113TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
113–488

PROMOTING NEW MANUFACTURING ACT

JUNE 23, 2014.—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. 4795]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 4795) to promote new manufacturing in the United States by providing for greater transparency and timeliness in obtaining necessary permits, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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39–006

PURPOSE AND SUMMARY

H.R. 4795, the "Promoting New Manufacturing Act," was introduced by Rep. Steve Scalise (R–LA) on May 30, 2014. The bill addresses preconstruction permits required under the Clean Air Act (CAA) for major stationary sources, and would require the Administrator of the Environmental Protection Agency (EPA) to take the following actions:

- To publish information regarding the estimated number of permits issued annually and timelines for making final permit decisions;
- When establishing new or revised air quality standards affecting the permitting process, to issue implementing guidance and regulations at the same time; and,
- To report annually to Congress on actions being undertaken by the agency to expedite the processing of permit applications.

BACKGROUND AND NEED FOR LEGISLATION

In his State of the Union speech this year, President Obama highlighted new manufacturing projects related to America's abundant energy supplies, stating that businesses "plan to invest almost $100 billion in new factories that use natural gas." He further stated that he would "cut red tape to help [S]tates get those factories built."

H.R. 4795 seeks to ensure these new manufacturing facilities will be built by improving the process for obtaining air permits required under the federal CAA. In particular, the bill addresses permits under the CAA's "New Source Review" (NSR) provisions that require that new or modified facilities obtain a preconstruction permit before commencing construction and install emissions control equipment as a condition of the permit.

Preconstruction permits for a new major stationary source, or a major modification of an existing major stationary source, are issued under two permitting programs.[1] The "Prevention of Significant Deterioration" (PSD) program applies in "attainment" areas where the air quality meets national ambient air quality standards (NAAQS),[2] or cannot be classified as either in "attainment" or "nonattainment" with the NAAQS. The "Nonattainment NSR" (NNSR) program applies in areas that are not in attainment with the NAAQS.[3] Because the NSR requirements are pollutant-specific, a preconstruction permit application may require both PSD and NNSR reviews. Collectively, the EPA refers to the PSD and NNSR programs as the "major NSR program."[4]

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[1] The draft legislation applies only to "Major NSR" permits for major stationary sources. The draft legislation does not apply to the "Minor NSR" program administered by States.

[2] EPA has established standards for six criteria pollutants: carbon monoxide, lead, ozone, particulate matter (PM2.5/PM10), nitrogen dioxide (NO2), and sulfur dioxide (SO2). *See* National Ambient Air Quality Standards (NAAQS) available at *http://www.epa.gov/air/criteria.html*.

[3] The PSD and NNSR programs are contained in parts C and D, respectively, of Title I of the CAA. *See* CAA *Part C of Title I*, §§ 160–169, 42 U.S.C. §§ 7470–7479 (PSD); CAA *Part D of Title I*, §§ 171–193, 42 U.S.C. §§ 7501–7515 (NNSR). For applicable federal regulations, *see* 40 CFR 51.165, 51.166, 52.21, 52.24 and part 51, Appendices S and W.

[4] The PSD program, which applies to criteria pollutants in areas in compliance with the NAAQS, as well as certain non-criteria pollutants regulated by EPA that do not have a NAAQS (*see* 40 CFR 52.21(a)(23)), requires installation of "Best Available Control Technology" (BACT) technologies, based on a case-by-case determination and taking into account cost and other factors. *See* Prevention of Significant Deterioration (PSD) Basic Information available at *http://www.epa.gov/NSR/psd.html*. The NNSR program, which applies to criteria pollutants in areas

Under the major NSR program, EPA establishes the basic permitting requirements through federal regulations. Although the majority of major NSR permits are issued by State and local permitting authorities, EPA also may be the permitting authority in certain States.[5] In instances where the EPA is not the permitting authority, EPA may review and submit comments on draft permits proposed by State or local permitting authorities. The agency maintains a database that tracks information relating to major source permits issued by the EPA Regional Offices and by State and local air agencies.[6]

By statute, a decision on a PSD permit application is required to be made within one year of the filing of a completed application. *See* CAA 165(c), 42 U.S.C. 7454(c). In practice, however, the permitting process can take significantly longer.[7] EPA has estimated that during the years 2008 through 2012, the percentage of major NSR permits issued within one year of receiving a completed permit application ranged from 46 percent to 80 percent depending upon the year.[8]

Pending manufacturing projects and permitting challenges

There are currently tens of billions of dollars in potential new manufacturing projects that have been announced, largely due to America's abundant energy supplies.

At the legislative hearing on the discussion draft of H.R. 4795,[9] Lorraine Krupa Gershman, Director of Regulatory and Technical Affairs with the American Chemistry Council (ACC), testified that "America's chemical industry is undergoing a historic expansion made possible by abundant, affordable supplies of natural gas and natural gas liquids from shale formations." She further testified that:

> [a]s of this week, 177 chemical industry projects, valued at $112 billion in potential new U.S. investment, have been announced. Fully 62 percent of this is foreign direct investment. Within 10 years, the new investments could generate tens of billions of dollars in new chemical industry

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that are out of compliance with the NAAQS, includes more stringent requirements, including installing "Lowest Achievable Emissions Rate" (LAER) technologies without taking into account costs and other factors, obtaining emissions offsets and achieving a net air quality benefit, and an alternatives analysis. *See* Nonattainment NSR Basic Information available at *http://www.epa.gov/nsr/naa.html*.

