emissions of harmful air pollution, so long as a polluting facility does not exceed its maximum *capacity* to pollute, measured by its “maximum hourly emissions rate,” or “maximum achievable hourly emissions rate.”

Americans care about increases in actual air pollution that worsens air quality and harms their health, not failures to increase theoretical ‘capacity’—a facility’s maximum hourly emissions rate from the past. Both bills would sanction enormous increases in dangerous air pollutants, ensuring such increases escape control and review in the real world. For the parents of a child being rushed to the emergency room due to an asthma attack caused by massive soot pollution increases from a nearby power plant, it is no solace to tell them that the higher pollution levels that choked their daughter’s breathing did not result from the plant exceeding its “maximum hourly emissions rate.” Asthma attacks, heart attacks and strokes are brought on by higher levels of actual, harmful air pollution in the real world, regardless of whether those higher amounts are caused by increases above the artificial concept of a plant’s maximum hourly emissions rate from some point in the plant’s past.

**2. What are some requirements of today’s stronger Clean Air Act that H.R. 3127 & H.R. 3128 would weaken?**

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<sup>4</sup> *New York v. EPA*, 413 F.3d 3, 39 (D.C. Cir. 2005).

The Clean Air Act requires an existing source to undergo NSR whenever it makes a “modification,” which is defined in the statute as, *inter alia*, any physical or operational change that “increases the amount of any pollutant emitted.” CAA § 111(a)(4). In the controlling D.C. Circuit Court of Appeals decision, the Court held, “the CAA unambiguously defines ‘increases’ in terms of *actual* emissions.” 413 F.3d 3, 39 (D.C. Cir. 2005) (emphasis added). Specifically, after reviewing the various ways that the 1977 Congress chose to modify the terms “emit” and “emitted, the Court concluded that Congress was “conscious of the distinction between actual and potential emissions,” and “use[d] the term ‘emitted’ to refer to actual emissions.” *Id.*

The Court further explained that “[i]f Congress had intended for ‘increases’ in emissions to be measured in terms of potential or allowable emissions, it would have added a reference to ‘potential to emit’ or ‘emission limitations.’ The absence of such a reference must be given effect.” *Id.* at 40. The Court added, “even if the word ‘emitted’ does not by itself refer to actual emissions, the phrase ‘the *amount* of any air pollutant *emitted*’ plainly refers to actual emissions.” *Id.* (emphasis in original). *See also Alabama Power v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979) (holding that the term “emit” is a “reference to some measure of actual emissions.”).

Both EPA and industry have rightly described measures of a facility’s potential or allowable emissions—what a facility is able to emit, its capacity to emit—in terms of the facility’s maximum hourly emissions rate, just as H.R. 3127 and H.R. 3128 do:

[A]s a practical matter, for most, if not all [electric generating units, or EGUs], the hourly rate at which the unit is actually *able* to emit is substantively equivalent to that unit’s historical *maximum* hourly emissions. That is, most, if not all EGUs will operate at their *maximum* actual physical and operational *capacity* at some point in a 5-year period. In general, highest emissions occur during the period of highest utilization. As a result, both the *maximum achievable and maximum achieved hourly emissions* increase tests allow an EGU to utilize *all of its existing capacity*, and in this aspect the hourly rate at which the unit is actually *able* to emit is substantively equivalent under both tests.

72 Fed. Reg. 26,202, 26,219/3 (May 8, 2007) (emphases added).<sup>5</sup> Industry attorneys, too, understand that capacity-based maximum achievable and maximum achieved hourly tests (like in H.R. 3127 and H.R. 3128) are “potential”-based emissions increase tests.<sup>6</sup> The Clean Air Act and D.C. Circuit decision in *New York v. EPA* make very clear that NSR unambiguously defines ‘increases’ in terms of actual emissions,” not a facility’s potential or capacity to emit. 413 F.3d, at 39.

**3. Allowing sources to increase *actual* emissions so long as the source does not increase its maximum hourly emissions rate would allow massive pollution increases to evade control, offset and analysis.**

Why do these difference matter? Because adopting H.R. 3127 & H.R. 3128 would severely weaken the Clean Air Act and allow enormous increase in actual, harmful air pollution to evade pollution controls, offsets, air quality impact analyses and regulatory/public oversight. EPA has recognized again and again that basing NSR only on emissions increases that exceed a facility’s higher maximum hourly emissions rate would allow changes that cause actual, significant emissions increases to evade review, pollution controls and offsets: this “could sanction greater actual emissions increases to the environment, often from older facilities, without any preconstruction review.”<sup>7</sup> EPA has explained how these actual emissions increases

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<sup>5</sup> EPA long has recognized that maximum achievable emissions tests under NSR are a function of increases in a source’s far higher potential emissions, rather than its lower actual emissions: “The ‘achievable’ test is a measure of the ‘potential’ emissions of a source ... in the classic and historic sense of the use of that term.” Memorandum from Adam M. Kushner, Director of EPA’s Air Enforcement Division, Office of Enforcement and Compliance Assurance, to William Harnett, dated August 25, 2005, at 9 (“EPA Enforcement Memo”).

