

TESTIMONY OF JOHN D. WALKE  
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LEGISLATIVE HEARING ON S. 1857, S. 203, S. 839 AND S. 1934  
BEFORE THE SUBCOMMITTEE ON CLEAN AIR AND NUCLEAR SAFETY,  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS  
U.S. SENATE  
November 14, 2017

Thank you, Chairman Capito and Ranking Member Whitehouse for the opportunity to testify today. My name is John Walke, and I am clean air director and senior attorney for the Natural Resources Defense Council (NRDC). NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 1.3 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing.

I have worked at NRDC since 2000. Before that I was a Clean Air Act attorney in the Office of General Counsel for the U.S. Environmental Protection Agency (EPA). Prior to that I was an attorney in private practice where I represented corporations, industry trade associations and individuals. Having worked on air pollution issues for the entirety of my career, I believe each of these bills would increase air pollution compared to today's law, some of them much more substantially and dangerously than others. I will address each of these bills and their potential to harm air quality and Americans' health in turn.

## **S.203 – The “Recognizing the Protection of Motorsports Act of 2017”**

### Introduction

The most troubling bill before us is one that should not be particularly controversial. The RPM Act, S. 203, appears to be a well-intentioned effort to clarify that vehicles used only for organized motorized racing events—whether they are built for racing or modified from on-road vehicles—do not have to meet the pollution control requirements that apply to on-road vehicles. Unfortunately, the current language of the RPM Act opens a hugely damaging loophole in the Clean Air Act. I believe the resulting increase in air pollution will dwarf the harmful air pollution and health impacts of the recent VW cheating scandal.

S. 203 creates an “exclusion” from the Clean Air Act’s anti-tampering provisions barring defeat devices for emissions control systems. The exclusion is for actions concerning motor vehicles or engine design elements or devices under section 203(a) of the Clean Air Act, 42 U.S.C. §7522(a)—and here is the crucial, problematic language—“if the action is for the *purpose* of modifying a motor vehicle into a vehicle *to be used solely for competition.*” Clean Air Act section 203(a) makes it unlawful to remove, “bypass, defeat, or render inoperative” any part of a motor vehicle’s emissions control system. The bill attempts to accomplish its goals further by amending section 216(2) of the Act to exclude “a vehicle used solely for competition” from the definition of the term “motor vehicle.” Even though this amendment may sound minor or technical in nature, were S. 203 to become law, it would have an extremely negative impact on air quality nationwide that would far surpass the Volkswagen “dieselgate” scandal.

A handful of companies have made and marketed for general use after-market “defeat devices,” which effectively turn off vehicle emissions controls. Up to now, the Department of Justice has been able to enforce against unscrupulous companies that have sold tens of thousands

of these devices for vehicles rarely used for racing, even when companies knew or should have known the defeat devices would be used on the nation's road and highways. In one consent agreement in 2015, EPA estimated that the devices sold allowed an additional 71,000 tons of smog-forming NOx pollution. That's equivalent to *all* motor vehicles emissions in the state of Wyoming *for a full year*, including on-road vehicles (cars, trucks, buses, semis, motorcycles etc.) and non-road vehicles (tractors, forklifts, utility and recreational vehicles, other construction, farm and garden equipment etc.).<sup>1</sup> It is comparable to the 75,000 tons of NOx emissions that EPA's most recent power plant rule reduced from coal-burning power plants in 22 eastern states.<sup>2</sup> In other words, these are enormous amounts of smog-forming pollutants, and this was just from a *single* defeat device legal settlement.

The current bill language in S. 203 could make it almost impossible for EPA and the Department of Justice to stop the sale of heretofore illegal defeat devices, as long as a company claims that they *intend* the device to be used for racing. I want to emphasize that this is a matter of legislative drafting. It is not difficult to exempt racing-only DIY modifications from pollution control requirements. But the bill before you goes far beyond that, threatening serious harm to public health. I urge the Committee to fix this fatal flaw before moving forward.

### Background

It is no secret that air pollution from motor vehicles greatly impacts air quality across the United States. Motor vehicles emit nitrogen oxides (NOx) emissions and volatile organic

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<sup>1</sup> U.S. EPA, National Emissions Inventory 2014, v.1 (71,621 tons of NOx emissions from mobile sources in Wyoming in 2014), *available at* [https://www3.epa.gov/cgi-bin/broker?service=data&debug=0&program=dataprog.state\\_1.sas&pol=NOX&stfips=56](https://www3.epa.gov/cgi-bin/broker?service=data&debug=0&program=dataprog.state_1.sas&pol=NOX&stfips=56).

<sup>2</sup> U.S. EPA, Regulatory Impact Analysis of the Cross-State Air Pollution Rule (CSAPR) Update for the 2008 National Ambient Air Quality Standards for Ground-Level Ozone, at ES-8, *available at* [https://www3.epa.gov/ttnecas1/docs/ria/transport\\_ria\\_final-csapr-update\\_2016-09.pdf](https://www3.epa.gov/ttnecas1/docs/ria/transport_ria_final-csapr-update_2016-09.pdf).

compounds (VOCs) that combine to form smog, as well as deadly fine particle pollution.