[5] In the majority of States, the States have developed NSR requirements and procedures that are defined and codified in a State Implementation Plan (SIP) approved by EPA. Other States rely on EPA's NSR program, and in these States, EPA has delegated authority on behalf of the agency (delegated States). In still other States, EPA may be the permitting authority. *See, e.g.* "Where You Live" available at *http://www.epa.gov/nsr/where.html*.

[6] *See* "RACT/BACT/LAER Clearinghouse" available at *http://cfpub.epa.gov/rblc/*. EPA estimates that the database currently contains information for approximately 50 percent of the major NSR permits. See EPA Technical Assistance available at *http://docs.house.gov/meetings/IF/IF03/20140528/102284/HMKP-113-IF03-20140528-SD003.pdf*. In its annual Budget Justification, the EPA reports the percentage of major NSR permits within one year. *See, e.g.* U.S. EPA Fiscal Year 2015 Justification of Appropriation Estimates available at *http://nepis.epa.gov/Exe/ZyPDF.cgi/P100I0WA.PDF?Dockey=P100I0WA.PDF*, at pp. 224, 829.

[7] *See, e.g.* EPA Oct. 15, 2012 Memo entitled "Timely Processing of Prevention of Significant Deterioration (PSD) permits when EPA or PSD-Delegated Air Agency Issues the Permit" available at *http://www.epa.gov/region7/air/nsr/nsrmemos/timely.pdf* (summarizing "best practices and other recommended tools to foster timely and consistent permit processing").

[8] *See* U.S. EPA Fiscal Year 2015 Justification of Appropriation Estimates available at *http://nepis.epa.gov/Exe/ZyPDF.cgi/P100I0WA.PDF?Dockey=P100I0WA.PDF*, at pp. 224, 829.

[9] The hearing was held on May 21, 2014 before the Energy and Power Subcommittee of the Committee on Energy and Commerce.

> exports, and hundreds of thousands of permanent new jobs.[10]

Additionally, Ross Eisenberg, Vice President, Energy and Resources Policy, National Association of Manufacturers, testified that "the boom in domestic energy production is driving major new investment in manufacturing, and contributing to increased U.S. competitiveness around the world." Further, "for manufacturers, this could mean as many as one million new jobs by 2025 as we build new iron, steel, cement, fertilizer, chemicals, aluminum, plastics, and many other manufacturing facilities, as well as the products that are made from these materials, so the future is good."

While there are billions of dollars in planned new manufacturing projects in the United States, they face regulatory uncertainty and potential delays in the permitting process. At the May 21, 2014 hearing, ACC's Director of Regulatory and Technical Affairs, Lorraine Gershman summarized these challenges, stating:

> All of these projects must undergo a lengthy and complex environmental permitting process, filled with challenges that could derail the investments. Problems include uncertainty as to the schedule and process for obtaining a final pre-construction permit, and a requirement that companies use emission modeling programs that cannot adequately accommodate site specific data. Once a project is significantly delayed, the project can be scrapped, and companies make plans to proceed elsewhere.

Similarly, Ken Weiss, Managing Director for Global Air Services with Environmental Resources Management (ERM), testified that "[c]ompanies seeking to execute capital projects need to be able to develop realistic and predictable project timelines" so that "equipment can be designed, procured, installed, and brought online when expected, and also support investment decisions." Currently, however, he testified that there can be significant delays: "We routinely advise clients that obtaining a PSD permit can take anywhere from 1 to 3 years, and that a minimum of 12 to 18 months need to be allowed in the project schedule."[11]

One of the most challenging aspects of the permitting process can be new or changing regulatory requirements, including new or revised NAAQS. Such new or revised NAAQS apply to preconstruction permit applications as soon as the new or revised standards become effective, except in limited circumstances.[12] At

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[10] The chemical products to be produced are used in many everyday products, including food packaging, film, trash bags, diapers, toys, housewares, window frames, clothing, detergents carpets, home furnishings and apparel, paints, electronics, and gasoline. *See* ACC, May 2013, "Shale Gas, Competiveness, and New US Chemical Industry Investment: An Analysis Based on Announced Projects," Appendix 4 available at *http://chemistrytoenergy.com/sites/chemistrytoenergy.com/files/shale-gas-full-study.pdf*.

[11] A June 2014 report recently concluded that, despite favorable economics, many new manufacturing projects in the chemical industry are being delayed for years due, in part, to "a lengthy and uncertain permitting process." *See* "Unlocking the economic potential of North America's energy resources," June 2014, Goldman Sachs Global Markets Institute available at *http://www.goldmansachs.com/our-thinking/our-conferences/north-american-energy-summit/unlocking-the-economic-potential-of-north-americas.pdf*.

[12] *See, e.g.* EPA Oct. 15, 2012 Memo, supra (new or revised NAAQs "apply to any final permit issued after the effective dates of the requirements unless the EPA has provided for grandfathering of the specific requirements for applications pending on the effective date of the new requirement"); *see also* April 1, 2010 Memo available at *http://www.epa.gov/region7/air/nsr/nsrmemos/psdnaaqs.pdf* ("EPA generally interprets the CAA and EPA's PSD permitting

the same time, EPA's implementing regulations and guidance for how to comply with the new or revised NAAQS may be significantly delayed.[13]

At the May 21, 2014 legislative hearing, witnesses addressed the potential for permitting delays when EPA changes NAAQS and fails to issue timely implementing regulations and guidance. ACC's Director of Regulatory and Technical Affairs, Lorraine Gershman testified: "Lacking clear direction from EPA, State permitting agencies and manufacturing facilities have, at times, been left confused about the requirements."[14] Similarly, Mr. Weiss testified: "Guidance is necessary, as many technical issues must be addressed in determining how to conduct the analyses that can show compliance with the ambient air quality standards. This is particularly important, as EPA is constantly updating the ambient air quality standards." He cited to various examples of project delays caused by the lack of guidance accompanying new, more stringent air quality standards.

