

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 9, 2017

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

)	
SIERRA CLUB, et al.,)	
)	
Petitioners,)	
)	
v.)	No. 15-1487 (and consolidated
)	petitions)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, et al.,)	
)	
Respondents.)	
)	

**RESPONDENTS’ NOTICE OF ACTION ON BRICK/CLAY RULE AND
UNOPPOSED MOTION TO SEVER AND HOLD IN ABEYANCE
INDUSTRY PETITIONS**

Respondents United States Environmental Protection Agency and E. Scott Pruitt, in his official capacity as Administrator (collectively “EPA”), hereby notify the Court that EPA has completed its review of some of the issues raised by Petitioners with respect to the rule that is the subject of these consolidated petitions, and is continuing its review of other issues, as discussed below. Based on this further review, EPA respectfully requests that the Court sever the petition filed by Sierra Club and Natural Resources Defense Council (No. 15-1487) from the petitions filed by the Brick Industry Association, the Tile Council of North

America, and Kohler Co. (collectively, “Industry Petitioners”) (Nos. 15-1492, 15-1493, 15-1496, 16-1179), and hold the proceedings on the industry petitions in abeyance. Sierra Club and Natural Resources Defense Council (collectively, “Environmental Petitioners”) and Industry Petitioners do not oppose the relief requested.¹

BACKGROUND

The consolidated petitions challenge EPA regulations establishing major-source hazardous air pollutant emission standards for facilities that manufacture brick and structural clay products and clay ceramics (the “Brick/Clay Rule”). Four parties have filed petitions for review of the Rule: Sierra Club and Natural Resources Defense Council (No. 15-1487); and the Brick Industry Association (No. 15-1492), the Tile Council (No. 15-1496), and Kohler (No. 15-1493). The Court consolidated all four petitions on its own motion on December 29, 2015.

¹ Environmental Petitioners further state: “Environmental Groups do not oppose the relief requested but note that legislation has been introduced in the House and Senate that would delay compliance with the Brick Rule until this case has been resolved. <https://www.congress.gov/bill/115th-congress/house-bill/1917/all-info?r=1>. Granting EPA’s motion would prevent this case from being resolved until after EPA completes the reconsideration process described in its letter and any challenge to the agency’s decision has been resolved in court. Thus, Environmental Groups’ members’ exposure to uncontrolled emissions of hazardous air pollutants could be prolonged for more than two years. Accordingly, Environmental Groups reserve the right to move at any time to lift the case from abeyance.”

ECF No. 1590969. Additionally, the Brick Industry Association filed a petition for review (No. 16-1179) of EPA's denial of its petition for administrative reconsideration of the Brick/Clay Rule. The Court consolidated that petition with the other petitions challenging the Brick/Clay Rule on July 21, 2016. ECF No. 1626203.

EPA filed its proof brief on January 19, 2017. The parties filed final briefs on April 28, 2017. In a September 12, 2017 Order, the Court scheduled oral argument for November 9, 2017.

On October 3, 2017, EPA filed a motion to continue oral argument and hold proceedings in abeyance. ECF No. 1696614. As EPA explained in that motion, Administrator Pruitt issued a letter on October 2 informing the petitioners that EPA intended to review the entire Brick/Clay Rule, including the issues that the parties have raised in the pending litigation. EPA sought postponement and abeyance in light of the Administrator's letter on the basis that the Agency might propose changes to the Brick/Clay Rule as a result of that review. Environmental Petitioners opposed EPA's motion, ECF No. 1698108, and Industry Petitioners supported it, ECF No. 1699146. The Court denied EPA's motion on October 26, and on its own motion directed the parties to "be prepared to address with specificity at oral argument whether an additional period of abeyance is appropriate for this matter." ECF No. 1701439.

On November 1, 2017, Administrator Pruitt issued a second letter to Petitioners providing additional information concerning EPA's review of the Brick/Clay Rule. Ex. A. As stated in the letter, EPA has completed its review of the issues raised by Environmental Petitioners, and has concluded that those issues do not warrant further consideration. *Id.* Accordingly, EPA will not reopen the Rule to provide an additional opportunity for further public comment on those issues, or to propose any changes to the Rule based on those issues. *Id.*

As further stated in the letter, EPA has completed its initial review of the issues raised by Industry Petitioners. Based on that review, EPA has decided to reconsider the Brick/Clay Rule based on those issues. Administrator Pruitt has instructed EPA's Office of Air Quality Planning and Standards "to consider what specific rule revisions are appropriate in light of these issues, and to prepare a proposed rule package for publication in the Federal Register to give interested persons the opportunity for comment on the rule revisions that the Agency proposes to make based on some or all of these issues."² *Id.* The Administrator has further directed EPA staff to have the proposed rule package ready for his signature on or before October 31, 2018, with the target of having final action on the proposal ready for signature in August, 2019. *Id.*

² The proposed rule package will also address an issue raised by Kohler on which EPA previously granted reconsideration.