Transportation produces more than half of the NO<sub>x</sub> emissions, almost a third of the VOCs, and over one-fifth of the particulate matter air pollution in the United States. Together, these air pollutants aggravate asthma, cause bronchitis, lung disease, heart attacks, strokes, and even premature death. Recently updated air pollution standards for motor vehicles will, by 2030, prevent:

- up to 2,000 premature deaths each year;
- 2,200 hospital admissions and asthma-related emergency room visits annually;
- 19,000 asthma exacerbations each year;
- 30,000 upper and lower respiratory symptoms in children each year; and
- 1.4 million lost school days, work days and minor-restricted activities annually.<sup>3</sup>

These standards will continue to reduce on-road emissions of some of the most common and pervasive air pollution nationwide, including NO<sub>x</sub>, VOCs, sulfur dioxide (SO<sub>2</sub>), carbon monoxide (CO) and known carcinogens, such as benzene and formaldehyde.<sup>4</sup>

Title II of the Clean Air Act regulates mobile sources of air pollution, and requires that, for the sale of a new motor vehicle, the automaker must supply a “certificate of compliance” to show compliance with federal emissions standards like those described above. Section 203 of the Act makes it unlawful to remove, “bypass, defeat, or render inoperative” any part of a motor vehicle’s emissions control system. 42 U.S.C. §7522(a)(3). S. 203 would exempt actions enabling modifications to a motor vehicle whose “*purpose*” is for the vehicle “to be used solely for competition.” If that asserted manufacturer or installer purpose is present, emissions control

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<sup>3</sup> U.S. EPA, “U.S. EPA sets Tier 3 Motor Vehicle and Fuel Standards,” *available at* <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100HVZV.PDF?Dockkey=P100HVZV.PDF>

<sup>4</sup> *Id.*

“defeat devices” lawfully may be sold, installed and distributed under the bill for vehicles that are used on-road, even routinely, and that may or may not also be used for competitions. Such defeat devices shut off a vehicle’s emission control system, and allow it to spew pollution into the air unrestrained.

In exempting a certain subset of defeat device manufacture, installation and use from the anti-tampering provisions of the Clean Air Act, S. 203 raises a host of problems with adverse air quality and health consequences. Though the aim of this bill may be to address the concerns of the motor vehicle racing community that uses vehicles for competitive racing exclusively, the bill creates a significant loophole for the manufacture and installation of defeat devices that will be used on highways and roads, rather than just competitive racing.

In testimony concerning S. 203’s counterpart bill in the House, H.R. 4715, the Congressional Research Service described the longstanding Clean Air Act approach, where the:

distinction between a vehicle’s capabilities and its intended use is key to EPA’s position. Going back as far as at least 1974, EPA has maintained that it would make determinations on exclusions from the motor vehicle definition based on *vehicle design, not intended use*. Since that time, EPA has employed that test for a variety of uses, including off-road vehicles, kit cars, vocational vehicles, and imported racing cars.<sup>5</sup>

It is exactly this “design versus *intended use*” issue that speaks to the most harmful impacts of this proposed legislation. S. 203 appears to be a well-intentioned effort to clarify that vehicles *actually* used only for racing—whether they are built for racing or modified from on-road vehicles—need not meet the pollution control requirements that apply to on-road vehicles.

Unfortunately, the current language of the bill opens a hugely damaging loophole in the Clean

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<sup>5</sup> Congressional Research Service, Testimony for Hearing on “Racing to Regulate: EPA’s Latest Overreach on Amateur Drivers” *available at* <https://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-114-SY21-WState-BYacobucci-20160315.pdf> (emphasis added).

Air Act, and the resulting increase in air pollution will dwarf the impacts of the VW cheating scandal.

As the CRS notes, EPA has experimented with attempting to regulate certain types of vehicles based on their uses in the past:

[I]n November 2002 EPA established emissions standards for recreational nonroad vehicles and engines—including motorcycles, all-terrain vehicles (ATVs), and snowmobiles.[] Within those rules, EPA provided specific procedures and guidance for how new nonroad motorcycles, or “dirt bikes,” can be converted from recreational use to competition-only. Specifically, only nonroad bikes may be converted.[] Before doing so, the owner must destroy the original emissions compliance label attached to the dirt bike, and the owner may not then use the bike for recreation. If the owner later sells the dirt bike, he or she must inform the purchaser that it has been modified and may only be used for competition. This process is, to our understanding, based solely on owner compliance, and EPA does not maintain any sort of database of these conversions.<sup>6</sup>

In essence, for dirt bikes, the Agency has no idea whether or not the requirements that would ensure compliance with this regulatory approach are being met, or what percentage of owners are complying. With no enforcement at all, compliance is unknown. Further, the Agency has explored temporary exclusions for certain types of racing vehicles, where the CRS also notes that the:

EPA and the National Highway Traffic Safety Administration (NHTSA), part of the Department of Transportation, also provide temporary exemptions for cars and trucks imported for racing purposes. In those cases, importers must follow a more detailed process to request an exemption from EPA and NHTSA. These exemptions are granted on a case-by-case basis. Importers must supply to EPA, among other things, the Vehicle Identification Number, or VIN, a list of race-specific characteristics (such as roll bars/cages and racing harnesses), a list of characteristics that preclude the vehicle’s safe use on roads (for example, lack of a reverse gear or headlights), and photos of the vehicle. In guidance available on its website, EPA specifically states that “not all vehicles used in races are excluded from emissions compliance. Determinations are based on the capability of the vehicle, not its intended use.”<sup>7</sup>

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<sup>6</sup> *Id.*, at 2.