For certain preconstruction permits, an additional source of delay in the permitting process may be administrative appeals to the EPA's Environmental Appeals Board (EAB). In particular, for PSD permits issued by EPA or delegated States, there is the potential for further delays during the pendency of any appeal to the EAB. EPA has estimated that the average time for resolution of such appeals is 5 months.[15]

At the May 21, 2014 legislative hearing, ACC's Director of Regulatory and Technical Affairs, Lorraine Gershman, testified that the bill "represents a step towards a timely, efficient and transparent regulatory process." NAM's Vice President for Energy and Resources Policy, Ross Eisenberg, testified that the bill "takes a pragmatic approach to this very complex issue." ERM's Managing Partner for Global Air Services, Ken Weiss, whose company has extensive experience in the permitting process, testified that "[t]he legislation will remove much uncertainty, and related schedule delays from the air emissions permitting process for major capital projects, and help ensure continued growth in manufacturing in the United States." The President and Chief Executive Officer of the Small Business & Entrepreneurship Council, Karen Kerrigan, testified that "Provisions that require the EPA to better monitor, make public, and report on the timing of permits, and to provide

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program regulations to require that each final PSD decision reflect consideration of any NAAQS in effect at the time the agency makes a final determination on a pending application").

[13] For example, EPA published a revised standard for fine particulate matter on January 15, 2013 (*see* National Ambient Air Quality Standards for Particulate Matter Final Rule, 78 Fed. Reg. 3086 ((Jan. 15, 2013)), but has yet to issue final implementing regulations and guidance. Similarly, for its revised ozone standards issued in 2008, the agency did not propose implementing regulations until 2013. *See* Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements, 78 Fed. Reg. 34178 (June 6, 2013).

[14] Additionally, she testified that even as to earlier issued NAAQS:

EPA is still working to implement some of these standards that they have put in place, with the unintended consequences of not having the models available, or not having monitoring available to make the designations. Areas that are in limbo between standards do not necessarily know how to proceed. This holds up permits. A lot of these projects come with a substantial amount of financing attached. This financing is not available indefinitely, and if these permits aren't issued, there are times where the financing will disappear, and the projects will therefore not go forward.

[15] *See* EPA Oct. 15, 2012 Memo, *supra* ("EAB review historically has taken an average of 5 months from the time a petition is filed to the time the EAB issued its decision in the matter"). The EAB has a Standing Order giving priority to NSR permit appeals. *See* EAB Revised Order Government Petitions for Review of Clean Air Act New Source Review Permits filed March 27, 2013.

timely and concurrent guidance and rules about how to comply with new or revised air quality standards, will establish greater clarity and certainty for businesses and investors."

What the Act Will Do

H.R. 4795 would provide for the following:

Permitting Dashboard: To provide more transparency regarding the preconstruction permit process, the bill directs the EPA Administrator to publish on the agency's website estimates of the following information: 1) the total number of major NSR permits issued annually; 2) the percentage of such permits issued within one year after the date of filing of a completed permit application; and 3) the average length of time for the EPA's EAB to issue final decisions on petitions appealing permit decisions. In preparing the report, EPA is not required to seek additional information from States and local agencies beyond the information already being voluntarily provided to the agency's central permitting database.

Timely Rules and Guidance: To ensure timely guidance regarding permitting requirements, the bill requires that if the EPA Administrator establishes or revises a national ambient air quality standard, the agency publish implementing regulations and guidance at the same time, including information regarding the submittal and consideration of preconstruction permit applications. In terms of the information included in the regulations and guidance, the Administrator has flexibility to include such information as the Administrator determines to be necessary and appropriate to assist States, permitting authorities and permitting applicants.

Report to Congress: To promote timely review of permit applications, the bill directs the EPA Administrator to report annually on actions undertaken by the agency to expedite the permitting process. In preparing the report, EPA is not required to seek additional information from States and local agencies beyond the information already being voluntarily provided to the agency's central permitting database.

Additional considerations

At the legislative hearing, and in technical assistance comments provided by the EPA on May 27, 2014,[16] concerns were raised that section 3(b) of the bill, which requires that EPA issue concurrent implementing regulations and guidance for new or revised air quality standards, could create a "loophole" or "amnesty" for new facilities by exempting them from the obligation to install stringent control technologies. The intent of section 3(b) is to ensure that EPA will be accountable when it issues new air quality standards, and that regulated entities will have the guidance they need to comply with the new standards when the new standards become effective, and will not be subject to permit delays.

The Committee notes that under the bill, the only circumstance under the bill in which a new or revised air quality standard would not apply to a pending permit application is if EPA failed to issue timely guidance relating to the permitting process. Under H.R. 4795, even if EPA fails to provide such guidance, the bill expressly

[16] *See* EPA Technical Assistance available at *http://docs.house.gov/meetings/IF/IF03/20140528/102284/HMKP-113-IF03-20140528-SD003.pdf*.

provides that nothing in the bill changes the obligation of new facilities to install "best available control technology" in attainment areas, and the "lowest achievable emissions rate" technology in nonattainment areas. As a practical matter, it is notable that EPA itself "grandfathers" in certain preconstruction permit applications, as it did when the agency issued its most recent revisions to its particulate matter standards in 2012, to avoid delaying or derailing projects.