<sup>6</sup> See, Joint Brief of Industry Petitioners, *New York v. EPA*, at 6 (characterizing an increase in a facility’s maximum hourly emissions rate as an increase in its existing capacity to emit); at 9 (for a project to “create ‘new’ capacity to emit,” it “must first increase an existing facility’s maximum achievable emissions rate”); at 10-11 (equating “potential to emit” with a facility’s “existing design capacity,” just like H.R. 3128); at 23 (equating a unit’s “maximum emissions rate” with its “capacity to emit”); see also, Joint Brief of Industry Intervenor, *New York v. EPA*, at 11 (“‘potential-to-potential’ test” compares “maximum emissions before a change to maximum emissions after a change.”) & 12 (linking increases in potential emissions rate to operation at full design capacity) & 13 (“increase in a major source’s “potential” emissions, *i.e.*, in the source’s maximum pre-change emissions level.”)

<sup>7</sup> 67 Fed. Reg. 80,186, 80,205 (December 31, 2002). See also, *id.* (“actual emissions increases resulting from unreviewed projects could go largely undocumented until a [NSR] review is performed by a new or modified facility



would result, taking the example of a widget factory: a physical change at a facility could “allow the owner to use [a] machine at much higher levels (*e.g.*, more hours per day or week) than it had in the past. As a result, *actual emissions (measured in [tons per year]) could more than double due to the increase in utilization even though hourly potential emissions remain the same.*”<sup>8</sup>

It is important to realize that the highest hourly emissions rate that a source could have achieved, or has achieved, does not reflect the source’s *actual* hourly emissions, on a day-to-day basis. Indeed, in a case study undertaken by EPA’s enforcement office, “the achievable hourly emission rate was calculated to be *more than ten times higher than the average hourly emission rate in the five-year period prior to the change.*” EPA Enforcement Memo, *supra* note 5, at 3 (emphasis added). This provides some idea of the reckless magnitude of actual emissions increases that could occur by adopting the “maximum (achievable) hourly emissions rate” approaches in H.R. 3127 or H.R. 3128.

EPA’s enforcement office previously has examined the weakening effect of a “maximum achievable hourly emissions rate text” on NSR, and the enormous emissions increases that could result. Examining actual emissions data for coal-burning electric generating units (EGUs) from the EPA Clean Air Markets Division, the agency’s enforcement office concluded that a maximum hourly achievable emissions rate test would fail to control actual annual emissions *increases* of 50 tons per year (“tpy”) of SO<sub>2</sub> and 978 tpy of NO<sub>x</sub> in one case study (EPA Enforcement Memo attachment, at 10); *increases* of 13,096 tpy of SO<sub>2</sub> in another case study (*id.* at 2); *increases* of 939 tpy of SO<sub>2</sub> and 1,405 tpy of NO<sub>x</sub> in another (*id.* at 20); and *increases* of 1,700 tpy of SO<sub>2</sub> and 507 tpy of NO<sub>x</sub> in a fourth case study (*id.* at 27). In one example, the annual

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that ultimately must undergo review. By that time, however, a violation of an increment could have unknowingly occurred.”), *id.* (“We agree that a potential-to-potential test for major NSR applicability could lead to unreviewed increases in emissions that would be detrimental to air quality.”).

<sup>8</sup> 61 Fed. Reg. 38,250, 38,269 (July 23, 1996) (emphasis added).

SO<sub>2</sub> emissions increase that evaded control was *over 327 times* the level that EPA considers *de minimis* and therefore exempt.<sup>9</sup> These exempted emissions increase levels are significantly higher than even the major stationary source threshold for brand new power plants (100 tpy) that EPA continues to recognize should be subject to BACT and LAER. And in many cases, these uncontrolled emissions *increases* are well above the *total* SO<sub>2</sub> and NO<sub>x</sub> emissions from individual power plant units that a rule like EPA's Clean Air Interstate Rule would have covered.

**4. Allowing sources to increase *actual* emissions so long as the source does not increase its maximum hourly emissions rate would allow large numbers of uncontrolled or poorly controlled industrial facilities to experience massive pollution increases that evade control, offset and analysis.**

One of the dirty little secret of air pollution control in the United States in 2018, nearly 50 years after the Clean Air Act was adopted, is that significant numbers of large industrial polluters remain either uncontrolled or lack state-of-the-art pollution controls for regulated air pollutants, such as sulfur dioxides or nitrogen oxides that form smog pollution. Using the most recent annual data available from EPA (2016), and focusing on coal-burning electric generating units (EGUs) in EPA's National Electric Energy Data System, NRDC identified the following numbers of EGUs that still lack state-of-the-art air pollution controls, in the form of selective catalytic reduction (SCR) or selective non-catalytic reduction (SNCR) for nitrogen oxides (NO<sub>x</sub>); or that lack wet or dry scrubbers for sulfur dioxide (SO<sub>2</sub>) emissions. Some of these units are uncontrolled for the relevant pollutant; others are equipped with sub-par measures like so-called "low NO<sub>x</sub> burners."

These results show that an astonishing 390 coal-burning electric generating units lack state-of-the-art air pollution controls for nitrogen oxides, and 306 lack such controls for sulfur dioxide. The 306 uncontrolled or poorly controlled EGUs emitted an even more astonishing

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<sup>9</sup> *Id.*

580,070 tons per year of sulfur dioxides in 2016. The 390 uncontrolled or poorly controlled EGUs emitted 451,638 tons of nitrogen oxides in 2016. The table on the following two pages breaks those units down by state. You will notice the large geographic imbalance, with significantly higher numbers of uncontrolled or poorly controlled coal units in the Midwest and some Southeastern states. These are among the most heavily polluting coal units whose transported smog and soot pollution plague air quality in downwind states in the mid-Atlantic and Northeastern states, up into New England.