<sup>7</sup> *Id.*, at 2-3.

Here, these vehicles' characteristics make it more obvious they are for racing only, and not being imported for on-road use. Moreover, a case-by-case evaluation by the agency would suggest that there is sufficient oversight to prevent rampant abuse.

### S.203 – Creating New Problems While Failing to Solve Others

The Clean Air Act today defines “non-road engine” and “non-road vehicle” to exclude vehicles or their engines that are “used solely for competition,” such as motor sport racing events. 42 U.S.C. § 7550(10) & (11). As the Congressional Research Service noted in testimony at a hearing for the counterpart House bill to S.203, however,<sup>8</sup> “[g]oing back as far as at least 1974, EPA has maintained that it would make determinations on exclusions from the motor vehicle definition based on vehicle design, *not intended use*.” Neither CRS nor we have identified any previous Department of Justice enforcement cases against defeat device manufacturers where the government was compelled to disprove or overcome manufacturer claims that the intent or purpose of the sale was for use solely for competition. Indeed, “CRS could identify no instances where enforcement actions were taken against parts suppliers who were operating solely in the racing parts market.”<sup>9</sup>

Consider the 2007 case by the Bush administration against a company for “selling devices that allow cars to release excess levels of pollution into the environment, in violation of the Clean Air Act.”<sup>10</sup> The company sold 44,000 defeat devices through retailers and on its Web site, with increased air pollution caused by these defeat devices “equivalent to the emissions produced by a half-million cars with fully operational emission control systems over their

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<sup>8</sup>*Id.*, at 3.

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

<sup>10</sup> U.S. Department of Justice, Federal Settlement Targets Illegal Emission Control “Defeat Devices” Sold for Autos, Press Release 07-490, Washington, DC, July 10, 2007, *available at* [https://www.justice.gov/archive/opa/pr/2007/July/07\\_enrd\\_490.html](https://www.justice.gov/archive/opa/pr/2007/July/07_enrd_490.html).

lifetimes.” *Id.* The Bush administration’s civil case was based on the sale of defeat devices to on-road vehicle users, despite the company’s claims that the devices were for off-road use only. *Id.* If the Bush administration had been proceeding under a Clean Air Act that excluded defeat device sales where a company claimed it was not the “purpose” of the defeat device to be used on-road, then this 2007 case—and others like it—would not have been possible. Hundreds of thousands of tons of illegal air pollution increases due to defeat devices in on-road vehicles would be perfectly fine. Americans would face excess air pollution and health risks equivalent to the emissions from millions more cars on the road.

Motor vehicles modified for racing present a situation where “there may be no way to produce parts that would only operate on modified motor vehicles.”<sup>11</sup> Were these vehicles limited to solely racing vehicles, the bill’s impacts would be limited and modest. However, past enforcement cases indicate that defeat devices generally are in wide use in on-road vehicles, and S. 203 would sanction the increase use of defeat devices—with the certainty that defeat devices will be used on-road, despite the intent of bill proponents that this not happen, and with an impossible or near-impossible legal standard for the Department of Justice to overcome in cases against defeat device manufacturers. We do not believe that to be the intent of S. 203 co-sponsors, but that will be the bill’s impact in the real world.

This will cause harmful impacts on air quality and Americans’ health. In prior defeat device cases, the government has found that:

In some of the supplier cases, settlements between EPA, the Department of Justice, and the defendants were based on the sale of defeat devices to road vehicle users *despite claims by the manufacturer that the parts were for off-road or nonroad use only.*<sup>12</sup>

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<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.*

In fact, in one enforcement case, the supplier acknowledged that it had sold over 85,000 defeat devices that it should have known were being used by on-road vehicle users.<sup>13</sup> In so doing, their sales led to increased emissions of almost 72,000 tons of NOx, over 4,200 tons of non-methane hydrocarbons, and 380 tons of particulate matter.<sup>14</sup> Together, these emissions equate to nearly twice the pollution emitted by Volkswagen from 2008 until the 2015 enforcement action.<sup>15</sup> For context, the study analyzing the impact of the VW “dieselgate” found that the company’s violations “result[ed] in a total of 59 [] premature deaths, 87% of which are attributable to the PM<sub>2.5</sub> exposure and 13% to ozone exposure.”<sup>16</sup>

What’s more, the NOx emissions from defeat devices sold by just one company, 71,000 tons, are one-and-one-half times the emissions from *every* mobile source—every car, truck, semi, bus, and bulldozer—in the State of West Virginia, for an *entire* year. Those same NOx emissions are equivalent to half of the annual mobile source emissions in Kansas or Iowa. And if you add in the emissions from three other companies’ defeat devices, the resulting NOx pollution is equivalent to half of Wisconsin’s annual mobile source NOx emissions, or over half of Nebraska’s.<sup>17</sup> Defeat devices sold by those manufacturers are on the road today. They are

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<sup>13</sup> Consent Agreement, In the Matter of H&S Performance, LLC, U.S. EPA, Environmental Appeals Board, No. CAA-HQ-2015-MSEB 8248, 8 (Dec. 17, 2015), PG 8 *available at* <https://www.epa.gov/sites/production/files/2016-01/documents/hscafo.pdf>.

