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BLOCKING REGULATORY INTERFERENCE FROM CLOSING KILNS ACT OF 2018

DECEMBER 4, 2018.—Ordered to be printed

Mr. BARRASSO, from the Committee on Environment and Public
Works, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 2461]

[Including cost estimate of the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred the bill (S. 2461) to allow for judicial review of certain final rules relating to national emission standards for hazardous air pollutants for brick and structural clay products or for clay ceramics manufacturing before requiring compliance with the rules by existing sources, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

GENERAL STATEMENT AND BACKGROUND

S. 2461 provides that the existing source compliance date for the Environmental Protection Agency's (EPA) National Emission Standards for Hazardous Air Pollutants (NESHAP) is delayed for the brick, clay, and tile industries (also known as the Brick Maximum Achievable Control Technology, or "Brick MACT," rule). Compliance will not be required until the earlier of the following dates: (1) two years after the date on which judicial decisions on the contested NESHAP regulation become final and are no longer subject to further appeal and review; and (2) December 26, 2020. Under the bill, the compliance deadline will therefore become effective no later than December 26, 2020. This addition of a date cer-

tain contrasts with the legislative text in S. 839, the Blocking Regulatory Interference from Closing Kilns Act of 2017. The change responds to feedback that the Committee received on S. 839 at a legislative hearing on November 14, 2017. In response, Senator Wicker, sponsor of S. 839, introduced bipartisan S. 2461 with Senator Donnelly as an original cosponsor.

The original Brick MACT rule was published on May 16, 2003. The brick industry estimates that, industry-wide, \$100 million was spent to comply with the rule before the U.S. Court of Appeals for the D.C. Circuit vacated the rule as unlawful in 2007.¹ Since compliance efforts were already underway, most existing facilities meet the requirements that would have been imposed under the 2003 rule, and many states have required controls that comply with that original standard.

In 2015, the EPA issued new Brick MACT regulations that significantly tightened emission standards from those in the 2003 rule, orphaning the investments made to comply with the vacated 2003 rule. The 2015 rule's compliance date for existing sources is December 26, 2018. The rule requires companies to submit test results certifying compliance within 180 days of the compliance date, and resubmit every five years thereafter.

In 2016, the industry estimated that compliance with the 2015 rule would cost \$100 million *annually*.² Compliance cost, divided by the number of plants currently operating, threatens to make many brick companies uneconomical. The brick industry is largely composed of family-owned businesses that were hard hit by the 2008 recession and the slow recovery of construction industry. Given the excessive costs, the industry challenged the rules in court. Industry challenges were rejected on July 6, 2018 in the U.S. Court of Appeals for the D.C. Circuit. Unless the court's decision is reversed or this legislation is passed, the industry faces a looming December 2018 compliance date.

OBJECTIVES OF THE LEGISLATION

S. 2461 would delay the compliance date for existing sources under the 2015 NESHAP to lessen the regulatory burden that could otherwise make many brick companies uneconomical.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 states that this Act may be cited as the "Blocking Regulatory Interference from Closing Kilns Act of 2018".

Section 2. Extension of existing source compliance dates for certain final rules relating to brick and structural clay products and clay ceramics manufacturing

Section 2 states the existing source compliance date under the contested final NESHAP regulations is delayed until the earlier of: (1) the date that is two years after the date on which judgment on

¹ Brick Industry Association (BIA), "BIA Supports New BRICK Bill Aiming to Extend EPA Emissions Timeline" (Mar. 7, 2018), <https://www.prnewswire.com/news-releases/bia-supports-new-brick-bill-aiming-to-extend-epa-emissions-timeline-300609699.html>.

