

FARM DUST REGULATION PREVENTION ACT OF 2011

DECEMBER 6, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1633]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 1633) to establish a temporary prohibition against revising any national ambient air quality standard applicable to coarse particulate matter, to limit Federal regulation of nuisance dust in areas in which such dust is regulated under State, tribal, or local law, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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## AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Farm Dust Regulation Prevention Act of 2011”.

### SEC. 2. TEMPORARY PROHIBITION AGAINST REVISING ANY NATIONAL AMBIENT AIR QUALITY STANDARD APPLICABLE TO COARSE PARTICULATE MATTER.

Before the date that is one year after the date of the enactment of this Act, the Administrator of the Environmental Protection Agency may not propose, finalize, implement, or enforce any regulation revising the national primary ambient air quality standard or the national secondary ambient air quality standard applicable to particulate matter with an aerodynamic diameter greater than 2.5 micrometers under section 109 of the Clean Air Act (42 U.S.C. 7409).

### SEC. 3. NUISANCE DUST.

Part A of title I of the Clean Air Act (42 U.S.C. 7401 et seq.) is amended by adding at the end the following:

#### “SEC. 132. REGULATION OF NUISANCE DUST PRIMARILY BY STATE, TRIBAL, AND LOCAL GOVERNMENTS.

“(a) IN GENERAL.—Except as provided in subsection (b), this Act does not apply to, and references in this Act to particulate matter are deemed to exclude, nuisance dust.

“(b) EXCEPTION.—Subsection (a) does not apply with respect to any geographic area in which nuisance dust is not regulated under State, tribal, or local law insofar as the Administrator finds that—

“(1) nuisance dust (or any subcategory of nuisance dust) causes substantial adverse public health and welfare effects at ambient concentrations; and

“(2) the benefits of applying standards and other requirements of this Act to nuisance dust (or such subcategory of nuisance dust) outweigh the costs (including local and regional economic and employment impacts) of applying such standards and other requirements to nuisance dust (or such subcategory).

“(c) DEFINITION.—In this section—

“(1) the term ‘nuisance dust’ means particulate matter that—

“(A) is generated primarily from natural sources, unpaved roads, agricultural activities, earth moving, or other activities typically conducted in rural areas;

“(B) consists primarily of soil, other natural or biological materials, or some combination thereof;

“(C) is not emitted directly into the ambient air from combustion, such as exhaust from combustion engines and emissions from stationary combustion processes; and

“(D) is not comprised of residuals from the combustion of coal; and

“(2) the term ‘nuisance dust’ does not include radioactive particulate matter produced from uranium mining or processing.”.

## PURPOSE AND SUMMARY

H.R. 1633, the “Farm Dust Regulation Prevention Act of 2011,” was introduced by Rep. Kristi Noem on April 15, 2011. The legislation would place limits on Clean Air Act regulation of nuisance dust generated by farming, ranching and other activities typically conducted in rural areas. Key provisions of the bill:

- Prohibit for one year the Environmental Protection Agency from promulgating any new National Ambient Air Quality Standard for coarse particulate matter.

- Limit Federal regulation of nuisance dust to areas in which it is not regulated under State, tribal, or local law, where it causes substantial adverse public health and welfare effects, and where the benefits of Federal regulation outweigh the costs.

- Nuisance dust is defined to mean particulate matter that is generated primarily from natural sources, unpaved roads, agricultural activities, earth moving, or other activities typically conducted in rural areas, and meets other specific criteria.

#### BACKGROUND AND NEED FOR LEGISLATION

Under the Clean Air Act, the Environmental Protection Agency (EPA) has established National Ambient Air Quality Standards (NAAQS) for particulate matter (PM). EPA initially established such standards in 1971, and subsequently revised those standards in 1987, 1997, and 2006. These NAAQS include standards for “coarse” particulate matter, which includes particles 10 micrometers in diameter or smaller, known as “PM<sub>10</sub>,” or dust. Since 1987, EPA has had a PM<sub>10</sub> standard that is a 24-hour standard in a 99th percentile form set at a level of 150 micrograms per cubic meter. EPA last revisited and decided to retain this standard in 2006. Certain geographic areas continue to work towards attaining the existing standard.

EPA is currently conducting a five-year review of its PM standards, including the standards for PM<sub>10</sub>. In April 2011, EPA released a policy assessment prepared by EPA staff recommending that EPA either retain the current PM<sub>10</sub> standard or revise it to a 98th percentile form and a level within the range of 65 to 85 micrograms per cubic meter.

H.R. 1633 achieves two important goals. In the short term, it provides regulatory certainty for agricultural, ranching and rural businesses, and in the longer term it provides greater flexibility to states and localities to manage dust in rural parts of the nation. The bill precludes a new coarse particulate matter standard for at least one year from the date of enactment, and it offers regulatory relief to rural America by recognizing that states and local communities are better equipped to monitor and control farm dust.

#### *The history of particulate matter regulation under the Clean Air Act*

Since passage of the 1970 Clean Air Act, the EPA has regulated particles emitted into the air. This includes fine particulate matter, which is produced primarily by combustion processes and atmospheric reactions, and coarse particulate matter, which is directly emitted or re-entrained into the air. In urban areas, coarse particulate matter is generally emitted as a result of mechanical processes. Sources of such coarse particles include, for example, traffic-related emissions such as tire and brake lining materials, direct emissions from industrial processes, and construction and demolition activities. In contrast, in rural areas, coarse particulate matter is more likely to consist of windblown dust and soils. Particulate matter, without distinction to its source, is one of the six criteria pollutants for which EPA sets and enforces NAAQS under the Clean Air Act.

Coarse particulate matter generally deposit rapidly on the ground or other surfaces and are not readily transported across urban or broader areas. In contrast, fine particulate matter from combustion and atmospheric reactions can remain suspended in the air and be transported across distances.

The agency’s initial 1971 NAAQS encompassed total suspended particulates up to 45 micrometers in diameter. However, when that

standard was reviewed, research showed that smaller particulates were more problematic and the standard was revised in 1987 to address particulates 10 micrometers in diameter or less (PM<sub>10</sub>). This new NAAQS included a 24-hour PM<sub>10</sub> standard of 150 micrograms per cubic meter and an annual standard of 50 micrograms per cubic meter. The PM<sub>10</sub> NAAQS regulations address urban dust emitted from industrial processes and automotive traffic, and also address rural dust and windblown dust of natural origin.

The standards were revised again in 1997 based on research attributing most of the adverse health impacts to fine particulate matter 2.5 micrometers or less in diameter (PM<sub>2.5</sub>). EPA created a separate set of NAAQS for PM<sub>2.5</sub>. The PM<sub>2.5</sub> standards address the fine particulate that forms in the air from gases emitted by combustion at power plants, factories, and motor vehicles, especially in urban areas. The agency also solicited comment on a proposal to eliminate the 24-hour NAAQS for PM<sub>10</sub>, but did not eliminate that standard in the final rule.

Because the 1987 PM<sub>10</sub> standards address both fine and coarse particulate, and therefore duplicate the public health protections associated with the new PM<sub>2.5</sub> NAAQS, EPA determined that the fine and coarse fractions of PM<sub>10</sub> should be considered separately. EPA in its final 1997 standards decided to use PM<sub>10</sub> as an indicator for only the coarse component of particulate matter. However, the Court of Appeals for the District of Columbia vacated EPA's decision to use PM<sub>10</sub> as an indicator for only the coarse component, and the 1987 standard remained in place.

In 2006, EPA proposed revisions to its PM standards. EPA shifted its focus to urban particulate matter, reflecting the growing recognition that coarse particles comprised of natural crustal soils, dust and other biologic material do not pose a serious public health concern. EPA proposed an exemption for "rural windblown dust and soils and PM generated by agricultural and mining sources." EPA noted that the coarse particles that people are typically exposed to in urban areas differ appreciably from the particles typically found in non-urban or rural areas. EPA also noted that coarse particulate matter is associated with health effects in studies conducted in urban areas, and the limited available health evidence more strongly implicates coarse particles from traffic-related and industrial sources than that from uncontaminated soil or geologic sources.