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

<sup>15</sup> Steven R. Barrett, et al., Impact of the Volkswagen emissions control defeat device on US public health, Environmental Research Letters, Volume 10, Number 11, October 2015, *available at*

<http://iopscience.iop.org/article/10.1088/1748-9326/10/11/114005/meta> (estimating VW emissions).

<sup>16</sup> *Id.*

<sup>17</sup> U.S. EPA, 2014 National Emissions Inventory data, *available at* [https://www3.epa.gov/cgi-bin/broker?polchoice=NOX&\\_debug=0&\\_service=data&\\_program=dataprog.national\\_1.sas](https://www3.epa.gov/cgi-bin/broker?polchoice=NOX&_debug=0&_service=data&_program=dataprog.national_1.sas) (providing state-wide emissions of smog-forming nitrogen oxides (NOx) from *all* mobile sources--on-road and off-road--for an *entire* year, are: 46,859 tons in West Virginia; 138,800

emitting enormous amounts of illegal air pollution every year—because once a defeat device is on a vehicle, EPA has no practical ability to bring enforcement actions against tens of thousands of individual vehicles that are driving on the nation’s roads and highways. As the CRS has testified, “EPA has historically not taken action against individuals,” despite having that authority.<sup>18</sup> S.203 is silent as to how to solve the problems that it worsens.

In fact, S. 203 entirely ignores the thicket of problems relating to abuse and enforcement that its provisions would create. There are over 240 million vehicles on the road today, and abuse of the particular “exclusion” afforded by S. 203 would have very negative impacts on air quality and Americans’ health. There are relatively few vehicles used solely for racing, and these vehicles are driven for relatively small periods of time, making their air pollution contributions comparatively insignificant. Narrowly crafted, targeted language that applied only to such modifications and vehicles likely would have little adverse effect on motor vehicle emissions, relative to current circumstances. Unfortunately, the RPM Act is the opposite of narrow and targeted. It is not realistic nor workable to expect that the federal government can protect Americans by ensuring that each vehicle equipped with defeat devices ‘intended’ for exclusive competitive use is in fact being used only for that non-road, competitive racing purpose.

The current bill language makes it effectively impossible for the federal government to stop, or enforce after-the-fact, the sale of these devices, as long as a company claims that they *intend* the device to be used for racing. Companies that know, companies that should have known, and companies that act in willful disregard of whether defeat devices are being used on-road may simply claim under S. 203 that on-road, non-competition use was not their “purpose.”

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tons in Kansas; 140,585 tons in Iowa; 147,392 tons in Nebraska; 156,318 tons in Wisconsin; 195,320 tons in Virginia.)

<sup>18</sup> *Supra note 5*, at 3.

This changed legal standard represents an extreme weakening of the standard the Department of Justice has used to hold companies liable for selling illegal defeat devices with awareness and abuses that do not rise all the way to the level of purposeful intent. It would not be difficult as a matter of drafting to exempt racing-only modifications from pollution control requirements, without the unworkable “purpose” condition. But S. 203 goes far beyond that, threatening serious harm to Americans’ health and air quality. We urge you to fix the bill’s language to avoid these undesired consequences., and to vote against S. 203 if it remains in its current, harmful form.

### **S. 839 – The “Blocking Regulatory Interference from Closing Kilns Act of 2017”**

Unlike almost every other industrial source of air pollution in the nation, there currently are no federal hazardous air pollutant standards in place for brick manufacturers. The industry is in the 17th year past the time that Congress directed that toxic pollution from these industrial facilities should be covered by Clean Air Act standards. Now, as litigation on these facilities is about to come to a close, S. 839 represents an effort to indefinitely delay the regulation that all other sources of industrial hazardous air pollution must meet. There is no reason that this bill should become law. It rewards delay tactics and prior Clean Air Act lawbreaking that the brick manufacturing industry supported. The bill seeks to further avoid federal regulation of deadly, carcinogenic air pollution at the expense of air quality and Americans living near these facilities.

The American people have been subject to excessive levels of highly toxic air pollution from brick manufacturers for seventeen years longer than the deadline Congress established in the 1990 Clean Air Act amendments. Meanwhile, other industries have been meeting required standards for one to two decades. It is unjustified and harmful to millions of

Americans to allow this one industry sector to continue evading standards for reducing hazardous air pollution.

