ENERGY IN DEPTH

ISSUE ALERT

Clearing the Air on the BREATHE Act

EID takes a closer look at "twisted sister" legislation offered as companion to ill-fated FRAC Act

On March 17, 2011, U.S. Reps. Rush Holt (D-N.J.) and Jared Polis (D-Colo.) posted identical press releases on their respective websites trumpeting the introduction of the "BREATHE Act," legislation the lawmakers sought to characterize as an attempt to end "exemptions" in the Clean Air Act (CAA) governing oil and natural gas development in the United States.

The bill is being touted as "sister legislation" to the FRAC Act – and indeed, the two are similar: Both are founded on the mistaken belief that major federal environmental laws somehow don't apply to America's energy producers. In fact, they do. They always have. And it's a pretty safe bet they always will.

Of course, with no legislative text available quite yet, the only sources we have on the scope and structure of the bill are the Polis/Holt press release and the legislative and regulatory wish-list produced in 2007 by the national anti-shale interest group Natural Resources Defense Council (NRDC), from which these lawmakers doubtless drew their inspiration.

Specific to the BREATHE Act, the bill reportedly includes two sections:

- The first directs EPA to regulate low-volume emissions from oil and natural gas sites as if they were "major" sources of emissions under the law -- an outcome requiring the agency to lump minor sources together (wherever they may be, whomever they may be owned by) to create a single, artificial unit eligible for regulation.

- The second provision relates to the regulation of hydrogen sulfide (H_2S), a naturally occurring chemical compound dangerous to human health at high levels, and one that Reps. Holt and Polis insist is "exempt from regulation" under CAA. In fact, H_2S is explicitly regulated under Section

112(r) of the Act, specifically designed to address the potential for an accidental, high-concentration release of the chemical.

Armed with this understanding of the bill (thanks to NRDC), we attempt below to separate myth from fact on the BREATHE Act:

Myth: "Originally included in the Clean Air Act's list of hazardous air pollutants, H_2S was removed with industry support." (Polis/Holt press release, Mar. 17, 2011)

Facts:

- Hydrogen sulfide's original listing was due to a "clerical error," according to Senate records – and was ultimately removed by Senate Democrats in 1991 via a technical correction resolution that did not receive a single vote in opposition.

- According to Senate transcripts, Sen. John Breaux (D-La.) offered the resolution on behalf of Senate Majority Leader George Mitchell, Democrat from Maine. From the Congressional Record: "Mr. President, the purpose of this joint resolution is to make a technical correction in section 112 of the Clean Air Act, as amended by section 301 of the Clean Air Act Amendments of 1990, Public Law 101-549. … This term [hydrogen sulfide] was **inadvertently left in the enrollment** of the 1990 legislation due to a **clerical error**. The joint resolution simply removes the term from the list in the Clean Air Act, as amended." (Senate Congressional Record, page S4679, Aug. 1, 1991)

- Despite making the determination that H_2S did not belong in the "routine emission" category, Congress did conclude that accidental releases of the compound could present a significant issue, and therefore decided to regulate it under the risk management provisions of CAA, establishing a program specifically designed to address the potential for accidental, large-scale releases of H_2S from various facilities, including oil and gas operations.

Myth: "Surely we wouldn't assume that as long as one car meets emissions standards, 20,000 cars wouldn't affect air quality. Unfortunately, this exact false logic is currently being applied to oil and gas drilling and it's causing noticeable health impacts." (Rep. Jared Polis [D-Colo.], as quoted in Mar. 17 press release)

Facts:

- Here, Rep. Polis attempts to analogize the cumulative emissions impact of 20,000 cars to the aggregation of oil and gas well sites under CAA. It's a colorful analogy, but, on closer inspection, an irrelevant one. Just as the Clean Air Act's "major emissions" threshold doesn't apply to the emissions of one car, it doesn't apply to the emissions of 20,000 cars either. Auto emissions are regulated by several other, more appropriate provisions of CAA, just as emissions from oil and natural gas are regulated under other, more appropriate provisions under the same Act.

- Given the varied types of industrial operations in the U.S., when Congress chose to revise the hazardous air pollutants title of the CAA, it applied emissions requirements to "major sources" of air pollution, which it defined as stationary sources -- or groups of stationary sources -- located within **a contiguous area** and **under common control** that emit more than 10 tons of any hazardous pollutant per year.

- Rep. Polis tries to justify these requirements by implying that only with aggregation can there be regulation. In reality, oil and natural gas production facilities are treated as "minor" sources under the law subject to detailed technology requirements, but not caught in the complicated and costly permitting requirements of the law's "major sources" category.

- Left on its own, EPA has already shown an interest in expanding its definition of "aggregation" well beyond what most folks would consider reasonable. In its greenhouse gas reporting regulations, EPA concluded that because the clear definition of an oil and natural gas production facility does not subject enough facilities to regulation, it would create a "basin" definition to apply to those operations instead. Under this construct, all well pads owned by a company in a basin would be treated as one facility. One of these "basins" happens to run from the border with Mexico to the Mississippi River, and from the Gulf of Mexico about 100 or more miles inland. Remarkably, EPA's position appears to be that this massive swath of real estate represents a "clustering" of wells eligible for aggregation. (EPA: Mandatory Reporting of Greenhouse Gases: Petroleum and Natural Gas Systems; Final Rule, Nov. 30, 2010)

Myth: “Like the FRAC Act, which addresses an industry exemption from the Safe Drinking Water Act, the BREATHE Act closes two industry exemptions in the Clean Air Act, which are causing direct and measurable heath consequences in area [sic.].” (Polis/Holt press release, Mar. 17, 2011)

Facts:

- In 1993, the Clinton administration’s EPA, headed-up throughout the president’s term by Carol Browner, issued a 228-page report to Congress detailing why the regulation of H_2S under CAA’s subtitle (b) of section 112 was a bad idea – a fact conveniently obscured by proponents of the BREATHE Act. Among the findings made by Ms. Browner’s agency to Congress:

o “[T]here appears to be no evidence that a significant threat to public health or the environment from routine emissions [of H_2S] from sour oil and gas wells.” (EPA: Report to Congress on Hydrogen Sulfide Air Emissions Associated with the Extraction of Oil and Natural Gas, Oct. 1993)

- Another inconvenient truth: According to EPA, H_2S is currently regulated under no fewer than five major federal environmental statutes:

o EPA: “[H_2S] is listed as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (**CERCLA**). It is listed under the Emergency Planning and Community Right-to-Know Act (**EPCRA**) ... The Occupational Safety and Health Administration (**OSHA**) has established General Industry Standards that list worker exposure concentration limits … The National Institute for Occupational Safety and Health (**NIOSH**) has produced a criteria document .. for safe worker exposure levels and work practices.” (Ibid)

- … and at least four separate federal agencies:

o EPA: “The United States EPA has the potential for regulation of new oil and gas well sources through the Prevention of Significant Deterioration (**PSD**) program, and, as mentioned previously, H_2S is listed under the CAA section 112(r) accidental release provisions. Other standards for worker and public protection from H_2S emissions come from the **Bureau of Land Management**,**Minerals Management Service**, and the American Conference of Governmental Industrial Hygienists.” (Ibid)

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