

Dissenting Views on H.R. 4471, Gasoline Regulations Act of 2012

I. PURPOSE OF THE LEGISLATION

The bill would create a new government bureaucracy to compile an impossible analysis of EPA rules that have not been proposed using data that does not exist. In the meantime, under the guise of lowering gasoline prices, the bill would block EPA from finalizing several important air quality rules. The bill also would gut EPA's proven scientific process for setting national ambient air quality standards for ozone pollution.

The bill would do nothing to protect consumers from gasoline price spikes. At the legislative hearing on the discussion draft of H.R. 4471, Gina McCarthy, Assistant Administrator for EPA's Office of Air and Radiation, testified that the bill "does not address the reasons for the recent increase in the price of gasoline, while rolling back core aspects of the Clean Air Act – which was passed on a bipartisan basis and signed by a Republican President."¹ During the markup of H.R. 4471 in the Subcommittee on Energy and Power, Chairman Whitfield himself stated, "there is nothing in our legislation, nor have we ever indicated there is anything in this legislation, that would, in and of itself, reduce gasoline prices."²

II. H.R. 4471 GUTS A KEY PROVISION OF THE CLEAN AIR ACT

The Clean Air Act requires EPA to set national ambient air quality standards (NAAQS) for pollutants that endanger public health or welfare.³ In essence, the NAAQS identify the levels of pollution that may remain in the air without making it harmful to breathe. Based upon the best medical and scientific evidence, EPA sets permissible levels of pollution that are requisite to protect public health with an adequate margin of safety.⁴ The Clean Air Act requires EPA to review and, as appropriate, update each NAAQS at minimum every five years.⁵

In 2001, the U.S. Supreme Court unanimously affirmed that the Clean Air Act requires EPA to set NAAQS based on the scientific and technical information about health effects, and without considering the economic costs of implementing the standards.⁶

¹ Committee on Energy and Commerce, Testimony of Gina McCarthy, Assistant Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency, *The American Energy Initiative: A Focus on Legislative Responses to Rising Gasoline Prices*, 112th Cong. (Mar. 28, 2012) (hereinafter "McCarthy testimony").

² Committee on Energy and Commerce, Subcommittee on Energy and Power, Statement of Chairman Ed Whitfield, *Markup of H.R. ____, The Gasoline Regulations Act of 2012, and H.R. ____, The Strategic Energy Production Act of 2012*, 112th Cong. (Apr. 17, 2012).

³ Clean Air Act §108.

⁴ Clean Air Act §109(b)(1).

⁵ *Id.* at (d)(1).

⁶ *Whitman v. American Trucking Associations*, 531 U.S. 457, 121 S. Ct. 903 (2001).

Section 6 of H.R. 4471 would override 40 years of clean air policy and principles, as well as the unanimous ruling of the Supreme Court, by requiring EPA to consider “feasibility and cost” when “revising or supplementing” the health-based ambient air quality standard for ozone. EPA Assistant Administrator Gina McCarthy testified that this provision would “fundamentally change the cornerstone of the Clean Air Act – the requirement that EPA set air quality standards for smog at the level that is necessary to protect public health based on a vigorous review of the science and without consideration of costs.”⁷

During full Committee consideration of H.R. 4471, Subcommittee Chairman Ed Whitfield argued in favor of section 6 of the bill by saying “the only reason costs are not being considered there today is because the Supreme Court said the language [in the Clean Air Act] was ambiguous.”⁸ This is not the case. In writing for a unanimous court, Justice Antonin Scalia stated: “The text of §109(b), interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA.”⁹

Notably, the Clean Air Act already emphasizes cost considerations to ensure only the most cost-effective air pollution controls are adopted to achieve the air quality standards. After EPA sets a NAAQS for a pollutant, the agency and states work together to identify nonattainment areas that exceed that health-based standard, based on monitored pollution levels. State and local governments then have up to three years to determine how to best reduce pollution in those areas and produce state implementation plans that outline the measures they will implement to attain the standard.¹⁰ During this stage, EPA and states identify the primary pollution sources and opportunities to control that pollution. The cost of controlling the pollution is considered before any controls are required, as state and local governments examine the cost-effectiveness of controls for various pollution sources and the feasibility of requiring such controls when developing strategies for achieving attainment with the NAAQS.

During consideration of H.R. 4471 by the full Committee, Rep. Gene Green introduced an amendment to strip section 6 of the bill. Rep. Green stated that “[f]undamentally changing the Clean Air Act is not going to bring down gas prices and we are setting a dangerous precedent in the Committee by saying that unhealthy levels of pollution become healthy when costs of cleaning up are too high.”¹¹ This amendment was defeated 18-28.

⁷ McCarthy testimony.

