

CEMENT SECTOR REGULATORY RELIEF ACT OF 2011

SEPTEMBER 26, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2681]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 2681) to provide additional time for the Administrator of the Environmental Protection Agency to issue achievable standards for cement manufacturing facilities, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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## AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Cement Sector Regulatory Relief Act of 2011”.

**SEC. 2. LEGISLATIVE STAY.**

(a) **ESTABLISHMENT OF STANDARDS.**—In place of the rules specified in subsection (b), and notwithstanding the date by which such rules would otherwise be required to be promulgated, the Administrator of the Environmental Protection Agency (in this Act referred to as the “Administrator”) shall—

(1) propose regulations for the Portland cement manufacturing industry and Portland cement plants subject to any of the rules specified in subsection (b)—

(A) establishing maximum achievable control technology standards, performance standards, and other requirements under sections 112 and 129, as applicable, of the Clean Air Act (42 U.S.C. 7412, 7429); and

(B) identifying non-hazardous secondary materials that, when used as fuels or ingredients in combustion units of such industry and plants are solid waste under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.; commonly referred to as the “Resource Conservation and Recovery Act”) for purposes of determining the extent to which such combustion units are required to meet the emissions standards under section 112 of the Clean Air Act (42 U.S.C. 7412) or the emission standards under section 129 of such Act (42 U.S.C. 7429); and

(2) finalize the regulations on the date that is 15 months after the date of the enactment of this Act.

(b) **STAY OF EARLIER RULES.**—

(1) The following rule is of no force or effect, shall be treated as though such rule had never taken effect, and shall be replaced as described in subsection (a): “National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants”, published at 75 Fed. Reg. 54970 (September 9, 2010).

(2) The following rules are of no force or effect, shall be treated as though such rules had never taken effect, and shall be replaced as described in subsection (a), insofar as such rules are applicable to the Portland cement manufacturing industry and Portland cement plants:

(A) “Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units”, published at 76 Fed. Reg. 15704 (March 21, 2011).

(B) “Identification of Non-Hazardous Secondary Materials That Are Solid Waste”, published at 76 Fed. Reg. 15456 (March 21, 2011).

**SEC. 3. COMPLIANCE DATES.**

(a) **ESTABLISHMENT OF COMPLIANCE DATES.**—For each regulation promulgated pursuant to section 2, the Administrator—

(1) shall establish a date for compliance with standards and requirements under such regulation that is, notwithstanding any other provision of law, not earlier than 5 years after the effective date of the regulation; and

(2) in proposing a date for such compliance, shall take into consideration—

(A) the costs of achieving emissions reductions;

(B) any non-air quality health and environmental impact and energy requirements of the standards and requirements;

(C) the feasibility of implementing the standards and requirements, including the time needed to—

(i) obtain necessary permit approvals; and

(ii) procure, install, and test control equipment;

(D) the availability of equipment, suppliers, and labor, given the requirements of the regulation and other proposed or finalized regulations of the Environmental Protection Agency; and

(E) potential net employment impacts.

(b) **NEW SOURCES.**—The date on which the Administrator proposes a regulation pursuant to section 2(a)(1) establishing an emission standard under section 112 or 129 of the Clean Air Act (42 U.S.C. 7412, 7429) shall be treated as the date on which the Administrator first proposes such a regulation for purposes of applying the definition of a new source under section 112(a)(4) of such Act (42 U.S.C. 7412(a)(4)) or the definition of a new solid waste incineration unit under section 129(g)(2) of such Act (42 U.S.C. 7429(g)(2)).

(c) **RULE OF CONSTRUCTION.**—Nothing in this Act shall be construed to restrict or otherwise affect the provisions of paragraphs (3)(B) and (4) of section 112(i) of the Clean Air Act (42 U.S.C. 7412(i)).

**SEC. 4. ENERGY RECOVERY AND CONSERVATION.**

Notwithstanding any other provision of law, and to ensure the recovery and conservation of energy consistent with the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.; commonly referred to as the “Resource Conservation and Recovery Act”), in promulgating rules under section 2(a) addressing the subject matter of the rules specified in section 2(b)(2), the Administrator—

(1) shall adopt the definitions of the terms “commercial and industrial solid waste incineration unit”, “commercial and industrial waste”, and “contained gaseous material” in the rule entitled “Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units”, published at 65 Fed. Reg. 75338 (December 1, 2000); and

(2) shall identify non-hazardous secondary material to be solid waste only if—  
 (A) the material meets such definition of commercial and industrial waste; or  
 (B) if the material is a gas, it meets such definition of contained gaseous material.

**SEC. 5. OTHER PROVISIONS.**

(a) **ESTABLISHMENT OF STANDARDS ACHIEVABLE IN PRACTICE.**—In promulgating rules under section 2(a), the Administrator shall ensure that emissions standards for existing and new sources established under section 112 or 129 of the Clean Air Act (42 U.S.C. 7412, 7429), as applicable, can be met under actual operating conditions consistently and concurrently with emission standards for all other air pollutants regulated by the rule for the source category, taking into account variability in actual source performance, source design, fuels, inputs, controls, ability to measure the pollutant emissions, and operating conditions.

(b) **REGULATORY ALTERNATIVES.**—For each regulation promulgated pursuant to section 2(a), from among the range of regulatory alternatives authorized under the Clean Air Act (42 U.S.C. 7401 et seq.) including work practice standards under section 112(h) of such Act (42 U.S.C. 7412(h)), the Administrator shall impose the least burdensome, consistent with the purposes of such Act and Executive Order 13563 published at 76 Fed. Reg. 3821 (January 21, 2011).

**PURPOSE AND SUMMARY**

H.R. 2681, the “Cement Sector Regulatory Relief Act of 2011,” was introduced by Rep. John Sullivan (together with Reps. Ross, Kinzinger, Latta, Walden, Barton, Carter, Dent, Boren and Alt-mire) on July 28, 2011. The legislation gives the Environmental Protection Agency (EPA) additional time and guidelines to develop achievable rules under the Clean Air Act (CAA) governing emissions of hazardous air pollutants from cement manufacturing plants. Key provisions of the bill would:

- Provide EPA with 15 months to re-propose and finalize achievable rules for cement manufacturing facilities;
- Extend compliance deadlines from 3 to at least 5 years to allow facilities adequate time to comply with standards and install necessary equipment;
- Direct EPA, when developing the new rules, to adopt definitions that allow cement manufacturing plants to continue to use alternative fuels for energy recovery; and
- Direct EPA to ensure that new rules are achievable by cement manufacturing facilities in the United States and impose the least burdensome regulatory alternatives consistent with the purposes of the CAA and President Obama’s Executive Order 13563 regarding improving regulation and regulatory review.