### Background

There are approximately 150 brick and clay kilns and ceramics plants large enough to be called “major sources” subject to regulation under the Clean Air Act’s hazardous air pollutant (HAP) program.<sup>19</sup> These plants emit significant amounts of hazardous air pollutants, including mercury and other heavy metals, dioxins/furans and acid gases. Acid gases in particular account for over 99% of kilns’ toxic emissions and include hydrogen chloride, hydrogen fluoride and chlorine. These highly toxic pollutants cause serious health effects, including severe respiratory illness, kidney damage, cancer and even death.

Section 112(d) of the Clean Air Act requires EPA to set emissions standards for hazardous air pollutants emitted by certain stationary sources listed under section 112(c) of the Act. 42 U.S.C. § 7412(d) & (c). EPA first issued standards for this sector on May 16, 2003. For existing sources of pollution, section 112(d)(3) of the Act requires a standard that is at least as stringent as the level of reduction achieved by the best performing 12 percent of already existing sources. 42 U.S.C. § 7412(d)(3). For new sources, the standard must be set at a level at least as stringent as the control level achieved in practice by the best controlled similar source. *Id.*

EPA was originally required to set standards for this source category in November of 2000. EPA did not issue those standards until 2003. 68 Fed. Reg. 26,690 (May 16, 2003). The Bush administration EPA proposed standards that did not meet the Clean Air Act’s plain

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<sup>19</sup> Memorandum from Kristin Sroka, RTI International, to Sharon Nizich, EPA/OAQPS/SPPD RE: Development of Cost and Emission Reduction Impacts for the Final BSCP Manufacturing NESHAP, EPA-HQ-OAR-2013-0291-0664, Sept. 24, 2015.

language and that were inconsistent with governing D.C. Circuit caselaw interpreting the Act.<sup>20</sup> Representatives for the brick and structural clay manufacturers supported the proposal of the unlawful standards. Members of the public commented to EPA that the proposed standards plainly violated the Clean Air Act. On March 13, 2007, the U.S. Court of Appeals for the D.C. Circuit invalidated the 2003 rule, siding with the arguments of commenters that had pointed out the standards were unlawful, and rejecting the arguments of the Bush EPA and brick and clay products manufacturers. The court found that the rule illegally attempted to redefine “best performing” sources in violation of the plain language of Clean Air Act section 112(d)(3), and was unlawfully weak and unprotective. *See Sierra Club v. EPA*, 479 F. 3d. 875 (D.C. Cir. 2007). Following extensive delay on remand, EPA proposed new standards pursuant to a consent decree on December 18, 2014, *see* 79 Fed. Reg. 75,622, and finalized standards on October 26, 2015, *see* 80 Fed. Reg. 65,470.

Representatives from the brick and clay products manufacturing industry and the Sierra Club challenged the final standards in court in 2015. On October 3<sup>rd</sup>, 2017, approximately 4 weeks before the court hearing, the EPA announced it would reconsider the standards and sought to place the lawsuits in abeyance, indefinitely.<sup>21</sup> EPA did so, fully aware of pending congressional legislation to delay compliance indefinitely with the hazardous air pollution standards so long as litigation and all appeal opportunities were continuing. The industry litigants supported EPA’s move; the health and environmental parties opposed.

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<sup>20</sup> 67 Fed. Reg. 47,894 *et seq* (July 22, 2002).

<sup>21</sup> Respondents’ Motion to Continue Oral Arguments and Hold Proceedings in Abeyance, No. 15-1487 *et al.* (D.C. Cir.) (Oct. 3, 2017), *available at* ([https://www.eenews.net/assets/2017/10/04/document\\_gw\\_01.pdf](https://www.eenews.net/assets/2017/10/04/document_gw_01.pdf)).

On October 26th, the D.C. Circuit Court of Appeals denied EPA’s request.<sup>22</sup> The court order directed “the parties [to] be prepared to address with specificity at oral argument whether an additional period of abeyance is appropriate for this matter.”<sup>23</sup> Then on Friday night, November 3rd, 2017, a mere 6 days before the court hearing, EPA informed the court and the Sierra Club that it wished to sever the petitions in the lawsuit, and “hold the proceedings on the industry petitions in abeyance”—indefinitely.<sup>24</sup> The agency’s court filing said that “EPA has determined that no further agency action is warranted as to the issues raised by Environmental Petitioners.” EPA urged the court to hear and resolve those issues—but not the industry legal challenges.<sup>25</sup> In a letter attached to the court filing, EPA said that it had decided to administratively reconsider issues raised by the industry litigants—but not the environmental petitioners.<sup>26</sup>

The court hearing on the Environmental Petitioners’ challenges to the standards happened on November 9th. At the hearing, the federal judges were incredulous and annoyed over the EPA’s request—with the industry’s backing—to further delay resolution of the standards that were nearly 20 years overdue already:

Federal judges today slammed U.S. EPA for foot-dragging on air standards for brick and tile manufacturers that are already nearly 20 years behind schedule.

By law, EPA was supposed to adopt maximum achievable control technology, or MACT, standards for the industry by 2000. But the Trump EPA recently said it would

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<sup>22</sup> Order, No. 15-1487 *et al.* (D.C. Cir.) (Oct. 26, 2017), *available at* [https://www.eenews.net/assets/2017/10/26/document\\_gw\\_06.pdf](https://www.eenews.net/assets/2017/10/26/document_gw_06.pdf).

