



United States Senate

WASHINGTON, DC 20510-0905

September 27, 2017

The Honorable Scott Pruitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20004

The Honorable Ann Marie Buerkle
Acting Chairman
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Dear Administrator Pruitt and Acting Chairman Buerkle:

In the wake of Hurricane Irma, at least 11 deaths and numerous injuries have been reported in the state of Florida due to accidental carbon monoxide poisoning from gasoline-powered portable generators.¹ One additional death has also been reported in North Carolina, along with other injuries throughout the Southeastern United States.² Many of these deaths and injuries could have been prevented had stronger safety standards been in place for portable gasoline generators. We therefore ask that you cease efforts to stop new generator safety rules and work towards the prompt implementation of these life-saving standards.

In November 2016, the U.S. Consumer Product Safety Commission (CPSC), following years of work on the issue, voted to issue a Notice of Proposed Rulemaking (NPRM) to finally implement a mandatory safety standard for portable generators.³ Since then, it appears that both of you have engaged in an off-the-record exchange of letters stating that the CPSC's ability to implement this potentially life-saving indoor carbon monoxide limit to assure the safety of people who use portable generators is preempted by the Clean Air Act.⁴ We believe these letters are inaccurate, appear to misunderstand the EPA's and the CPSC's respective obligations to protect the health and safety of the American public, and could lead to more avoidable deaths and injuries – just like those we just saw with Hurricane Irma – due to accidental carbon monoxide poisoning.

Portable generators often provide a needed power source for first responders and homeowners seeking to recover from the devastation caused by hurricanes. Unfortunately, many consumers are unaware of the significant danger posed by carbon monoxide poisoning experienced as a result of the improper operation of these generators.

¹ <http://www.miamiherald.com/news/weather/hurricane/article174097351.html> (noting 11 generator-linked carbon monoxide deaths in the State of Florida); <http://www.sun-sentinel.com/news/weather/hurricane/sfl-carbon-monoxide-deaths-20170914-story.html> (noting numerous injuries related to generator-linked carbon monoxide poisoning after Hurricane Irma).

² <http://www.charlotteobserver.com/news/article173612361.html> (noting generator-related carbon monoxide death in Henderson County, NC during power outage following Hurricane Irma).

³ <https://www.federalregister.gov/documents/2016/11/21/2016-26962/safety-standard-for-portable-generators>

⁴ Letter from E. Scott Pruitt, Administrator, EPA, to Ann Marie Buerkle, Acting Chairman, CPSC (dated May 10, 2017); Letter from Ann Marie Buerkle to E. Scott Pruitt (dated Aug. 16, 2017).

From 1991-2009, the National Institutes of Health (NIH) reported that there were 75 deaths from carbon monoxide poisoning.⁵ Backup generators were responsible for 83 percent of those deaths. A second NIH report found that after four major hurricanes struck Florida in 2004, six deaths and 167 hospitalizations were almost all attributed to carbon monoxide poisoning due to improper use of portable generators.⁶ The Centers for Disease Control and Prevention warned of this danger in the wake of Hurricane Harvey,⁷ as did the Florida Department of Health in Orange County as Hurricane Irma approached.^{7,8}

In a May 10, 2017, letter to the CPSC, Administrator Pruitt stated that the EPA is charged with regulating portable generators under section 213 of the Clean Air Act and that the CPSC may be precluded from regulating them using its own statutory authority. This is a fundamental misreading of the law. These provisions are intended to regulate emissions from non-road engines or vehicles when the EPA determines that such emissions “are significant contributors to ozone or carbon monoxide concentrations in more than 1 area which has failed to attain the national ambient air quality standards for ozone or carbon monoxide.”

Your joint assertion that the CPSC may lack the authority to address this risk - if heeded by the agency - would likely result in a regulatory black hole that may well yield no added protections but could instead lead to additional avoidable deaths and injuries. The CPSC clearly has the statutory authority to regulate to “prevent or reduce an unreasonable risk of injury associated” with any aspect of a consumer product, including portable generators.⁹ So that we can better understand your views on this topic, particularly in the wake of the numerous generator-related deaths and injuries in the wake of Hurricane Irma, we request you immediately stop efforts to derail this life-saving rule and request your prompt assistance in responding to the following requests:

1. Please provide a legal analysis describing how the authority provided in section 213 of the Clean Air Act could be used to protect against the risk of injury or death caused by the indoor use of portable generators. Please also provide a list of any previous instances in which section 213 was used to regulate to address any acute, rather than ambient, air emission sources.
2. Could section 213 be used to prevent or reduce accidental carbon monoxide exposures as a result of their indoor use across the entire United States? If so, please provide your legal basis for this view. If not, then do you agree that section 31(a) of the Consumer Product Safety Act, which you cite in your letters as describing the reasons why the Clean Air Act preempts the CPSC’s action, would not apply to this circumstance?

⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3490658/>

⁶ <https://www.ncbi.nlm.nih.gov/pubmed/16034315>

⁷ <https://www.usatoday.com/story/news/2017/09/02/houston-faces-threats-mold-fumes-and-toxic-water-cleaning-up-after-harvey/628190001/>

⁸ <http://www.orlandosentinel.com/weather/hurricane/os-hurricane-irma-carbon-monoxide-poisoning-20170906-story.html>

⁹ 15 U.S.C. 2056(a).

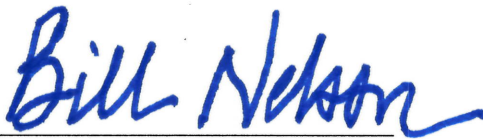
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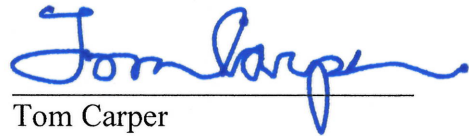
3. In its NPRM, the CPSC specifically addressed the question of preemption you raised in your letter, and explained, using information drawn from legislative, regulatory and litigation history, why section 213 of the Clean Air Act does not trigger preemption under the Consumer Product Safety Act. The proposal also noted that “deaths and injuries associated with CO emissions from portable generators have increased since the EPA adopted its regulations limiting CO emissions from the type of engines used in portable generators,” citing this as another reason why the preemption provisions in the Consumer Product Safety Act are not triggered by the Clean Air Act. Does the EPA disagree with the CPSC’s analysis? If so, what is the legal or factual basis for the EPA’s position?
4. Please provide a copy of all documents (including emails, memos, correspondence, white papers, meeting presentations or notes) obtained or sent by CPSC or EPA political appointees (including transition team officials) related to the regulation of portable generators.

Thank you very much for your attention to this important matter. Please provide your response no later than October 20, 2017.

Sincerely,



Bill Nelson
Ranking Member
Senate Committee on Commerce, Science,
and Transportation



Tom Carper
Ranking Member
Senate Committee on Environment
and Public Works

cc: The Honorable Elliot E. Kaye, Commissioner
The Honorable Robert S. Adler, Commissioner
The Honorable Marietta S. Robinson, Commissioner
The Honorable Joseph Mohorovic, Commissioner