<b>Coal-Burning Electric Generating Units That Lack State-of-the-Art Air Pollution Controls (at end of 2016)</b>		
<b>U.S. States</b>	<b>Lack SCR or SNCR for Nitrogen Oxides<sup>10</sup></b>	<b>Lack Wet or Dry Scrubbers for Sulfur Dioxide</b>
<b>Total U.S.</b>	390	306
Alabama	9	9
Arkansas	5	4
Arizona	10	1
California	3	4
Colorado	15	7
Connecticut	1	1
Florida	1	2
Georgia	5	2
Illinois	21	22
Indiana	23	16
Iowa	19	16
Kansas	7	4
Kentucky	22	11
Louisiana	4	6
Maine	2	2
Maryland		2
Michigan	19	23
Minnesota	13	14
Mississippi	6	7
Missouri	23	30
Montana	8	3
Nebraska	12	12

<sup>10</sup> Selective Catalytic Reduction or Selective Non-Catalytic Reduction air pollution control devices.

Nevada	2	1
New Mexico	3	
New Hampshire		2
New York	5	4
North Carolina	12	8
North Dakota	11	3
Ohio	16	8
Oklahoma	12	11
Oregon	1	1
Pennsylvania	14	23
South Carolina	7	6
Tennessee	4	
Texas	20	17
Utah	10	2
Virginia	12	3
Washington	1	0
West Virginia	2	4
Wisconsin	13	13
Wyoming	14	2

Some of these dirty dinosaur EGUs were placed online as long ago as 1947. The average age of these dirty coal units is 48 years-old. Analysis performed by Synapse Energy Economics for NRDC reveals that “capacity factor is related to generator age, with older units operating at lower capacity factors, by roughly one percentage point for each year of age, which the memo deems a “conservatively low presumption.”<sup>11</sup> These conclusions demonstrate the motivation, desire and need for EGU owner/operators to undertake physical changes, for example, in order to replace equipment, undertake upgrades or otherwise restore decreased capacity. As EPA recognizes, this in turn provides owners with an incentive and opportunity to increase the hours

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<sup>11</sup> Memo from Bruce Biewald and David White, Synapse Energy Economics, Inc., to David Hawkins, NRDC (Aug. 12, 1998), in docket for EPA’s Proposed “Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emissions Increases for Electric Generating Units,” 72 Fed. Reg. 26,202 (May 7, 2007).

of operation and availability of the EGUs, thereby increasing total air pollution amounts into Americans communities.<sup>12</sup>

With the aging utility fleet of uncontrolled and poorly controlled EGUs extending into lifetimes of 50-70 years, and EGU capacity factors declining one percentage point each year, the owners/operators of these EGUs are certain to need to undertake physical changes at these units in order to keep these units running, and to restore decreased capacity. As the table shows, many of these units still lack advanced pollution controls and continue to emit at very high emissions rates. It would be irresponsible to weaken the Clean Air Act by eliminating legal constraints on huge annual emissions increases that would result from physical changes at power plants increasing hours of operation.

By ignoring the direct relationship between increases in hours of operation and total emissions increases, H.R. 3127 and H.R. 3128 would work in tandem with well-understood and inevitable industry phenomena,<sup>13</sup> to create guaranteed, significant emissions increases from EGUs that increase hours of operation sufficiently to cause those emission increases. Indeed, H.R. 3127 and H.R. 3128 would have the effect of placing dirty grandfathered coal units on steroids, facilitating their ability to extend their lives and remain as dirty or become even dirtier than they were: older, uncontrolled and poorly controlled coal-burning power plant units could

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<sup>12</sup> U.S. EPA, Technical Support Document, at 3-1; 5-3 (“We believe it is unlikely that an EGU would increase its efficiency without also increasing its operating and physical capacity,” including availability.), in docket for EPA’s Proposed “Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emissions Increases for Electric Generating Units,” 72 Fed. Reg. 26,202 (May 7, 2007).

<sup>13</sup> These phenomena include forced outages of increased number and length over time; capacity factors declining with age; economic incentives to increase availability of capitalized baseload units with low fuel costs; economic incentives to avoid the expense of advanced pollution control devices; and economic incentives to avoid installation of pollution controls where not legally obligated to do so. The U.S. is very familiar with these phenomena, industry motivations and industry legal evasions as a result of decades long NSR enforcement initiatives against coal-burning power plants. Especially against this backdrop, it would be reckless to adopt bills whose very design allows EGUs to operate more hours per year as a result of physical changes and significantly increase annual emissions of smog, soot, mercury and hazardous air pollutants.

increase actual nitrogen oxide and sulfur dioxide emissions by very significant amounts—hundreds and thousands of tons, annually. These units could extend their heavily polluting lives and remain grandfathered in perpetuity—all the while avoiding BACT/LAER controls required by an annual emissions test, evading pollution offsets in areas not meeting national health standards, analyses of actual health standard violations in areas meeting standards, and regulatory/public oversight.

It is critically important to emphasize that H.R. 3127 and H.R. 3128 do not eviscerate the clean air safeguards and obligations described above *just* for power plants. These extreme bills apply to any “stationary source,” meaning the entire universe of industrial pollution facilities regulated under the Clean Air Act: hazardous waste incinerators, oil refineries, chemical plants, lead smelters, and many hundreds of other industrial sectors and types of polluting equipment. All would be allowed to increase emissions of harmful air pollutants like nitrogen oxides, sulfur dioxide, particulate matter and lead, while evading air pollution controls, offset of remaining emissions in areas with currently unhealthy air, analysis of violations of health standards and regulatory/public oversight.