In the final 2006 rule, EPA tightened the NAAQS for PM<sub>2.5</sub>, and ultimately retained the 24-hour PM<sub>10</sub> standard of 150 micrograms per cubic meter, while dropping the annual PM<sub>10</sub> standard based on a lack of evidence of longer term health problems attributable to particulates in that size category. While the agency did not finalize its proposed exemption for windblown dust and soils in its final 2006 standards, it required monitoring for PM NAAQS only in urban areas.

#### *Current EPA regulation of farm dust*

On October 25, 2011, EPA Assistant Administrator Gina McCarthy testified that currently 41 counties in the United States are classified as being in nonattainment with this standard. Subsequently, an environmental organization petitioned EPA to designate 15 additional areas as being in nonattainment with the exist-

ing PM<sub>10</sub> NAAQS, reclassify 6 currently “moderate” nonattainment areas to “serious” nonattainment, which carries more stringent compliance requirements, and require the states of Arizona, Colorado, Montana, Nevada, New Mexico, Oklahoma, Utah and Wyoming to revise their current state implementation plans to adopt more stringent standards.

Each state with nonattainment areas is responsible for creating and enforcing a SIP for coming into attainment with the PM<sub>10</sub> standard. These SIPs may impose dust-limiting requirements on agricultural operations such as harvesting, driving trucks and equipment on unpaved roads, or moving cattle. Examples of such measures are listed in the state implementation plans for several areas of the Southwest, such as San Joaquin and Imperial Counties in California, and Maricopa County in Arizona.

EPA has required that the SIPs contain specific management practices for agricultural sources. For example, Kevin Rogers, President of the Arizona Farm Bureau and farmer in a PM<sub>10</sub> nonattainment area, testified regarding costly requirements imposed on farmers and ranchers. These may include “tillage based on soil moisture, not working the fields in windy conditions, modifying equipment to prevent PM generation, speed limits on unpaved roads, planting windbreaks and permanent cover crops, to name a few.” He added that EPA is currently pushing for “mandatory restrictions against working the fields when winds reach a certain speed.”

Illinois cattle rancher and former President of the National Cattlemen’s Beef Association Steve Foglesong testified that “one cattle operation located in a dust nonattainment area in Arizona spent \$400,000 to comply with the current standard.” A major part of the cost is associated with spreading large amounts of water on the ground to suppress dust—and having to do so in parts of the country where water is a scarce resource.

Under the SIP process, states adopt measures that are subject to EPA review and approval. SIPs must include Federally enforceable measures and failure to submit an approvable SIP may trigger sanctions and a Federal implementation plan. Many areas spend years in negotiation with EPA to achieve an approvable SIP. For example, the Imperial County Board of Supervisors describes an “expensive and intensive effort” working with EPA in 2005 to develop a SIP: “EPA finally took action in early 2010 on the [SIP], disapproving portions of it and seeking a variety of new and additional measures before it would even consider approval of the 2005 plan submittal.”

The Board of Supervisors in Imperial County, California, in a letter to the Committee, stated that while the County, in collaboration with EPA, developed and adopted SIP provisions affecting the farming community in 2005, in 2010 EPA took action to disapprove portions of it and to require a variety of new and additional measures affecting farming operations. They stated, for example, that while the County’s 2005 plan covered all farms of 40 acres or more, which represent 97 percent of all farmland in the Imperial Valley, EPA is now seeking to impose measures on all farms in the county of 10 acres or more.

The Imperial County Board of Supervisors further stated in a letter to the Committee: “The new measures will impose even stricter

controls on our farmers, providing little or no benefit towards Imperial County's effort to meet attainment of the NAAQS for PM<sub>10</sub>. It seems clear that there is absolutely no justification for imposing requirements that would have a negative impact on the economy and employment in the County, when the rules and controls would not change the ability of the County to meet the standards on the few high PM days that are caused by exceptional events or transport from a foreign country." As a result of EPA's actions, the Board has urged Congress to provide a temporary one-year prohibition on EPA disapproval of SIPs in areas that receive less than 10 inches of precipitation per year; EPA sanctions for such areas; and the use of Federal funds by EPA or other Federal agencies for purposes of litigation against such jurisdictions.

*EPA review of particulate matter standards*

The agency is in the process of conducting its required 5-year review of the NAAQS for particulate matter, both PM<sub>10</sub> and PM<sub>2.5</sub>. A proposed rule has not yet been published.

In April 2011, EPA released its "Policy Assessment for the Review of the Particulate Matter National Ambient Air Quality Standards." In the Assessment, EPA staff recommended the agency either retain the current 24-hour PM<sub>10</sub> standard of 150 micrograms per cubic meter or revise it to a range of 65–85 micrograms per cubic meter. The agency also recommends either retaining the current 99th percentile form or changing it to 98th percentile—the latter effectively permitting additional exceedances before an area is designated nonattainment. EPA asserts that changing the form to 98th percentile would make a standard in the upper end of the proposed new range "generally equivalent" to the current standard and form. However, a study submitted by the Coarse Particulate Matter Coalition found that such a change would make the NAAQS considerably more stringent, predicting that it would cause many rural areas to exceed the standard or would bring them to the brink of exceedance of the standard, particularly in areas of the West, Southwest, and Midwestern United States.

EPA has acknowledged that the scientific evidence calling for a more stringent PM<sub>10</sub> standard based on rural soils is limited. The agency has not excluded the option of retaining the current standard. Nonetheless, the fact that the agency's record also includes multiple recommendations to consider strengthening the current standard has created uncertainty for the agricultural community. Farmers, ranchers, and rural businesses have expressed concern about costlier and more intrusive measures than those which are imposed under the existing PM<sub>10</sub> NAAQS. Even more significantly, rural businesses in areas currently in attainment with the existing standard express concern about the implications of being designated as nonattainment areas under a new more stringent PM<sub>10</sub> NAAQS.

In response to concerns about expanded regulation, EPA Administrator Lisa Jackson stated in an October 14, 2011 letter to two U.S. Senators that "I am prepared to propose the retention—with no revision—of the current PM<sub>10</sub> standards and form when it is sent to OMB for interagency review." However, this statement has not adequately addressed the concerns of many stakeholders, including the American Farm Bureau Federation and its 51 affiliates,

the National Cattlemen's Beef Association, and over 185 agricultural and other organizations that have written in support of H.R. 1633 because the Administrator's statement does not resolve regulatory uncertainty.

After Administrator Jackson's statement, Assistant Air Administrator Gina McCarthy testified: "I believe that there should be regulations on coarse particles, and coarse particles, no matter where they are emitted from, can be reduced in areas where they are causing a health burden that they should be reduced if they can be done cost-effectively." When asked whether the final rule could differ from the proposed version and include farm dust, Ms. McCarthy responded that "the Administrator has made her intention clear but certainly she can't preclude the rights and responsibilities she has under the Administrative Procedures Act and the right to listen to comment that is received."

If EPA does not change the existing PM<sub>10</sub> NAAQS during its current rulemaking process, it is possible at least one petitioner will challenge EPA in court seeking to compel the agency to promulgate a more stringent NAAQS. In the words of Rep. Lee Terry, "We are only one lawsuit away from you [EPA] being forced to regulate dust particles from farming activities. . . ." When asked about the possibility, Assistant Administrator McCarthy acknowledged the possibility of such lawsuits and said she could do nothing to stop it. In a subsequent panel, attorney John Walke of the Natural Resources Defense Council, an organization that frequently sues EPA, declined to foreclose the option of a litigation forcing a new PM<sub>10</sub> standard. The recent petition seeking to designate 15 additional areas as being in nonattainment with the existing PM<sub>10</sub> NAAQS also demonstrates the potential for litigation.

H.R. 1633 is needed to eliminate regulatory uncertainty, and provide regulatory relief associated with current and potential future regulation of dust in rural America. Without legislation, the rulemaking process and legal challenges could result in more stringent dust regulations and costs to agricultural and rural businesses.

*H.R. 1633—The Farm Dust Regulation Prevention Act of 2011*

H.R. 1633, the "Farm Dust Regulation Prevention Act of 2011," includes the following provisions:

Section 1 provides the short title of "Farm Dust Regulation Prevention Act of 2011."