## BACKGROUND AND NEED FOR LEGISLATION

*Introduction*

American cement producers are struggling to remain globally competitive in the current economic climate. The domestic cement sector currently faces numerous new EPA rules under the CAA and other statutes. Among the most significant and costly rules for this sector are three interrelated, highly complex, and data-intensive rules setting new standards affecting the nation's approximately 100 Portland cement manufacturing plants.

The rules were developed under Sections 112 and 129 of the CAA which target emissions of hazardous air pollutants. Under these sections, EPA is required to set technology-based standards for sources that emit such pollutants that are reflective of levels of emissions limits achieved by the best performing sources. EPA is directed to establish "maximum achievable control technology" (MACT) and other standards to reduce emissions of such pollutants.

The EPA rules addressed in H.R. 2681 including the following:

(1) National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants (commonly referred to as "Cement MACT" or "Cement NESHAP"), 75 Fed. Reg. 54970 (September 9, 2010), promulgated under Section 112 and 111 of the Clean Air Act;

(2) Standards of Performance and Emissions Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units ("CISWI Rule"), 76 Fed. Reg. 15704 (March 21, 2011), promulgated under Section 129 of the Clean Air Act; and,

(3) Identification of Non-Hazardous Secondary Materials That Are Solid Waste ("NHSM Rule"), 76 Fed. Reg. 15456 (March 21, 2011), promulgated under Sections 2002(a)(1) and 1004(27) of the Resource Conservation and Recovery Act.

The Cement MACT Rule and the CISWI Rules collectively affect the nation's nearly 100 Portland cement plants. The Cement MACT Rule amends the Agency's MACT standards for cement kilns issued in 1999, as well as amending new source performance standards for these facilities. The NHSM rule defines non-hazardous secondary materials as fuel or waste, which determines whether an emissions source will be regulated under Section 112 or Section 129 of the CAA.

There has been widespread concern within the cement sector about the costs and feasibility of implementing these rules as currently written. The Cement Sector Regulatory Relief Act of 2011 is designed to give EPA the time and parameters it needs to develop standards for cement manufacturing plants that will protect public health and the environment without undue threat of cement plant shutdowns and the associated loss of thousands of jobs across the United States.

*Potential economic and job impacts*

EPA estimates that the capital costs associated with the Cement MACT rule will be \$2.2 billion that up to 12 cement plants may be idled or permanently shut down under the rule, and that there

will be a 5.4 percent increase in the average price of Portland cement. The Portland Cement Association, however, has estimated \$3.4 billion in compliance costs for the Cement MACT Rule *alone*, and an additional \$2 billion for the CISWI Rule. They also estimate the potential shutdowns attributable to the rules to be up to 18 plants (representing 11 million metric tons of capacity) or more—a loss of up to 4,000 jobs directly attributable to the projected plant shutdowns triggered by the new rules, and an additional 12,000 to 19,000 job losses in the construction industry due to higher cement and concrete costs. They also project increased imports of cement from China and other cement exporting nations with weaker environmental regulations and thus higher emissions.

These rules affecting the cement sector have particularly severe potential impacts in the current economic climate. For example, at a September 8, 2011, hearing before the Subcommittee on Energy and Power, Dan Harrington, President and CEO of Lehigh Hanson, testified that “[t]he current recession has been far too long and far too deep, and it has left the cement industry in its weakest economic conditions since the 1930s.” He further testified that for those employed at the plants that may be shut down by EPA’s rules, “the opportunities are very limited because they are high-wage jobs. Most of our employees are represented by collective bargaining agreement so they are union employees and they are well paid. They are highly skilled and they are very specialized for the plants and the equipment that we run, so just transferring that job knowledge is difficult. So it will be devastating to those communities.”

At the same time EPA is promulgating these rules, the U.S. economy has been suffering and unemployment remains extremely high, particularly for the U.S. construction industry. The President has responded by, among other things, supporting major infrastructure projects as a means to create jobs and jump-start the economy. Federal funding for such projects was a significant component of the 2009 stimulus package, and it remains a top priority with the Administration as is evidenced by the President’s proposed American Jobs Act, which maintains an emphasis on infrastructure. A critical component of these proposed roads, bridges, tunnels, buildings, and other infrastructure projects is cement.

*The need for a legislative stay and more compliance time*

All three rules have been challenged before the Agency and in the Federal courts. Although EPA has initiated reconsideration of two of the rules (the Cement MACT and CISWI Rules), and issued a limited stay of the effective date for one of the rules (the CISWI Rule), there continues to be significant regulatory uncertainty, and cement producers are in a state of limbo. This is because the outcome of EPA’s reconsideration process is unknown, including whether EPA’s stay will be upheld as it has been challenged in Federal court.

Legislation staying the rules is needed to prevent cement manufacturing plants located across the United States from having to decide whether to make millions of dollars in major and irreversible capital expenditures to comply before they know what the rules ultimately will require, or to shut down. A legislative stay for a sufficient period of time, moreover, is essential to ensure EPA

has adequate time to resolve difficult technical issues and develop more workable rules for the sector.

An extension of the current compliance periods is also needed for implementing the final rules. Given their technical complexity, the billions of dollars in compliance costs, and the current economic climate, extending the compliance periods will help to ensure that U.S. cement manufacturers can finance and install necessary control equipment, consistent with capital planning cycles and the availability of qualified vendors and of high-quality control equipment. Extending the compliance periods is also needed given the many other major regulations affecting the cement manufacturing sector taking effect over the next few years.

Witnesses have addressed the need for a legislative stay of the rules and extension of the compliance periods. On April 15, 2011, the Subcommittee on Energy and Power received testimony from Aris Papadopoulos, chairman of the Portland Cement Association, who stated that while the industry has invested tens of billions of dollars in modernizing and expanding facilities with state-of-the-art technologies, many plants would not be able to comply with the rules in the compliance periods under the current rules. He stated that the Cement MACT Rule, as originally promulgated, “is either technically and/or economically unachievable,” and that it “would close 18 of the country’s 100 cement plants during the next two years.” Similarly, on September 8, 2011, the Subcommittee on Energy and Power received testimony from Dan Harrington, President and CEO of Lehigh Hanson, who said that H.R. 2681 “will mitigate regulatory uncertainty and place these rules on a more reasonable schedule. This bill will enable the industry to continue to make capital investments in the U.S. market that will preserve jobs that serve as the anchor of dozens of American communities.”