**5. H.R. 3127 would additionally weaken current law and allow massive increases in harmful air pollution to escape control, offsets, air quality impact analyses & regulatory/public review.**

H.R. 3127 has two additional elements that badly fail the test asking whether the bill lets industry pollute more. First, the bill outright exempts so-called “pollution control projects” that are “undertaken to reduce the emission of any pollutant”: (1) even if that project significantly increases one or more other regulated air pollutants; (2) even if that project reduces a less dangerous air pollutant while increasing more dangerous air pollutant(s) significantly; and (3) even if the project reduces one pollutant by a small amount that is substantially outweighed by

enormous increases in the amount of other air pollutants. The Clean Air Act has never allowed these harmful outcomes, and H.R. 3127 would weaken longstanding law, while also overturning the controlling D.C. Circuit Court of Appeals decision that rejected a similar Bush EPA “pollution control project” exclusion.<sup>14</sup>

Second, H.R. 3127 would outright exempt from NSR safeguards so-called “reliability projects” undertaken at any stationary source—not just power plants—to “improve[] the ability of the electric system” to meet various electricity descriptions. The bill is so sweeping in these descriptions that it would absurdly exempt the nation’s power plants from NSR clean air safeguards altogether, when plants undertake physical or operational changes that significantly increase emissions by thousands or even tens of thousands of tons per year. Indeed, this element of H.R. 3127 is so extreme and reckless that it includes *no* constraint on a stationary source’s ability to increase harmful air pollution, not even the irresponsible “maximum hourly emission rate” condition, or the single air pollutant “pollution control project” condition, in the other parts of H.R. 3127.

**B. Suggested NSR “Debottlenecking” Reforms Would Allow Significant Emissions Increase to Occur Without Requiring Modern Pollution Controls, Offsets, Air Quality Impact Analysis or Regulatory/Public Oversight.**

Another pollution-increasing NSR “reform” request by industry addresses what is referred to as “debottlenecking.” This is an obscure term that fails to capture the resulting hazards of the requested deregulation: letting significant increases in emissions of harmful air pollution evade state-of-the-art pollution control equipment, avoid the offset of remaining emissions in areas not meeting national health standards, ignore safeguards against health violations in areas meeting standards, and circumvent regulatory and public oversight. Industry

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<sup>14</sup> *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

long has lobbied EPA to deregulate emissions increases that result from units upstream and downstream of the unit(s) being changed, even though those emissions increases either would not occur or would be unlikely in the absence of that change. In other words, there is a causal link between the change and the emissions increase that industry would like to ignore, in order to avoid the NSR pollution control obligations. In 2006, the Bush Administration EPA issued a proposed rulemaking that would have succumbed to these industry demands, entitled “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting,” 71 Fed. Reg. 54,235 (Sept. 14, 2006). The proposal was never adopted, for good reason, but it illustrates the harmful, real-world pollution impact exempting pollution increases from debottlenecking.

EPA proposed to deregulate significant emissions increases made possible when a change “debottlenecks” a facility, *i.e.*, when a change to one unit removes a constraint that was causing another unit at the same facility to operate below capacity. *See* 71 Fed. Reg. at 54238/1. According to EPA’s proposal, even if a “debottlenecking” change to one unit leads to increased operations—and increased emissions—at another unit, that emissions increase was not “caused” by the change, so long as “the debottlenecked unit’s post-project emissions were already authorized by a pre-existing air quality permit.” *Id.* at 54,240. In 2017, industry comments advocate for EPA to revisit this proposal, and also reveal a desire to dispense with the “causation” requirement of the 2006 proposal entirely, since it “suffers from ambiguity over whether emissions increases are ‘caused’ by the change.”<sup>15</sup> Both the original 2006 “debottlenecking” proposal and today’s even more deregulatory industry proposals are reckless

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<sup>15</sup> Air Permitting Forum Comments on Department of Commerce, Impact of Federal Regulations on Domestic Manufacturing; Notice; Request for Information, 82 Fed. Reg. 12,786 (Mar. 7, 2017), Docket ID No. 170302221–7221–01.



and would allow harmful air pollution to increase significantly, all while evading the suite of air pollution safeguards in the Clean Air Act NSR program.

The Clean Air Act long has been concerned with “any physical change in, or change in the method of operation of, a stationary source *which increases the amount of any air pollutant emitted by such source* or which results in the emission of any air pollutant not previously emitted.” See CAA § 111(a)(4). The D.C. Circuit Court of Appeals has recognized that only increases in the amount of any air pollutant emitted by a stationary source that are entirely unrelated to a change may be excluded from consideration. *New York v. EPA*, 413 F.3d 3, 32-33 (D.C. Cir. 2005). This common sense understanding guards against the circumvention of pollution controls for emissions increases caused by and related to the change that itself increased emissions at the source.

EPA’s 2006 rulemaking proposal acknowledged—as it had to, really—that post-change emissions increases it sought to ignore and exclude *were* related to the debottlenecking change.<sup>16</sup> EPA proposed to exempt those pollution increases anyway. But the Clean Air Act plainly does not authorize EPA to ignore emission increases made possible by a change simply by *deeming* those increases to be caused solely by some other contributing factor. Rather, any post-change emissions increase that is related to a change must be counted in determining whether the change triggers NSR, regardless of whether other factors also play a role in bringing about that increase.