ARGUMENT

EPA respectfully requests that the Court sever and hold in abeyance the industry petitions in this case. EPA has now determined with greater specificity the portions of the Brick/Clay Rule that EPA intends to reconsider, and identified a process and a timetable for such reconsideration. In light of EPA's decision to undertake reconsideration of the Brick/Clay Rule based on issues raised by the Industry Petitioners, the prior positions expressed in the Agency's brief as to those issues may not necessarily reflect EPA's ultimate conclusions. Severance and abeyance of the industry petitions would therefore preserve the resources of the Court and the parties, as the reconsideration process will result in rulemaking that may revise or rescind some or all of the portions of the Brick/Clay Rule challenged by these petitioners, thereby obviating the need for judicial resolution of some or all of the issues they raise. Moreover, because it would not be proper to speculate on the outcome of the reconsideration process, counsel for EPA may be unable to represent the current Administration's conclusive position on the aspects of the Rule challenged by Industry Petitioners at argument on November 9. Accordingly, severance and abeyance of the industry petitions will promote judicial economy.

Severance of the industry petitions would allow the proceedings on the environmental petition to move forward without further delay. EPA has determined that no further agency action is warranted as to the issues raised by

Environmental Petitioners. Accordingly, there is no impediment to the Court's resolution of those issues now.

CONCLUSION

WHEREFORE, EPA respectfully requests that the Court issue an order: (1) severing the industry petitions (Nos. 15-1492, 15-1493, 15-1496, and 16-1179); (2) holding the industry petitions in abeyance; and (3) directing EPA, within 90 days of the Court's Order on this Motion and every 90 days thereafter, to file a status update informing the Court of the status of the Agency's reconsideration of the Brick/Clay Rule.

Dated: November 3, 2017

Respectfully submitted,

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Counsel for Respondents

CERTIFICATE OF COMPLIANCE

The undersigned states that this Motion complies with the typeface style requirements of Fed. R. App. P. 27(d)(1)(E) because the Motion was prepared in proportionally spaced typeface using Microsoft Word 14 point Times New Roman type, and that this Motion complies with the length requirements of Fed. R. App. P. 27(d)(2), as this Motion contains 1,114 words, excluding the parts of the Motion exempt under Fed. R. App. P. 32 (a)(7)(B)(iii).

Dated: November 3, 2017

/s/ Kate R. Bowers

KATE R. BOWERS

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the Court's CM/ECF system, which will send notification of said filing to all Counsel of Record.

Dated: November 3, 2017

s/ Kate R. Bowers

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EXHIBIT A



E. SCOTT PRUITT
ADMINISTRATOR

November 1, 2017

Ms. Linda Miller
Counsel for Brick Industry Association
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Ms. Valerie Green
Counsel for Kohler Company
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Mr. Jeffrey Longworth
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Mr. James Pew
Counsel for Sierra Club and Natural Resources Defense Council
Earthjustice
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Re: Review of final rule titled *National Emission Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing; and National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing; Final Rule*, 80 FR 65470, published on October 26, 2015

Dear Ms. Miller, Ms. Green, Mr. Longworth and Mr. Pew:

This letter concerns the U.S. Environmental Protection Agency final rule titled *National Emission Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing; and National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing. (Brick/Clay Ceramics Rule)* published at 80 Fed. Reg. 65470 (Oct. 26, 2015),

which is currently the subject of pending petitions for review in the United States Court of Appeals for the District of Columbia Circuit in Sierra Club v. EPA, No. 15-1487 (and consolidated cases).

I am writing to provide you with additional information concerning the EPA's review of the *Brick/Clay Ceramics Rule*, including the issues that you have raised in the pending litigation.

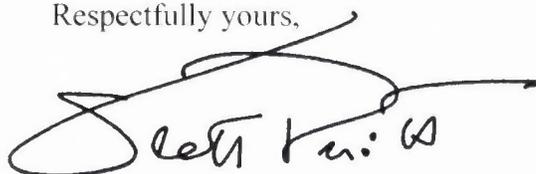
With respect to the issues raised by Petitioners Sierra Club and Natural Resources Defense Council, the agency has completed its review. We have now concluded that these issues do not warrant further consideration, and we will neither reopen the rule to provide an additional opportunity for further public comment on those issues nor propose any changes to the rule based on those issues.

With respect to the issues raised by Petitioners Brick Industry Association, Tile Council of North America and Kohler, the agency has completed its initial review of those issues. Based on our initial review, the EPA has decided to reconsider the rule based on the issues raised in those petitions for review. As the next step in that reconsideration, I have instructed the Office of Air Quality Planning and Standards in the Office of Air and Radiation to consider what specific rule revisions are appropriate in light of these issues and to prepare a proposed rule package for publication in the Federal Register to give interested persons the opportunity for comment on the rule revisions that the agency proposes to make based on some or all of these issues. This proposed rule package will also address the agency's ongoing reconsideration of the rule on the issue on which the EPA previously granted reconsideration on May 12, 2017 (concerning the location for temperature measurement as an operating parameter for demonstrating compliance with the dioxin/furan emission limitations).

I have directed EPA staff to have this proposed rule package ready for my signature on or before October 31, 2018, with the target of having final action on this proposal ready for my signature in August 2019.

If you have any questions about the EPA's review of the *Brick/Clay Ceramics Rule*, please contact Keith Barnett in OAQPS at (919) 541-5605. If you have any questions about or wish to discuss the pending litigation concerning the *Brick/Clay Ceramics Rule*, please contact Kate Bowers at (202) 307-0930.

Respectfully yours,

A handwritten signature in black ink, appearing to read "E. Scott Pruitt", with a large, sweeping flourish extending to the right.

E. Scott Pruitt