#### *The need for achievable regulations*

In addition to the need for adequate time for issuance and compliance with the Cement MACT and CISWI Rules, there is a pressing need for ensuring that these rules are achievable in practice. Cement manufacturers have not opposed regulation, but rather advocated for achievable and affordable rules.

Substantive concerns with the Cement MACT and CISWI Rules have focused on the need for standards that are achievable by real-world cement plants consistently for all regulated pollutants across the full range of operating conditions, as required by the CAA. Many stakeholders in the cement sector specifically have expressed concern about EPA’s practice of setting standards following a “pollutant-by-pollutant” approach. In particular, commenters on the Cement MACT Rule submitted comments challenging that approach. See 75 Fed. Reg. 54998–54999 (September 9, 2011). They have maintained that Congress intended actual sources, performing under real-life conditions, be the benchmark for determining the MACT floors, and that the focus should be on what the best existing source or sources for all pollutants truly can achieve on an overall basis.

EPA itself has indicated that the CAA can be interpreted to support a “plant-by-plant” or source-based approach. In the Cement MACT Rule, 75 Fed. Reg. 54998–54999 (September 9, 2011), EPA expressly stated that Section 112(d)(3) of the CAA is “ambiguous

as to whether the MACT floor is to be based on the performance of an entire source or on the performance achieved in controlling particular [hazardous air pollutants].” Nevertheless, EPA followed a “pollutant-by-pollutant” approach in the Cement MACT Rule which has led to unachievable standards.

As a result, no cement plants in the United States currently can meet all the recent EPA standards. On September 8, 2011, EPA Assistant Administrator Gina McCarthy acknowledged that fact stating “I do not believe there is a single facility” that currently meets the Cement MACT standards. Consistent with this testimony, the legislative record for H.R. 2681 includes a Portland Cement Association study issued in January 2011, which found that “[n]o cement plant in the United States can currently meet all NESHAP and/or CISWI standards simultaneously.” Congress did not intend this arbitrary outcome. Congressional intent was that best performers must actually be controlling their emissions and that their techniques must be capable of being reproduced by others in the source category.

There are also major concerns associated with the NHSM Rule, which EPA has not stayed. In that rule, EPA has established an approach that will redefine many materials with energy value, which are now used as fuel, as “solid waste” under the Resource Conservation and Recovery Act. Accordingly, cement kilns that burn those materials will be redefined as incinerators and will be subject to the more rigid requirements under Section 129 rather than Section 112 of the CAA. As a result of the changes in the definition of “solid waste,” many cement plants will discontinue the good practice of recovering energy from tire-derived and other materials, and the materials will be treated as waste and landfilled—a bad result for the environment.

On September 8, 2011, the Subcommittee on Energy and Power received testimony from Dan Harrington of Lehigh Hanson, and chairman of the Government Affairs Council of the Portland Cement Association, who stated that “the CISWI and solid waste rules actually undermine environmental quality by creating barriers to the combustion and reuse of 12 million tons of other industries’ byproducts in cement kilns, byproducts which would otherwise be landfilled. This includes the re-use of millions of used tires as a non-hazardous and high-BTU fuel—which is in direct contrast to the many years of Agency support and encouragement of the beneficial use of scrap tires as a fuel in cement kilns.”

### *Benefits*

While the regulated community, as noted above, does not oppose the issuance of achievable regulations, and H.R. 2681 requires EPA to promulgate new rules to regulate hazardous air pollutant emissions from cement manufacturing facilities, the Committee notes that questions have been raised concerning EPA’s projections of benefits under these rules. In particular, EPA does not calculate the benefits from reductions of mercury or other hazardous air pollutants. Rather, EPA calculates benefits based on the incidental reductions in outdoor particulate levels, called “PM,” a non-hazardous pollutant.

Dr. Peter Valberg, a toxicologist and principal of Gradient, an environmental consulting firm, and former faculty member at the

Harvard School of Public Health, testified before the Subcommittee on Energy and Power on September 8, 2011. He noted at the outset that, “by every public health measure, from infant mortality to life expectancy, we are healthier today, and exposed to fewer hazards, than ever before. Our present-day air is much cleaner now than years ago, thanks to EPA, and our air quality is among the best in the world.”

He also testified that, with respect to EPA’s projections of benefits from reductions of particulate matter, “[i]ntricate statistical manipulations are required to demonstrate the PM-mortality correlations. The computer models require many assumptions and adjustments, and the results you get depend on the model you use, how you set it up, and how many different tests you run. You need to correct for many non-PM pollutants as well as non-pollution factors that may confound the PM-mortality associations. It’s not clear that all confounders have been taken into account, and mere associations cannot establish causality.”

He also testified that exposure to outdoor particulate matter is very small compared to exposure resulting from normal everyday activities, such as cleaning, cooking, baking, frying, barbecuing, mowing lawns, raking leaves, or enjoying a fireplace. He stated that there are major questions about “lives saved” by small PM reductions in the outdoor air. He further stated “[m]ost importantly, neither the animal toxicology nor the human clinical data validate the statistical associations from the observational epidemiology studies.”

*What the Cement Sector Regulatory Relief Act of 2011 would do*

Under H.R. 2681, EPA would be required to promulgate new rules to replace the three rules referenced above for the cement manufacturing sector, and to extend the compliance deadlines for regulated entities from 3 years to at least 5 years. The Committee urges EPA in promulgating the new rules to address all of the significant substantive technical issues that have been raised in the current reconsideration proceedings, and to set reasonable compliance dates for cement producers to install necessary controls and to come into compliance with the new rules.

In promulgating the new rules for cement manufacturing facilities, H.R. 2681 would require that EPA, in defining the terms “commercial and industrial solid waste incineration unit,” “commercial and industrial solid waste,” and “contained gaseous material,” adopt the meaning of those terms set forth in a 2000 EPA rule published at 65 Fed. Reg. 75338 (December 1, 2000). Under these definitions, units designed for energy recovery are regulated under Section 112 of the Clean Air Act, and are excluded from being regulated as incinerators under Section 129.