EPA admitted that its 2006 deregulatory proposal “may result in fewer

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<sup>16</sup> As an example of its proposed approach, EPA described “a physical change to expand the capacity of [a] melting unit,” after which “the casting unit can operate at a higher throughput.” 71 Fed. Reg. at 54240/3. Though EPA acknowledged that it was the change to the melting unit that allowed the casting unit to operate at a higher throughput, EPA explained that under its approach, it would simply deem the emissions increase resulting from that higher throughput not to be causally linked to the change. *Id.* That explanation was plainly wrong and EPA’s conclusion was, therefore, indefensible.

projects undergoing NSR than would the current actual-to-projected-actual emissions test with its wider view of causation,” 71 Fed. Reg. at 54243/3, and “may result in sources not needing BACT/LAER review for the changed units.” *Id.* at 54,240/3. When a modification triggers NSR and a unit is required to satisfy BACT or LAER, emissions from that unit and the source are typically decreased by an amount far more than the amount that emissions would have increased if the modification had proceeded without NSR. Thus, for example, even though the projected emissions increase resulting from a planned change may only modestly exceed the NSR *de minimis* level of 40 tons per year of SO<sub>2</sub>, say 50 tons per year, installation of up-to-date technology may reduce the source’s annual emissions by *hundreds* of tons. This outcome makes sense. After all, Congress’ intent in requiring NSR for modifications was not just to discourage sources from increasing emissions significantly, but to establish a sensible trigger for when an uncontrolled or poorly controlled unit (perhaps a unit that was grandfathered from NSR requirements initially) must install up-to-date pollution controls capable of reducing the source’s emissions substantially. Deregulatory “debottlenecking” proposals not only would allow significant emissions *increases* to evade control, such deregulation would forego hundreds of tons of emissions *reductions* that the law long has required.

## **II. Amnesty From New Source Review Requirements**

The Trump EPA is reversing clean air enforcement positions against coal-burning power plants that EPA has taken and that federal courts have upheld not once, but twice. Moreover, the Trump administration promises EPA enforcement relief to all industrial polluters covered by the Clean Air Act’s NSR programs, thereby allowing regulated industries to increase harmful air pollution and evade modern pollution controls, offsets, air quality impact analyses, and regulatory and public oversight. These retreats, along with other reversals in EPA practices,

reflect the Trump administration granting effective amnesty from legal requirements that protect Americans and uphold the Clean Air Act.

All of these reckless steps are taken in a memorandum<sup>17</sup> from EPA Administrator Scott Pruitt that EPA quietly released after hours on the same day that Pruitt appeared before a congressional oversight committee for the first time since taking office. He made no mention of the enforcement reversals or attacks on clean air safeguards during his testimony.

In Pruitt's memo, EPA effectively adopts the position of a coal-burning power plant defendant in a clean air enforcement case, DTE Energy, represented by the same law firm where the political head of EPA's clean air office worked before the Senate confirmed him last month. Pruitt announces EPA will exercise its "enforcement discretion" *not* to enforce the Clean Air Act against not just power plants, but all industrial polluters, that fail to properly project how much they will increase harmful air pollution following construction projects. The Trump EPA is reversing course on enforcement stances that EPA is taking in lawsuits today, including in cases where federal courts have sided with EPA and against defendant positions that the Trump EPA now adopts.

The Trump EPA enforcement retreat amounts to permission for industrial polluters to commit fraud and make false projections about their increased emissions, so long as those projections are "procedurally" adequate—even if they are substantively bogus and ultimately harmful to air quality. EPA specifically promises polluting lawbreakers it does not intend to enforce the law against failures to perform "required" air quality analysis, or failures to follow emissions calculation requirements. EPA Amnesty Memo, at 8. What's most remarkable

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<sup>17</sup> U.S. EPA, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability* (Dec. 7, 2017) ("EPA Amnesty Memo"), [https://www.epa.gov/sites/production/files/2017-12/documents/nsr\\_policy\\_memo.12.7.17.pdf](https://www.epa.gov/sites/production/files/2017-12/documents/nsr_policy_memo.12.7.17.pdf).

is EPA is presently in court enforcing against Clean Air Act violations that led the Trump EPA Administrator to issue a memo saying, “Never mind. We won’t enforce against that lawbreaking from now on.”

Equally remarkable, the central promise and approach of Pruitt’s memo—that EPA will not “second guess” polluters—is precisely the approach that a federal appellate court has characterized as a straw man. In the second *U.S. v. DTE Energy* case, the federal appeals court wrote that “the focus on so-called ‘second-guessing’ is misplaced,” because obviously EPA may bring enforcement lawsuits to challenge a company’s improper emissions projections.<sup>18</sup> The court continued by noting “the EPA definitely is not confined to a ‘surface review’ or ‘ cursory examination.’”<sup>19</sup> The EPA Amnesty Memo confines EPA enforcement to just those indefensible failings, in a concerted political effort to obstruct EPA enforcement against companies’ improper air pollution projections. Pruitt says archly that “the court decision does not compel the EPA to pursue enforcement in such situations”; EPA won’t pursue enforcement at all, meddling judges.

Pruitt’s action plainly is meant to sabotage the ongoing clean air enforcement case against DTE Energy. Worse, Pruitt *openly* disavows the possibility of similar enforcement cases against other industrial polluters during the Trump administration. Pruitt promises that “EPA does not intend to pursue new enforcement cases in circumstances such as those presented in the DTE matter.” Enforcement sabotage, through and through.

It is challenging to convey to those unfamiliar with the NSR program just how reckless this Pruitt memo is. At one point, the memo “clarifies” the EPA regulations to mean that when a company projects emissions increases and follows *procedural* requirements, EPA will not

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<sup>18</sup> *U.S. v. DTE Energy*, 845 F.3d 735 (6<sup>th</sup> Cir. 2017), <https://www.leagle.com/decision/infco20170110108>.