At the legislative hearing, and in a June 5, 2014 letter from the California Air Resources Board, concerns also were raised that section 3(b) of the bill would prohibit States or local permitting authorities from applying a new or revised NAAQS if EPA failed to issue concurrent implementing regulations and guidance. As noted above, the intent of section 3(b) is to ensure that EPA is accountable when issuing new federal air quality standards and provides timely guidance to permit applicants and permitting authorities. Under the NSR program, nothing precludes States or local permitting authorities from imposing more stringent requirements pursuant to State or local law than the federal standards established by EPA.[17] Accordingly, if a State or local permitting authority wanted to apply a new or revised NAAQS even in the absence of EPA implementing regulations and guidance, H.R. 4795 would not prevent such an approach.

Supporters of the legislation

Supporters include the American Chemistry Council, National Association of Manufacturers, Small Business & Entrepreneurship Council, U.S. Chamber of Commerce, and the Industrial Energy Consumers of America.

HEARINGS

The Subcommittee held a hearing on the discussion draft of H.R. 4795 on May 21, 2014. The Subcommittee received testimony from:

- Ms. Lorraine Krupa Gershman, Director, Regulatory & Technical Affairs, American Chemistry Counsel;
- Mr. Ross Eisenberg, Vice President, Energy and Resources Policy, National Association of Manufacturers;
- Mr. Ken Weiss, Global Managing Partner, Air and Climate Change, Environmental Resources Management (ERM);
- Ms. Karen Kerrigan, President and Chief Executive Officer, Small Business & Entrepreneurship Council;
- Mr. John Walke, Senior Attorney and Director, Climate and Clean Air Program, Natural Resources Defense Council; and,
- Mr. Colin O'Mara, Secretary, Delaware Department of Natural Resources and Environmental Control.

COMMITTEE CONSIDERATION

On May 28, 2014 and May 29, 2014, the Subcommittee on Energy and Power met in open markup session and forwarded the bill to the full Committee by a roll call vote of 14 ayes and 8 nays. Dur-

[17] *See* "Where You Live" ("States may develop unique NSR requirements and procedures tailored for their air quality needs of each area as long as the program is at least as stringent as EPA's requirements.") available at *http://www.epa.gov/nsr/where.html*.

ing the markup, two amendments were offered and passed by voice vote, two amendments were offered and rejected by voice vote, and one amendment was offered and rejected by a roll call vote.

On June 9, 2014 and June 10, 2014, the Committee on Energy and Commerce met in open markup session. During the markup, three amendments were offered, of which one was withdrawn and two were rejected by roll call votes. A motion by Mr. Upton to order H.R. 4795, reported to the House, as amended, was agreed to by a record vote of 30 ayes and 19 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. A motion by Mr. Upton to order H.R. 4795 reported to the House, without amendment, was agreed to by a roll call vote of 30 ayes and 19 nays. The following reflects the roll call votes taken during the Committee consideration:

COMMITTEE ON ENERGY AND COMMERCE -- 113TH CONGRESS
ROLL CALL VOTE # 43

BILL: H.R. 4795, the "Promoting New Manufacturing Act"

AMENDMENT: An amendment offered by Mr. Waxman, No. 1, strikes provisions ensuring that when the Environmental Protection Agency issues revised national ambient air quality standards that it shall concurrently publish regulations and guidance for implementing the standard.

DISPOSITION: **NOT AGREED TO**, by a roll call vote of 18 yeas and 27 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Waxman	X		
Mr. Hall				Mr. Dingell	X		
Mr. Barton				Mr. Pallone	X		
Mr. Whitfield		X		Mr. Rush			
Mr. Shimkus		X		Ms. Eshoo	X		
Mr. Pitts		X		Mr. Engel			
Mr. Walden				Mr. Green	X		
Mr. Terry		X		Ms. DeGette	X		
Mr. Rogers		X		Mrs. Capps	X		
Mr. Murphy		X		Mr. Doyle	X		
Mr. Burgess		X		Ms. Schakowsky	X		
Mrs. Blackburn		X		Mr. Matheson		X	
Mr. Gingrey		X		Mr. Butterfield	X		
Mr. Scalise		X		Mr. Barrow		X	
Mr. Latta		X		Ms. Matsui			
Mrs. McMorris Rodgers				Ms. Christensen	X		
Mr. Harper		X		Ms. Castor	X		
Mr. Lance		X		Mr. Sarbanes			
Mr. Cassidy		X		Mr. McNerney	X		
Mr. Guthrie		X		Mr. Braley	X		
Mr. Olson		X		Mr. Welch	X		
Mr. McKinley		X		Mr. Lujan	X		
Mr. Gardner		X		Mr. Tonko	X		
Mr. Pompeo				Mr. Yarmuth	X		
Mr. Kinzinger		X					
Mr. Griffith		X					
Mr. Bilirakis		X					
Mr. Johnson		X					
Mr. Long		X					
Mrs. Ellmers		X					

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COMMITTEE ON ENERGY AND COMMERCE -- 113TH CONGRESS
ROLL CALL VOTE # 44

BILL: H.R. 4795, the "Promoting New Manufacturing Act"

AMENDMENT: An amendment offered by Mr. McNerney, No. 3, to provide that a Federal, state, local or tribal permitting authority may nullify the limitation on applicability of a new or revised national ambient air quality standard to the permitting process where the Administrator fails to publish regulations and guidance relating to the submission and consideration of a preconstruction permit application concurrently with issuance of such a new or revised standard.