These definitions will ensure that the valuable energy content in a wide range of materials can continue to be recovered at cement manufacturing facilities and will not be wasted. Congress has long supported innovation to safely extract the energy value from secondary materials, and if EPA promulgates rules that discourage the recapture of their energy value, as a nation we will be landfilling energy. This is not sound energy or environmental policy.



Further, H.R. 2681 clarifies that the emissions standards set by the Administrator in the new rules must be achievable in practice. Section 5(a) specifically requires the Administrator to ensure that emission standards for existing and new sources established under Section 112 or 129 of the CAA can be met under actual operating conditions consistently and concurrently with emission standards for all other air pollutants regulated by the rule for the source category, taking into account variability in actual source performance, source design, fuels, inputs, controls, ability to measure the pollutant emissions, and operating conditions. This is intended to ensure that the standards set can be achieved in practice by facilities using available technology.

Section 5(a) clarifies Congress' intent that the standards EPA sets are based on emissions limits that are currently achieved in practice. In setting standards, EPA must utilize facility data to establish standards based on the criteria and methodology in this section of the bill. EPA should review all available data and, to the maximum extent practicable, utilize it to develop the standards in the manner required by the legislation. In addition to the data that EPA relied on to develop the cement kiln rules, facilities that will be regulated by these rules routinely submit air emissions inventory and toxic release inventory data as required by EPA and the states. EPA has broad technical expertise and experience analyzing the full range of facility data. To the extent that EPA determines that the existing data should be supplemented in order to develop the standards as required by the bill, EPA may need to seek limited additional data from regulated sources, such as data to understand cement kiln emission variability.

Finally, H.R. 2681 also reiterates that in promulgating the new rules, the Administrator should impose the least burdensome regulatory alternatives, consistent with the purposes of the CAA and President Obama's Executive Order 13563 (published January 21, 2011). That order states that an agency should "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."

In that executive order relating to improving regulation and regulatory review, the President recognized the need for regulations, but emphasized that regulatory agencies must do so "while promoting economic growth, innovation, competitiveness, and job creation." This provision in H.R. 2681 is intended to ensure that where alternative measures authorized by the CAA will achieve the goals of the Act, that the Administrator chooses the least burdensome of those alternatives consistent with the objectives of the Act and the President's recent executive order.

#### *Supporters of the legislation*

Supporters of H.R. 2681 include the Portland Cement Association, National Association of Manufacturers, U.S. Chamber of Commerce, and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers.

#### HEARINGS

The Subcommittee on Energy and Power on April 15, 2011, held a hearing on "The American Energy Initiative: Recent EPA

Rulemakings Relating to Boilers, Cement Manufacturing Plants and Utilities,” and received testimony from:

- Tom Fanning, Chairman, President and Chief Executive Officer, Southern Company;
- Anthony F. Earley, Jr., Executive Chairman, DTE Energy;
- Aris Papadopolous, President and Chief Executive Officer, Titan America LLC;
- Dirk Krouskop, Vice President, Safety, Health and Environment, MeadWestvaco Corporation;
- Paul Kempf, Director of Utilities, University of Notre Dame;
- Michael J. Bradley, Executive Director, The Clean Energy Group; and
- John Walke, Clean Air Director and Senior Attorney, Natural Resources Defense Council.

The Subcommittee on Energy and Power on September 8, 2011, held a legislative hearing on H.R. 2250, the “EPA Regulatory Relief Act of 2011,” and H.R. 2681, the “Cement Sector Regulatory Relief Act of 2011,” and received testimony from:

- The Honorable Gina McCarthy, Assistant Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency;
- James A. Rubright, Chairman and Chief Executive Officer, Rock-Tenn Company;
- Paul Gilman, Ph.D., Chief Sustainability Officer and Senior Vice President, Covanta Energy Corporation;
- Todd Elliott, General Manager, Acetate, Celanese Corporation;
- Daniel M. Harrington, President and CEO, Lehigh Hanson, Inc;
- Peter A. Valberg, Ph.D., Principal, Environmental Health, Gradient Corporation;
- John Walke, Clean Air Director and Senior Attorney, Natural Resources Defense Council; and
- Eric Schaeffer, Executive Director, Environmental Integrity Project.

#### COMMITTEE CONSIDERATION

H.R. 2681 was introduced on July 28, 2011, by Representatives Sullivan and Ross, together with Representatives Kinzinger, Latta, Walden, Barton, Carter, Dent, Boren and Altmire.

On September 8, 2011, the Subcommittee on Energy and Power held a legislative hearing on H.R. 2681.

On September 13, 2011, the Subcommittee on Energy and Power reported the bill favorably to the full committee by voice vote. During the markup, one amendment was offered and defeated, by voice vote.

On September 20 and 21, 2011, the Committee on Energy and Commerce met in open markup session. During the markup, two amendments were offered, one of which was adopted by voice vote.

#### COMMITTEE VOTES

Clause 3(b) of rule XII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. A motion by Mr.

Upton to order H.R. 2681, reported to the House, as amended, was agreed to by a record vote of 33 yeas and 12 nays. The following reflects the recorded votes taken during the Committee consideration, including the names of those Members voting for and against.

**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS  
ROLL CALL VOTE # 67**

**BILL: H.R. 2681**, the "Cement Sector Regulatory Relief Act of 2011"

**AMENDMENT:** An Amendment by Mr. Rush, No. 2, to clarify that certain provisions of the bill are intended to supplement, and not supersede, any provisions of sections 112 and 129 of the Clean Air Act.