<sup>19</sup> *Id.*

challenge false or wrong or even fraudulent pollution projections unless there is “clear error” in application of the procedures. Forget the substance of the projections—the intended or actual air pollution increases. Nothing in the EPA Amnesty Memo says that a company’s projection of pollution increases needs to be right or even reasonable; indeed, the clear import is polluter projections need be neither.

The only example of a “clear error” exception in the EPA Amnesty Memo is applying an incorrect number in the regulations during those procedural steps; applying the right number during the procedural steps and giving that piece of paper to the government suffices, even if the company’s pollution projection is manipulated, unreasonable, wrong or it results in unlawful air pollution increases.

The EPA Amnesty Memo further blesses a deregulatory invention that appears nowhere in the statute or EPA regulations, to allow polluters to exclude emissions increases and thereby reduce the chance that a facility will need to install modern pollution controls, obtain air pollution offsets, conduct air quality impact analyses or undergo regulatory/public oversight. The memo says that a “source must exercise judgement to exclude increases for which the project is not the *‘predominant cause.’*” EPA Amnesty Memo, at 7. That italicized legal test is an invention, appearing nowhere in the Clean Air Act or EPA regulations. It grants industrial emitters an unfounded loophole to argue that actual emissions increases are not cognizable legal emissions increases based solely on the “judgment” of the self-interested source operator, and based on an invented legal test designed to allow *more* emissions increases to escape review, control, and offset. The Trump administration<sup>20</sup> and EPA’s political critics condemn agency guidance documents when it suits their purposes but, as here, this administration embraces

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<sup>20</sup> U.S. Department of Justice, *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases* (Jan. 25, 2018), <https://www.justice.gov/file/1028756/download>.

deregulatory guidance documents when it furthers an agenda to grant industry amnesty from environmental violations and permission to increase harmful air pollution.

Moreover, the memo goes out of its way to reverse EPA's regulatory and enforcement practice to allow companies to purport to "manage" projected air pollution increases to prevent significant increases, but to do so in completely *unenforceable* ways. EPA to date has not recognized unenforceable industry claims about managing emissions increases, for the simple reasons that there is no way to ensure that companies have been or will be controlling pollution in the way they claim, and no way to enforce any failures to control pollution increases after the fact. Incredibly, the Pruitt memo says that the mere "intent" of a company to manage emissions increases—notwithstanding failure to do so—is good enough for government under the Trump administration. EPA Amnesty Memo at 6. This is enforcement sabotage, through and through.

This is not simply capitulation by the Trump EPA. It is abdication of EPA's law enforcement responsibilities to uphold the law against polluters that may be knowingly breaking the law, and that EPA believes may be breaking the law. Administrator Pruitt says that matters not—procedural niceties will suffice, and EPA will not "second-guess" those polluters through inquiry or disagreement.

By effectively promising industrial lawbreakers that EPA will not enforce certain Clean Air Act NSR requirements, Pruitt's memo represents a Trump administration attempt to grant amnesty from these requirements. The memo uses coded language about what EPA will "focus on" and what EPA "does not intend to pursue," to bless activities that the law considers violations. As noted, the memo even "clarifies" what the NSR regulations mean, and blesses a loophole nowhere found in the regulations, re-casting those regulations to mean something they do not say.

Pruitt's memo predictably uses boilerplate language that EPA includes in memos when the agency wants to let regulated industries rely on winked agency promises of deregulation, at the same time that EPA wishes to be immune from citizen lawsuits to uphold the law, and immune from judges reviewing improper final agency action that breaks the law. It's especially perverse for an EPA Administrator that testified<sup>21</sup> in Congress in the morning against the evils of EPA guidance documents, to turn around in the evening and issue a guidance document that deregulates clean air responsibilities and promises to abdicate EPA's duty to enforce the law.

But the trouble goes well beyond that: in 2002, the Bush administration EPA weakened the clean air regulations at issue here, to insert loopholes and exemptions that let industry increase harmful air pollution significantly and evade any modern pollution controls to reduce emissions. A central author of those 2002 Bush EPA clean air rollbacks was a former industry attorney named Bill Wehrum. Mr. Wehrum left EPA to join the law firm of Hunton & Williams, where he and his colleagues represented coal-burning power plant companies. Among the power plant companies that Hunton & Williams represents is DTE Energy, the defendant in a Clean Air Act enforcement case that sought to exploit one of the loopholes Mr. Wehrum added to weaken the clean air regulations. The DTE Energy clean air enforcement case is the driving force, and the high-profile enforcement retreat, at the heart of Mr. Pruitt's memo.

As you know, Mr. Wehrum now is the political head of the Trump EPA air office tasked with carrying out these clean air regulations. Mr. Wehrum's name does not appear on the EPA Amnesty Memo. Presumably, the DTE Energy case appears on a list of matters from which Mr. Wehrum recused himself. He should have. Nevertheless, the public deserves to know what role,

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<sup>21</sup> U.S. House of Representatives, Energy & Commerce Committee, <https://energycommerce.house.gov/hearings/mission-u-s-environmental-protection-agency/>.

if any, Mr. Wehrum, Hunton & Williams, and/or DTE Energy played in producing this Trump administration give-away to polluting industries.

