

Committee on Energy and Commerce

DISSENTING VIEWS

H.R. 1917, the Blocking Regulatory Interference from Closing Kilns (BRICK) Act

We oppose H.R. 1917, also known as the BRICK Act. This legislation would 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 until "judgment [on court appeals, motions for stay, and administrative stay motions] becomes final, and no longer subject to further appeal or review." The bill's mechanism for extending compliance deadlines establishes a dangerous and hazardous precedent. It would specifically encourage the filing and perpetuation of frivolous and inappropriate lawsuits to delay the legal effect of regulations to protect public health and the environment.

H.R. 1917 is unnecessary: judicial redress in these instances is already available to the industry; however, no party has yet availed itself of their rights as interested parties in these proceedings to request a stay of the rule in federal court.

BACKGROUND

Section 112 of the Clean Air Act (CAA) requires EPA to set technology-based standards to reduce air toxics. These hazardous air pollutants (HAPs) are known or suspected to cause cancer and 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 EPA takes a technology-based approach to regulating HAPs in order to achieve substantial reductions in air toxics relatively quickly using readily available technology.

Section 112 requires EPA to develop regulations for distinct source categories – like brick kilns – that set specific emission limits based on levels already being achieved by similar facilities. These regulations are known as Maximum Achievable Control Technology (MACT) standards, and the CAA required EPA to complete them for all source categories by 2000. EPA sets minimum emissions levels, known as the MACT floor, based on the best-performing sources in a category.

As such, EPA's Brick and Clay MACT standards are long overdue. The D.C. Circuit Court vacated an earlier version of EPA's rule in 2007. On remand from the court, EPA developed a new proposal and issued a final rule covering the Brick and Structural Clay Products industry and the Clay Ceramics industry in 2015.²

¹ Environmental Protection Agency, About Air Toxics (<https://www.epa.gov/urban-air-toxics/about-urban-air-toxics>) (accessed Jan. 9, 2018).

² Environmental Protection Agency, *National Emissions Standards for Hazardous Air Pollutants (NESHAP) for Brick and Structural Clay Products Manufacturing; and NESHAP for*

SUMMARY OF THE BRICK ACT

Subsection 2(b) of the BRICK Act delays implementation of the final Brick and Structural Clay Products rule and the final Clay Ceramics Manufacturing rule, or any subsequent rule, by extending all compliance deadlines based on pending judicial review. Subsection (c) suspends all compliance deadlines starting 60 days after the final rule appears in the Federal Register and ending when “judgment becomes final, and no longer subject to further appeal or review.”

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. This procedure would encourage frivolous challenges and additional appeals in order to extend the ultimate compliance deadlines set under the EPA final rule.

At the full committee markup, Ranking Member Pallone 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.”³

This existing judicial process is the appropriate way to seek a stay of a rule, and is preferable to the Congressional intervention proposed by the BRICK Act. To date, no one has petitioned the court to stay the effectiveness of the Brick and Clay rules.

Furthermore, the BRICK Act is unnecessary since EPA recently announced plans to reconsider the Brick and Clay rule, which is expected to be finalized by August 2019. Due to

Clay Ceramics Manufacturing, 80 Fed. Reg. 65470 (Oct. 26, 2015) (Final Rule) (www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-25724.pdf).

³ House Committee on Energy and Commerce, Statement of Rep. Pallone, Debate on H.R. 1917, the “Blocking Regulatory Interference from Closing Kilns (BRICK) Act,” *Full Committee Markup*, 115th Cong. (Dec. 6, 2017).

these plans, EPA asked the D.C. Circuit to indefinitely postpone the brick industry's lawsuit on the rule's merits.⁴

CONCLUSION

We oppose H.R. 1917 and 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. 1917 sets an extremely bad precedent. The majority has offered this remedy in other legislation in response to other CAA authorities and rulemakings. Had Congress adopted a policy in the CAA that rulemakings would not be final until all court challenges and lawsuits had been resolved, the U.S. would not have realized the tremendous public health and environmental benefits that our country now enjoys. The CAA does provide judicial remedies. When properly petitioned, the courts already have ample power under federal statutes to stay agency rule in a myriad of instances. A fair and appropriate remedy for interested parties who oppose the rule's application and enforcement already exists – there is no need for another remedy.

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



Paul D. Tonko
Ranking Member
Subcommittee on Environment

⁴ Respondents' Notice of Action on Brick/Clay Rule and Unopposed Motion to Sever and Hold in Abeyance Industry Petitions, *Sierra Club, et al. v. United States Environmental Protection Agency, et al.*, D.D.C. (No. 15-1487).