

BLOCKING REGULATORY INTERFERENCE FROM CLOSING
 KILNS ACT OF 2017

JANUARY 10, 2018.—Committed to the Committee of the Whole House on the State
 of the Union and ordered to be printed

Mr. WALDEN, from the Committee on Energy and Commerce,
 submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1917]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 1917) to allow for judicial review of any final rule addressing national emission standards for hazardous air pollutants for brick and structural clay products or for clay ceramics manufacturing before requiring compliance with such rule, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 1917, Blocking Regulatory Interference from Closing Kilns (BRICK) Act of 2017, was introduced by Representative Bill Johnson (R-OH) on April 5, 2017. The legislation addresses the Environmental Protection Agency’s (EPA) National Emission Standards for Hazardous Air Pollutants (NESHAP) for Brick and Structural Clay Products Manufacturing and for Clay Ceramics Manufacturing published on October 26, 2015. The bill would extend the compliance dates for the final rule to allow for completion of judicial review before compliance by the affected entities would be required.

BACKGROUND AND NEED FOR LEGISLATION

EPA published its final rule entitled “NESHAP for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing” (2015 Brick MACT) on October 26, 2015.¹ EPA has promulgated this rule pursuant to section 112 of the Clean Air Act (CAA), which authorizes the agency to set emissions standards for certain sources that emit mercury and other hazardous air pollutants (HAP). The final rule applies to kilns at brick and structural clay products manufacturing facilities, and at clay ceramics manufacturing facilities.² Compliance for existing affected sources is required by December 26, 2018.³

Prior to issuance of the 2015 Brick MACT, EPA had issued an earlier version in 2003.⁴ This earlier rule required brick plants to install equipment on their kilns to control hydrogen fluoride (HF) and hydrogen chloride (HCl) emissions, and particulate matter as a surrogate for metal HAPs including mercury, and to create work practices to reduce other emissions.⁵ While the brick industry spent millions of dollars to comply with the 2003 rule,⁶ almost one year after the compliance deadline had passed, that rule was vacated and remanded back to EPA by the United States Court of Appeals for the District of Columbia with direction to rewrite the rule.⁷

In developing its revised rule, EPA determined that the substantial emissions reductions achieved by the control devices installed under the 2003 rule would be the starting point for the emissions limits under the current rule.⁸ EPA, in its final revised rule, set

¹See NESHAP for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing; Final Rule, 80 Fed. Reg. 65469 (October 26, 2015). EPA published a correction to make two technical corrections to the published regulation on December 4, 2015. See 80 Fed. Reg. 75817 (December 4, 2015).

²80 Fed. Reg. at 65521, 65544.

³*Id.* at 65539 and 65566.

⁴See NESHAP for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing Final Rule, 68 Fed. Reg. 26690 (May 16, 2003).

⁵*Id.*; see also, e.g. *Chamber of Commerce Report* published February 2, 2016, which is entitled, “Regulatory Indifference Hurts Vulnerable Communities, No. 7 in a Series of Regulatory Reports,” available at https://www.uschamber.com/sites/default/files/documents/files/022360_etra_brick_study_01_29.pdf; p. 7.

⁶*Id.*

⁷*Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007).

⁸See, e.g. NESHAP for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing; Proposed Rules, 79 Fed. Reg. 75622, 75627, 75635–36 (Dec. 18, 2014).

the level of performance based on the controls installed in response to the now vacated rule.⁹

Legal challenges to the final rule are currently pending in the Court of Appeals for the District of Columbia.¹⁰ For the 2015 Brick MACT, concerns have been raised regarding the legality of the rule, including potentially significant costs, which may make compliance impossible for many smaller plants. While EPA estimates annual costs to comply with the rule to be \$25 million, industry estimates have projected the annual costs to be potentially up to \$100 million or greater.¹¹ Concerns have specifically been raised that in developing the final rule, EPA has incorrectly assumed that brick companies already have or can readily borrow the capital needed to install the required equipment, and that the costs of the rule can be passed on to consumers simply by increasing brick prices.¹²

There are an estimated 7,000 workers employed by the brick industry nationwide.^{13, 14}

WHAT THE LEGISLATION WOULD DO

H.R. 1917 would extend the compliance dates of the final 2015 Brick MACT rule pending judicial review. The bill would extend the compliance dates for the period of time that begins sixty days after the final rule, or any successor or amended rule, appears in the Federal Register, and would end when all final legal challenges filed during that period have been resolved, and are no longer subject to legal review.