Section 2 prohibits EPA from proposing, finalizing, implementing or enforcing any regulation revising the National Ambient Air Quality Standards applicable to coarse particulate matter for one year from the date of enactment.

Section 3 provides that "nuisance dust" shall not be subject to regulation under the Clean Air Act, except to the extent that nuisance dust in a geographic area is not currently regulated by state, tribal or local law and the Administrator of the Environmental Protection Agency (EPA) finds: (1) nuisance dust causes substantial adverse public health and welfare effects at ambient concentrations; and (2) the benefits of applying standards and requirements of the Clean Air Act to nuisance dust outweigh the costs (including economic and employment impacts) of applying the standards.

Section 3 also defines "nuisance dust" to mean particulate matter that (1) is generated primarily from natural sources, unpaved

roads, agricultural activities, earth moving, or other activities typically conducted in rural areas; (2) consists primarily of soil, other natural or biological materials, or some combination thereof; (3) is not emitted directly into the ambient air from combustion, such as exhaust from combustion engines and emissions from stationary combustion processes; and (4) is not comprised of residuals from the combustion of coal. The term “nuisance dust” does not include radioactive particulate matter produced from uranium mining or processing.

The “Farm Dust Regulation Prevention Act of 2011” was introduced on April 15, 2011, by Representatives Noem, Hurt, Boswell, and Kissell. An Amendment in the Nature of a Substitute was offered and favorably reported by the Subcommittee on Energy and Power on November 3, 2011.

#### *Supporters of the legislation*

Supporters of the legislation include the Agribusiness Association of Indiana, Agribusiness Association of Iowa, Agricultural Council of Arkansas, Agricultural Retailers Association, Agri-Mark Inc., Alabama Cattlemen’s Association, Alabama Pork Producers Association, All-Terrain Vehicle Association, American Farm Bureau Federation and their 51 state affiliates, American Feed Industry Association, American Motorcyclist Association, American Sheep Industry Association, American Veal Association, Americans for Prosperity, Americans for Tax Reform, Arizona Cattle Feeders Association, Arizona Cattle Growers Association, Arizona Cattlemen’s Association, Arizona Cotton Growers Association, Arizona Pork Council, Arkansas Cattlemen’s Association, Arkansas Pork Producers Association, Arkansas Poultry Federation, California Cattlemen’s Association, California Pork Producers Association, Colorado Association of Wheat Growers, Colorado Cattlemen’s Association, Colorado Corn Growers Association, Colorado Lamb Council, Colorado Livestock Association, Colorado Pork Producers Council, Colorado Potato Administrative Committee, Colorado Sheep & Wool Authority, Colorado Wool Growers Association, Council for Citizens Against Government Waste, CropLife America, Dairy Farmers of America, Dairy Producers of New Mexico, Dairy Producers of Utah, Dairylea Cooperative, Florida Cattlemen’s Association, Florida Nursery, Growers and Landscape Association, Georgia Agribusiness Council, Georgia Cattlemen’s Association, Georgia Fruit and Vegetable Growers Association, Georgia Milk Producers, Georgia Pork Producers Association, Georgia Poultry Federation, Georgia Watermelon Association, Idaho Cattle Association, Idaho Dairymen’s Association, Idaho Grain Producers Association, Idaho Pork Producers Association, Idaho Potato Commission, Idaho Wool Growers Association, Illinois Beef Association, Illinois Pork Producers Association, Imperial County Board of Supervisors, Imperial County Farm Bureau, Independent Cattlemen’s Association of Texas, Indiana Beef Cattle Association, Indiana Pork, Iowa Cattlemen’s Association, Iowa Pork Producers Association, Kansas Livestock Association, Kansas Pork Association, Kentucky Cattlemen’s Association, Kentucky Pork Producers Association, Let Freedom Ring, Livestock Marketing Association, Louisiana Cattlemen’s Association, Louisiana Pork Producers Association, Maine Hog Growers Association, Michigan Cattlemen’s Association, Michigan Pork

Producers Association, Milk Producers Council, Minnesota Grain and Feed Association, Minnesota Pork Producers Association, Minnesota State Cattlemen's Association, Mississippi Cattlemen's Association, Mississippi Pork Producers Association, Missouri Cattlemen's Association, Missouri Corn Growers Association, Missouri Pork Producers Association, Missouri Poultry Federation, Montana Pork Producers Council, Montana Stockgrower's Association, Montana Wool Growers Association, National Association of Manufacturers, National Cattlemen's Beef Association, National Chicken Council, National Cotton Council, National Cotton Ginners' Association, National Council of Farmer Cooperatives, National Federation of Independent Business, National Grain and Feed Association, National Livestock Producers Association, National Meat Association, National Milk Producers Federation, National Mining Association, National Oilseed Processors Association, National Pork Producers Council, National Potato Council, National Renderers Association, National Stone, Sand & Gravel Association, National Turkey Federation, Nebraska Cattlemen's Association, Nebraska Grain and Feed Association, Nebraska Pork Producers Council, Inc., New Hampshire Pork Producers Council, New Mexico Cattle Growers Association, New Mexico Farm and Livestock Bureau, New Mexico Federal Lands Council, New Mexico Wool Growers Inc., New York Producers Cooperative, Inc., North Carolina Agribusiness Council, Inc., North Carolina Cattlemen's Association, North Carolina Forestry Association, North Carolina Horse Council, North Carolina Peanut Growers Association, North Carolina Pork Council, North Carolina Poultry Federation, North Carolina Soybean Producers Association, Inc., North Carolina SweetPotato Commission, North Dakota Corn Growers Association, North Dakota Pork Producers Council, North Dakota Stockmen's Association, Northeast Ag and Feed Alliance, Northeast Dairy Farmers Cooperative, Ohio Agribusiness Association, Ohio Cattlemen's Association, Ohio Pork Producers Council, Oklahoma Cattlemen's Association, Oklahoma Poultry Federation, Oklahoma Pork Council, Oregon Pork Producers Association, PennAg Industries Association, Pennsylvania Pork Producers Strategic Investment Program, Public Lands Council, Rocky Mountain Agribusiness Association, Select Milk Producers, Inc., Small Business & Entrepreneurship Council, South Carolina Cattlemen's Association, South Carolina Pork Board, South Dakota Agri-Business Association, South Dakota Association of Cooperatives, South Dakota Cattlemen's Association, South Dakota Dairy Producers, South Dakota Grain & Feed Association, South Dakota Pork Producers Council, South Dakota Soybean Association, South Dakota Stockgrowers Association, South Dakota Wheat Inc., South East Dairy Farmers Association, Southeastern Livestock Network, Southern Cotton Growers, Southern Crop Production Association, Southeast Milk Inc., St. Albans Cooperative Creamery, Stewards of the Sequoia, Tennessee Cattlemen's Association, Tennessee Pork Producers Association, Texas Agricultural Cooperative Council, Texas and Southwestern Cattle Raisers Association, Texas Association of Dairymen, Texas Cattle Feeders Association, Texas Pork Producers Association, The Blue Ribbon Coalition, The Fertilizer Institute, Upstate Niagara Cooperative, USA Rice Federation, US Beet Sugar Association, US Chamber of Commerce, Utah Cattlemen's Association, Utah Pork Producers As-

sociation, Utah Wool Growers Association, Virginia Agribusiness Council, Virginia Cattlemen's Association, Virginia Grain Producers Association, Virginia Pork Industry Association, Virginia Poultry Federation, Washington Cattle Feeders Association, Washington Cattlemen's Association, Washington Pork Producers, Western Business Roundtable, West Virginia Cattlemen's Association, Wisconsin Dairy Business Association, Wisconsin Pork Producers, Wyoming Pork Producers, and the Wyoming Stock Grower's Association.

