

ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

May 28, 2014

To: Subcommittee on Energy and Power Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Subcommittee Markup of H.R. ___, the “Promoting New Manufacturing Act”

On Thursday, May 29, 2014, at 10:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Energy and Power will hold markup of H.R. ___, the “Promoting New Manufacturing Act.” On Wednesday, May 28, 2014, the Subcommittee will convene at 4:30 p.m. in 2123 Rayburn House Office Building for opening statements only. It will reconvene on Thursday, May 29, at 10:00 a.m. in 2123 Rayburn House Office Building.

I. BACKGROUND

H.R. ___, the “Promoting New Manufacturing Act,” modifies the Clean Air Act’s preconstruction permitting process under a new or revised national ambient air quality standard (NAAQS). The bill also requires the Environmental Protection Agency (EPA) to report information regarding state preconstruction permitting times and to report on EPA actions to expedite the state permitting actions.

A. National Ambient Air Quality Standard-Setting Process

The Clean Air Act requires EPA to set national ambient air quality standards for certain pollutants that endanger public health and the environment. EPA sets primary NAAQS at concentration levels sufficient to protect the public health with an adequate margin of safety.¹ Essentially, the primary NAAQS identify the level of ambient air pollution that is “safe” to breathe.

¹ Clean Air Act § 109(b)(1).

EPA sets the NAAQS based on a thorough review of the medical and scientific evidence, as well as advice provided by an independent scientific review committee.² EPA must review each NAAQS every five years and make revisions as appropriate.³

Once EPA establishes the NAAQS, the states have primary responsibility for achieving pollution reductions to meet the standards.⁴ Within a year after EPA establishes or revises a NAAQS, each state must designate areas within its borders as in attainment (meeting the NAAQS) or nonattainment (exceeding the NAAQS or contributing to a nearby area's violation of the NAAQS).⁵ EPA must issue final designations within two years of issuing the NAAQS but can take an additional year if more information is needed.⁶

Within three years of EPA issuing the NAAQS, each state must prepare and submit state implementation plans (SIPs) to require and enforce pollution reductions sufficient to meet the NAAQS in each air quality control region.⁷ If EPA disapproves a SIP (or if a state fails to submit a SIP), EPA must promulgate a federal implementation plan, unless the state corrects any deficiencies in its SIP as needed to address EPA's concerns.⁸

As part of the implementation process, EPA may issue regulations or guidance to help states and regulated entities attain the NAAQS, but EPA is not required to do so by statute.

B. Preconstruction Permitting

The Clean Air Act requires major new or expanding stationary sources of air pollution to obtain permits before they start construction. This requirement aims to ensure that a new facility, or significant modifications to an existing facility, will not significantly increase air pollution above levels that are safe to breath. The preconstruction permitting provisions achieve this by requiring new and modified sources to use control technology to reduce their emissions and to assess their remaining air quality impacts.

States, not EPA, issue the vast majority of preconstruction permits.

The permitting requirements differ depending on whether the new or modified source would be located in an attainment or nonattainment area. In clean air areas that meet the NAAQS, the facility owner or operator must obtain a preconstruction permit under the

² *Id.* at § 109(d)(2).

³ *Id.* at § 109(d)(1).

⁴ *Id.* at § 107(a).

⁵ *Id.* at § 107(d)(1)(A). Areas can also be designated as “unclassifiable,” if there is insufficient information available to determine whether an area meets a NAAQS.

⁶ Clean Air Act § 107(d)(1)(B).

⁷ *Id.* at § 110(a).

⁸ *Id.* at §§ 110(k), 110(c).