<sup>23</sup> *Id.*

<sup>24</sup> Respondents’ Notice of Action on Brick/Clay Rule and Unopposed Motion to Sever and Hold in Abeyance Industry Petitions, No. 15-1487 *et al.* (D.C. Cir.) (Nov. 11, 2017), *available at* [https://www.eenews.net/assets/2017/11/06/document\\_gw\\_04.pdf](https://www.eenews.net/assets/2017/11/06/document_gw_04.pdf).

<sup>25</sup> *Id.*

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

address industry concerns and finalize a new rule by 2019 to replace standards that the Obama administration issued.

A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit heard arguments from environmental groups over the Obama-era rule. But when an attorney for EPA took the stand, the judges shifted from questioning her on the environmental claims to frustration over the agency's delays.

"This rule was supposed to be out in 2000. ... Under your scenario, we're now going to be 19 years past that," Judge Patricia Millett said. "Why is the time frame you proposed reasonable?"

"Don't you have some duty to act with exceptional urgency?"<sup>27</sup>

The judges were annoyed further by the inability of government counsel to say with any "specificity" when and why the EPA decided to review and potentially change the rule. "We're trying to move this case forward," one judge said.<sup>28</sup> Government attorneys never did supply those answers.<sup>29</sup> Finally, the third judge indicated that the court might simply deny EPA's motion to hold the industry lawsuit in abeyance, saying the court could proceed and decide the industry claims.

"I don't see what we're taking away from you if we deny your motion," he said, adding that EPA would still be able to revise the standards in a new rulemaking regardless of the court's decision.<sup>30</sup>

### Legislation

S. 839 aims to help industrial emitters avoid regulation by seeking to *further* delay implementation of seventeen years-overdue hazardous air pollution standards for brick and clay products manufacturing facilities. The legislation would delay compliance deadlines until every lawsuit has been fully litigated and appealed, including to the Supreme Court. This would have

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<sup>27</sup> "Judges scoff as EPA requests more time for rule due in 2000," Amanda Reilly, E&E News (Nov. 9, 2017).

<sup>28</sup> *Id.*

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

<sup>30</sup> *Id.*

the effect of stalling these much needed and overdue health protections for as long as industry lawyers can keep a case alive, no matter how lacking in merit legal challenges may be. The already-harmful legislative delay now would be exacerbated by obvious manipulation and indefinite delay of the industry lawsuit by the current administration, with the full support of the industry litigants, as shown by events of the past six weeks. Congress should not reward these tactics.

Federal Courts already have the authority to stay the effectiveness of a rule during a court's review, but industry has not met—nor even attempted—the exacting legal standard to justify any stay. Far more often, as here, the regulations remain in effect or may take effect while parties challenge the rule. The standard to delay a rulemaking's effectiveness requires a party to show that: (1) it is likely to prevail on the merits of the appeal; (2) without relief, it will be irreparably harmed; (3) issuance of the stay would not substantially harm other parties interested in the proceedings; and (4) the stay would favor the public interest. As noted, none of the industry litigants have even asked the court to stay the rule, presumably because they recognize that they do not meet the legal requirements.

Incentivizing the types of delay tactics that the BRICK Act would condone sets precisely the wrong legal precedent. The bill's language allows for delays relating to "any rule" for brick kilns under section 112 of the Act, including any that "succeeds or amends" the 2015 standards. This sets up the judiciary and the American people for an endless merry-go-round that never results in lawfully required hazardous air pollution reductions. We urge Senators to vote against S. 839.

**S. 1857 – A Bill to establish a compliance deadline of May 15, 2023, for Step 2 emissions standards for new residential wood heaters, new residential hydronic heaters, and forced-air furnaces**

S. 1857 delays compliance deadlines for Clean Air Act standards for new wood heaters until May 15, 2023. In so doing, the bill would reward laggards in the industry by allowing them to avoid compliance with standards that most manufacturers currently meet. Moreover, the underlying standards are already flexible and have a lengthy transition period. This bill and its resulting delays would harm air quality and health in the communities where these devices are most used. S. 1857 also disadvantages manufacturers who played by the rules and are already meeting the standards. The legislation thus discourages desirable innovation and responsible corporate steps, in addition to increasing air pollution and harming Americans' health.

**Background**

In 2015, EPA updated Clean Air Act New Source Performance Standards (NSPS) for residential wood heating devices. EPA last updated the standards in 1988. The Clean Air Act requires that EPA review and revise these types of standards as necessary every eight years, following their adoption in 1988. EPA did not undertake this review until 2015, making the updated standards 21 years overdue.