#### HEARINGS

On October 25, 2011, the Subcommittee on Energy and Power held a legislative hearing on the "Farm Dust Regulation Prevention Act of 2011" and received testimony from:

- Representative Kristi Noem (South Dakota), U.S. House of Representatives;
- Representative Robert Hurt (Virginia), U.S. House of Representatives;
- Gina McCarthy, Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency;
- Steve Foglesong, Ranch Owner, Black Gold Cattle Company and Immediate Past president, NBA, on behalf of the National Cattlemen's Beef Association;
- Kevin Rogers, President, Arizona Farm Bureau, on behalf of the American Farm Bureau Federation;
- Pete Lien, President, Pete Lien & Sons, Inc., on behalf of the National Stone, Sand & Gravel Association;
- Kurt E. Blase, Partner, Holland & Knight, on behalf of the Coarse Particulate Matter Coalition;
- Till von Wachter, Ph.D., Associate Professor of Economics, Columbia University;
- Gregory Wellenius, Sc.D., Assistant Professor of Community Health, Brown University; and,
- John Walke, Clean Air Director and Senior Attorney, Natural Resources Defense Council.

#### COMMITTEE CONSIDERATION

H.R. 1633 was introduced on April 15, 2011 by Representatives Kristi Noem, Robert Hurt, Leonard Boswell, and Larry Kissell.

On October 25, 2011, the Subcommittee on Energy and Power held a legislative hearing on H.R. 1633.

On November 3, 2011, the Subcommittee on Energy and Power reported the bill favorably to the full committee, by roll call vote of 12 ayes and 9 nays. During the markup, an Amendment in the Nature of a Substitute was offered, and adopted by voice vote. One amendment was offered and defeated, by voice vote.

On November 29 and 30, 2011, the Committee on Energy and Commerce met in open markup session. During the markup, 9 amendments were offered of which 2 were adopted.

On November 30, 2011, the Committee ordered H.R. 1633 favorably reported to the House, as amended.

## COMMITTEE VOTES

Clause 3(b) of rule XII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. A motion by Mr. Upton to order H.R. 1633, reported to the House, as amended, was agreed to by a record vote of 33 yeas and 16 nays. The following reflects the recorded votes taken during the Committee consideration, including the names of those Members voting for and against.

**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS  
ROLL CALL VOTE # 69**

**BILL:** H.R. 1633, the "Farm Dust Regulation Prevention Act of 2011"

**AMENDMENT:** An amendment offered by Mr. Waxman, No. 2, to exclude from the definition of "nuisance dust" particulate matter produced from mining activities.

**DISPOSITION:** NOT AGREED TO, by a roll call vote of 16 yeas to 30 nays.

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

11/30/2011

**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS  
ROLL CALL VOTE # 70**

**BILL: H.R. 1633**, the "Farm Dust Regulation Prevention Act of 2011"

**AMENDMENT:** An amendment offered by Ms. Eshoo, No. 3, as amended by the Waxman amendment, to limit the temporary prohibition on revisions to the National Ambient Air Quality Standard for coarse particulate matter.

**DISPOSITION: NOT AGREED TO**, by a roll call vote of 18 yeas to 33 nays.

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

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**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS  
ROLL CALL VOTE # 71**

**BILL: H.R. 1633**, the "Farm Dust Regulation Prevention Act of 2011"

**AMENDMENT:** An amendment offered by Mr. Rush, No. 4 to strike provisions relating to nuisance dust.

**DISPOSITION: NOT AGREED TO**, by a roll call vote of 18 yeas to 31 nays.

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

11/30/2011

**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS  
ROLL CALL VOTE # 72**

**BILL: H.R. 1633**, the "Farm Dust Regulation Prevention Act of 2011"

**AMENDMENT:** An amendment offered by Ms. Castor, No. 5, to exclude from the definition of "nuisance dust" particulate matter containing arsenic or other heavy metals that are hazardous to human health.

**DISPOSITION: NOT AGREED TO**, by a roll call vote of 16 yeas to 30 nays.

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

11/30/2011

**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS  
ROLL CALL VOTE # 73**

**BILL: H.R. 1633**, the "Farm Dust Regulation Prevention Act of 2011"

**AMENDMENT:** An amendment offered by Ms. Christensen, No. 7, to allow the EPA Administrator to regulate nuisance dust under the Clean Air Act upon determination that the State, tribal or, local laws do not regulate such dust at a level requisite to protect public health.

**DISPOSITION: NOT AGREED TO**, by a roll call vote of 14 yeas to 30 nays.

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

11/30/2011

**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS  
ROLL CALL VOTE # 74**

**BILL: H.R. 1633**, the "Farm Dust Regulation Prevention Act of 2011"

**AMENDMENT:** An amendment offered by Mr. Butterfield, No. 8, to define "nuisance dust" as crustal coarse crustal particulate matter that is produced from agricultural activities.

**DISPOSITION: NOT AGREED TO**, by a roll call vote of 16 yeas to 33 nays.

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

11/30/2011

**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS  
ROLL CALL VOTE # 75**

**BILL: H.R. 1633**, the "Farm Dust Regulation Prevention Act of 2011"

**AMENDMENT:** A motion by Mr. Upton to order H.R. 1633 favorably reported to the House, as amended.  
(Final Passage)

**DISPOSITION: AGREED TO**, by a roll call vote of 33 yeas to 16 nays.

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

11/30/2011

## COMMITTEE OVERSIGHT FINDINGS

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

## STATEMENT OF GENERAL PERFORMANCE, GOALS AND OBJECTIVES

H.R. 1633 prohibits EPA from revising the National Ambient Air Quality Standards applicable to coarse particulate matter for one year from the date of enactment, and also provides that nuisance dust shall not be subject to Federal regulation under the Clean Air Act, except to the extent it is not currently regulated by State, tribal or local law, causes substantial adverse public health and welfare effects, and the benefits of regulation outweigh the costs.

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. 1633, the “Farm Dust Regulation Prevention Act of 2011,” would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

## EARMARKS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI, the Committee finds that H.R. 1633, the “Farm Dust Regulation Prevention Act of 2011,” contains no earmarks, limited tax benefits, or limited tariff benefits.

## COMMITTEE COST 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.

DECEMBER 6, 2011.

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. 1633, the Farm Dust Regulation Prevention Act of 2011.

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. 1633—Farm Dust Regulation Prevention Act of 2011*

Summary: H.R. 1633 would prohibit the Environmental Protection Agency (EPA) from issuing any new National Ambient Air Quality Standard for particulate matter (PM) greater than 2.5 micrometers in diameter for at least one year from the date of enactment. This legislation also would amend the Clean Air Act (CAA)

to exclude, with an exception, PM considered to be “nuisance dust” from regulation by the CAA. That exception would apply to areas without any state, tribal, or local regulation of “nuisance dust” if EPA finds that such dust would cause substantial adverse effects and only if regulating it would result in benefits that outweigh the costs, including economic and employment impacts.

Nuisance dust would be defined in the legislation to mean PM that is generated primarily from natural sources, unpaved roads, agricultural activities, earth moving, or other activities typically conducted in rural areas, and consists primarily of soil or other natural biological materials. PM that is emitted into the air from combustion or is produced from uranium mining or processing would be excluded from this definition.

CBO estimates that implementing this legislation would cost \$10 million over the 2012–2016 period, assuming appropriation of the necessary funds. Such funding would cover EPA’s costs to carry out changes to certain existing emission control standards, and activities to study the need and feasibility of modifying EPA’s national monitoring network for PM.

Pay-as-you-go procedures do not apply to H.R. 1633 because the bill would not affect direct spending or revenues.

H.R. 1633 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 1633 is shown in the following table. The costs of this legislation fall within budget function 300 (natural resources and environment).

	By fiscal year, in millions of dollars—					
	2012	2013	2014	2015	2016	2012–2016
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level .....	*	2	2	3	3	10
Estimated Outlays .....	*	2	2	3	3	10

Note: \* = less than \$500,000.

Basis of estimate: For this estimate, CBO assumes that H.R. 1633 will be enacted in calendar year 2012 and that the necessary amounts to implement this legislation will be appropriated for each year. In total, CBO estimates that implementing this legislation would cost about \$10 million over the next five years.

EPA has established two standards for PM—one for coarse particles measuring between 2.5 and 10 micrometers and one for fine particles that are 2.5 micrometers in diameter or less. Currently, EPA is not planning to revise any standard related to coarse PM. Thus, CBO estimates that implementing section 2 of this legislation to prohibit such regulation would have no significant impact on the federal budget.