DISPOSITION: NOT AGREED TO, by a roll call vote of 19 yeas and 29 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Waxman	X		
Mr. Hall				Mr. Dingell	X		
Mr. Barton		X		Mr. Pallone	X		
Mr. Whitfield		X		Mr. Rush			
Mr. Shimkus				Ms. Eshoo	X		
Mr. Pitts		X		Mr. Engel	X		
Mr. Walden		X		Mr. Green	X		
Mr. Terry		X		Ms. DeGette	X		
Mr. Rogers		X		Mrs. Capps	X		
Mr. Murphy		X		Mr. Doyle	X		
Mr. Burgess		X		Ms. Schakowsky	X		
Mrs. Blackburn		X		Mr. Matheson		X	
Mr. Gingrey		X		Mr. Butterfield	X		
Mr. Scalise		X		Mr. Barrow		X	
Mr. Latta		X		Ms. Matsui			
Mrs. McMorris Rodgers				Ms. Christensen	X		
Mr. Harper		X		Ms. Castor	X		
Mr. Lance		X		Mr. Sarbanes			
Mr. Cassidy		X		Mr. McNerney	X		
Mr. Guthrie		X		Mr. Braley	X		
Mr. Olson		X		Mr. Welch	X		
Mr. McKinley		X		Mr. Lujan	X		
Mr. Gardner		X		Mr. Tonko	X		
Mr. Pompeo		X		Mr. Yarmuth	X		
Mr. Kinzinger		X					
Mr. Griffith		X					
Mr. Bilirakis		X					
Mr. Johnson		X					
Mr. Long		X					
Mrs. Ellmers		X					

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COMMITTEE ON ENERGY AND COMMERCE -- 113TH CONGRESS
ROLL CALL VOTE # 45

BILL: H.R. 4795, the "Promoting New Manufacturing Act"

AMENDMENT: A motion by Mr. Upton to order H.R. 4795 favorably reported to the House. (Final Passage)

DISPOSITION: AGREED TO, by a roll call vote of 30 yeas and 19 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Waxman		X	
Mr. Hall				Mr. Dingell		X	
Mr. Barton	X			Mr. Pallone		X	
Mr. Whitfield	X			Mr. Rush			
Mr. Shimkus	X			Ms. Eshoo		X	
Mr. Pitts	X			Mr. Engel		X	
Mr. Walden	X			Mr. Green		X	
Mr. Terry	X			Ms. DeGette		X	
Mr. Rogers	X			Mrs. Capps		X	
Mr. Murphy	X			Mr. Doyle		X	
Mr. Burgess	X			Ms. Schakowsky		X	
Mrs. Blackburn	X			Mr. Matheson	X		
Mr. Gingrey	X			Mr. Butterfield		X	
Mr. Scalise	X			Mr. Barrow	X		
Mr. Latta	X			Ms. Matsui			
Mrs. McMorris Rodgers				Ms. Christensen		X	
Mr. Harper	X			Ms. Castor		X	
Mr. Lance	X			Mr. Sarbanes			
Mr. Cassidy	X			Mr. McNerney		X	
Mr. Guthrie	X			Mr. Braley		X	
Mr. Olson	X			Mr. Welch		X	
Mr. McKinley	X			Mr. Lujan		X	
Mr. Gardner	X			Mr. Tonko		X	
Mr. Pompeo	X			Mr. Yarmuth		X	
Mr. Kinzinger	X						
Mr. Griffith	X						
Mr. Bilirakis	X						
Mr. Johnson	X						
Mr. Long	X						
Mrs. Ellmers	X						

06/10/2014

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. 4795 provides direction to EPA to improve the transparency and timeliness of the preconstruction permit process under the Clean Air Act.

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. 4795 would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

EARMARK, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives, the Committee finds that H.R. 4795 contains no earmarks, limited tax benefits, or limited tariff benefits.

COMMITTEE COST ESTIMATE

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

CONGRESSIONAL BUDGET OFFICE ESTIMATE

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

JUNE 20, 2014.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4795, the Promoting New Manufacturing Act.

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

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 4795—Promoting New Manufacturing Act

Summary: H.R. 4795 would impose various administrative requirements on the Environmental Protection Agency (EPA) aimed at increasing the transparency of its decisions and reducing delays associated with the permitting process under the Clean Air Act's New Source Review (NSR) preconstruction program. Under that

program, stationary sources of air pollution are required to obtain permits prior to building any new facilities or making any modifications to existing facilities. Usually, NSR permits are issued by state or local air pollution control agencies.

Enacting this legislation would require EPA to perform the following activities:

- Present on the agency's website the number of preconstruction permits issued annually, the percentage of such permits issued within one year after filing an application, and the average length of time for EPA's Environmental Appeals Board to resolve administrative appeals;
- Publish regulations and guidance to assist states, permitting authorities, and permitting applicants whenever final or revised national ambient air quality standards are implemented; and
- Submit an annual report to the Congress identifying actions being taken by the agency to expedite the permitting process and the specific reasons for any delays in issuing permits.

CBO estimates that implementing this legislation would cost about $2 million over the 2015–2019 period, subject to the availability of appropriated funds. Enacting H.R. 4795 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 4795 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: CBO estimates that implementing H.R. 4795 would cost $2 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. 4795 will be enacted by the end of 2014 and that the necessary amounts to implement the legislation will be appropriated.