The 2015 standards will reduce fine particle pollution and VOCs from new wood heaters by almost 70%. The standards cut carbon monoxide pollution by 62%.<sup>31</sup> These reductions will especially benefit communities where wood smoke is a major contributor to deadly fine particle pollution. The standards also will make heaters more efficient, allowing homeowners to use less wood and save money. EPA estimated that the benefits of these cleaner residential wood heaters

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<sup>31</sup> U.S. EPA, Fact Sheet: Overview of Final Updates to Air Emissions Requirements for New Residential Wood Heaters, *available at* <https://www.epa.gov/residential-wood-heaters/fact-sheet-overview-final-updates-air-emissions-requirements-new>

range between \$3.4 to \$7.6 billion annually, with costs estimated at \$46 million. This means \$74 to \$165 in benefits for every \$1 in costs.<sup>32</sup> The Agency noted that the rule has an unusually large net benefit due to the costly health impacts associated with wood smoke and the comparative affordability of pollution reductions from new wood heaters.<sup>33</sup>

In promulgating the 2015 standards, EPA built in five years for manufacturers to comply with stronger emissions control technology requirements. This phased approach started in 2015 with Step 1 of the rulemaking. Step 2 compliance deadlines begin in 2020. There is a long list of devices that already meet these Step 2 standards, and Congress should not reward the laggards.<sup>34</sup> Moreover, some manufacturers oppose delaying the standards. The Hearth, Patio & Barbecue Association, along with the Northeast States for Coordinated Air Use Management (NESCAUM), wrote to members of the U.S. House of Representatives about H.R. 694, a companion bill in the House. These groups voiced strong support for compliance by 2020, noting that EPA's standards will:

save consumers money, many of whom are low-income households, by lowering fuel costs through increased appliance efficiency. Replacing non-EPA-certified stoves with today's modern stoves will reduce health risks from exposure to wood smoke, but this can only be done if products are clean burning, fuel efficient, and affordable. Finally, this program will ensure continued innovation in U.S. manufacturing that will help keep domestic companies competitive in the solid fuel industry.<sup>35</sup>

Reducing the adverse air quality and health hazards from non-compliant wood stoves is critically important.

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> U.S. EPA. Compliance, List of EPA Certified Wood Stoves, October 2017 *available at* <https://www.epa.gov/compliance/list-epa-certified-wood-stoves>.

<sup>35</sup> Letter from The Northeast States for Coordinated Air Use Management (NESCAUM) and the Hearth, Patio, and Barbeque Association, May 8, 2017 *available at* <http://www.nescaum.org/documents/nescaum-hpba-joint-letter-to-congress-wood-device-nsp-20170508.pdf>.

## Health Impacts

Wood stoves are a significant source of air pollution. According to the American Lung Association:

Residential wood heaters include open fireplaces, outdoor and indoor wood-fired boilers, indoor heaters, furnaces, masonry heaters and wood and pellet stoves. The U.S. Census [] reports that nearly two percent of all U.S. households use wood as a primary heat source. In 2006, one study estimated that approximately 14 to 17 million such devices were then in use in the United States. [] Annual sales of outdoor wood boilers grew ten-fold between 2000 and 2005—a rate suggesting that 500,000 outdoor wood boilers may have been in use by 2010[.]<sup>36</sup>

The health impacts from these devices are real and harmful. Extending compliance deadlines only further delays the cleanups that should have occurred decades ago. Wood stove smoke contains deadly fine particle pollution, but it also contains carbon monoxide, volatile organic compounds, black carbon, and hazardous air pollutants, such as cancer-causing benzene.

### **Particulate Matter**

The EPA recognizes wood smoke as a major source of fine particulate matter emissions, making up 7% of anthropogenic emissions of primary PM<sub>2.5</sub> in 2002.<sup>37</sup> Fine particulate matter causes premature death, cardiovascular disease and respiratory harms. In particular, EPA's Integrated Science Assessment for particulate matter found that wood smoke was associated with an increased risk of cardiovascular mortality, as well as more emergency department visits from cardiovascular disease and respiratory diseases. In late 2013, the International Agency for Research on Cancer, part of the World Health Organization, concluded that particulate matter

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<sup>36</sup> American Lung Association, Comments on U.S. Environmental Protection Agency Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced Air Furnaces and New Residential Masonry Heaters, EPA Docket ID NO. EPA-HQ-OAR-2009-0734 *available at* <http://www.lung.org/assets/documents/advocacy-archive/comments-to-epa-woodburning.pdf>

<sup>37</sup> U.S. EPA. Integrated Science Assessment (ISA) for Particulate Matter (Final Report, Dec 2009). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-08/139F, 2009, *available at* <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=216546>.

could cause lung cancer.<sup>38</sup> The IARC reviewed the most recent research and reported that the risk of lung cancer increases as fine particle levels rise.<sup>39</sup>

### **Carbon Monoxide**

Wood smoke is a primary source of carbon monoxide.<sup>40</sup> Research has shown that short-term levels of carbon monoxide can be fatal, and contribute to over 20,000 nonfatal emergency room visits each year in the U.S.<sup>41</sup> EPA's Integrated Science Assessment concluded that short-term ambient levels of carbon monoxide are likely to cause cardiovascular morbidity, may contribute to adverse birth outcomes and developmental effects, and cause harm to the central nervous and respiratory systems, even at low levels.<sup>42</sup> The Agency for Toxic Substances and Disease Registry concluded that “[a]lthough there may be an exposure level that can be tolerated with minimal risk of adverse effects, the currently available toxicological and epidemiological data do not identify such minimal risk levels.”<sup>43</sup>