CBO estimates, however, that exempting nuisance dust from regulation under the CAA would require EPA to revise certain existing emission control standards, including those regulations that target PM as well as those that affect toxic substances in the air, to the extent that nuisance dust may be covered by those standards. Some of those revisions would be necessary because the agency expects some sources of PM would petition EPA to modify certain regulations. According to EPA, it costs on average \$500,000 to

revise a clean air standard; this cost includes both the personnel and contract costs required to revise cost and benefit models, determine new environmental impacts, reassess monitoring and modeling data, publish a proposal, receive and respond to public comments, and issue a final rule for the revision. Over the next five years, CBO expects that, under the bill, several existing standards would be reviewed at a cost of \$5 million.

In addition, CBO estimates that EPA would incur additional costs to consider the need to reconfigure its PM national network. That network consists of 200 sampling stations that determine the chemical composition of PM in the ambient air. Under the bill, EPA may need to modify that network in order to differentiate nuisance dust from other PM and in order to revise various emission control standards that are based on monitoring data. Industry experts that CBO consulted note that there is some uncertainty about the feasibility of distinguishing nuisance dust from other PM. Consequently, CBO expects that EPA would initially study the possibility of updating its monitoring network before making any significant capital expenditures. Over the 1998–2000 period, EPA spent about \$50 million annually to develop and implement modifications to its air-sampling network to carry out regulations related to fine PM. Thus, CBO estimates that modifying this system to differentiate nuisance dust could be costly; however, spending to support that effort, if needed, would not occur until after 2016. Based on information from EPA, we expect that the agency would spend \$5 million over the next five years to study the need and feasibility of modifying its monitoring network.

Pay-As-You-Go considerations: None.

Intergovernmental and private-sector impact: H.R. 1633 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: Ryan Miller; Impact on the private sector: Amy Petz.

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

#### FEDERAL MANDATES STATEMENT

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

#### ADVISORY COMMITTEE STATEMENT

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

#### APPLICABILITY TO LEGISLATIVE BRANCH

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

## SECTION-BY-SECTION ANALYSIS OF LEGISLATION

*Section 1—Short title*

Section 1 provides the short title of “Farm Dust Regulation Prevention Act of 2011.”

*Section 2—Temporary prohibition against revising any National Ambient Air Quality Standard applicable to coarse particulate matter*

Section 2 prohibits EPA from proposing, finalizing, implementing or enforcing any regulation revising the National Ambient Air Quality Standards applicable to coarse particulate matter for one year from the date of enactment.

*Section 3—Nuisance dust*

Section 3 provides that “nuisance dust” shall not be subject to regulation under the Clean Air Act, except to the extent that nuisance dust in a geographic area is not currently regulated by state, tribal or local law and the Administrator of the Environmental Protection Agency finds: (1) nuisance dust causes substantial adverse public health and welfare effects at ambient concentrations; and (2) the benefits of applying standards and requirements of the Clean Air Act to nuisance dust outweigh the costs (including economic and employment impacts) of applying the standards.

Section 3 also defines “nuisance dust” to mean particulate matter (1) that is generated primarily from natural sources, unpaved roads, agricultural activities, earth moving, or other activities typically conducted in rural areas; (2) consists primarily of soil, other natural or biological materials, or some combination thereof; (3) is not emitted directly into the ambient air from combustion, such as exhaust from combustion engines and emissions from stationary combustion processes; and (4) is not comprised of residuals from the combustion of coal. The term “nuisance dust” does not include radioactive particulate matter produced from uranium mining or processing.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

**CLEAN AIR ACT**

## TITLE I—AIR POLLUTION PREVENTION AND CONTROL

## PART A—AIR QUALITY AND EMISSION LIMITATIONS

\* \* \* \* \*

**SEC. 132. REGULATION OF NUISANCE DUST PRIMARILY BY STATE, TRIBAL, AND LOCAL GOVERNMENTS.**

(a) *IN GENERAL.*—*Except as provided in subsection (b), this Act does not apply to, and references in this Act to particulate matter are deemed to exclude, nuisance dust.*

(b) *EXCEPTION.*—Subsection (a) does not apply with respect to any geographic area in which nuisance dust is not regulated under State, tribal, or local law insofar as the Administrator finds that—

(1) nuisance dust (or any subcategory of nuisance dust) causes substantial adverse public health and welfare effects at ambient concentrations; and

(2) the benefits of applying standards and other requirements of this Act to nuisance dust (or such subcategory of nuisance dust) outweigh the costs (including local and regional economic and employment impacts) of applying such standards and other requirements to nuisance dust (or such subcategory).

(c) *DEFINITION.*—In this section—

(1) the term “nuisance dust” means particulate matter that—

(A) is generated primarily from natural sources, unpaved roads, agricultural activities, earth moving, or other activities typically conducted in rural areas;

(B) consists primarily of soil, other natural or biological materials, or some combination thereof;

(C) is not emitted directly into the ambient air from combustion, such as exhaust from combustion engines and emissions from stationary combustion processes; and

(D) is not comprised of residuals from the combustion of coal; and

(2) the term “nuisance dust” does not include radioactive particulate matter produced from uranium mining or processing.

\* \* \* \* \*

## DISSENTING VIEWS

As approved, H.R. 1633 has the potential to be interpreted very broadly in manners that could significantly limit existing and future Clean Air Act public health protections. At the October 25, 2001 hearing on H.R. 1633, the Farm Dust Regulation Prevention Act, the author of the legislation stated that the purpose of H.R. 1633 is “to (end) the Environmental Protection Agency’s (EPA) regulation of farm dust in rural America, while still maintaining the protections of the Clean Air Act to the public’s health and welfare.”<sup>1</sup> Farm dust examples include the dust kicked up by a combine harvesting wheat or a pickup truck driving down a dirt road and can be classified as coarse particulates. Based on speculation that the EPA was considering tightening the standards for coarse particulate matter, which includes farm dust, the author of the bill decided to introduce this legislation to prevent something that had yet to be even proposed.

Consequently, by rushing this bill through Committee with only one hearing and little consideration for long-term consequences, this Committee has ignored assurances by the EPA Administrator that EPA would not tighten the standards and also ended up passing legislation that opens gaping holes in the Clean Air Act through which one could drive a herd of cattle.

### *Legislating the Clean Air Act*

The Clean Air Act Amendments of 1990 (1990 Amendments) were the last major changes to the original Clean Air Act (CAA) of 1970. No one involved in the 1990 Amendments took these changes lightly; many hearings, markups, amendments, and negotiations with the Senate were held throughout the 101st Congress. Over 100 of the 166 cosponsors were Republicans. According to the Committee on Energy and Commerce’s report on the 1990 Amendments, the Subcommittees on Health and the Environment, Energy and Power, and Oversight and Investigations held 70 days of hearings over a 10 year period. During the 101st Congress, when the 1990 Amendments were passed, the Subcommittee on Health and the Environment held eight days of hearings and the Subcommittee on Energy and Power held six hearings. Once the 1990 Amendments moved to the full Committee, an additional 10 markup sessions were held before the 1990 Amendments passed 41–1. Members of the Committee involved in that process remember how extensive those sessions were and what efforts were made to incorporate suggestions from both Republicans and Democrats to make it a stronger bill.

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<sup>1</sup>Testimony of Congresswoman Kristi Noem before the Subcommittee on Energy and Power, Legislative Hearing on H.R. 1633, the Farm Dust Regulation Prevention Act of 2011, 112th Congress (October 25, 2011).

In addition to consideration by the Committee on Energy and Commerce, the 1990 Amendments were referred to the Committee on Public Works and Transportation and the Committee on Ways and Means. When the House and the Senate met in a conference committee, conferees included members from seven House Committees—Energy and Commerce; Ways and Means; Education and Labor; Interior and Insular Affairs; Merchant Marine and Fisheries; Science, Space, and Technology; and Public Works and Transportation. The conference committee held five sessions and the conference report on the 1990 Amendments passed by a vote of 401–25 in the House and 89–10 in the Senate.