Based on information from EPA, CBO estimates that implementing H.R. 4795 would have a small annual cost. Under the legislation, EPA would provide permitting data on the agency's website and prepare an annual report for the Congress using information that is already collected. In addition, EPA usually publishes implementing guidance associated with final regulations. However, implementing this legislation would ensure that such guidance is published concurrently rather than after final regulations have been published. On balance, CBO estimates that over the 2015–2019 period, implementing this bill would cost about $2 million.

Pay-As-You-Go considerations: None.

Intergovernmental and private-sector impact: H.R. 4795 contains no intergovernmental or private-sector mandates as defined in UMRA.

Estimate prepared by: Federal costs: Susanne S. Mehlman; Impact on state, local, and tribal governments: Jon Sperl; Impact on the private sector: Matthew Denneny.

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.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 4795 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting H.R. 4795 specifically directs to be completed no rulemakings within the meaning of 5 U.S.C. 551 that would not otherwise be issued by the agency.

ADVISORY COMMITTEE STATEMENT

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

APPLICABILITY TO LEGISLATIVE BRANCH

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

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This section provides the short title of "Promoting New Manufacturing Act."

Section 2. Building and manufacturing projects dashboard

This section directs the Administrator of the Environmental Protection Agency (EPA) to publish in a readily accessible location on the agency's website estimates of: (1) the number of preconstruction permits issued annually under the Clean Air Act's (CAA) New Source Review (NSR) program for major sources, including "Prevention of Significant Deterioration" and "Nonattainment NSR" permits; (2) the percentage of such permits issued within one year after the date of filing of a completed application; and (3) the average length of time for the EPA's Environmental Appeals Board to resolve administrative appeals. Nothing in this section compels the EPA to seek additional information from States and permitting agencies beyond information voluntarily provided by State and local air agencies for EPA's RACT/BACT/LAER Clearinghouse database.

Section 3. Timely issuance of regulations and guidance to address new or revised National Ambient Air Quality Standards in preconstruction permitting:

This section directs that in publishing any final new or revised national ambient air quality standard (NAAQS), the EPA Administrator shall publish concurrently implementing regulations and guidance, as necessary and appropriate to assist States, permitting authorities, and permitting applicants. This section also provides that if the Administrator fails to publish concurrently final regulations and guidance addressing the submittal and consideration of permit applications under a new or revised NAAQS, the new or revised NAAQS shall not apply to preconstruction applications until such final regulations and guidance have been published. Nothing in the section shall be construed to eliminate the obligation of a preconstruction permit applicant to install best available control technology and lowest achievable emissions rate technology, as applicable.

Section 4. Report to Congress on actions to expedite review of preconstruction permits:

This section requires that EPA annually submit a report to Congress on actions being taken by the agency to expedite the process for issuing preconstruction permits. Nothing in this section compels the EPA to seek information beyond information voluntarily provided by States and local air agencies in EPA's RACT/BACT/LAER Clearinghouse database.

Section 5. Definitions:

This section contains the following definitions:

(1) "Administrator" means the EPA Administrator.

(2) "Best available control technology" has the meaning given that term in CAA section 169(3).

(3) "Lowest achievable emissions rate" has the meaning given that term in CAA section 171(3).

(4) "Major Emitting Facility" and "Major Stationary Source" has the meaning given to those terms in CAA section 302(j).

(5) "National Ambient Air Quality Standard" means a national ambient air quality standard for an air pollutant under CAA section 109 that is finalized after the date of enactment of the Act.

(6) "Preconstruction permit" means a permit that is required under part C or D of title I of the CAA for the construction or modification of a major emitting facility or stationary source, and includes any such permit issued by the EPA or a State, local or tribal permitting authority.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation does not amend any existing Federal statute.

DISSENTING VIEWS

I. SUMMARY

H.R. 4795, the "Promoting New Manufacturing Act," does nothing to promote new manufacturing or to improve the permitting process for new and expanding manufacturing facilities. Instead, the bill weakens air quality protections, allows more pollution, and threatens public health.

The Clean Air Act requires major new or expanding sources of air pollution to obtain permits with pollution limits before the facilities start construction. These preconstruction permits ensure that a new or expanded facility will not increase local air pollution to levels that violate national ambient air quality standards (NAAQS), which the Environmental Protection Agency (EPA) sets for six principal air pollutants. When EPA updates each air quality standard to reflect the latest science, permit applicants have to meet the new, more protective standard and show their emissions will not harm public health.

H.R. 4795 creates a loophole in this process. The bill establishes imprecise procedural requirements for EPA to follow after setting a new air quality standard. If EPA does not meet those requirements, then a new or expanding facility can apply for a preconstruction permit based on the old air quality standard, which is not adequate to protect public health. In effect, this bill could give new sources of pollution "amnesty" from new science-based air quality standards.

This amnesty provision will allow more pollution to enter the air, harming public health. It also does not make economic sense. Allowing new facilities to pollute more than their fair share means that existing industrial facilities may have to do more to reduce their emissions if the area is near or in nonattainment (exceeding the NAAQS or contributing to a nearby area's violation of the NAAQS). It also raises the economy-wide cost of cleaning up pollution. As the Clean Air Act has long recognized, it is generally far more efficient and cost-effective to build pollution controls into a facility up front, rather than adding them later.

By setting vague procedural requirements for EPA to follow and applying an outdated standard if EPA fails to meet those requirements, the bill creates more regulatory uncertainty and sets up new avenues for litigation. This will only serve to delay preconstruction permitting for manufacturing facilities, not expedite it, and it will harm public health in the process.

II. BACKGROUND

A. National Ambient Air Quality Standard-Setting process

The Clean Air Act requires EPA to set NAAQS 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.