⁸ Committee on Energy and Commerce, Statement of Chairman Ed Whitfield, *Markup of H.R. 4471, The Gasoline Regulations Act of 2012, and H.R. 4480, The Strategic Energy Production Act of 2012*, 112th Cong. (May 17, 2012).

⁹ *Whitman v. American Trucking Associations*, 531 U.S. 457, 121 S. Ct. 903 (2001).

¹⁰ *Id.* at §110(a).

¹¹ Committee on Energy and Commerce, Statement of Rep. Gene Green, *Markup of H.R. 4471, The Gasoline Regulations Act of 2012, and H.R. 4480, The Strategic Energy Production Act of 2012*, 112th Cong. (May 17, 2012).

III. H.R. 4471 BLOCKS EPA AIR QUALITY RULES

The bill blocks EPA from finalizing several rules until after a new interagency committee submits a final report on the cumulative impacts of numerous EPA programs. The future rules blocked by this bill would reduce tailpipe pollution from motor vehicles and toxic air pollution from oil refineries; provide states guidance needed to implement the 2008 ambient air quality standards for ozone; and update the 2008 ozone standard based on developments in the peer-reviewed health research over the past five years.

Section 4 of the bill gives the new committee seven months to draft this complicated analysis, solicit public comment, and finalize the report; section 5 prevents EPA from finalizing these rules for at least six months after the report is complete. This means that these rules will be blocked for at least 13 months. As a practical matter, however, it is substantially more difficult for EPA to issue rules that do not have statutory deadlines. Thus, the elimination of any statutory deadlines for several of these rules could indefinitely delay the rules.

Specifically, section 5 of the bill would block the following rules:

A. Tier 3 Motor Vehicle Emission and Fuel Standards

EPA is working to develop a “Tier 3” program for motor vehicle tailpipe emissions and fuels but has not yet proposed new regulations. In a letter to Subcommittee Chairman Ed Whitfield, EPA stated that the agency is developing the Tier 3 standards to improve air quality and help states and localities meet the “health-based air quality standards in a cost-effective and timely way.”¹² The program also will help automakers by enabling a harmonized national vehicle emissions control program and facilitating the development of lower cost technologies to improve fuel economy.¹³

EPA told Subcommittee Chairman Whitfield that the “the only fuel requirement we are considering for Tier 3 is one that would lower the amount of sulfur in gasoline.”¹⁴ EPA estimates that such a requirement will cost approximately one penny per gallon in 2017, based on modeling conducted by MathPro, an energy economics firm.¹⁵ According to the National Association of Clean Air Agencies, a Tier 3 program with low-sulfur gasoline would be a highly cost-effective measure for meeting the ambient air quality standards, and absent this program, states and localities would be forced “to turn to other, more expensive, less cost-effective measures” to meet air quality standards.¹⁶

¹² Letter from Gina McCarthy, Assistant Administrator, U.S. Environmental Protection Agency, to Rep. Ed Whitfield, Chairman, Subcommittee on Energy and Power, Committee on Energy and Commerce (Feb. 27, 2012).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ National Association of Clean Air Agencies, *Cleaner Cars, Cleaner Fuel, Cleaner Air: The Need for and Benefits of Tier 3 Vehicle and Fuel Regulations*, 15 (Oct. 31, 2011).

B. Air Emission Standards for Oil Refineries

Section 5 of the bill would block EPA from issuing rules to reduce toxic air pollution from refineries, which can cause cancer, birth defects, and other serious health problems, as well as rules to reduce carbon pollution from new refineries, which contributes to climate change.

Section 112 of the Clean Air Act requires EPA to set specific emission limits for toxic air pollutants from categories of industrial sources (e.g., refineries) based on the emission levels already being achieved by similar facilities. These regulations are known as Maximum Achievable Control Technology – or MACT – standards. Within eight years of setting a MACT standard for a source category, EPA must conduct a risk assessment and determine if any changes are needed to reduce the residual risks to human health.¹⁷ Because control technologies improve over time, the Clean Air Act also requires EPA to review the MACT standards every eight years and revise them as appropriate to reflect developments in practices, processes, and control technologies.¹⁸ Section 5 of the bill would block EPA from finalizing the residual risk and technology review of existing standards for refineries and would indefinitely delay the final rules by eliminating all statutory deadlines for their issuance.

In addition, section 111 of the Clean Air Act requires EPA to establish new source performance standards (NSPS) for new facilities (and modified facilities that significantly increase emissions) reflecting the application of the best system of emissions reductions using demonstrated control technology. Section 5 of the bill would block EPA from setting NSPS for greenhouse gas emissions from oil refineries and indefinitely delay the rules by eliminating all statutory deadlines for their issuance.