Prevention of Significant Deterioration (PSD) program. The owner or operator must demonstrate that the facility is using best available control technology (BACT) and that “emissions from ... such facility will not cause, or contribute to, air pollution in excess of any ... [NAAQS] in any air quality control region.”⁹ As part of the permitting process, the facility must conduct an air quality impact analysis to show that the new emissions, in combination with emissions from other nearby sources, will not cause or contribute to a violation of the NAAQS.¹⁰ If the analysis shows that the facility’s emissions would drive the area into nonattainment, then the facility may have to take additional action to lower its emissions impact. The law specifies that the permitting agency must grant or deny a PSD permit application no later than one year after the completed permit application was filed.¹¹

For nonattainment areas, which already have unhealthy air, the facility owner or operator must obtain a preconstruction permit under the nonattainment new source review (NSR) program. The nonattainment NSR program requires the facility to install pollution controls sufficient to meet the lowest achievable emission rate (LAER), which is the most stringent emission limitation required by a state plan or achieved in practice by that type of source. The program also requires any proposed new emissions from the new or modified facility to be offset by reductions from existing sources.¹² The Clean Air Act does not set a time limit for the permitting agency to act on a nonattainment NSR permit application.

If the applicant or stakeholders disagree with a final permit decision, they can appeal the decision. The venue for this appeal depends on which permitting authority issued the preconstruction permit. Most states operate their own permitting programs, which are incorporated in their state implementation plans. In these states, appeals are handled by state or local administrative review boards and state courts. A few states choose to operate EPA’s permitting program through delegated authority. For permits issued by these states, and the few permits issued by EPA, the applicant or stakeholders can petition the federal Environmental Appeals Board (EAB) for review. The EAB can uphold EPA’s permit decision or remand it back to EPA to correct any identified legal deficiencies. While EPA decisions upheld by the EAB are rarely challenged, any such challenges are heard in the U.S. Court of Appeals for the appropriate circuit.

C. Addressing Preconstruction Permits Under a New NAAQS

During the subcommittee hearing on the bill, one of the majority witnesses raised a concern about projects with pending permit applications and the potential impact of a revised

⁹ Clean Air Act §§ 165(a)(3) and (a)(4).

¹⁰ *Id.* at § 165(e).

¹¹ *Id.* at § 165(c).

¹² *Id.* at § 173.

NAAQS on the timely processing of those permits.¹³ EPA addressed this concern in its most recent revision of the fine particulate matter (PM_{2.5}) NAAQS. In the PM_{2.5} NAAQS final rule, EPA specified how the standard would apply to pending permit applications. The rule “grandfathered” permit applications that were well along in the permitting process, specifically permits that had been determined to be complete on or before December 14, 2012, or for which public notice of a draft permit or preliminary determination had been published as of the effective date of the revised PM_{2.5} NAAQS. Sources eligible for grandfathering are allowed meet the requirements associated with the prior PM_{2.5} NAAQS rather than the revised PM_{2.5} NAAQS.¹⁴ EPA has indicated that it plans to pursue this approach for future NAAQS revisions.

II. SECTION-BY-SECTION ANALYSIS

Section 2 of the bill requires EPA to create an online “dashboard” of information about preconstruction permitting since fiscal year 2008. This dashboard is to include the number of preconstruction permits issued each year; the percentage of those permits issued within a year of the date of filing a completed application; and the average length of time for the EAB to issue a final decision on petitions appealing a decision to grant or deny a preconstruction permit application. Section 2 requires EPA to publish this data within 60 days of enactment and to update it annually.

Section 3 requires EPA to issue regulations and guidance for implementing a new or revised NAAQS “concurrently” with issuing the new or revised NAAQS, including information relating to preconstruction permit applications under the new or revised NAAQS. If EPA fails to issue such implementation regulations and guidance concurrently with the NAAQS, then the new or revised NAAQS will not apply to preconstruction permit applications until EPA has published final implementation regulations and guidance. This is a substantive change from current law, in that it could allow a facility to qualify for a permit under old (and less stringent) air quality standards. Section 3 also states that the requirement to concurrently issue regulations and guidance does not preclude EPA from issuing subsequent regulations and guidance to facilitate implementation of the NAAQS.

Section 4 requires EPA to submit an annual report to Congress about the agency’s efforts to expedite the process for issuance of preconstruction permits. EPA also must identify any reasons for delays in issuing preconstruction permits and describe what EPA is doing to resolve those delays. The bill requires EPA to collect and respond to public comment on each report to Congress.

