

Dissenting Views on H.R. 4557, the Blocking Regulatory Interference From Closing Kilns (BRICK) Act

H.R. 4557, also known as the BRICK Act, represents an effort by the Republicans to delay implementation of the Environmental Protection Agency's (EPA) final Brick and Structural Clay Products rule and the final Clay Ceramics Manufacturing rule (Brick and Clay MACT) by extending all compliance deadlines pending judicial review. If this bill were to become law, compliance with the Brick and Clay MACT would be delayed until "judgment becomes final, and no longer subject to further appeal or review."

I. BACKGROUND

A. Clean Air Act Section 112

Section 112 of the Clean Air Act requires EPA to set technology-based standards to reduce toxic air pollutants. Toxic air pollutants, which are also known as hazardous air pollutants (HAPs), are known or suspected to cause cancer or other serious health effects, such as reproductive or birth defects or neurological effects, or adverse environmental effects. EPA rulemakings aim to reduce the release of 187 HAPs including mercury, cadmium, lead, benzene and dioxin.¹

In the 1990 Clean Air Act Amendments, Congress established a new approach to regulating air toxics. Congress directed EPA to take a technology-based approach to the suite of air toxics rather than the chemical-by-chemical, risk-based approach that had largely failed to address toxic air pollution during the Clean Air Act's first 20 years. Congress's focus was on achieving substantial reductions in air toxics relatively quickly using readily available technology. It directed EPA to follow the technology-based standards with additional standards, where needed to protect health, as determined through risk assessments.²

Section 112 requires EPA to develop regulations for distinct source categories (e.g., power plants, boilers, and cement kilns) that set specific emission limits based on the emission levels already being achieved by similar facilities. These regulations are known as Maximum Achievable Control Technology – or MACT – standards. For existing sources, the emission standard must be at least as stringent as the average emissions achieved by the best-performing 12 percent of sources in that source category.³ For new sources, the emission standard must be at least as stringent as the emission control achieved by the best-controlled similar source.⁴ These minimum emissions levels are known as the MACT floor.

¹ U.S. Environmental Protection Agency, *About Air Toxics* (online at www.epa.gov/oar/toxicair/newtoxics.html).

² Clean Air Act § 112(f).

³ *Id.* at § 112(d)(3).

⁴ *Id.* at §112(d)(3).

EPA must apply MACT standards to major sources, but may establish less stringent standards for sources that emit lower levels of pollution, which are termed “area sources.”⁵ Major sources are those that emit 10 or more tons per year (tpy) of any single air toxic or 25 tpy of any combination of air toxics.⁶ In lieu of applying MACT, for area sources EPA may require the use of “generally available control technologies or management practices.” EPA also has the authority under section 112 to set a health-based standard for pollutants for which a health threshold has been established.⁷

These standards are long overdue. The Clean Air Act required EPA to establish emission standards for source categories on a specified schedule and to complete standards for all source categories by 2000.⁸ Facilities must comply with emissions limits within three years; or within four years, if the state or federal permitting authority determines an additional year is necessary to install pollution controls at an existing facility.⁹

B. EPA’s Final Brick and Structural Clay Products Rule and Final Clay Ceramics Rule

Standards for Brick and Structural Clay Products and Clay Ceramics were originally issued on May 16, 2003, but were subsequently challenged and the D.C. Circuit Court vacated them on March 13, 2007.¹⁰ In response to a lawsuit, EPA developed a new proposal and on September 24, 2015, EPA issued a final rule covering the Brick and Structural Clay Products industry and the Clay Ceramics industry.¹¹

The brick and structural clay products production process consists of preparing the raw materials (primarily clay and shale), forming the processed materials into bricks and shapes, and drying and firing the bricks and shapes. The clay ceramics production process consists of processing clay, shale, and other additives, forming the processed materials into tile and sanitary ware shapes, and drying, glazing, and firing the tile and sanitary ware shapes.

⁵ *Id.* at §112(d)(5).

⁶ *Id.* at §112(a)(1).

⁷ *Id.* at §112(d)(4).

⁸ *Id.* at § 112(e)(1).

⁹ *Id.* at § 112(i)(3).

¹⁰ U.S. EPA, *Fact Sheet: Final Amendments to the Air Toxics Standards for Brick and Structural Clay Products Manufacturing and Clay Ceramics Manufacturing*, p. 2 (Sept. 24, 2015) (online at www3.epa.gov/airtoxics/brick/20150924fs.pdf).

¹¹ U.S. EPA, *National Emissions Standards for Hazardous Air Pollutants (NESHAP) for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing*, 80 Fed. Reg. 65470 (Oct. 26, 2015) (final rule) (online at www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-25724.pdf) (hereinafter “*Brick and Clay MACT Rule*”).

Within the Brick and Structural Clay Products industry, there are 44 major sources of pollution – 36 of which are small businesses¹² – that manufacture face brick, structural brick, brick pavers, other brick products, clay pipe, roof tile, extruded floor and wall tile, and other extruded dimensional clay products. For this category, EPA set a health-based standard for acid gases (i.e., hydrogen fluoride, hydrogen chloride, and chlorine); and technology-based standards for non-mercury metals (or particulate matter as a surrogate) and mercury.¹³

Within the Clay Ceramics rule, there are two categories of units: (1) tile units and (2) sanitary ware units. None of the units in the tile unit category are major sources.¹⁴ Accordingly, there will not be any costs or emissions reductions for these units.¹⁵ For sanitary ware units, only one company owns units that are major sources, and therefore it will be the only company that will incur costs.¹⁶