For good reason, law enforcement agencies like EPA rarely issue so-called “enforcement discretion” guidance that promises not to enforce some aspect of federal law: these promises undermine the Rule of Law and the public’s confidence in law enforcement; they threaten the concerns and rights protected by the law, such as clean air & Americans’ health; and in their worst form, these promises can suggest a sordid collusion of interests with corporations that skirt the law. As a Reagan administration EPA policy put it, enforcement discretion promises “may erode the credibility of EPA’s enforcement program by creating real or perceived inequities in the Agency’s treatment of the regulated community.” That Reagan-era enforcement policy still stands, and it is a testament to why enforcement discretion promises are highly unusual.

At EPA, there is a specific enforcement office process for issuing what are called “no [enforcement] action assurances” to specific facilities, in specific situations, based on case-specific circumstances.<sup>22</sup> The Trump EPA has issued “no action assurances,” for example, ‘for the import of power generators to be donated for use in communities impacted by Hurricanes Harvey and Irma in Texas and Florida, to assist in recovery efforts.’ Proper EPA “no action assurances” promising the exercise of “enforcement discretion” ordinarily are issued by the highest-ranking official of EPA’s Office of Enforcement and Compliance Assurance.<sup>23</sup> At the very least, EPA policy dating to 1984 requires the “advance concurrence” of the enforcement office.

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<sup>22</sup> U.S. EPA, *Policy Against “No Action” Assurances* (Nov. 16, 1984), <https://www.epa.gov/sites/production/files/2013-10/documents/noactionass-mem.pdf>.

<sup>23</sup> See, e.g., U.S. EPA, *No Action Assurance for Import of Yamaha Generators for Hurricane Recovery Efforts in Texas and Florida* (Sept. 15, 2017), <https://response.epa.gov/sites/12382/files/yamahanaa091817.pdf>.



Pruitt's "enforcement discretion" memo represents a form of "no action assurance" that differs from any I have previously seen in several highly unusual, even unprecedented ways. First, I know of no other EPA "enforcement discretion" guidance that was issued in the middle of a pending enforcement case against a corporate defendant accused of the very failings that the agency says it will turn a blind eye to, henceforth.

Second, the added insult to injury here is federal courts twice have sided with the legal views of EPA enforcement officials prosecuting these failings, while rejecting the defendant's contrary views.

Third, I am unaware of any "enforcement discretion" promise or no action assurance signed by the EPA Administrator. Pruitt's decision to do so clearly is intended to assure corporations that EPA's enforcement retreat and grant of amnesty enjoy the highest level of political support. Amazingly, the memo even goes out of its way to trace that high level political support all the way back to President Trump. Pruitt says his memo is consistent with an agenda to "reduce burden on regulated sources in accordance with recent Presidential actions," citing a Trump executive order and memo to 'reduce regulatory burden' and 'enforce regulatory reform.'

Fourth, I offer an observation from my days working as an EPA attorney: it is extraordinary, possibly unprecedented, for EPA to issue an "enforcement discretion" assurance that omits the name of even a single official from EPA's enforcement office. Pruitt is the memo's author, the addressees are Regional Administrators, and the only two officials copied on the memo are Pruitt's chief of staff and the political deputy to the head of EPA's air office, Bill Wehrum.

An already-reckless memo ends, aptly, on a foreboding note. In the memo's last paragraph, Pruitt observes that states are approved by EPA to carry out the clean air program in

question. He goes on to say, ominously, that if EPA “later determine[s] that the [clean air program] approved [by EPA] is deficient, the EPA has authority. . . to call for a state to revise its regulations.” This none too subtle threat signals that states that fail to follow the Trump EPA rollbacks could face demands by EPA to weaken state regulations.

These outrageous Trump EPA actions raise a host of questions that Americans deserve to have answered: Were Mr. Wehrum’s former law firm, Hunton & Williams, DTE Energy or any other non-governmental parties involved with this memo or the process that led to it? What about Mr. Wehrum, or his deputy? Who helped write the memo? Did EPA’s enforcement office write it? Were they consulted about it? If so, in what capacity and when? Were EPA and Department of Justice lawyers prosecuting the case against DTE Energy and handling its appeals, involved or consulted? What about enforcement officials in EPA regional offices, where power plant cases often are prosecuted? And EPA’s Office of General Counsel—what roles, if any, did it play in this fiasco? Has EPA assessed how much harmful air pollution could increase from Administrator Pruitt’s effective grants of amnesty and abdication of law enforcement duties?

Many more questions and concerns are certain to emerge about the Trump administration’s abdication and other reckless actions described here.

Public health and environmental groups have submitted a Freedom of Information Act request to EPA and the Department of Justice to obtain all records associated with this irresponsible transaction. Congress and EPA’s Office of Inspector General also should investigate these deeply troubling actions.

Finally, an agency like EPA may not issue guidance that relieves regulated industries of legal obligations, unless the agency first undertakes notice-and-comment rulemaking that provides the public fair opportunities to comment and oppose unlawful or harmful actions. The

Trump EPA did not do this. In the meantime, nothing in the Administrator’s action stops states, public health and environmental groups, and ordinary citizens from bringing enforcement lawsuits to uphold clean air protections that the Trump administration proclaims it will not.

### **III. Final Thoughts on Calls for NSR “Reform”**

To a remarkable degree, political and industry attacks on the NSR program have trafficked in rhetoric, assertion and anecdote, unsubstantiated by verifiable evidence or facts. I am aware of no peer-reviewed studies substantiating these attacks. This dynamic is especially true when critics and opponents assert that the NSR program discourages investments and activities that would result in net environmental benefits, compared to the status quo. The Trump EPA’s 13783 Report, for example, contends that “[i]n some circumstances, the NSR process discourages the construction of new facilities or modifications of existing ones that could result in greater environmental improvements.”<sup>24</sup> There is not so much as a footnote or any other evidence to back this claim; it is raw assertion. Surely the burden of proof should be on interests seeking to weaken clean air, public health and environmental safeguards, before amending the Clean Air Act or EPA regulations.