The Clean Air Act Amendments of 1990 was not perfect legislation; compromises require each side make concessions on important issues. However, it has proved to be effective over the years—as the Assistant EPA Administrator noted in her testimony, “the Gross Domestic Product of the United States grew by more than 200 percent” while saving approximately 160,000 lives last year by reducing premature mortality risks.<sup>2</sup> Pollutant emissions have dropped by 41 percent since 1990.<sup>3</sup>

H.R. 1633, on the other hand, had only one hearing and two markups. Where the 1990 Amendments were truly bipartisan, only four of 120 cosponsors of H.R. 1633 are Democrats. Ten amendments were considered for H.R. 1633 but only one Democratic amendment was adopted and the vote from the Subcommittee on Energy and Power occurred along partisan lines. This is not compromise legislation. Furthermore, if this were a simple bill amending a small part of the Clean Air Act, this process would be of less concern. Unfortunately, ambiguity resulting from the poor drafting of the legislation could jeopardize the entire National Ambient Air Quality Standard (NAAQS) for any size of particulate matter generated in rural, suburban, or urban areas. This bill creates ambiguities and uncertainties that some will undoubtedly try to exploit and that will likely lead to lengthy and extensive litigation. Ambiguously drafted bills, such as H.R. 1633, unnecessarily cede prerogatives of the legislative branch to the other two branches of government.

Section two of H.R. 1633 prohibits the EPA for one year from proposing, finalizing, implementing, or enforcing “any regulation revising” any primary or secondary NAAQS that applies to particulate matter larger than 2.5 micrometers, generally referred to as coarse particulates. Farm dust is one kind of coarse particulate matter. Rather than simply preventing the EPA from prospectively revising the existing coarse particulate standard, Section 2 of this bill is written in such a way that could be interpreted to apply to the entire national ambient air quality standard program for particulate matter. It could prevent (for one year) the revision of the fine particle standards because the fine particle monitors used to determine attainment status include in their measurements some

<sup>2</sup>Testimony of EPA Assistant Administrator Regina McCarthy before the Subcommittee on Energy and Power, Legislative Hearing on H.R. 1633, the Farm Dust Regulation Prevention Act of 2011, 112th Congress (October 25, 2011). McCarthy’s testimony cited the Bureau of Economic Analysis, National Economic Accounts, “Table 1.1.5. Gross Domestic Product,” <http://bea.gov/national/index.htm#gdp>

<sup>3</sup>“Our Nation’s Air—Status and Trends through 2008,” EPA (February 2010). <http://epa.gov/airtrends/2010/report/airpollution.pdf>

particles larger than 2.5 microns.<sup>4</sup> Second, it could prevent the implementation and enforcement of the existing fine and coarse particle matter control program because the existing NAAQS are themselves regulations revising standards applicable to particles greater than 2.5 microns in diameter. While those potential interpretations are not the best reading of this section, the ambiguities in this section will likely lead to litigation and uncertainties that better drafting could prevent.

Section three creates a new category of air pollution called “nuisance dust” that would be completely exempt from EPA clean air regulations. This exemption will likely lead to significant litigation and regulatory uncertainty as polluters try to have their emissions fit into the definition of “nuisance dust” and thus be exempt from regulations, including air toxics regulations, new source performance standards, and perhaps even regulatory provisions to reduce pollution from power plants and mobile sources. The bill language encourages litigation by using undefined and ambiguous terms such as “primarily,” “activities typically conducted in rural areas,” and “natural” material to define “nuisance dust.” The definition does not clarify the size of “nuisance dust,” meaning that nuisance dust could include fine particles. “Nuisance dust” is defined broadly enough that, in addition to farm dust, it could include other particles such as toxins or metals released from mining or other industrial activities. The definition exempts particulate matter generated from “natural sources,” “earth moving” or “other activities typically conducted in rural areas.” Mining operations, road construction, or earth moving also occur in urban settings so these types of “nuisance dust” could also be exempted from regulation in urban areas as well. Finally, even if “nuisance dust” is generated in a rural area that dust is not guaranteed to stay in rural areas. Winds can carry dust many miles and EPA sensors do not differentiate rural dust from urban dust.

This definition is problematic because: a) nuisance dust would include both fine and coarse particulate matter; b) nuisance dust can be generated anywhere; and c) particulate matter monitors do not distinguish between nuisance dust and other types of fine or coarse particulate matter. Thus, because all measurements of particulate matter potentially include some nuisance dust, there are implications for all particulate matter standards whose implementation, enforcement and development rests on monitoring or monitored results.

#### *A solution in search of a problem*

After rumors surfaced that the EPA would attempt to impose stricter regulations on coarse particulate matter, the EPA Administrator worked to assuage those concerns. In March of this year a news article quoted the Administrator that EPA had “no plans to” implement stricter standards. The article also noted that, because the NAAQS is required to be reviewed every five years and go through a public comment period,<sup>5</sup> the Administrator could not de-

<sup>4</sup> Testimony of EPA Assistant Administrator Regina McCarthy before the Subcommittee on Energy and Power, Legislative Hearing on H.R. 1633, the Farm Dust Regulation Prevention Act of 2011, 112th Congress (October 25, 2011).

<sup>5</sup> This review and comment period is required under 42 USC 85 § 7409(d)(1).

finitively say that stricter regulations would not be implemented until after completion of the public comment period.<sup>6</sup> On October 14, 2011, before the Subcommittee on Energy and Power's hearing on H.R. 1633, the EPA Administrator sent a letter to the chairwoman of the Senate Committee on Agriculture, Nutrition, and Forestry stating the EPA's intent "to propose the retention—with no revision—of the current" particulate matter standards.<sup>7</sup>

Republican members of this Committee insist the legislation is necessary despite the EPA Administrator's assurance that stricter regulations will not be implemented. Meanwhile, the Republican author of a similar Senate bill, a former secretary of the Department of Agriculture, takes a different position. In one of his weekly columns, the Senate sponsor stated, "I asked only for clarity from EPA, and this week Administrator Jackson finally provided it."<sup>8</sup>

Unfortunately, Republican members of the Committee on Energy and Commerce would not believe the letter of the EPA Administrator to a Senate committee chairwoman even as constituents of the bill's author questioned the need for H.R. 1633. The Sioux Falls Argus Leader wrote, "it's disappointing to see (the bill's author) continue her fight against a made-up problem like the potential for farm dust regulations by the Environmental Protection Agency."<sup>9</sup> The Yankton Daily Press & Dakotan gave a "THUMBS DOWN to (the bill's author), who can't seem to find her way out of an imagined dust storm. . . . We wish South Dakota's lone representative would stop trying to stir the fears of farmers and ranchers and instead spend her time fighting real problems rather than imagined ones."<sup>10</sup>

#### *Real solutions to real problems*

The Clean Air Act and the Amendments of 1990 have provided this country with important public health benefits and proven that the economy can grow while we reduce pollution. Nonetheless, as a chief author of the changes made in 1990, I admit that the CAA is showing its age and would benefit from some carefully targeted amendments to address specific problems. However, Republican members are not crafting real solutions targeted at the problems they perceive in the Clean Air Act. H.R. 1633 is ambiguous and subject to interpretations that go far beyond the stated intent of its authors.

I have been a harsh critic of erroneous administration of the CAA by the EPA and other failures by that agency. The way this or similar matters should be tended to is by proper oversight, hearings, correspondence, and careful investigative staff work. Such due diligence is the surest way to avoid unintended consequences which produce erroneous and surprising repercussions from litigation to appeal unwise or incorrect interpretations of the statute.

<sup>6</sup>"Bill to ban phantom EPA dust rule approved by House panel," November 2, 2011, Washington Post.

<sup>7</sup>Letter from Lisa Jackson, EPA Administrator, to Senator Debbie Stabenow, Oct. 14, 2011, available at <http://epa.gov/pm/pdfs/20111014Stabenow.pdf>.

<sup>8</sup>"EPA Announcement a Victory for Agriculture," Senator Mike Johanns, October 17, 2011, <http://johanns.senate.gov>.

<sup>9</sup>"Noem pushing ahead blindly in dust-up with EPA," Sioux Falls Argus Leader, October 21, 2011.

<sup>10</sup>"We Say—In The Dust," Yankton Daily Press & Dakotan, October 21, 2011.

Members from the majority and minority have historically been willing to engage in proper legislative oversight and fact finding leading to thoughtful and effective amendments to address administrative failure or administrative misbehavior by the EPA. On many occasions in the past I have led or supported such action by Congress and stand ready to assist in such proper action. That approach, using the regular order, assures a far better and more successful result to dealing with the problem, real or imagined, before us.