II. H.R. 4557, THE BLOCKING REGULATORY INTERFERENCE FROM CLOSING KILNS (BRICK) ACT

A. Summary of the BRICK Act

Section 2 of the bill delays implementation of the final Brick and Structural Clay Products rule and the final Clay Ceramics Manufacturing rule, by extending all compliance deadlines based on pending judicial review. Under subsection (b), the compliance or submission date extension applies to “any final rule to address national emission standards for hazardous air pollutants (NESHAP) for brick and structural clay products manufacturing or clay ceramics manufacturing under 112 of the Clean Air Act,” or any subsequent rule.¹⁷

Subsection (c) establishes a uniform time period for all compliance deadline extensions. Under the legislation, the time period starts 60 days after the final rule appears in the Federal Register, and ends when “judgment becomes final, and no longer subject to further appeal or review.”¹⁸

¹² See, U.S. EPA, *Regulatory Impact Analysis: Final Brick and Structural Clay Products NESHAP*, p. 2-9 – 2-10 (Jul. 2015) (online at www3.epa.gov/airtoxics/brick/20150928ria.pdf).

¹³ U.S. EPA, *Brick and Clay MACT Rule*, 80 Fed. Reg. 65470 (Oct. 26, 2015) (final rule) (online at www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-25724.pdf).

¹⁴ *Note*: all are considered synthetic area sources, which means they have voluntarily become minor sources.

¹⁵ See, U.S. EPA, *Brick and Clay MACT Rule*, 80 Fed. Reg. 65470 at 65512 (Oct. 26, 2015) (final rule) (online at www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-25724.pdf).

¹⁶ *Note*: all of the rest of the units are minor sources. *Id.* at 65513.

¹⁷ H.R. 4557, the “Blocking Regulatory Interference from Closing Kilns (BRICK) Act” at § 2(b).

¹⁸ *Id.* at § 2(c).

B. Issues Raised by the BRICK Act

The bill's proponents argue that legislation is needed to delay implementation of EPA's Brick and Clay rules until all legal challenges are resolved by the courts. However, legal challenges to final EPA rules are routine and courts have the power on their own to stay the effectiveness of regulations under court challenge.

The bill throws out existing judicial process by legislatively granting a blanket extension for any compliance deadline, regardless of the merits of the legal challenge or the final outcome. Under the legislation, effectuation of EPA's Brick and Clay rules would automatically be delayed by however much time it takes to conclude litigation. This would encourage frivolous challenges and additional appeals in order to extend the ultimate compliance deadlines set under the EPA final rule. Previous attempts to grant blanket compliance extensions for EPA rules have been met with similar criticism.¹⁹

At the full committee markup, Rep. Rush noted that:

“Well-established legal factors exist for granting a stay. These factors take into account whether there is a likelihood of success on the merits, the prospect of irreparable harm to the moving party and other parties, and most importantly, whether granting the stay is in the public interest. The courts have used these factors time and time again to determine whether to grant a stay and for how long. There is no reason for Congress to override this process and the judgment of the court.”²⁰

And Ranking Member Pallone went on to mention that using the existing judicial process is preferable to Congressional intervention:

“[i]ndustry working with EPA, and using existing authority to seek a stay if absolutely necessary, is a better path than pursuing a legislative fix. As was the case when we

¹⁹ See, e.g., H.R. 2042, the Ratepayer Protection Act. At the April 14, 2015 legislative hearing, Massachusetts Assistant Attorney General, Melissa Hoffer, pointed out that the current judicial process for delaying a rule “has withstood the test of time, and ensures that courts will undertake a careful balancing of interests before granting a stay of agency action,” and she further explained that the blanket extension in the discussion draft would “create powerful incentives for frivolous litigation in an effort to stall and avoid compliance with the Clean Power Plan.” (online at democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Hoffer-EP-Ratepayer-Protection-2015-04-14.pdf).

²⁰ House Committee on Energy and Commerce, Statement of Rep. Rush, Debate on H.R. 4557, the “Blocking Regulatory Interference from Closing Kilns (BRICK) Act,” *Full Committee Markup of 17 Bills*, 114th Cong. (Feb. 25, 2016).

considered a similar provision for power plants in the Ratepayer Protection Act, the litigation delay in the BRICK Act creates a very bad precedent.”²¹

To date, none of the parties have filed motions with the court to stay EPA’s Brick and Clay rule.

III. CONCLUSION

We oppose H.R. 4557 and we do not support the legislative remedy offered in the bill. While we believe the brick and clay industry has legitimate reasons to contest the current Brick and Clay MACT rule, the industry has not availed itself of the appropriate judicial remedy which has always been available to them – requesting a stay of the rule by the court. This problem should be resolved by the judiciary, not by Congress. Further, the bill would incentivize all parties that contest these rules to file repeated challenges resulting in endless delay of this rulemaking and continued uncertainty about the regulatory status of these facilities.

H.R. 4557 sets an extremely bad precedent. The majority has offered this remedy in other legislation in response to other authorities and rulemakings of the Clean Air Act. Had Congress adopted a policy in the Clean Air Act that rulemakings would not be final until all court challenges and lawsuits had been resolved, we would never have achieved the tremendous public health and environmental benefits that we now enjoy. The Clean Air Act does provide judicial remedies. If petitioned, the courts already have the power to stay a rule if warranted. This is the appropriate remedy in this situation.

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



Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce



Bobby L. Rush
Ranking Member
Subcommittee on Energy and Power

²¹ House Committee on Energy and Commerce, Statement of Rep. Pallone, Debate on H.R. 4557, the “Blocking Regulatory Interference from Closing Kilns (BRICK) Act,” *Full Committee Markup of 17 Bills*, 114th Cong. (Feb. 25, 2016).