Section 5 defines terms used in the bill.

III. CONCERNS RAISED BY THE BILL

¹³ House Committee on Energy and Commerce, Subcommittee on Energy and Power, Testimony of Kenneth Weiss, *Legislative Hearing on H.R. __, the “Promoting New Manufacturing Act,”* 113th Cong. (May 21, 2014).

¹⁴ U.S. Environmental Protection Agency, *National Ambient Air Quality Standards for Particulate Matter*, 78 Fed. Reg. 3248 (Jan. 15, 2013) (final rule).

This bill raises several questions and concerns.

A. Section 3

Section 3 allows new and modified sources of pollution to meet weaker air quality standards if EPA fails to meet certain requirements when revising a NAAQS. This allows for more pollution and harmful health effects, and it shifts more of the burden for pollution control from new and modified sources to existing sources. During the subcommittee hearing on the bill, Rep. Dingell asked Collin O’Mara, Secretary of the Delaware Department of Natural Resources and Environmental Control, whether this language would help his agency process preconstruction permits any faster. Secretary O’Mara answered “no.”

Section 3 modifies the existing Clean Air Act requirements by adding both a new requirement for EPA to issue implementation regulations and guidance and a deadline for such issuance. As a practical matter, concurrent issuance of implementation regulations is not always feasible or advisable. Most guidance develops organically out of and responds to questions and issues that arise as states and regulated entities begin to implement the NAAQS. Moreover, in some cases, the existing implementation regulations are sufficient for the revised NAAQS, and no new guidance is even needed.¹⁵ John Walke, Senior Attorney and Director of the Climate and Clean Air Program at the Natural Resources Defense Council, testified at the subcommittee hearing that the bill would require EPA to issue rules and guidance “regardless of the need for such action, prior to fully hearing from states, or understanding questions as they arise during the course of implementation.”¹⁶

Secretary O’Mara took issue with what he called the “underlying assumption of the legislation,” that “permitting authorities are incapable of managing the pre-construction permitting process” despite “decades of experience showing otherwise.” He testified that a “wealth of guidance and tools” exist that the state can use after EPA adopts or revises a NAAQS. He also noted that the state, on occasion, has “found that approaches that we developed during transition were more flexible and protective than those contained in the guidance issued later by EPA.”¹⁷

The language also introduces regulatory uncertainty and increases the risk of litigation. Section 3(a) requires EPA to concurrently publish implementation regulations and guidance, and

¹⁵ See, e.g., the recent revision of the lead NAAQS.

¹⁶ House Committee on Energy and Commerce, Subcommittee on Energy and Power, Testimony of John Walke, Natural Resources Defense Council, *Legislative Hearing on H.R. ___, the “Promoting New Manufacturing Act,”* 113th Cong. (May 21, 2014) (hereinafter “Walke testimony”).

¹⁷ House Committee on Energy and Commerce, Subcommittee on Energy and Power, Testimony of Collin O’Mara, Secretary, Delaware Department of Natural Resources and Environmental Control, *Legislative Hearing on H.R. ___, the “Promoting New Manufacturing Act,”* 113th Cong. (May 21, 2014) (hereinafter “O’Mara testimony”).

if EPA fails to do so, section 3(b) defers application of the standard to a preconstruction permit application “until the Agency has published such final regulations and guidance.” Section 3(c) allows EPA to issue additional guidance and regulation in the future. Together, these three provisions leave open to interpretation what material must be released “concurrently” to prevent a delay in applying the new or revised NAAQS, what material constitutes “final” regulation and guidance, and what material would be appropriate for EPA to release at a later time. When issuing a new or revised NAAQS, EPA may believe states and regulated entities have the tools and resources they need to implement it, with the understanding that additional guidance will evolve as issues arise. Industry, however, could file suit and claim that EPA failed to “concurrently” issue all requisite information or that the “final” regulations and guidance are not sufficient. Such litigation could cause needless and harmful delay in implementing more protective air quality standards.