**DISPOSITION: NOT AGREED TO**, by a roll call vote of 13 yeas to 32 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Waxman	X		
Mr. Barton				Mr. Dingell			
Mr. Stearns		X		Mr. Markey			
Mr. Whitfield		X		Mr. Towns	X		
Mr. Shimkus		X		Mr. Pallone	X		
Mr. Pitts		X		Mr. Rush	X		
Mrs. Bono Mack		X		Ms. Eshoo	X		
Mr. Walden		X		Mr. Engel			
Mr. Terry		X		Mr. Green	X		
Mr. Rogers		X		Ms. DeGette	X		
Mrs. Myrick				Mrs. Capps	X		
Mr. Sullivan		X		Mr. Doyle			
Mr. Murphy		X		Ms. Schakowsky	X		
Mr. Burgess		X		Mr. Gonzalez			
Mrs. Blackburn		X		Mr. Inslee			
Mr. Bilbray		X		Ms. Baldwin			
Mr. Bass		X		Mr. Ross		X	
Mr. Gingrey		X		Mr. Matheson		X	
Mr. Scalise		X		Mr. Butterfield	X		
Mr. Latta		X		Mr. Barrow		X	
Mrs. McMorris Rodgers		X		Ms. Matsui	X		
Mr. Harper		X		Mrs. Christensen	X		
Mr. Lance		X		Ms. Castor	X		
Mr. Cassidy		X					
Mr. Guthrie		X					
Mr. Olson		X					
Mr. McKinley		X					
Mr. Gardner		X					
Mr. Pompeo		X					
Mr. Kinzinger		X					
Mr. Griffith		X					

09/21/2011

**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS  
ROLL CALL VOTE # 68**

**BILL: H.R. 2681**, the "Cement Sector Regulatory Relief Act of 2011"

**AMENDMENT:** A motion by Mr. Upton to order H.R. 2681 favorably reported to the House, as amended. (Final Passage).

**DISPOSITION: AGREED TO**, by a roll call vote of 33 yeas to 12 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Waxman		X	
Mr. Barton				Mr. Dingell			
Mr. Stearns	X			Mr. Markey			
Mr. Whitfield	X			Mr. Towns		X	
Mr. Shimkus	X			Mr. Pallone		X	
Mr. Pitts	X			Mr. Rush		X	
Mrs. Bono Mack	X			Ms. Eshoo		X	
Mr. Walden	X			Mr. Engel			
Mr. Terry	X			Mr. Green	X		
Mr. Rogers	X			Ms. DeGette		X	
Mrs. Myrick				Mrs. Capps		X	
Mr. Sullivan	X			Mr. Doyle			
Mr. Murphy	X			Ms. Schakowsky		X	
Mr. Burgess	X			Mr. Gonzalez			
Mrs. Blackburn	X			Mr. Inslee			
Mr. Bilbray	X			Ms. Baldwin			
Mr. Bass	X			Mr. Ross	X		
Mr. Gingrey	X			Mr. Matheson	X		
Mr. Scalise	X			Mr. Butterfield		X	
Mr. Latta	X			Mr. Barrow	X		
Mrs. McMorris Rodgers	X			Ms. Matsui		X	
Mr. Harper	X			Mrs. Christensen		X	
Mr. Lance	X			Ms. Castor		X	
Mr. Cassidy	X						
Mr. Guthrie	X						
Mr. Olson	X						
Mr. McKinley	X						
Mr. Gardner	X						
Mr. Pompeo	X						
Mr. Kinzinger	X						
Mr. Griffith	X						

09/21/2011

## COMMITTEE OVERSIGHT FINDINGS

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

## STATEMENT OF GENERAL PERFORMANCE, GOALS AND OBJECTIVES

H.R. 2681 provides additional time and guidelines for the Administrator of the Environmental Protection Agency to issue achievable standards for cement manufacturing facilities.

## NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 2681, the Cement Sector Regulatory Relief Act of 2011, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

## EARMARK

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI, the Committee finds that H.R. 2681, the Cement Sector Regulatory Relief Act of 2011, contains no earmarks, limited tax benefits, or limited tariff benefits.

## COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate provided by the Congressional Budget Office. Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

*H.R. 2681—Cement Sector Regulatory Relief Act of 2011*

Summary: Over the past year, EPA completed three emissions standards that apply to cement manufacturing plants. H.R. 2681 would prevent those rules from being implemented and require EPA to propose new regulations. EPA would have 15 months from the bill's enactment to finalize the new regulations; plants affected by those regulations would have at least five years to comply with the new rules. CBO estimates that enacting this legislation would have a net cost of \$1 million over the 2012–2016 period, subject to the availability of appropriated funds. Enacting H.R. 2681 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 2681 contains no new intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

Estimated cost to the Federal Government: CBO estimates that implementing H.R. 2681 would have a net cost of \$1 million over the next five years. The costs of this legislation fall within budget function 300 (natural resources and environment).

Basis of estimate: For this estimate, CBO assumes that H.R. 2681 will be enacted by the end of 2011 and that the necessary amounts to implement the legislation will be appropriated for each year.

According to EPA, the agency spent about \$2 million over the 2008–2011 period to develop and finalize the emissions standards for cement manufacturing plants. CBO estimates that it would cost EPA about \$2 million over the 2012–2016 period to implement and enforce those rules under current law. While enacting this bill would preclude EPA from spending resources on those activities, this legislation would require EPA to spend resources on proposing and finalizing new regulations.

The new regulations would be based on emissions limits that can be achieved in practice by facilities using available technology. At this time, EPA is uncertain how it would interpret this requirement for the new regulations and cannot say what the cost to develop the new rules would be. For this estimate, CBO assumes that rulemaking costs for the new rules would be similar to those for the prior effort (\$2 million) to issue regulations. CBO estimates that implementing and enforcing the new regulations would have an additional cost of about \$1 million over the 2012–2016 period.

On balance, CBO estimates that implementing this legislation would have a net cost of \$1 million over the next five years.

Pay-As-You-Go considerations: None.

Intergovernmental and private-sector impact: H.R. 2681 contains no new intergovernmental or private-sector mandates as defined in UMRA.

Estimate prepared by: Federal costs: Susanne S. Mehlman; Impact on state, local, and tribal governments: Ryan Miller; Impact on the private sector: Amy Petz.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

#### FEDERAL MANDATES STATEMENT

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

#### ADVISORY COMMITTEE STATEMENT

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

#### APPLICABILITY TO LEGISLATIVE BRANCH

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

#### SECTION-BY-SECTION ANALYSIS OF LEGISLATION

##### *Section 1—Short title*

This section provides the short title of “Cement Sector Regulatory Relief Act of 2011.”

##### *Section 2—Legislative stay*

Sections 2(a) and 2(b) direct the Administrator of the EPA to issue new rules to replace three published, interrelated EPA rules setting MACT and other performance standards for the Portland cement manufacturing industry and Portland cement plants. These

rules were issued under sections 112 and 129 of the CAA, and sections 2002(a)(1) and 1004(27) of RCRA. Section 2(b) directs the Administrator to finalize the new rules 15 months from the date of enactment of the Act.