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 a NAAQS for a pollutant, the states have primary responsibility for achieving pollution reductions to meet the standard.[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 a NAAQS but can take an additional year if more information is needed.[6]

Within three years of EPA issuing a 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 (FIP), unless the state corrects any deficiencies in its SIP as needed to address EPA's concerns.[8]

EPA has issued and periodically updated general regulations establishing requirements for state implementation of the NAAQS.[9] As part of the implementation process, EPA may issue additional regulations or guidance to help states and regulated entities implement a specific NAAQS, but EPA is not required by statute to issue any regulations or guidance on implementation.

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 breathe. The preconstruction permitting provisions achieve this by: (1) requiring new and modified sources to use control technology to reduce their emissions; and (2) to assess, and if necessary address, 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 fa-

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[1] Clean Air Act § 109(b)(1).
[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] *Id.* at § 107(d)(1)(B).
[7] *Id.* at § 110(a).
[8] *Id.* at §§ 110(k), 110(c).
[9] 40 C.F.R. § 51.

cility owner or operator must obtain a preconstruction permit under the 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." [10] 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.[11] 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.[12]

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.[13] 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.

III. SECTION-BY-SECTION ANALYSIS AND CONCERNS RAISED BY THE BILL

A. Section 2

Section 2 of the bill requires EPA to create an online database of information about preconstruction permitting since fiscal year 2008. This database 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 peti-

[10] Clean Air Act §§ 165(a)(3) and (a)(4).
[11] *Id.* at § 165(e).
[12] *Id.* at § 165(c).
[13] *Id.* at § 173.

tions 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.

The bill, as amended during the subcommittee markup, provides that EPA can rely on information that it already has in its possession and does not have to collect any additional information from state and local permitting authorities in order to meet the requirements of section 2.

EPA currently maintains an online database—the RACT/BACT/LAER clearinghouse—to share information about air pollution control technologies used in permitting decisions.[14] State and local permitting agencies report permit information to EPA on a voluntary basis. EPA estimates that the database reflects only about half of the permits issued.

If EPA relies on this clearinghouse to calculate statistics about permitting times for the new database, the statistics would be misleading at best, since they would be based on a partial and non-representative sample of permits. In fact, the statistics are likely to over-estimate permitting times, since state and local permitting authorities may be more likely to report unique or particularly challenging permits to the RACT/BACT/LAER clearinghouse and omit more straightforward permits. To obtain a more comprehensive picture of permitting times, EPA would have to collect information from state and local permitting agencies, which would strain the resources of the same officials tasked with processing the preconstruction permits.

As a result, it is unclear whether the bill's new permitting database serves any useful purpose.

B. Section 3

Subsection 3(a) effectively requires EPA to issue regulations and guidance for implementing a new or revised NAAQS "concurrently" with issuing the new or revised air quality standard. If EPA fails to do so, subsection 3(b) defers application of the new air quality standard to a new preconstruction permit "until the Agency has published such final regulations and guidance." 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 the language in section 3 would help his agency process preconstruction permits any faster. Secretary O'Mara answered "no."[15]

EPA issuance of "concurrent" rules and guidance

Subsection 3(a) of the bill directs EPA to issue regulations and guidance concurrently "as the Administrator determines necessary and appropriate to assist states, permitting authorities, and permit applicants." This qualifying language appears to give EPA some discretion to determine when such rules and guidance are appropriate. But subsection 3(b) of the bill takes away that discretion.

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[14] U.S. Environmental Protection Agency, *RACT/BACT/LAER Clearinghouse (RBLC) (online at http://cfpub.epa.gov/rblc/)*.

[15] 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").

Subsection 3(b) states that if EPA fails to publish final regulations and guidance concurrently with a new air quality standard, then new facilities can receive preconstruction permits under the old air quality standard rather than the new one. As a result, EPA will have no real choice about when and if to issue rules and guidance, if the agency aims to ensure all permit applicants comply with the new air quality standard.

As a practical matter, it is not always feasible or advisable for EPA to issue concurrent implementation regulations and guidance when revising a NAAQS. Most guidance develops organically as states and regulated entities begin to implement the NAAQS and ask EPA questions. Moreover, in some cases, the existing implementation regulations are sufficient for the revised NAAQS, and no new guidance is even needed.[16]

In its technical assistance to the Committee, EPA raised these concerns. EPA explained that implementing regulations are sometimes but not always necessary, as the general implementation rules apply to new NAAQS, even without revision. EPA also explained 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 expressed 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.

Moreover, state and local permitting agencies do not need concurrent EPA rules and guidance to begin processing preconstruction permits under a new air quality standard. At the subcommittee hearing, 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 California Air Resources Board (CARB) wrote a letter to the Committee sharing similar concerns. CARB wrote: "For decades, permitting authorities have successfully implemented their programs in response to every new standard U.S. EPA has promulgated. In fact, permitting agencies have historically been the advisors to U.S. EPA on the guidance it ultimately releases."[18]

Impact on air quality

Section 3 also allows certain facilities to emit more air pollution and harm public health.

