

BLOCKING REGULATORY INTERFERENCE FROM CLOSING  
KILNS ACT OF 2016

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FEBRUARY 29, 2016.—Committed to the Committee of the Whole House on the State  
of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4557]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 4557) 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. 4557, the Blocking Regulatory Interference from Closing Kilns (BRICK) Act, was introduced by Rep. Bill Johnson (R–OH) on February 12, 2016, together with Rep. Sanford Bishop (D–GA), Rep. Martha Roby (R–AL), Rep. Terry Sewell (D–AL), and Rep. John Shimkus (R–IL). 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. Key provisions of H.R. 4557 include the following:

- 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.<sup>1</sup> 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.<sup>2</sup> Compliance for existing affected sources is required by December 26, 2018.<sup>3</sup>

Prior to issuance of the 2015 Brick MACT, EPA had issued an earlier version in 2003.<sup>4</sup> 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.<sup>5</sup> While the brick industry spent millions of dollars to comply with the 2003 rule,<sup>6</sup> 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.<sup>7</sup>

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

<sup>1</sup> See 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).

<sup>2</sup> 80 Fed. Reg. at 65521, 65544.

<sup>3</sup> *Id.* at 65539 and 65566.

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

<sup>5</sup> *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](https://www.uschamber.com/sites/default/files/documents/files/022360_etra_brick_study_01_29.pdf), p. 7.

<sup>6</sup> *Id.*

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

limits under the current rule.<sup>8</sup> EPA, in their final revised rule, set the level of performance based on the controls installed in response to the now vacated rule.<sup>9</sup>

Legal challenges to the final rule are currently pending in the Court of Appeals for the District of Columbia.<sup>10</sup> For the 2015 Brick MACT, concerns have been raised regarding the legality of the rule, as well as the 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.<sup>11</sup> 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.<sup>12</sup>

On February 3, 2016, the Subcommittee on Energy and Power held a legislative hearing on the discussion draft of H.R. 4557. At the hearing, witnesses testified that the brick industry is dominated by small businesses, many of which are family owned and have been in operation for many generations, and are struggling in the current economy.<sup>13</sup> They raised concerns that under the timelines of the rule, these small businesses may be forced to undertake costly compliance measures, or possibly have to shut down, all before the legality of the rule is established. For example, Mr. Davis Henry, President of Henry Brick, a small business which has manufactured clay brick in Alabama for over 70 years, and who also serves as Vice Chairman of the Board for the Brick Industry Association, testified:

Regulations like these threaten the continued existence of many small companies in our industry including mine . . . Henry Brick simply cannot afford to try and hit another potentially moving target of Brick MACT compliance. We acted in good faith to comply with the 2003 Brick MACT and now face some of the steepest costs in the industry . . . We need the BRICK Act to ensure that we are not required to invest again until we know that the standard is not going to change. This is not a hypothetical issue for Henry Brick. It is real. It has happened to us. Please do not let it happen again.<sup>14</sup>

<sup>8</sup>See, 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).

<sup>9</sup>See, e.g. 80 Fed. Reg. at 65473.

<sup>10</sup>Legal 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).

<sup>11</sup>See, 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.”)

<sup>12</sup>*Id.* at p. 8.

<sup>13</sup>See, e.g. Testimony of Creighton McAvoy (“Approximately seventy-five percent of the companies in the brick industry are small businesses and like McAvoy Brick, they have been making brick for a hundred years or more and have been good employers and neighbors in their local communities”)

<sup>14</sup>See, also, e.g. Testimony of Davis Henry (“ . . . when we came into compliance in 2006 with the original MACT, as I have stated, we spent a million and a half dollars . . . A year later it was vacated. We have had to operate those control devices since 2007 regardless of whether

Similarly, Mr. Creighton McAvoy, President of the McAvoy Brick Company, which has manufactured clay brick and pavers in Pennsylvania for over 120 years, and who serves on the Board of Directors of the Brick Industry Association, testified:

We are concerned that this regulation could become the moving target that the last Brick MACT did and that regulatory uncertainty could cripple my ability to remain in business . . . . We are here to ask your help to ensure that what happens—happened to companies like Henry Brick does not happen again. We believe the BRICK Act can give us this certainty we need.<sup>15</sup>

There are an estimated 7,000 workers employed by the brick industry nationwide.<sup>16</sup>

#### WHAT THE LEGISLATION WOULD DO

H.R. 4557 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. 4557 seeks to ensure this will not occur with respect to the current rule.<sup>17</sup>

#### HEARINGS

The Subcommittee on Energy and Power held a legislative hearing on the discussion draft of H.R. 4557 on February 3, 2016. The

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there was a MACT in place or not. So we have spent no telling how much money over that time operating them. . . . And now to be faced with having to replace those with new control devices that are exponentially higher in cost for only a 4 percent gain or reduction in emissions seems outrageous.”)