#### *Section 3—Compliance dates*

Section 3(a) extends the deadline for compliance with the new rules from 3 years to not earlier than 5 years from the date of enactment of the Act to allow sufficient time for facilities to install controls.

Section 3(b) clarifies that for each of the new rules promulgated pursuant to the Act, the date on which the Administrator proposes the rule shall be treated as the proposal date for purposes of the definition of a “new source” under section 112(a)(4), and of a “new solid waste incineration unit” under section 129(g)(2) of the CAA.

Section 3(c) clarifies that nothing in the legislation should be construed to restrict the Administrator or a State permitting authority from granting an extension under CAA section 112(i)(3)(B) allowing an existing source up to 1 additional year to comply if necessary for the installation of controls, or to restrict the president from granting limited national security-related exemptions under CAA Section 112(i)(4).

#### *Section 4—Energy recovery and conservation*

This section provides that in defining the terms “commercial and industrial solid waste incineration unit,” “commercial and industrial waste,” and “contained gaseous material,” the Administrator should adopt the meaning of those terms set forth in a 2000 rule promulgated by the Clinton Administration. These definitions provide that units designed for energy recovery should be regulated under section 112 of the CAA, and should not be classified as incinerators and regulated under CAA section 129. This section is intended to ensure the continued use of a wide range of alternative fuels and encourage energy recovery.

#### *Section 5—Other provisions*

Section 5(a) clarifies that the emissions standards set by the Administrator in the new rules should be achievable in practice. The section directs the Administrator to ensure that the emissions standards can be met under actual operating conditions consistently and concurrently for all pollutants regulated by the new rules. This section is intended to ensure that the standards are based on emissions limits achieved in practice by real-world cement manufacturing facilities.

Section 5(b) clarifies that in promulgating the new rules, the Administrator should impose the least burdensome regulatory alternatives, consistent with the purposes of the CAA and Executive Order 13563 (published January 21, 2011).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

The bill does not change existing law.



## DISSENTING VIEWS

### I. PURPOSE OF LEGISLATION

The purpose of this bill is to delay EPA from implementing long overdue standards to reduce toxic air pollution from cement kilns, one of the largest sources of airborne mercury in the United States.

The bill's supporters often claim that the bill will give EPA the time it needs to "get the rules right."<sup>1</sup> The Committee report states that the purpose of the bill is to "provide additional time for the Administrator of the Environmental Protection Agency to issue achievable standards for cement manufacturing facilities."

This is misleading for several reasons. First, as explained in more detail below, section 2 of bill effectively vacates EPA's already-finalized cement kiln rules and prohibits EPA from finalizing new regulations for 15 months. In addition, section 3 of the bill bars EPA from requiring cement kilns to reduce pollution to comply with any revised standards for at least five years once they go into effect. EPA does not want this delay. Gina McCarthy, Assistant Administrator for Air and Radiation at the U.S. Environmental Protection Agency, categorically stated, "We did not ask for this. We do not need this."<sup>2</sup> In fact, Ms. McCarthy concluded that the bill's authors "have no mandatory timeline in mind for when these public health protections should be achieved."<sup>3</sup>

Subcommittee Chairman Ed Whitfield also claimed that this bill requires EPA to implement new emissions controls for cement kilns but replaces "unrealistic targets and timetables with achievable ones."<sup>4</sup> Congressman Lee Terry called the technology to reduce these emissions from cement kilns a "pipe dream."<sup>5</sup> Congressman John Shimkus stated that the standards should be "achievable by real-world facilities, not desktop analysis, not mathematical formulas or equations but ones that industry can actually achieve."<sup>6</sup> These statements suggest that EPA's cement kiln rules are based on standards that are not reasonable or available. That is not the case.

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<sup>1</sup>Statement of Congressman Morgan Griffith, Subcommittee on Energy and Power, Markup of H.R. 2681, The Cement Sector Regulatory Relief Act of 2011 and H.R. 2250, The EPA Regulatory Relief Act of 2011, 112th Cong. (Sept. 13, 2011).

<sup>2</sup>Testimony of Gina McCarthy, Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency, before the Subcommittee on Energy and Power, Legislative Hearing on H.R. 2250, the EPA Regulatory Relief Act of 2011 and H.R. 2681, the Cement Sector Regulatory Relief Act of 2011, 112th Cong. (Sept. 8, 2011).

<sup>3</sup>Id.

<sup>4</sup>Statement of Chairman Ed Whitfield, Subcommittee on Energy and Power, Legislative Hearing on H.R. 2250, the EPA Regulatory Relief Act of 2011 and H.R. 2681, the Cement Sector Regulatory Relief Act of 2011, 112th Cong. (Sept. 8, 2011).

<sup>5</sup>Statement of Congressman Lee Terry, Subcommittee on Energy and Power, Markup of H.R. 2681, The Cement Sector Regulatory Relief Act of 2011 and H.R. 2250, The EPA Regulatory Relief Act of 2011, 112th Cong. (Sept. 13, 2011).

<sup>6</sup>Statement of Congressman John Shimkus, Subcommittee on Energy and Power, Markup of H.R. 2681, The Cement Sector Regulatory Relief Act of 2011 and H.R. 2250, The EPA Regulatory Relief Act of 2011, 112th Cong. (Sept. 13, 2011).

In fact, the Clean Air Act requires EPA to set specific emission limits for toxic air pollutants based on pollution reductions that similar facilities already are achieving in the real world, not reductions achievable only in a laboratory or in computer models.<sup>7</sup> For existing sources, the emission standard must be at least as stringent as the average emissions achieved by the best-performing 12% of sources in that source category—not the top 1% or 2%, but the top 12%.<sup>8</sup> For new sources, the emission standard must be at least as stringent as the emissions levels achieved by the best-controlled similar source.<sup>9</sup> These minimum emissions levels are known as the Maximum Achievable Control Technology (MACT) floor.