C. National Ambient Air Quality Standard for Ozone

Section 5 would prevent EPA from finalizing “any rule revising or supplementing the national ambient air quality standards for ozone.” This would block EPA from updating the 2008 ozone standard to reflect the best available science. The provision eliminates the current statutory deadline for updating the ozone standard, allowing at least an additional five-year delay in updating the standard (i.e., it appears that EPA would have no operative statutory deadline for updating the ozone standard prior to 2018, at minimum). In addition, because the bill blocks any rules that “supplement” the standard and does not define “supplement,” this provision could have the effect of blocking the rules necessary to implement even the 2008 ozone standard. As a result, this would leave only the 1997 ozone standard in effect, which the Clean Air Science Advisory Board and two EPA Administrators have found to be insufficient to protect public health.

During consideration of H.R. 4471 by the full Committee, Ranking Member Henry Waxman introduced an amendment that would allow EPA to finalize the rules blocked by section 5 of the bill if the rules would control pollution linked to asthma attacks, heart attacks,

¹⁷ Clean Air Act §112(f)(2).

¹⁸ *Id.* at (d)(6).

cancer, birth defects, neurological damage, premature death, and other serious harm to human health. This amendment was defeated 9-29. Rep. Bobby Rush introduced an amendment requiring the Energy Information Administration (EIA) to determine whether implementation of the Gasoline Regulations Act is projected to lower gasoline prices in the United States within 10 years. If EIA determines that the bill is not projected to lower gasoline prices, then section 5 (delaying final action on several EPA rules) and section 6 (re-writing the health-based standard-setting process for ozone) would have no effect. This amendment was defeated by voice vote.

IV. SECTION-BY-SECTION ANALYSIS

A. Section 2. Transportation Fuels Regulatory Committee

This section establishes a new interagency committee to analyze the cumulative impacts of certain EPA rules and actions, as described in section 3. The Secretary of Energy is tasked to serve as the committee's chair. Chris Smith, Deputy Assistant Secretary for Oil and Natural Gas in the Office of Fossil Energy at the Department of Energy (DOE), raised concerns about this new interagency committee and the bill's requirement that DOE serve as chair. He noted that "much of the expertise in conducting such analyses of regulatory actions lies outside DOE."¹⁹

B. Section 3. Analyses

This section requires the interagency committee to conduct an analysis of the cumulative impact of "covered rules" and "covered actions."

Section 3 defines "covered rule" to include rules that have not yet been proposed and rules that have not even been contemplated. The definition includes the following rules, as well as "any successor or substantially similar rules:"

- The Tier 3 motor vehicle emission and fuel standards (not yet proposed);
- Any new source performance standard or air toxics standard for refineries proposed after March 15, 2012;
- Any rule proposed after March 15, 2012, to implement the Renewable Fuels Program; and
- The 2008 rule establishing the NAAQS for ozone; EPA's potential reconsideration of the ozone standard, currently slated for 2013; and "any subsequent rule revising or supplementing" the ozone NAAQS.

¹⁹ Committee on Energy and Commerce, Testimony of Chris Smith, Assistant Secretary for Oil and Natural Gas in the Office of Fossil Energy, Department of Energy, *The American Energy Initiative: A Focus on Legislative Responses to Rising Gasoline Prices*, 112th Cong. (Mar. 28, 2012).

Section 3 defines “covered action” to mean any action taken since January 1, 2009, by EPA, a state agency, a local government, or a permitting agency to issue a permit for greenhouse gas emissions from facilities involved in the production, transportation, or distribution of gasoline or diesel fuel, under titles I or V of the Clean Air Act.

Section 3 outlines the parameters of the interagency committee’s analysis. The committee must estimate the cumulative impacts of the covered rules and actions on several end points, including gasoline prices, capital investments and projected maintenance and operation of new equipment, refinery capacity, employment, other cumulative costs and benefits, and even the global economic competitiveness of the United States.

Since most of the “covered rules” have yet to be proposed, it is unclear how the interagency committee could estimate the levels of pollution control that may be required, predict compliance options, and assess the specified effects. Given all of the uncertainties and guesswork inherent in such an analysis, it is unclear how the committee could produce an economic analysis of the rules with any measure of credibility. EPA Assistant Administrator Gina McCarthy testified “it is unclear how the new committee would analyze rules that have not yet been proposed, or how the public could comment on that analysis in an informed way.”²⁰ She also noted that such an analysis would be redundant and a waste of government resources, given the extensive analysis EPA already completes as part of the rulemaking process and the interagency review conducted by OMB.²¹

Furthermore, while section 3 states that the Committee is not required to create or use data that is not readily accessible, it appears that much of the necessary data does not currently exist. EIA, which is better positioned than any other government agency to tackle this analysis, told Democratic Committee staff it currently does not have the analytic capability to conduct the state or regional level breakdowns required by section 3 and would have to collect or purchase new data. Even if EIA just conducted a national-level analysis, “there could be some considerable additional costs for EIA, as contractor expertise and manpower would likely be needed to supplement EIA’s staffing.”²² EIA also concluded that the scope of the study covers a “wide area of activity that would be difficult to track much less analyze,” such as actions by any state, local government, or permitting agency.²³

During consideration of H.R. 4471 by the full Committee, Rep. Lois Capps offered an amendment that would nullify section 4 (requiring the interagency committee to produce a report) and section 5 (delaying certain EPA rules) if the Secretary of Energy determined that the analyses required under section 3 are infeasible to conduct, require data that does not exist, or would generate results subject to such large estimates of uncertainty that the results would be neither reliable nor useful. This amendment was defeated 14-31.