If EPA fails issue concurrent rules and guidance as required by section 3, an applicant for a preconstruction permit need not com-

[16] *See, e.g.,* the recent revision of the lead NAAQS.
[17] O'Mara testimony.
[18] Letter from Mary D. Nichols, Chairman, California Air Resources Board, to the Honorable Fred Upton and the Honorable Ed Whitfield, Committee on Energy and Commerce (June 5, 2014) (hereinafter "CARB letter").

ply with a new NAAQS until EPA has published final regulations and guidance. During the Subcommittee hearing on the bill, John Walke, Senior Attorney and Director of the Climate and Clean Air Program at the Natural Resources Defense Council, referred to this as "amnesty" from national air quality standards.[19]

The Subcommittee on Energy and Power amended the bill to add a statement that section 3 does not eliminate the obligation of a preconstruction permit applicant to install best available control technology and lowest achievable emissions rate technology, as applicable. However, this new language, contained in section 3(c)(2), does not change the legal effect of the bill or have any impact on the amnesty it provides. A facility still could obtain a preconstruction permit based on an old air quality standard.

When a company applies for a preconstruction permit to build a new facility or modify an existing one, there are two steps. In step one, the company must determine which pollution controls it will install to reduce the facility's emissions. The bill does not appear to affect this obligation to identify effective pollution controls, and section 3(c)(2) reiterates that the obligation remains.

In step two, the applicant must estimate how much pollution the new source will emit, after installing pollution controls, and show that it will not cause a violation of the air quality standard. In other words, the applicant must model air pollution in the area and show that adding pollution won't make the air unsafe to breathe. If the new facility's emissions will cause a violation of the air quality standard, the applicant must take additional steps to cut its emissions or obtain offsets for the excess pollution.

The bill interferes with this second step of the process, the point at which the facility has to prove that its pollution will not harm public health. If EPA does not issue rules and guidance at the same time it issues a new air quality standard, the old air quality standard applies for purposes of a preconstruction permit. This means that when the facility is demonstrating whether its emissions will violate the air quality standard, it is using the old, insufficiently protective standard as a benchmark.

In practical terms, this will allow some facilities to emit extra pollution at levels that could harm public health. 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.

This would worsen air quality, particularly in communities downwind of the facility, and harm public health. Secretary O'Mara from the state of Delaware testified that the legislation 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 to allow harmful emissions in exceedance of a new

[19] 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").

NAAQS."[20] CARB wrote that the bill bars permitting agencies from applying a new air quality standard to preconstruction permits, "even if public health concerns would otherwise warrant doing so."[21]

Impact on the cost of and responsibility for cutting air pollution

Section 3 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 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 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]

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[20] O'Mara testimony.
[21] CARB letter.
[22] O'Mara testimony.
[23] Walke testimony.
[24] O'Mara testimony.

Impact on regulatory certainty, litigation risks, and permitting timing

The language in section 3 creates regulatory uncertainty, increases the risk of litigation, and could slow permitting rather than expedite it.

Subsection 3(a) of the bill directs EPA to issue regulations and guidance "concurrently" with any new or updated NAAQS. As noted above, however, it is not always feasible or advisable for EPA to issue concurrent implementation regulations or guidance when revising a NAAQS. This creates a catch-22 for EPA. On the one hand, EPA could hurry to issue implementation guidance before hearing questions from states and industry. That guidance will necessarily be incomplete, as it will not address issues that only emerge during the implementation process. An industry group that wanted to delay implementation of the new air quality standard could file a lawsuit saying that EPA's guidance was not sufficient.

On the other hand, EPA could wait to issue more robust and helpful guidance, but in the meantime, facilities would be able to obtain preconstruction permits under the old air quality standard. Downwind communities and nearby businesses might challenge a permit that allows a new facility to pollute more and shifts the burden of pollution reduction on to them.

Overall, section 3 leaves open to interpretation—and litigation—which rules and guidance EPA must release "concurrently" to prevent a delay in applying the new or revised NAAQS, what constitutes "final" regulation and guidance, and which rules and guidance EPA can wait to release at a later time. This uncertainty creates new opportunities for more lawsuits and delay.

CARB argues that this bill could actually slow the permitting process by forcing states to wait for EPA guidance, even if the state does not think that guidance is necessary to issue permits. CARB wrote:

> States such as California, with several regions having severe air quality issues, need the flexibility to develop and implement programs that are protective of public health and welfare while accounting for local air quality, population exposure, the economy, and other factors. Waiting for U.S. EPA to develop guidance will result in unnecessary delays and public health risks because permitting agencies appear to be barred from issuing permits consistent with new, more health-protective air quality standards until U.S. EPA provides guidance.[25]

Amendments Defeated During Markup

At the full Committee markup, Democratic members offered two amendments that aimed to fully or partially address the concerns raised by section 3. Rep. Waxman offered an amendment to strike subsection 3(b), which allows a facility to obtain a preconstruction permit under an old air quality standard if EPA does not meet certain procedural requirements. The Waxman amendment was defeated by a roll call vote of 18–27. Rep. McNerney offered an

[25] CARB letter.

amendment to give a federal, state, or local permitting authority the choice to opt out of implementing subsection 3(b), if that permitting authority determines that the 3(b) loophole would increase air pollution, slow the permitting process, increase regulatory uncertainty, create new litigation, shift the burden of pollution control to existing facilities, or increase the overall cost of achieving air quality standards. The McNerney amendment was defeated by a roll call vote of 19–27.

C. Section 4

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.

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 could require EPA to involve itself more deeply in state and local permitting decisions. These requirements would also slow the permit process by diverting limited EPA resources from processing permits, issuing guidance, and providing support to state and local permit authorities.

Section 5 specifies that EPA is not required to collect any additional information from state and local permitting authorities to complete this report, but it is unclear how EPA could complete the report without doing so.

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

HENRY A. WAXMAN,
Ranking Member.

BOBBY L. RUSH,
Ranking Member,
Subcommittee on Energy and Power.

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