The bill’s supporters also claim that this bill will help create regulatory certainty. Congressman Pete Olson, for example, stated that the legislation “would provide regulatory certainty to businesses that are trying to create American jobs.”<sup>10</sup> Congressman John Shimkus stated that the “whole idea of this bill is to create certainty.”<sup>11</sup> Daniel Harrington, testifying on behalf of the Portland Cement Association, stated that the bill will “mitigate regulatory uncertainty and place these rules on a more reasonable schedule.”<sup>12</sup>

The bill actually would create substantial uncertainty for industry, both on the timing for compliance and the degree of emission control required. It also will do nothing to reassure communities living near cement kilns that EPA will be able to achieve meaningful reductions in toxic air pollution. In response to questioning from Ranking Member Rush, Ms. McCarthy from EPA stated that the bill “raises significant uncertainty about whether or not we can move this forward and what standards would need to be applied.”<sup>13</sup>

In particular, section 5 of the bill is ambiguous. It places new constraints and conditions on how EPA must set specific emission standards for toxic air pollution. It also requires EPA to select the “least burdensome” option when looking at how to cut pollution. But the bill does not explain what this means. Ms. McCarthy from EPA testified that this section could “raise legal uncertainty” because it is not clear whether or not it trumps current law.<sup>14</sup> Environmental lawyers who have been litigating these provisions for decades told the subcommittee that this section would override current law and exempt cement kilns from requirements to achieve maximum reductions in toxic air pollution.<sup>15</sup> These are two distinct

<sup>7</sup> CAA § 112(d).

<sup>8</sup> CAA § 112(d)(3).

<sup>9</sup> CAA § 112(d)(3).

<sup>10</sup> Statement of Congressman Pete Olson, Subcommittee on Energy and Power, Markup of H.R. 2681, The Cement Sector Regulatory Relief Act of 2011 and H.R. 2250, The EPA Regulatory Relief Act of 2011, 112th Cong. (Sept. 13, 2011).

<sup>11</sup> Statement of Congressman John Shimkus, Subcommittee on Energy and Power, Markup of H.R. 2681, The Cement Sector Regulatory Relief Act of 2011 and H.R. 2250, The EPA Regulatory Relief Act of 2011, 112th Cong. (Sept. 13, 2011).

<sup>12</sup> Testimony of Daniel Harrington, CEO, Lehigh Hanson, before the Subcommittee on Energy and Power, Legislative Hearing on H.R. 2250, the EPA Regulatory Relief Act of 2011 and H.R. 2681, the Cement Sector Regulatory Relief Act of 2011, 112th Cong. (Sept. 8, 2011).

<sup>13</sup> Testimony of Gina McCarthy, Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency, before the Subcommittee on Energy and Power, Legislative Hearing on H.R. 2250, the EPA Regulatory Relief Act of 2011 and H.R. 2681, the Cement Sector Regulatory Relief Act of 2011, 112th Cong. (Sept. 8, 2011).

<sup>14</sup> *Id.*

<sup>15</sup> Testimony of John Walke, Senior Attorney, Natural Resources Defense Council, before the Subcommittee on Energy and Power, Legislative Hearing on H.R. 2250, the EPA Regulatory Re-

legal interpretations of the language. All that is certain is that this language will create new litigation to determine which interpretation prevails.

In the end, this bill creates substantial uncertainty, ensures litigation, and goes far beyond providing EPA additional time to complete a rulemaking it has already finalized. This bill delays and may substantially weaken long overdue public health protections, allowing continued uncontrolled emissions of toxic air pollutants that cause cancer, developmental harm, and other serious health effects.

## II. RULES BLOCKED BY THE LEGISLATION

Section 112 of the Clean Air Act requires EPA to set technology-based standards to reduce toxic air pollutants from distinct source categories (e.g., power plants, boilers, and cement kilns). Toxic air pollutants are pollutants that are known or suspected to cause cancer or other serious health effects, such as reproductive or birth defects or neurological effects, or adverse environmental effects. EPA rulemakings aim to reduce the release of 187 hazardous air pollutants including mercury, cadmium, lead, benzene and dioxin.

Mercury is a hazardous air pollutant of particular concern. Mercury is emitted into the air and is then deposited into water bodies, where it contaminates fish and other aquatic life. High levels of mercury in fish have triggered mercury advisories in water bodies around the country. Pregnant and nursing women, women who may become pregnant and young children who eat large amounts of mercury-contaminated fish are especially at risk because mercury damages babies' developing brains, leading to learning disabilities and lowered IQ.

On August 6, 2010, EPA issued final rules to reduce toxic air pollution from cement kilns under section 111 (new source performance standards) and section 112 (MACT).<sup>16</sup> The new source performance standards will reduce nitrogen oxides, sulfur dioxide, and particulate matter and will apply to all cement kilns built after June 16, 2008. The MACT standards will reduce mercury and acid gases by 92% and 97%, respectively.<sup>17</sup>

The rules will reduce mercury and other hazardous air pollutants by 16,600 pounds, but EPA does not have sufficient data to monetize the resulting health benefits.<sup>18</sup> In addition, reductions in particulate matter will avoid 17,000 cases of aggravated asthma, 1,500 heart attacks, 650 cases of chronic bronchitis, and 130,000 days when people miss work. The monetized benefits are estimated to be between \$6.7 billion and \$18 billion per year in 2013, while the costs are estimated at \$350 million annually.<sup>19</sup>

Relief Act of 2011 and H.R. 2681, the Cement Sector Regulatory Relief Act of 2011, 112th Cong. (Sept. 8, 2011).

<sup>16</sup>U.S. Environmental Protection Agency, National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, Final Rule 75 Fed. Reg. 54970 (Sept. 9, 2010).

<sup>17</sup>Id.

<sup>18</sup>U.S. Environmental Protection Agency, Fact Sheet, Final Amendments to National Air Toxics Emission Standards and New Source Performance Standards for Portland Cement Manufacturing (Aug. 9, 2010).

<sup>19</sup>Id.

III. BILL SUMMARY: H.R. 2681, CEMENT SECTOR REGULATORY RELIEF  
ACT OF 2011

This bill delays implementation of rules to reduce hazardous air pollution from cement kilns, undermines EPA's authority to require application of the best performing emissions control technologies on cement kilns, and allows more cement kilns to incinerate waste without being subject to the more stringent pollution control requirements that apply to waste incinerators.

Section 2 of bill effectively vacates EPA's cement kiln rules and directs EPA to promulgate new MACT standards for these facilities. As reported out of the Subcommittee on Energy and Power, the bill prohibited EPA from finalizing these regulations for at least 15 months and allowed for an indefinite further delay. During the Full Committee markup, Congressman John Sullivan offered an amendment to clarify that EPA must finalize the regulations on the date that is 15 months after the date of enactment. This language appears to preclude EPA from acting earlier or later than the date that is 15 months after the date of enactment. This amendment passed on voice vote.