²⁰ McCarthy testimony.

²¹ *Id.*

²² E-mail from Energy Information Administration to Energy and Commerce Committee Democratic staff (May 15, 2012).

²³ *Id.*

C. Section 4. Reports; Public Comment

Even if it were possible to conduct a credible analysis of proposed rules that do not yet exist, it could prove impossible to do so by the statutory deadline. Section 4 requires the interagency committee to finish a preliminary report within 90 days of enactment; accept public comment for 60 days; and complete a final report within 60 days of closing the comment period. That allows just seven months for completion of this complex economic analysis. The more limited economic analysis of a single proposed regulation commonly takes almost as long as is provided here for the entire cumulative analysis.

D. Section 5. No Final Action on Certain Rules

Section 5 blocks EPA from finalizing three rules for at least six months after the day on which the interagency committee submits its final report. This section also allows the rules to be indefinitely delayed by overriding existing statutory deadlines for the rules and by failing to establish any new deadlines (except for the Tier 3 standards, which do not currently have a deadline). The blocked rules include:

- The Tier 3 motor vehicle emission and fuel standards, which have not yet been proposed;
- Any new source performance standard or air toxics standard for refineries proposed after March 15, 2012; and
- Any rule “revising or supplementing” the NAAQS for ozone.

See section III above for a description of the rules blocked by H.R. 4471.

E. Section 6. Consideration of Feasibility and Cost in Revising or Supplementing NAAQS for Ozone

Section 6 of H.R. 4471 would override 40 years of clean air policy and principles, as well as a unanimous ruling of the Supreme Court, by requiring EPA to consider “feasibility and cost” when “revising or supplementing” the health-based ambient air quality standard for ozone. See section II above for a more detailed discussion of the implications of this provision.

V. AMENDMENTS OFFERED IN FULL COMMITTEE

During consideration of H.R. 4471 by the full Committee, Ranking Member Henry Waxman introduced an amendment that would allow EPA to finalize the rules blocked by section 5 of the bill if the rules would control pollution linked to asthma attacks, heart attacks, cancer, birth defects, neurological damage, premature death, and other serious harm to human health. This amendment was defeated 9-29.

Rep. Bobby Rush introduced an amendment requiring EIA to determine whether implementation of the Gasoline Regulations Act is projected to lower gasoline prices in the United States within 10 years. If EIA determines that the bill is not projected to lower gasoline prices, then section 5 (delaying final action on several EPA rules) and section 6 (re-writing the health-based standard-setting process for ozone) would have no effect. This amendment was defeated by voice vote.

Rep. Gene Green introduced an amendment to strip section 6 of the bill, which would gut the Clean Air Act requirement to set air quality standards for ozone based on the best available science. This amendment was defeated 18-28.

Rep. Lois Capps offered an amendment that would nullify section 4 (requiring the interagency committee to produce a report) and section 5 (delaying certain EPA rules) if the Secretary of Energy determined that the analyses required under section 3 are infeasible to conduct, require data that does not exist, or would generate results subject to such large estimates of uncertainty that the results would be neither reliable nor useful. This amendment was defeated 14-31.

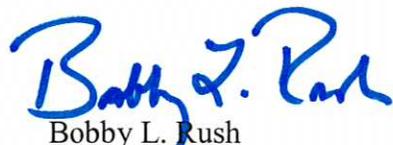
Rep. Jan Schakowsky offered an amendment saying that the Gasoline Regulations Act would not take effect until a fee is assessed on and collected from the oil industry to pay for the cost of implementing the legislation. The legislation otherwise does not authorize appropriations for the new interagency committee to complete the mandated study. This amendment was defeated 9-29.

Rep. Donna Christensen offered an amendment to add findings to the bill about the root causes of a spate of East Coast refinery closures and sales in late 2011 and early 2012. These findings stated that market forces, not environmental regulations, were the primary factors driving companies to close or sell their refineries in Pennsylvania and the U.S. Virgin Islands. This amendment was defeated 16-30.

VI. CONCLUSION

Because H.R. 4471 poses a significant threat to the public health by blocking important regulations to reduce air pollution, and provides no benefits, we dissent from the decision to favorably report the legislation.


Henry A. Waxman
Ranking Member


Bobby L. Rush
Ranking Member
Subcommittee on Energy and Power