The approach here assures mischief, mistakes, confusion, and difficulty for everyone who might be affected by the failures of H.R. 1633. If we want to make changes, let's make the same type of effort we did 21 years ago and really examine the specific problems and propose legislation that solves those problems. Until that time comes, I will continue to oppose these half thought out bills that are poorly written, contain no new solutions, and make little effort to bring both parties to the table to find a true, well reasoned compromise.

I am ready to help deal with this problem in a proper way. This regrettably is not a proper way to deal with these important and complicated problems.

JOHN D. DINGELL.

## DISSENTING VIEWS FOR H.R. 1633

The Farm Dust Regulation and Prevention Act of 2011 would substantially weaken the Clean Air Act by eliminating EPA's authority to regulate particulate matter from a broad range of sources and by jeopardizing existing state and federal regulations that apply to fine and coarse particulate pollution across all sources of that pollution. It would also block EPA from revising the health-based air quality standard for coarse particulate matter for one year and may block EPA from revising the fine particulate matter standard for one year.

Although the title of the bill suggests that it covers only dust from farms, the bill creates a broad new category of pollution, called nuisance dust, and exempts it from the Clean Air Act entirely without any scientific evidence that doing so will not harm public health. The bill would exempt from the Clean Air Act any particulate matter pollution that is emitted from sources such as open-pit mines, mining processing plants, sand and gravel mines, smelters, coal mines, coal-processing plants, ferroalloy plants (which produce materials used in steel manufacture), cement kilns, and waste and recovery facilities. These facilities emit fine particulates, coarse particulates, arsenic, lead, mercury, cadmium, zinc, chromium, and other heavy metals, all of which could fall under this bill's broad exemption from the Clean Air Act. The bill also may exempt emissions of nitrogen oxides and sulfur dioxide from power plants and other combustion sources, as explained below.

### I. PURPOSE OF H.R. 1633

The Clean Air Act requires EPA to set National Ambient Air Quality Standards (NAAQS) for pollutants considered harmful to public health and the environment. NAAQS are set to determine the amount of pollution allowed in the ambient air but do not, in and of themselves, establish any emission control requirements for any industry or source, including agriculture. EPA sets NAAQS for particles that are 10 micrometers in diameter or smaller, as these particles can travel through the throat and nose and enter the lungs. The current standard for PM<sub>10</sub> (coarse particles) has been in place since 1987 to address the health effects of short-term, acute exposure to coarse particles. EPA has also set a NAAQS for PM<sub>2.5</sub> (fine particles). The Clean Air Act requires EPA to review the latest science and update each NAAQS as needed every five years. EPA is currently in the process of updating the NAAQS for fine and coarse particles.

Both fine and coarse particulates harm health. Numerous studies have concluded that exposure to fine particles can cause premature death, asthma attacks and other respiratory disease, heart attacks,

and stroke.<sup>1</sup> EPA's Integrated Science Assessment for Particulate Matter examined the best peer-reviewed scientific literature and concluded that the medical evidence suggests a causal relationship between short term exposure to coarse particle pollution and cardiovascular effects, respiratory effects, and mortality.<sup>2</sup> Individuals with preexisting lung diseases such as asthma, children and older adults are more vulnerable to these health effects from exposure to coarse particles.<sup>3</sup> EPA has concluded that that exposure to coarse particles "can have an important public health impact" because of the "magnitude of these subpopulations and risks identified in health studies conducted in urban and industrial areas."<sup>4</sup>

Supporters of this bill claim that H.R. 1633 will simply prevent the EPA from regulating coarse particles emitted from agricultural activities for one year. At the Subcommittee markup, Chairman Ed Whitfield stated that this bill "provides needed certainty that the agricultural sector and rural America will not be burdened with costly new EPA dust regulations."<sup>5</sup> Gina McCarthy, Assistant Administrator for Air and Radiation at EPA, testified that this bill is not necessary if the goal is to prevent EPA from tightening the NAAQS for coarse particles.<sup>6</sup> On October 14, 2011, EPA Administrator Jackson sent a letter to Senator Debbie Stabenow stating that EPA plans to propose retaining, not revising, the current PM<sub>10</sub> standard and form, which ensures that the standard will not be revisited for five years.

In reality, despite the bill's title, H.R. 1633's primary impact will go far beyond farm dust, which EPA does not regulate and does not intend to regulate. Rather, the bill broadly exempts from the Clean Air Act a wide range of non-agricultural sources and pollution. In fact, during the full committee markup, Rep. John Shimkus acknowledged that the bill is intended to exempt particulate matter pollution from mining operations.

During the full committee markup, Democrats offered several amendments to limit the scope of the bill. Ranking Member Bobby Rush offered an amendment to prohibit EPA from revising the PM<sub>10</sub> standard for one year and strike the language exempting so-called nuisance dust from the Clean Air Act. In addition, Rep. G.K. Butterfield offered an amendment to narrow the definition of nuisance dust to mean "coarse crustal or organic particulate matter that is produced from agricultural activities." These amendments were defeated.

<sup>1</sup> U.S. EPA, Integrated Science Assessment for Particulate Matter (Final Report) (Dec. 15, 2009) at 2-14-2-15.

<sup>2</sup> *Id.* at 2-18.

<sup>3</sup> U.S. EPA, Fact Sheet: Final Revisions to the National Ambient Air Quality Standards for Particle Pollution (Sept. 21, 2006); U.S. EPA, National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61178 (Oct. 17, 2006).

<sup>4</sup> U.S. EPA, National ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61178 (Oct. 17, 2006).

<sup>5</sup> Statement of Chairman Ed Whitfield, Markup of H.R. 1633, The Farm Dust Regulation Prevention Act of 2011, 112th Cong. (Nov. 3, 2011).

<sup>6</sup> Testimony of the Honorable Gina McCarthy, Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency, before the Subcommittee on Energy and Power, Committee on Energy and Commerce, H.R. 1633, the Farm Dust Regulation Prevention Act of 2011, 112th Cong. (Oct. 25, 2011).

## II. SECTION-BY-SECTION ANALYSIS

A. *Section 2*

Section 2 of H.R. 1633 prohibits EPA from proposing, finalizing, implementing, or enforcing any regulation revising the NAAQS applicable to particles larger than 2.5 micrometers for one year after the date of enactment.

The effect of this provision is ambiguous, but it could affect the NAAQS standard for fine as well as coarse particulate matter. If this section applies only to the PM<sub>10</sub> NAAQS, it has no practical effect, as EPA plans to retain the current PM<sub>10</sub> NAAQS and would not revisit the standard again for five years. However, EPA has expressed concern that this section also could apply to the PM<sub>2.5</sub> NAAQS because, as a practical matter, PM<sub>2.5</sub> monitors capture and “count” some particles larger than PM<sub>2.5</sub>, and thus designations and violations for PM<sub>2.5</sub> in part address some larger particles.<sup>7</sup> Thus, the PM<sub>2.5</sub> NAAQS arguably is applicable to particles larger than PM<sub>2.5</sub>. If so, this section would block EPA’s ongoing PM<sub>2.5</sub> NAAQS review and rulemaking.

Ranking Member Rush offered an amendment during the subcommittee and full committee markups to clarify that this section does not intend to preclude EPA from revising the PM<sub>2.5</sub> NAAQS if the Administrator determines that the science merits such a revision. These amendments were defeated.

B. *Section 3*

This section amends the Clean Air Act and eliminates EPA’s authority under the CAA to regulate anything that constitutes “nuisance dust,” except in narrowly defined circumstances that are unlikely to occur.