The Trump Commerce Department report targeting NSR suffers from the same lack of evidence or independently verifiable facts.<sup>25</sup> It is not so much a report as a compendium of complaints and demands for deregulation. It is a litany of assertions from industry comments that themselves are self-serving contentions rather than evidence. Neither of these Trump administration documents provide any factual basis for legislation, certainly none that weakens and worsens clean air, public health and environmental protections.

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<sup>24</sup> 13783 Report, at 2-3.

<sup>25</sup> See generally, U.S. Commerce Department, *Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing* (Oct. 6, 2017).

Leading industry complaints about NSR fare no better on the evidentiary score. In an article entitled *EPA's New Source Review Program: Time for Reform*, co-authored by one of my co-panelists, the claim is made that “recent changes in the NO<sub>2</sub>, SO<sub>2</sub>, fine PM, and ozone NAAQS have further complicated the NSR process, resulting in permitting delays and, in some cases, the decision by industry to defer or cancel projects.”<sup>26</sup> Following this last inflammatory charge, the authors drop a footnote, which reads in relevant part: “For example, the Baton Rouge Area Chamber reported that four major industrial projects were either put on hold or redirected to another location after EPA proposed to revise the ozone NAAQS in December 2015.”<sup>27</sup>

I read this claim when the Baton Rouge Area Chamber first made it, and invited the Chamber to substantiate that claim and to identify, publicly, the “four major industrial projects.” They refused. After other industry lobbyists took up and used this same example, repeatedly, I challenged the Baton Rouge Area Chamber to identify the four projects. Again, they refused. I have reached the conclusion that there are no such projects or, if there are, there are other factors influencing the project decisions—location, general economic conditions, tax incentives, available labor, financing, the possible list is long—and the supposed project developers are unwilling to submit their accusations blaming the Clean Air Act to the most basic scrutiny, to the point of refusing to disclose the identity of the projects or the accusing companies.

A similar phenomenon—eschewing actual evidence, relying on assertion or speculation—surrounds industry suggestions that NSR has prevented greater emissions reductions and health and environmental improvements:

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<sup>26</sup> Art Fraas, John Graham & Jeff Holmstead, *EPA's New Source Review Program: Time for Reform* 47 Environmental Law Reporter 10026, 10031 (2017) (hereinafter, Fraas *et al.*); see also, *id.* at 10028 (“discussions with industry sources suggest that the cost of emissions offsets effectively prohibits the siting of major new industrial plants in certain [nonattainment] areas”).

<sup>27</sup> *Id.*, at 10031, n. 36.

- “Thus, it has arguably been more economic in some cases to continue to operate relatively old, inefficient, and high-polluting plants than to install new facilities or upgrade existing facilities with better pollution control technology.”<sup>28</sup>
- “To the extent this has occurred, NSR review has had the perverse effect of delaying reductions in pollutants such as SO<sub>2</sub> and NO<sub>x</sub>.”<sup>29</sup>

“Arguably” and “to the extent this has occurred” provide no reasonable basis for legislation. Left unsaid in these criticisms, of course, is the reality that industrial facilities always may decrease emissions, and upgrade facilities with better pollution control technology to reduce emissions, so long as overall emissions do not increase significantly. Criticisms that lay blame with NSR for this not happening deserve to be looked behind; invariably one will find there an unmentioned objective to *increase* emissions of one or more regulated air pollutants by significant amounts, and to evade controls and other safeguards for those increases.

To its credit, the Fraas *et al.* article does not argue that the weakening reforms it advocates would achieve the same or greater health & environmental benefits. It says simply the regulatory program would still be allowed “to achieve significant environmental results,”<sup>30</sup> which of course is in the eyes of the industry reform beholders. Like many similar critiques of the NSR program, this article’s reform proposals tend to gloss over the emissions increases that the proposed reforms would allow.

Finally, it’s worth drawing attention to some of the internal inconsistencies and cross-purposes associated with competing NSR “reform” proposals. For example, the Fraas *et al.* article seeks to dispense with air pollution offsets within the same air shed—pointing to putatively more cost-effective opportunities to reduce air pollution transported from long

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<sup>28</sup> Fraas, *et al.*, 47 ELR at 10030, n.27. This article cited “evidence” backing this claim in an EPA 2001 NSR report prompted by then-Vice President Cheney’s energy task force. But that EPA report itself lacks evidence to support the claim, and is itself an example of a government report simply repeating self-serving industry assertions as evidence. See U.S. EPA, New Source Review Report to the President (2002).

<sup>29</sup> *Id.* at 10030.

<sup>30</sup> *Id.*, at 10027.

distances—while rollback reforms such as H.R. 3127 and H.R. 3128 would allow large industrial polluters like coal-burning power plants to massively *increase* air pollution transported over long distances.<sup>31</sup>

No acceptable NSR “reform” should give an affirmative answer to the question posed at the top of this testimony: will it let industry pollute more? This Committee should reject any appeals for reforms that would let industries pollute more, by significantly higher amounts, and in the process, evade air pollution controls and pollution offsets in areas already experiencing unsafe air quality. Americans deserve better.

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<sup>31</sup> Fraas, *et al.*, 47 ELR at 10035.