These provisions also allow more pollution. If EPA fails to meet the unclear standard for concurrent guidance, an applicant for a preconstruction permit need not comply with a new NAAQS until EPA has published “final” regulations and guidance. During the subcommittee hearing on the bill, John Walke referred to this as “amnesty” from national air quality standards.¹⁸ In practical terms, this means that a facility conducting an air quality impact analysis for purposes of its permit application only has to show that the facility’s emissions will not cause the area to violate the old air quality standard, not the new, more protective air quality standard. EPA or a state permitting agency might have to issue a permit for a higher-polluting facility that, under current law, would have to install additional pollution controls to lower its emissions before receiving that permit. Secretary O’Mara testified that the bill “would allow a source to pollute more than it is entitled to” under the Clean Air Act.¹⁹ John Walke called this a “radical departure from the Clean Air Act, 37 years of permitting practice, and responsible public health safeguards.”²⁰

This would worsen air quality, particularly in communities downwind of the facility, and harm public health. Secretary O’Mara testified that the legislation as drafted would “undermine the basic framework of the Clean Air Act—to protect public health of all Americans with an adequate margin of safety—and will undercut public confidence in permitting programs that were designed to protect public health, because regulatory agencies will be required allow harmful emissions in exceedance of a new NAAQS.”²¹

It also would shift the burden of air quality improvements to existing industrial facilities. For example, in an attainment area, if an applicant for a preconstruction permit does not have to meet a revised (more protective) NAAQS, then that facility is in effect using up more of the local air emissions “budget” than it should be. This could make it more difficult for existing sources in the area to expand their facilities without pushing the area closer to or into nonattainment. New facilities also may find it harder to locate in the area in the future. Secretary O’Mara said it

¹⁸ Walke testimony.

¹⁹ O’Mara testimony.

²⁰ Walke testimony.

²¹ O’Mara testimony.

would be “highly unfair” to force new and existing sources to “make up” for a facility that emits “more pollution than otherwise would be allowed.”²²

In an area that is already in nonattainment, a new or modified facility that is allowed to emit more pollution because it was permitted under an old NAAQS necessarily will force other industrial sources in the nonattainment area to make deeper air pollution reductions to bring the area into attainment with the new NAAQS. John Walke testified that the bill’s “amnesty” provision “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 to newly constructed or modified facilities.”²³

The bill also has the perverse effect of increasing the cost to industry of achieving air quality standards. The Clean Air Act recognizes that it is generally far less costly and more efficient to install pollution controls when a facility is being designed or significantly modified, rather than retrofitting existing facilities, which may retire soon anyway, with additional pollution controls. Thus, many provisions of the Act require more stringent pollution controls for new and modified sources, compared with existing sources. This bill, however, allows new facilities to forego installing the most effective pollution controls at the front end, which could end up costing that facility and other existing and future facilities more at the back end. As Secretary O’Mara testified, a “very likely result of this bill would be to heap additional, costly pollution reduction requirements on already stressed existing sources, rather than allowing for the efficient installation of pollution controls while new sources are being constructed, which is the most cost-effective way to reduce pollution into the future.”²⁴

B. Section 2

EPA simply does not have much of the data and information that would be required to complete the dashboard required by section 2. States, not EPA, issue the vast majority of preconstruction permits. Nothing in current law requires states to provide information to EPA about the timing of permit issuances. As a result, EPA would have to require state and local air quality permitting authorities to provide this information to EPA. This places a burden on the same state and local officials, as well as EPA officials, who are responsible for processing the permits that this bill purports to expedite. This burden is exacerbated by the requirement to obtain six years of data on past permitting actions and by setting a 60-day deadline for publishing this data. These provisions are simply not practical.

During the subcommittee hearing, Chairman Whitfield stated that EPA already collects this information and publishes a summary table in its annual budget justification.²⁵ According to EPA, the data in this table represents only a subset of all permits issued. EPA prepares this table

²² *Id.*

²³ Walke testimony.