*Definition of nuisance dust*

Section 3(c) of the bill as amended in subcommittee, defines “nuisance dust” as particulate matter that is generated from “natural sources, unpaved roads, agricultural activities, earth moving, or other activities typically conducted in rural areas,” and “consisting primarily of soil, other natural or biological materials.” In response to concerns that had been raised by Democratic members, the Majority’s amendment in subcommittee also changed the bill to clarify that nuisance dust does not include particulate matter that is “emitted directly into the ambient air from combustion, such as exhaust from combustion engines and emissions from stationary combustion processes.” This ensures that particulate matter “emitted directly” from combustion at sources, such as power plants or mobile sources, does not fall under the bill’s exemption for nuisance dust. But this provision also raises new questions about whether the bill would still have the effect of exempting particulate matter that is not “emitted directly” from a source but forms in the atmosphere from reactions of nitrogen oxides and sulfur dioxides. During the full committee markup, the majority accepted two amendments to clarify that the definition of nuisance dust does not include particulate matter from coal combustion residual disposal sites and

<sup>7</sup> EPA staff telephone communication with Democratic Committee staff (Oct. 20, 2011).

uranium mining operations, both of which could have been exempted from the Clean Air Act under the definition of nuisance dust.

Even with these clarifications, the definition of nuisance dust and the exemption for nuisance dust from the Clean Air Act remain very broad. The fact that the majority has added three specific exclusions to its definition of nuisance dust demonstrates that the broad and loose language in section 3 could apply well beyond farm dust to a range of industrial activities, whether or not this is the intention of the bill's sponsors.

The definition and exemption apply to particles of any size, not just coarse particles, and they are not limited to rural areas. The definition captures particulate emissions from any source that "typically" is located outside of urban areas, which can include an array of industrial operations with significant emissions from non-combustion processes. The bill, therefore, could hinder or prevent EPA from reducing deadly fine particle pollution, as well as coarse particulate pollution, in rural and urban areas across the country from a broad range of sources. EPA emphasized this concern at the legislative hearing.

The definition for nuisance dust includes particulate matter primarily composed of "natural materials" generated from "earth moving" or "activities typically conducted in rural areas," thereby applying the exemption far beyond agricultural activities. The reference to "earth moving" clearly covers particulate matter from large industrial mining operations, such as the Kennecott copper mine in Utah, which is the largest source of particulate matter in the state. This reference to "earth moving" also covers sand and gravel mines, which can generate substantial pollution in the process of digging, transporting, and processing the materials.<sup>8</sup>

During the full committee markup, Ranking Member Waxman offered an amendment to ensure that particulate matter from mining operations would remain covered by the Clean Air Act. This amendment was defeated.

The reference to "activities typically conducted in rural areas" is undefined and could include particulate matter from construction and demolition activities, cement kilns, coal processing plants, ferroalloy plants, smelters, and any other industrial operation that is "typically conducted" in rural areas. The majority's exclusion for particulate matter from combustion sources would not exclude particulate pollution from industrial operations that generate particulate matter through processes other than combustion, such as milling, grinding, smelting, and other high-temperature industrial processes. This bill would exempt all particulate matter pollution from these sources from the entire Clean Air Act, eliminating EPA's authority to protect public health from the effects of exposure to this pollution except in very narrow circumstances, as explained below.

Particulate pollution from mining, cement plants, smelters, and other industrial activities can consist of or be contaminated with heavy metals such as arsenic, mercury, and other air toxics. This

<sup>8</sup>See, for example, a report prepared by the Committee on Government Reform, Special Investigations Division Minority Staff, for Congresswoman Hilda L. Solis and Congressman Henry A. Waxman, Environmental Effects of Gravel Mining in Irwindale, CA: Basic Information Is Not Available to Assess Health and Environmental Risks to the Community (Dec. 12, 2002).

raises concerns that the bill could preclude EPA from protecting public health from exposure to toxic air pollution under section 112 of the Clean Air Act. During the full committee markup of the bill, Rep. Kathy Castor offered an amendment to ensure that particulate matter containing arsenic and other heavy metals would remain covered by the Clean Air Act. This amendment was defeated.

The majority has not presented any scientific evidence that exempting “nuisance dust” as defined in the bill would not result in significant public health effects. Researchers at Johns Hopkins University wrote a letter to the Committee stating that the bill “does not take account of the available scientific knowledge on public health risks posed by exposure to rural PM” and “does not account for current or future knowledge of health risks posed by rural PM exposure, and rather enacts a permanent exemption of rural PM from CAA regulation.” The scientists conclude that this approach “is not supported by the scientific evidence or good professional judgment, and is not scientifically defensible.”<sup>9</sup> Rep. Anna Eshoo offered an amendment during the full committee markup to nullify the bill’s exemption for nuisance dust if the EPA Administrator and Clean Air Scientific Advisory Committee determine that the bill’s exemption would increase incidence of asthma attacks, respiratory disease, cardiovascular disease, or premature mortality. Her amendment was defeated.

In addition to the public health impacts of exempting nuisance dust, it is unclear how this exemption could be accomplished as a practical matter. During the legislative hearing on the bill, EPA Assistant Administrator Gina McCarthy testified as follows:<sup>10</sup>

[U]nlike the terms “fine particle” and “coarse particle,” the term “nuisance dust” is not a scientific or scientifically-defined term. It would be very difficult to incorporate an exclusion for “nuisance dust” into a scientifically-based program. This could raise practical problems. For example, monitoring air quality is an essential element of the ambient air quality program; it is how we determine which areas have healthy air and which do not. It is unclear how one could design a monitor that measured “fine particles except for nuisance dust,” and it is unclear how the Agency could implement particle pollution programs without a scientifically sound monitoring network.

Air quality monitors can distinguish pollution particles by size and, to some degree, by chemical composition. They cannot distinguish pollution particles by source. In most cases, it would be difficult or impossible to ascertain if a violation of the PM<sub>10</sub> or PM<sub>2.5</sub> standard was due to spikes in “nuisance dust” or another type of particle pollution. Thus, it is unclear how EPA could set a health-based standard for PM<sub>10</sub> or PM<sub>2.5</sub> that excludes some particles but includes other particles, depending on the source of the particles.

Overall, Assistant Administrator McCarthy raised concerns about the effect of this bill on the existing health-based standards for particle pollution. Since the existing air quality standards do

<sup>9</sup>Letter to Ranking Member Henry Waxman from The Johns Hopkins Center for a Livable Future (Nov. 1, 2011).

<sup>10</sup>McCarthy testimony.

not distinguish between “nuisance dust” and other particles, she testified that “the bill raises the issue of whether the EPA could enforce or maintain existing fine or coarse particle pollution standards.”<sup>11</sup>

*Limitation on EPA’s authority over particle pollution*

Section 3(b) of the bill describes the very narrow conditions under which EPA may still use the Clean Air Act to control particle pollution that is “nuisance dust.”

This section provides that the CAA continues to apply to nuisance dust only if three conditions apply. First, the Administrator must find that nuisance dust causes substantial adverse public health and welfare effects. Second, even if the Administrator determines that nuisance dust causes substantial harm, she also must find that the benefits of regulating nuisance dust outweigh the costs, including impacts on employment. Third, the Administrator only has this authority in areas where state, local or tribal governments are not regulating nuisance dust. Many areas either already have some regulation applicable to something encompassed by the broad definition of nuisance dust or could readily adopt some form of regulation. The bill includes no requirement that such regulation achieve any degree of health protection for the public at large or for sensitive populations such as children and the elderly.

The bill’s supporters argue that because nuisance dust would be regulated at the state or local level, there would be no harm to public health. The decades of experience with air pollution problems prior to 1970 demonstrate that states and localities acting alone are not able to adequately address air pollution problems. As Rep. John Dingell observed during the full committee markup, “air moves.” States and localities are affected by air pollution generated by sources outside their jurisdiction that they cannot control. In addition, in the absence of minimum federal standards, there can be a race to the bottom, as businesses threaten to move to other jurisdictions with looser standards. For these reasons, it has been widely accepted for decades that minimum federal standards are necessary to afford a basic level of clean air to all Americans. The Clean Air Act is founded on the principle of cooperative federalism, in which the federal government sets minimum standards, but decisions on how to achieve those standards are left to states and localities, which implement the standards. This bill would revert to the pre-1970 approach to pollution control with respect to the pollutants and sources that fall under the definition of nuisance dust.

During the full committee markup, Rep. Donna Christensen offered an amendment to allow EPA to step in to address nuisance dust if the state, local, or tribal agencies are not regulating nuisance dust at a level requisite to protect public health. This amendment was defeated.

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<sup>11</sup> McCarthy testimony.

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

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EDWARD J. MARKEY.  
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EDOLPHUS TOWNS.  
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