### **Nitrogen Oxides**

The EPA recognized wood smoke, including residential wood burning, as a source of nitrogen oxides in the 2008 *Integrated Science Assessment of Oxides of Nitrogen—Health*

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<sup>38</sup> International Agency for Research on Cancer, World Health Organization, Press Release: Outdoor air pollution a leading environmental cause of cancer deaths, October 17, 2013 *available at* [https://www.iarc.fr/en/media-centre/iarcnews/pdf/pr221\\_E.pdf](https://www.iarc.fr/en/media-centre/iarcnews/pdf/pr221_E.pdf).

<sup>39</sup> *Id.*

<sup>40</sup> U.S. EPA. Integrated Science Assessment for Carbon Monoxide (Final Report, Jan 2010). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-09/019F, 2010, *available at* <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=218686>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Agency for Toxic Substances and Disease Registry (ATSDR) 2012 Toxicological Profile of Carbon Monoxide, p. 23, *available at* <https://www.atsdr.cdc.gov/toxprofiles/TP.asp?id=1145&tid=253> .

*Criteria* (NOx ISA, 2008). The NOx ISA estimated that residential wood burning produced 40,000 metric tons of nitrogen oxides in 2002 (Table 2.2-1).<sup>44</sup>

### **Hazardous Air Pollutants**

Wood smoke contains at least 26 pollutants specified in the Clean Air Act as hazardous. Some, such as benzene and formaldehyde, are known carcinogens. Others have non-carcinogenic impacts. These gases can also irritate the eyes, skin, and respiratory tract, impair lung function, and affect vital organs.

### **Conclusion**

The damage from S. 1857 will persist not simply for the three years of delay proposed in the bill, but for years and decades to come, if new and noncompliant higher-polluting wood heaters sold between 2020 and 2023 continue to emit more pollution over the entire lifespan of the equipment. We urge Senators to vote against S. 1857.

### **S. 1934 – The “Alaska Remote Generator Reliability and Protection Act”**

EPA regulations list special requirements for certain types of generators in Alaska.<sup>45</sup> S. 1934 specifically exempts *non-emergency* compression ignition internal combustion engines (CI ICE) that were made after 2014, from complying with Tier 4 particulate matter standards, or installing a particulate matter pollution control device. The bill would eliminate those requirements for engines made after 2014, and would allow for emission control devices only when and if the Administrator determines that “such a requirement will not negatively affect electricity or energy reliability in any remote area of the State of Alaska.”

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<sup>44</sup> U.S. EPA, Integrated Science Assessment for Oxides of Nitrogen – Health Criteria (Final Report, Jul 2008). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-08/071, 2008, *available at* <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=194645>.

<sup>45</sup> 40 C.F.R. 60.4216(c).

This equipment emits nitrogen oxides, particulate matter, sulfur dioxide, carbon monoxide, and hydrocarbons, all of which are extremely harmful to human health. EPA notes that:

Stationary internal combustion engines are common combustion sources that collectively can have a significant impact on air quality and public health. The air toxics emitted from stationary engines include formaldehyde, acrolein, acetaldehyde and methanol. Exposure to these air toxics may produce a wide variety of health difficulties for people including irritation of the eyes, skin and mucous membranes, and central nervous system problems. Engines also emit the conventional air pollutants created when fuel is burned including carbon monoxide (CO), nitrogen oxides (NO<sub>x</sub>), volatile organic compounds (VOCs), and particulate matter (PM). The health effects of these pollutants include a range of respiratory (breathing) issues, especially asthma among children and seniors.<sup>46</sup>

The U.S. EPA finalized standards for these and other facilities in July of 2016. In doing so, EPA adopted a definition for what was a “remote area of Alaska” consistent with previous rulemakings. 88 Fed. Reg. 44,215 *et seq.* (July 7, 2017).

S. 1934 explicitly excuses regulatory requirements for these types of new engines that are classified as *non-emergency* from compliance with clean air requirements. Though the purposes of the bill seem to suggest some sort of justification based on “electricity or energy reliability in remote areas of Alaska,” in section 2(b), there are no legislative findings that support this suggestion. Nor is the legislation accompanied by any legislative finding or evidence that regulations for post-2014, cleaner-burning engines will create demonstrated risks to electricity or energy reliability.

It is a dangerous legislative precedent to prohibit cleaner-burning engines in the absence of thorough legislative investigation and proof of harm that outweighs the clean air and public health benefits. S. 1934 would delay adoption of cleaner diesel engines indefinitely in the relevant areas of Alaska. We are not aware of proven reliability threats that would justify such

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<sup>46</sup> U.S. EPA, Fact Sheet “Basic Information for Stationary Engines,” *available at* <https://www.epa.gov/stationary-engines/basic-information-stationary-engines>.

indefinite delay, especially for non-emergency engines. The legislation further creates an inequity for sources that must comply with updated clean air standards. We urge Senators to vote against S. 1934.