²⁴ O’Mara testimony.

²⁵ U.S. Environmental Protection Agency, *Fiscal Year 2015 Justification of Appropriation Estimates for the Committee on Appropriations*, at 224 (Mar. 2014).

based on data entered voluntarily by states into the RACT/BACT/LAER Clearinghouse (RBLC), a database established by EPA to promote the sharing of information about air pollution technologies used in permitting decisions. State and local permitting agencies are not required to report to this database, and EPA estimates that the database reflects only about half of the permits issued.²⁶ To obtain a more comprehensive picture of the permits issued, EPA would have to require state and local permitting agencies to provide the information.

In response to questions from Rep. Tonko, Secretary O'Mara testified that this could serve as a distraction to state and local permit writers permit writers, noting that "every minute they are spending on that is a minute they are not issuing a permit."²⁷

C. Section 4

Because EPA is not the permitting authority for the vast majority of preconstruction permits, it is unclear how EPA would be able to explain or commit to resolve any permitting delays, as required in the annual report to Congress mandated by section 4, except in the small minority of cases for which EPA is the permitting authority. Completing these annual reports would require EPA to involve itself more deeply in state and local permitting decisions than it has to date. These requirements would also further slow the permit process by diverting extremely limited EPA resources from processing permits, issuing guidance, and providing support to state and local permit authorities. In response to questions from Rep. Tonko, Secretary O'Mara stated that this report to Congress would not help his agency expedite preconstruction permitting.²⁸

IV. FUNDING FOR EPA AND STATE AND LOCAL PERMITTING AGENCIES

During the subcommittee hearing on the bill, witnesses and Committee members discussed how budget cuts to EPA and state and local permitting agencies have affected their ability to issue rules, guidance, and permits, as well as how the bill would exacerbate those effects.

John Walke noted that budget cuts already have harmed EPA's ability to implement and enforce the law. Given this reality, Walke testified that "adding paperwork and reporting exercises to the Agency's existing statutory duties to protect Americans' health" would only make it harder for EPA to do its job.²⁹ Secretary O'Mara testified that if "Congress seeks to expedite state permitting functions and issuance of guidance by EPA," then Congress should

²⁶ E-mail Correspondence between U.S. Environmental Protection Agency and Committee Minority Staff (May 21, 2014).

²⁷ O'Mara testimony.

²⁸ *Id.*

²⁹ Walke testimony.

“provide additional revenue to EPA and the state and local permitting agencies so that we have sufficient staff and resources to deliver permits efficiently and predictably.”³⁰

V. EPA TECHNICAL ASSISTANCE ON THE BILL

EPA was unable to provide a witness for the subcommittee hearing on the bill but provided majority and minority staff with technical assistance on the bill’s potential impact on EPA, state and local governments, and public health. This technical assistance does not represent the official position of EPA or the Obama Administration on the bill.

Overall, EPA raises concerns similar to those described above. In particular, EPA notes that the bill’s information collection and reporting requirements would impose a significant burden on state and local air quality agencies, since those are the agencies that actually issue the majority of the preconstruction permits. EPA has some of the relevant permitting information in its possession, but in order to compile the comprehensive data envisioned by section 2 of the bill, state and local air agencies would have to devote already scarce resources to compiling information on past permit applications instead of processing pending ones.

EPA also raises concerns about the implications of requiring EPA to issue regulations and guidance “concurrently” with a new or revised NAAQS. EPA explains that implementing regulations are sometimes but not always necessary, as the agency often writes rules that apply to new NAAQS without revision. As for guidance, EPA explains that guidance is most often the result of consultation with state and local air agencies and affected sources after they begin the process of implementing the NAAQS. EPA expresses concern that requiring EPA to issue unnecessary or premature rules and guidance could complicate the ability of EPA, the states, and regulated parties to meet their legal obligations and create greater regulatory uncertainty.

³⁰ O’Mara testimony.