

Dissenting Views on H.R. 1633, the Farm Dust Regulatory Prevention Act  
By Representative John D. Dingell

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 101<sup>st</sup> 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 101<sup>st</sup> 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.

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.

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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, 112<sup>th</sup> Congress (October 25, 2011).

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 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

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<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, 112<sup>th</sup> 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>

<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, 112<sup>th</sup> Congress (October 25, 2011).

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 definitively 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>

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

<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>.

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.

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.

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<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.