² U.S. Chamber of Commerce, "Regulatory Indifference Hurts Vulnerable Communities" at 2, 9 (2016), https://www.uschamber.com/sites/default/files/documents/files/022360_etra_brick_study_01_29.pdf.

a contested final rule becomes final and is no longer subject to appeal or review; and (2) December 26, 2020. The section further states that in the case of a judgment entered against the EPA relating to a contested final rule, the Administrator shall finalize new rules with respect to the NESHAP for brick and structural clay products manufacturing and clay ceramics manufacturing.

LEGISLATIVE HISTORY

On February 2, 2018, Senator Wicker introduced S. 2461, the Blocking Regulatory Interference from Closing Kilns Act of 2018 with Senator Donnelly. Senators Capito, Heitkamp, Inhofe, and Manchin are also cosponsors. The bill was referred to the Senate Committee on Environment and Public Works.

HEARINGS

A legislative hearing was held on November 14, 2017 in the Environment and Public Works Subcommittee on Clean Air and Nuclear Safety on S. 839, the Blocking Regulatory Interference from Closing Kilns Act of 2017. Following the hearing and in response to hearing testimony, S. 2461, the Blocking Regulatory Interference from Closing Kilns Act of 2018, was introduced.

ROLLCALL VOTES

On September 18, 2018, the Committee on Environment and Public Works met to consider S. 2461. S. 2461 was ordered favorably reported with a roll call vote of 11 ayes and 10 nays. (Senators Barrasso, Boozman, Capito, Ernst, Fischer, Inhofe, Moran, Rounds, Shelby, Sullivan, and Wicker voted aye. Senators Booker, Cardin, Carper, Duckworth, Gillibrand, Markey, Merkley, Sanders, Van Hollen, and Whitehouse voted nay).

REGULATORY IMPACT STATEMENT

In compliance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the committee makes evaluation of the regulatory impact of the reported bill.

The bill does not create any additional regulatory burdens, nor will it cause any adverse impact on the personal privacy of individuals.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104-4), the committee finds that S. 2461 would impose no Federal intergovernmental unfunded mandates on State, local, or tribal governments.

S. 1934 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). The bill contains no new private-sector mandates as defined in UMRA.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires that a statement of the cost of the reported bill, prepared by the Congressional Budget Office, be included in the report. That statement follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 3, 2018.

Hon. JOHN BARRASSO,
*Chairman, Committee on Environment and Public Works,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2461, the Blocking Regulatory Interference from Closing Kilns Act of 2018.

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.

S. 2461—Blocking Regulatory Interference from Closing Kilns Act of 2018

S. 2461 would extend compliance dates for entities affected by final rules 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; and
- NESHAP for Brick and Structural Clay Products Manufacturing and NESHAP for Clay Ceramics Manufacturing: Correction, published in the *Federal Register* on December 4, 2015.

The NESHAP rule, published on October 26, 2015, by the Environmental Protection Agency (EPA), requires manufacturers of brick, structural clay, and ceramic products to reduce emissions of hazardous air pollutants from kilns. Under that rule, manufacturers must comply with the regulations by December 2018.

S. 2461 would extend compliance dates for manufacturers until September 2020. CBO estimates that revising the rule's compliance date would not have a significant effect on the agency's workload or spending.

The bill also would require EPA to finalize new NESHAP regulations within one year after judicial review of the rule is completed. Using information from EPA about current activities related to the NESHAP and similar rules promulgated under the Clean Air Act, CBO estimates that the costs of undergoing a new rulemaking would total about \$1 million over a period of two to three years. That amount includes the costs for personnel and contracts necessary to develop and issue a proposal, to receive and respond to public comments, and to issue a final rule.

Enacting S. 2461 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting S. 2461 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 2461 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On January 10, 2018, CBO transmitted a cost estimate for H.R. 1917, the Blocking Regulatory Interference from Closing Kilns Act of 2017, as ordered reported by the House Committee on Energy and Commerce on December 6, 2017. The two pieces of legislation are similar; however, S. 2461 would require EPA to conduct a new rulemaking to replace the current NESHAP, whereas H.R. 1917 would not. As a result, CBO's estimate of the costs to implement S. 2461 are higher than for H.R. 1917.