<sup>15</sup>See also, Testimony of Creighton McAvoy (“According to EPA’s costs estimates, they expect that we will install and operate a control device that will cost approximately \$1.5 million and become a synthetic minor source, thus avoiding the Brick MACT requirements. . . . If that control is incapable of helping us get out of this rule . . . . we believe we will have to install a control system that EPA estimates at costing \$2.7 million to control three to five pounds of mercury and 100 to 200 pounds of metals each year . . . . We are simply not sure anyone will loan us the money to purchase these controls or that we will be able to pay this money back, particularly if it is for the more expensive system that has never been demonstrated to work on brick kiln emissions”).

<sup>16</sup>See 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>.

<sup>17</sup>The 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”).

hearing was entitled, “H.R. 3797, the Satisfying Energy Needs and Saving the Environment (SENSE) Act and H.R. 4557, the Blocking Regulatory Interference from Closing Kilns (BRICK) Act” and witnesses included the following:

- The Honorable Keith J. Rothfus, U.S. House of Representatives, Pennsylvania;
- Davis Henry, President and CEO, Henry Brick;
- Creighton “Butch” McAvoy, President, McAvoy Brick Company;
- Vincent Brisini, Director of Environmental Affairs for Olympus Power;
- Dennis Beck, Chairman of the Western Pennsylvania Coalition for Abandoned Mine Reclamation; and,
- John Walke, Senior Attorney and Clean Air Director, Natural Resources Defense Council.

#### COMMITTEE CONSIDERATION

On February 11, 2016, the Subcommittee on Energy and Power met in open markup session to consider H.R. 4557 and forwarded the bill to the full Committee, without amendment, by voice vote.

On February 25, 2016, the Committee on Energy and Commerce met in open markup session to consider H.R. 4557. During the markup, no amendments were offered. A motion by Mr. Upton to order H.R. 4557 reported to the House, without amendment, was agreed to by a record vote of 28 ayes and 22 nays.

#### COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives 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 -- 114TH CONGRESS  
ROLL CALL VOTE # 47**

**BILL: H.R. 4557**, the "Blocking Regulatory Interference from Closing Kilns Act of 2016"

**AMENDMENT:** A motion by Mr. Upton to order H.R. 4557 favorably reported to the House, without amendment.  
(Final Passage)

**DISPOSITION: AGREED TO**, by a roll call vote of 28 yeas and 22 nays

| REPRESENTATIVE        | YEAS | NAYS | PRESENT | REPRESENTATIVE  | YEAS | NAYS | PRESENT |
|-----------------------|------|------|---------|-----------------|------|------|---------|
| Mr. Upton             | X    |      |         | Mr. Pallone     |      | X    |         |
| Mr. Barton            | X    |      |         | Mr. Rush        |      | X    |         |
| Mr. Whitfield         | X    |      |         | Ms. Eshoo       |      | X    |         |
| Mr. Shimkus           | X    |      |         | Mr. Engel       |      | X    |         |
| Mr. Pitts             |      |      |         | Mr. Green       |      |      |         |
| Mr. Walden            | X    |      |         | Ms. DeGette     |      | X    |         |
| Mr. Murphy            | X    |      |         | Ms. Capps       |      | X    |         |
| Mr. Burgess           | X    |      |         | Mr. Doyle       |      | X    |         |
| Mrs. Blackburn        | X    |      |         | Ms. Schakowsky  |      | X    |         |
| Mr. Scalise           |      |      |         | Mr. Butterfield |      | X    |         |
| Mr. Latta             | X    |      |         | Ms. Matsui      |      | X    |         |
| Mrs. McMorris Rodgers | X    |      |         | Ms. Castor      |      | X    |         |
| Mr. Harper            | X    |      |         | Mr. Sarbanes    |      | X    |         |
| Mr. Lance             | X    |      |         | Mr. McNerney    |      | X    |         |
| Mr. Guthrie           | X    |      |         | Mr. Welch       |      | X    |         |
| Mr. Olson             | X    |      |         | Mr. Lujan       |      | X    |         |
| Mr. McKinley          | X    |      |         | Mr. Tonko       |      | X    |         |
| Mr. Pompeo            | X    |      |         | Mr. Yarmuth     |      | X    |         |
| Mr. Kinzinger         | X    |      |         | Ms. Clarke      |      | X    |         |
| Mr. Griffith          | X    |      |         | Mr. Loeb sack   |      | X    |         |
| Mr. Bilirakis         |      |      |         | Mr. Schrader    |      | X    |         |
| Mr. Johnson           | X    |      |         | Mr. Kennedy     |      | X    |         |
| Mr. Long              | X    |      |         | Mr. Cardenas    |      | X    |         |
| Mrs. Ellmers          | X    |      |         |                 |      |      |         |
| Mr. Bucshon           | X    |      |         |                 |      |      |         |
| Mr. Flores            | X    |      |         |                 |      |      |         |
| Mrs. Brooks           | X    |      |         |                 |      |      |         |
| Mr. Mullin            | X    |      |         |                 |      |      |         |
| Mr. Hudson            | X    |      |         |                 |      |      |         |
| Mr. Collins           | X    |      |         |                 |      |      |         |
| Mr. Cramer            | X    |      |         |                 |      |      |         |

02/25/2016

## COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee made findings that are reflected in this report.

## STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

H.R. 4557 would extend the compliance deadlines for EPA's 2015 Brick MACT rule pending completion of judicial review.

## NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 4557 would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

## EARMARK, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives, the Committee finds that H.R. 4557 contains no earmarks, limited tax benefits, or limited tariff benefits.

## COMMITTEE COST ESTIMATE

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.

## CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, 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, February 29, 2016.*

Hon. FRED UPTON,  
*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. 4557, the Blocking Regulatory Interference from Closing Kilns Act of 2016.

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.

Enclosure.

*H.R. 4557—Blocking Regulatory Interference from Closing Kilns Act of 2016*

H.R. 4557 would extend compliance dates for entities affected by any final rule addressing national emission standards for haz-

ardous air pollutants (NESHAP) under the Clean Air Act for brick, structural clay, and ceramic products manufactured in kilns.

Rules that would be affected by this legislation include:

- 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 of time after a judgement becomes final (and would no longer be 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.

Based on information from the Environmental Protection Agency (EPA), CBO estimates that implementing this legislation would not have a significant effect on EPA's workload and would have no significant effect on the budget.

Because enacting H.R. 4557 would not affect direct spending or revenues, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 4557 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 4557 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

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.

#### DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 4557 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

#### DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting H.R. 4557 specifically directs to be completed no specific rulemakings within the meaning of 5 U.S.C. 551 that would not otherwise be issued by the agency.

## 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

The legislation includes the following provisions:

*Section 1: Short title*

This section provides the short title of “Blocking Regulatory Interference from Closing Kilns Act of 2016.”

*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*

This section extends compliance dates of any final rule addressing NESHAP for brick and structural clay products manufacturing or clay ceramics manufacturing issued under section 112 of the CAA.

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 NESHAP for brick and structural clay products or for clay ceramics manufacturing under section 112 of the CAA, including any final rule that succeeds or amends the 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

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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup> For new sources, the emission standard must be at least as stringent as the emission control achieved by the best-controlled similar source.<sup>4</sup> These minimum emissions levels are known as the MACT floor.

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<sup>1</sup>U.S. Environmental Protection Agency, *About Air Toxics* (online at [www.epa.gov/oar/toxicair/newtoxics.html](http://www.epa.gov/oar/toxicair/newtoxics.html)).

<sup>2</sup>Clean Air Act § 112(f).

<sup>3</sup>*Id.* at § 112(d)(3).

<sup>4</sup>*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.”<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup>

#### *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.<sup>10</sup> 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.<sup>11</sup>

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.

Within the Brick and Structural Clay Products industry, there are 44 major sources of pollution—36 of which are small businesses<sup>12</sup>—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-

<sup>5</sup> *Id.* at § 112(d)(5).

<sup>6</sup> *Id.* at § 112(a)(1).

<sup>7</sup> *Id.* at § 112(d)(4).

<sup>8</sup> *Id.* at § 112(e)(1).

<sup>9</sup> *Id.* at § 112(i)(3).

<sup>10</sup> 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](http://www3.epa.gov/airtoxics/brick/20150924fs.pdf)).

<sup>11</sup> 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](http://www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-25724.pdf)) (hereinafter “*Brick and Clay MACT Rule*”).

<sup>12</sup> 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](http://www3.epa.gov/airtoxics/brick/20150928ria.pdf)).

based standards for non-mercury metals (or particulate matter as a surrogate) and mercury.<sup>13</sup>

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.<sup>14</sup> Accordingly, there will not be any costs or emissions reductions for these units.<sup>15</sup> 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.<sup>16</sup>

## 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.<sup>17</sup>

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.”<sup>18</sup>

### 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.<sup>19</sup>

<sup>13</sup>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](http://www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-25724.pdf)).

<sup>14</sup>Note: all are considered synthetic area sources, which means they have voluntarily become minor sources.

<sup>15</sup>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](http://www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-25724.pdf)).

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

<sup>17</sup>H.R. 4557, the “locking Regulatory Interference from Closing Kilns (BRICK) Act” at §2(b).

<sup>18</sup>*Id.* at §2(c).

<sup>19</sup>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

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.<sup>20</sup>

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

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.

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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](https://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Hoffer-EP-Ratepayer-Protection-2015-04-14.pdf)).

<sup>20</sup>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).

<sup>21</sup>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).

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

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