In addition to this up-front delay, section 3 of the bill bars EPA from requiring cement facilities to reduce pollution to comply with any revised standards for at least five years, and potentially longer. The Clean Air Act currently requires facilities to comply with emissions limits "as expeditiously as practicable" and within three years at most.<sup>20</sup> The bill requires EPA to consider numerous factors when establishing a compliance date, including the costs of achieving emissions reductions, feasibility, availability of equipment and labor, and potential net employment impacts. This provides a new basis for industry litigation on any final rules.

Section 5 of the bill arguably undermines the fundamental premise of sections 112 and 129 of the Clean Air Act. Section 5 establishes two new criteria for EPA to consider when setting emissions standards for toxic air pollution from cement kilns. One could interpret these criteria as supplanting the existing criteria for determining MACT, substantially weakening the existing standards for controlling toxic air pollution. Alternatively, one could interpret this section as complementing but not replacing current law. In that case, these criteria would merely inform decisions where EPA currently has discretion, such as in setting MACT standards more stringent than what is required by law. Both the intent of the provisions and the legal effect of the language are ambiguous, providing at minimum new legal risks and opportunities for litigation. During questioning by Ranking Member Waxman at the September 8 legislative hearing, Ms. McCarthy from EPA stated that section 5 of both bills could "raise legal uncertainty."<sup>21</sup>

If section 5 of the bill overrides current Clean Air Act standards, the result would be less stringent emissions reduction requirements and weaker protections for public health.

<sup>20</sup> CAA § 112(i)(3).

<sup>21</sup> Testimony of Gina McCarthy, Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency, before the Subcommittee on Energy and Power, Legislative Hearing on H.R. 2250, the EPA Regulatory Relief Act of 2011 and H.R. 2681, the Cement Sector Regulatory Relief Act of 2011, 112th Cong. (Sept. 8, 2011).

Section 5(a) of the bill requires EPA to set emissions standards that can be met under actual operating conditions “consistently and concurrently with emission standards for all other air pollutants” taking into account several mitigating factors. Committee Members supporting this provision and witnesses at the hearings suggested that this is intended to change how EPA sets air toxics standards.

EPA has set MACT standards for numerous sources since 1990. Sections 112 and 129 of the Clean Air Act require EPA to set toxic air pollution standards for a source category based on the average emissions levels achieved by the best performing 12% of facilities in that industry. EPA does this on a pollutant-by-pollutant basis. EPA reviews the emissions levels being achieved in practice and calculates the average of the cleanest 12% of sources for each pollutant.

The language in the bill suggests that EPA may have to set MACT limits based on the “best performing sources” for all pollutants in the aggregate. If this is what the language requires, it would be an impossible task for EPA. The agency would have to determine, for example, whether a plant that emits 150 pounds of mercury and 100 tons of lead each year is better or worse performing than a plant that emits 200 pounds of mercury and 50 tons of lead. Giving EPA open-ended and unworkable directions is a recipe for delay, litigation, and weak, if any, standards.

Similarly, section 5(b) could be interpreted to require EPA to forego numeric emissions limits in favor of less stringent work practice standards. Sections 112 and 129 of the Clean Air Act require EPA to set MACT standards for new and existing sources of pollution based on the emission levels achieved by relatively clean similar facilities. When the Administrator determines that it is not feasible to reduce pollution by prescribing or enforcing emissions standards for a source, she may promulgate less protective work practice standards instead.<sup>22</sup> Section 5(b), however, may compel the Administrator to choose the least burdensome regulatory option, including work practice standards, without requiring a finding of infeasibility. As a result, EPA could be required to set work practice standards across the board, even if a more stringent standard is feasible and more protective of public health. John Walke, a senior attorney at the Natural Resources Defense Council, testified that this section would have the effect of exempting cement kilns from maximum reductions in toxic air pollution emissions, “in contrast to almost other major industrial source of toxic air pollution in the nation.”<sup>23</sup>

Ranking Member Bobby Rush introduced an amendment in the subcommittee and full committee markups to clarify that section 5 is intended to supplement but not supplant EPA’s existing authority under sections 112 and 129 of the Clean Air Act. This amendment was defeated in full committee by a vote of 13 to 32.

Section 4 of the bill could exempt facilities that burn waste from the standards that apply to incinerators, which are subject to more

<sup>22</sup> CAA § 112(h).

<sup>23</sup> Testimony of John Walke, Senior Attorney, Natural Resources Defense Council, before the Subcommittee on Energy and Power, *Legislative Hearing on H.R. 2250, the EPA Regulatory Relief Act of 2011 and H.R. 2681, the Cement Sector Regulatory Relief Act of 2011*, 112th Cong. (Sept. 8, 2011).

stringent monitoring, reporting and pollution control requirements under section 129 of the Clean Air Act. The bill directs EPA to adopt the definitions of “commercial and industrial solid waste incineration unit,” “commercial and industrial waste,” and “contained gaseous material” as prescribed in the 2000 EPA rule on solid waste incineration.<sup>24</sup> In 2007, the U.S. Court of Appeals for the District of Columbia vacated these definitions as inconsistent with the plain language and intent of the Clean Air Act.<sup>25</sup> The court also determined that the narrow definition of commercial and industrial waste “substantially reduces” the number of facilities subject to the more stringent section 129 requirements by exempting any incinerator that recovers or has the potential to recover energy.<sup>26</sup>

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

HENRY A. WAXMAN.  
BOBBY L. RUSH.  
DIANA DEGETTE.  
JAN SCHAKOWSKY.  
ED TOWNS.  
LOIS CAPPS.  
ELIOT L. ENGEL.  
EDWARD J. MARKEY.  
ANNA G. ESHOO.  
MIKE DOYLE.  
DORIS O. MATSUI.  
FRANK PALLONE, Jr.  
DONNA M. CHRISTENSEN.

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<sup>24</sup> U.S. Environmental Protection Agency, *Standards for Performance of New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units*, 65 Fed. Reg. 75338 (Dec. 1, 2000).

<sup>25</sup> Due to procedural errors in the rulemaking, EPA reconsidered and re-promulgated the 2000 definition in 2005 in substantially similar form. The court vacated the 2005 rule. *See* Natural Resources Defense Council, v. U.S. Environmental Protection Agency, 489 F.3d 1250 (D.C. Cir. 2007).

<sup>26</sup> *Id.*