This bill will ensure that there is adequate time for meaningful judicial review before the owners and operators of brick manufacturing facilities are required to make significant and potentially irreversible decisions regarding capital investments, or to operate less or shut down, all before the legality of the 2015 Brick MACT is known. While some have raised concerns that this bill would create an inappropriate precedent, here the agency's original rule was vacated after the compliance deadlines had already passed, and H.R. 1917 seeks to ensure this will not occur with respect to the current rule.¹⁵

⁹See, e.g. 80 Fed. Reg. at 65473.

¹⁰Legal challenges have been filed by environmental organizations and regulated entities in the U.S. Court of Appeals for the District of Columbia Circuit. See *Sierra Club v. EPA*, No. 15-1487 (D.C. Cir.), and consolidated cases (Case Nos. 15-1492, 15-1493, 15-1496).

¹¹See, e.g. *Chamber of Commerce Report* at pp. 8-9 ("The Brick Industry Association estimates that the annual cost of the Brick MACT will be \$100 million or more [citation omitted] and that compliance will be nearly impossible for many smaller plants.")

¹²*Id.* at p. 8.

¹³See *Chamber of Commerce Report* published February 2, 2016, which is entitled, "Regulatory Indifference Hurts Vulnerable Communities, No. 7."

¹⁴See *Chamber of Commerce Report* at p. 6. For additional background, see also, e.g. Brick Industry Association, *An Overview of the American Brick Industry* available at <http://www.gobrick.com/Resources/American-Brick-Industry>.

¹⁵The EPA's Mercury and Air Toxics (MATS) rule highlights how EPA's rules can effectively circumvent meaningful judicial review. For example, in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the U.S. Supreme Court held that EPA had violated the CAA in enacting regulations for power plants under Section 112 of the CAA. While the court found the rulemaking to be legally flawed, as a practical matter, the court's decision was of limited effect. See, e.g. June 30, 2015 *EPA Connect, The Official Blog of the EPA Leadership* (EPA Acting Administrator McCabe stated following the decision: "the majority of power plants are already in compliance or well on their way to compliance.")

COMMITTEE ACTION

On September 13, 2017, the Subcommittee on Environment held a hearing on H.R. 1917. The Subcommittee received testimony from:

- Ryan Parker, President and CEO, Endicott Clay Products;
- Vincent Brisini, Director of Environmental Affairs, Olympus Power, LLC, on behalf of Anthracite Region Independent Power Producers Association (ARIPPA);
- Frank Moore, President, Hardy Manufacturing Company, Inc.;
- Steve Page, President and General Manager, Sonoma Raceway;
- Alexandra E. Teitz, Principal, AT Strategies, LLC, on behalf of Sierra Club; and
- Rebecca Bascom, Professor, Penn State College of Medicine, on behalf of American Thoracic Society.

On November 15, 2017, the Subcommittee on Environment met in open markup session and forwarded H.R. 1917, without amendment, to the full Committee by a record vote of 12 yeas and 10 nays. On December 6, 2017, the full Committee on Energy and Commerce met in open markup session and ordered H.R. 1917, without amendment, favorably reported to the House by a record vote of 31 yeas and 23 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII requires the Committee to list the record votes on the motion to report legislation and amendments thereto. The following reflects the record votes taken during the Committee consideration:

**COMMITTEE ON ENERGY AND COMMERCE -- 115TH CONGRESS
ROLL CALL VOTE # 64**

BILL: H.R. 1917, Blocking Regulatory Interference from Closing Kilns Act of 2017

AMENDMENT: A motion by Mr. Walden to order H.R. 1917 favorably reported to the House, without amendment. (Final Passage)

DISPOSITION: AGREED TO, by a roll call vote of 31 yeas and 23 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Walden	X			Mr. Pallone		X	
Mr. Barton	X			Mr. Rush		X	
Mr. Upton	X			Ms. Eshoo		X	
Mr. Shimkus	X			Mr. Engel		X	
Mr. Burgess	X			Mr. Green		X	
Mrs. Blackburn	X			Ms. DeGette		X	
Mr. Scalise	X			Mr. Doyle		X	
Mr. Latta	X			Ms. Schakowsky		X	
Mrs. McMorris Rodgers	X			Mr. Butterfield		X	
Mr. Harper	X			Ms. Matsui		X	
Mr. Lance	X			Ms. Castor		X	
Mr. Guthrie	X			Mr. Sarbanes		X	
Mr. Olson	X			Mr. McNeerney		X	
Mr. McKinley	X			Mr. Welch		X	
Mr. Kinzinger	X			Mr. Lujan		X	
Mr. Griffith	X			Mr. Tonko		X	
Mr. Bilirakis	X			Ms. Clarke		X	
Mr. Johnson	X			Mr. Loeb sack		X	
Mr. Long	X			Mr. Schrader		X	
Mr. Bucshon	X			Mr. Kennedy			
Mr. Flores	X			Mr. Cardenas		X	
Mrs. Brooks	X			Mr. Ruiz		X	
Mr. Mullin	X			Mr. Peters		X	
Mr. Hudson	X			Ms. Dingell		X	
Mr. Collins	X						
Mr. Cramer	X						
Mr. Walberg	X						
Mrs. Walters	X						
Mr. Costello	X						
Mr. Carter	X						
Mr. Duncan	X						