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

MINORITY VIEWS OF SENATORS CARPER, CARDIN, SANDERS, WHITEHOUSE, GILLIBRAND, BOOKER, MARKEY AND VAN HOLLEN

S. 2461 would delay achievable Clean Air Act air toxic standards for the brick, clay, and tile industries until December 31, 2020. Such a delay would result in an increase in hazardous air pollution, which would negatively affect the health of millions of Americans and punish manufacturers that have already made investments necessary to meet the current standards.

When legislators enacted the Clean Air Act Amendments of 1990 they thought the nation's major emitters of air toxics would be regulated by 2000. Unfortunately, it took almost two decades to reduce emissions from some of our largest emitters of cancer-causing pollution, with the brick kiln industry being one of the last sources to be regulated.

The delays in air toxic emission reductions from the brick kiln industry are a direct result of EPA not following the law. In 2003, President George W. Bush's EPA issued emission standards for the brick kiln industry that violated the Clean Air Act's requirements and were subsequently vacated by the courts. The courts required President Obama's EPA to rewrite the rules while the brick kiln industry continued to operate without the need to comply with any federal air toxic standards. EPA's failures in 2003 led to over a decade of harmful air toxics emissions, and great uncertainty for industry and for states and their citizens affected by these emissions.

In 2015, EPA finalized new national emission standards for hazardous air pollutants (NESHAP) for brick and structural clay products manufacturing and clay ceramics manufacturing (known as the brick kiln industry). All major emitters in this industry must meet maximum achievable control technology (MACT) standards by December 31, 2018. EPA estimated annual costs of implementing the rule would be \$24.6 million and the quantifiable annual benefits would be between \$76 and \$170 million.¹ These estimates underrepresent the expected air quality and health benefits of this rule. According to EPA, "[D]ata, resource, and methodological limitations prevented EPA from monetizing the benefits from several important benefit categories, including benefits from reducing exposure up to 375 tons of hazardous air pollutants (acid gases and metals) each year, as well as reducing ecosystem effects and visibility impairment."² EPA also estimated that only two to four facilities out of the 69 facilities expected to be subjected to the emission requirements are at significant risk of closure.

¹80 FR 65470.

²U.S. EPA, "Regulatory Impact Analysis: Final Brick and Structural Clay Products NESHAP," (July 2015), https://www3.epa.gov/ttnecas1/docs/ria/nonmetallic-mineral_ria_final-brick-neshap_2015-0907.pdf.

S. 2461 proposes a delay in the compliance date of the brick kiln NESHAP from December 31, 2018 to December 31, 2020 and requires EPA to respond to a recent lawsuit in a short timeframe. Although S. 2461 improves upon S. 839, significant concerns remain and we continue to oppose S. 2461, as written. EPA has already signaled the agency will provide the brick kiln industry with an extra year to comply with the standards, pushing the compliance date back to December 31, 2019. The agency's announced compliance extension will, as a practical matter, provide relief for any facility that needs additional time to comply.³ Further delaying the imposition of air toxics standards for brick kilns without assurances that EPA will not further weaken the standards does not make sense at this time.

THOMAS R. CARPER.
BENJAMIN L. CARDIN.
BERNARD SANDERS.
SHELDON WHITEHOUSE.
KIRSTEN GILLIBRAND.
CORY A. BOOKER.
EDWARD J. MARKEY.
CHRIS VAN HOLLEN.

³U.S. EPA "MACT Compliance Extension Requests for Brick Manufacturing Facilities," (July 14, 2018) available at https://www.eenews.net/assets/2018/09/18/document_pm_01.pdf.

CHANGES IN EXISTING LAW

Section 12 of rule XXVI of the Standing Rules of the Senate requires the committee to publish changes in existing law made by the bill as reported. Passage of this bill will make no changes to existing law.