12/06/2017

OVERSIGHT FINDINGS AND RECOMMENDATIONS

Pursuant to clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII, the Committee held a hearing and made findings that are reflected in this report.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

Pursuant to clause 3(c)(2) of rule XIII, the Committee finds that H.R. 1917 would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, January 10, 2018.

Hon. GREG WALDEN,
*Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1917, the Blocking Regulatory Interference From Closing Kilns Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jon Sperl.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 1917—Blocking Regulatory Interference From Closing Kilns Act of 2017

H.R. 1917 would extend compliance dates for entities affected by any final rule addressing national emission standards for hazardous air pollutants (NESHAP) under the Clean Air Act for brick, structural clay, and ceramic products manufactured in kilns.

The rules that would be affected are:

- NESHAP for Brick and Structural Clay Products Manufacturing and NESHAP for Clay Ceramics Manufacturing, published in the Federal Register on October 26, 2015;
- NESHAP for Brick and Structural Clay Products Manufacturing and NESHAP for Clay Ceramics Manufacturing: Correction, published in the Federal Register on December 4, 2015; and
- Any final rule that succeeds or amends those rules.

The NESHAP rule published on October 26, 2015, requires manufacturers of brick, structural clay, and ceramic products to reduce emissions of hazardous air pollutants from kilns.

The bill would extend compliance dates for manufacturers to allow for resolution of the judicial review process. Manufacturers would not need to comply with the rule until a specified period after a judgment becomes final (that is, the judgment is not subject

to further appeal or review) for all legal actions filed during the 60 days after the final rule is published in the *Federal Register*.

Using information from the Environmental Protection Agency about current activities related to NESHAP, CBO estimates that the costs of modifying existing regulations to comply with H.R. 1917 would be minimal and would not have a significant effect on the agency's workload or spending.

Enacting H.R. 1917 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 1917 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1917 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Jon Sperl. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII, the general performance goal or objective of this legislation is to extend the compliance deadlines for EPA's 2015 Brick MACT rule pending completion of judicial review.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII, no provision of H.R. 1917 is known to be duplicative of another Federal program, including any program that was included in a report to Congress pursuant to section 21 of Public Law 111-139 or the most recent Catalog of Federal Domestic Assistance.

COMMITTEE COST ESTIMATE

Pursuant to clause 3(d)(1) of rule XIII, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

EARMARK, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

Pursuant to clause 9(e), 9(f), and 9(g) of rule XXI, the Committee finds that H.R. 1917 contains no earmarks, limited tax benefits, or limited tariff benefits.

DISCLOSURE OF DIRECTED RULE MAKINGS

Pursuant to section 3(i) of H.Res. 5, the Committee finds that H.R. 1917 contains no directed rule makings.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

Section 1 provides that the Act may be cited as the “Blocking Regulatory Interference from Closing Interference from Closing Kilns Act of 2017.”

Section 2. Extending compliance dates (Pending Judicial Review) of rules addressing National Emission Standards for Hazardous Air Pollutants for brick and structural clay products manufacturing or clay ceramics manufacturing

Section 2(a) provides that the term “compliance date” means the date by which any State, local, or tribal government or other person is first required to comply with the rule.

Section 2(b) provides that the final rules subject to the Act include any final rule that addresses National Emission Standards for Hazardous Air Pollutants (NESHAP) for brick and structural clay products or for clay ceramics manufacturing under section 112 of the Clean Air Act (CAA), including any final rule that succeeds or amends the Environmental Protection Agency’s (EPA) final rule published at 80 Fed. Reg. 65469 (October 26, 2015) and 80 Fed. Reg. 75817 (December 4, 2015).

Section 2(c) provides that the time period by which the compliance dates would be extended would be the period of time that begins 60 days after the final rule appears in the Federal Register, and ends on the date on which judgment becomes final, and no longer subject to further appeal or review, in all actions filed during the initial 60 days after the rule appears in the Federal Register seeking review of the rule, including actions pursuant to CAA section 307.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation does not amend any existing Federal statute.

DISSENTING VIEWS

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 Clay*

Continued

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 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

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

³House 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).

⁴Respondents’ 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).

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, Sub-
committee on Environ-
ment.*

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